

# A different sense of humanity: occupation in Francis Lieber's Code

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## **Abstract**

*Accounts narrating the history of the modern law of occupation display ambivalence to the 1863 Lieber Code. At times, they mark the humanity of its provisions on occupied territories; at others, they find its concept of humanity in occupation limited compared to subsequent developments. A broader reading of the Code against Lieber's published works, teaching, and correspondence reveals a unique – and disconcerting – sense of humanity pervading through its provisions. Lieber's different sense of humanity, not directed at individuals, throws light on the history of the law governing occupied territories today and paves the way for critical reflections on its conceptual bases.*

**Keywords:** occupation, Lieber Code, Lieber's sense of humanity, occupied territories, early modern occupation law, humanitarian imperative, international order, military necessity, public order.

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The development of the modern law of war is often seen as a process of 'humanization'.<sup>1</sup> In this view, the law's evolution tells a story of measured progress, from rules once dictated by state interests towards norms increasingly aimed at affecting the humane treatment of individuals, on and off the battlefield. According to this view, today's international humanitarian law represents a pinnacle of achievement of the laws of war project.

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Parallel to progressive accounts, one finds a predisposition to emphasize humanitarian sentiment in earlier legal prescriptions, war practices, and writing on war, treating these as precedents lending the moral authority of history to the 'humanity in warfare' project.<sup>2</sup> Such accounts tend to accentuate the humanity in restraints legislated, practised or theorized by and for past belligerents and occupants. If progressive accounts hail the 1949 Geneva Conventions as the height of humanitarian achievement, other accounts commend the humanity expressed by the 1874 Brussels Declaration, the 1880 *Oxford Manual*, or the 1899/1907 Hague Regulations.<sup>3</sup>

Nowhere is this ambivalence more patent than with the Lieber Code.<sup>4</sup> Frequently referred to as 'the first modern codification of the laws of war',<sup>5</sup> it was commissioned by the Union government and promulgated by President Lincoln in the midst of the American Civil War. Though authored by a private person, its impact on subsequent codification of the laws of war and its development was considerable.<sup>6</sup> Thus, the Lieber Code is acknowledged as the basis for the Brussels, Oxford, and Hague texts, but also commonly credited for the humanity pervading its provisions.<sup>7</sup>

Consider the case of the law of occupation, one of the first areas of the laws of war to be codified in modern times – starting with the Lieber Code. While the Code's contribution to the development of humanitarian norms governing occupied territories is commonly acknowledged,<sup>8</sup> progressive historiography ascribes early modern occupation law – again, starting with the Code – with a limited humanitarian motivation or impact. It identifies the law's transformation into a truly humanitarian instrument with the 1949 Fourth Geneva Convention. Thus, Article 47 of that Convention is perceived as a provision 'of an essentially

- 1 Theodor Meron, 'The humanization of humanitarian law', in *American Journal of International Law*, Vol. 94, No. 2, April 2000, p. 246 ('the humanization of [the law of war], a process driven to a large extent by human rights and the principles of humanity [through which] . . . the law of war has been changing and acquiring a more humane face').
- 2 Rotem Giladi, *Rites of Affirmation: Progress and Immanence in International Humanitarian Law Historiography* (unpublished manuscript, 2012), analyses this ambivalence.
- 3 'Project of an International Declaration concerning the Laws and Customs of War, Brussels, 27 August 1874', in Dietrich Schindler and Jiri Toman (eds), *The Laws of Armed Conflicts*, 4th edition, M. Nijhoff, Leiden, 2004, p. 27; International Law Institute, 'Manual on the Laws of War on Land, Oxford, 9 September 1880', in *ibid.*, p. 29. For accounts commending e.g. the humanity of the Hague Regulations, see, for example, Arthur Eyffinger, *The 1907 Hague Peace Conference: 'the conscience of the civilized world'*, JudiCap, The Hague 2007.
- 4 *Instructions for the Government of Armies of the United States in the Field, General Orders No. 100*, War Dept., Washington DC, 24 April 1863 (hereafter Lieber Code).
- 5 Richard R. Baxter, 'The first modern codification of the laws of war: Francis Lieber and General Orders No. 100', in *International Review of the Red Cross*, Vol. 3, No. 25, April–May 1963, p. 171; D. Schindler and J. Toman, above note 3, p. 3 ('The "Lieber Instructions" represent the first attempt to codify the laws of war').
- 6 I deal with the Code's impact below; the next part deals with the Code's context and its making.
- 7 Johann Caspar Bluntschli, 'Lieber's service to political science and international law', in Daniel C. Gilman (ed.), *The Miscellaneous Writings of Francis Lieber*, Vol. II, Lippincott, Philadelphia, 1881, p. 12; Doris A. Graber, *The Development of the Law of Belligerent Occupation 1863–1914*, Columbia University Press, New York, 1949, p. 5 (the Lieber Code 'marks the beginning of the modern law of belligerent occupation').
- 8 D. A. Graber, above note 7; Eyal Benvenisti, *The International Law of Occupation*, Princeton University Press, Princeton, 1993; Karma Nabulsi, *Traditions of War: Occupation Resistance, and the Law*, Oxford University Press, Oxford, 1999.

humanitarian character; its object is to safeguard human beings and not to protect the political institutions and government machinery of the State as such'.<sup>9</sup> The law of occupation in the Fourth Convention is accordingly perceived as 'primarily motivated by humanitarian considerations'.<sup>10</sup> Humanity in occupation today expresses a concern for the human dignity of individuals and civilian populations who find themselves under an occupation.<sup>11</sup>

By contrast, the 1899/1907 Hague Regulations are perceived to have furnished individuals with only rudimentary protection against the occupant.<sup>12</sup> And, unlike Article 47 of the Fourth Geneva Convention, their Article 43 also protected 'the separate existence of the State, its institutions and its laws'.<sup>13</sup> Thus, the law contained in the Hague Regulations is depicted less as the product of an effort to humanize civilized warfare and more as a legacy of a personal sovereignty era, a means of preserving the power bases of the European *ancien régime* as well as the European public order itself against the threats of revolution and nationalism,<sup>14</sup> or as a diplomatic compromise between weak and powerful states.<sup>15</sup> Such accounts imply that whatever concept of humanity existed in early modern occupation law was nebulous, primitive, and unavoidably limited.

Reconciling this ambivalence is possible; the Lieber Code may therefore truly represent a humanitarian achievement for its time, while at the same time foretelling subsequent progress. In other words, the Code may embody an essential link between past and present in the story of the emergence of the modern humanitarian law of occupation and, equally, in the shaping of the contemporary meaning of humanity in war. This assumes that the sense of humanity underpinning the Code's provisions on occupation is comparable and related to that informing today's law of occupation. This article challenges that assumption,

9 Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary, (IV) Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross (ICRC), Geneva, 1958, pp. 273–274.

10 ICRC, 'Occupation and international humanitarian law: questions and answers', 4 August 2004, available at: <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/634KFC> (last visited 2 March 2012); E. Benvenisti, above note 8, pp. 105–106 (the Fourth Geneva Convention represents a 'shift of attention from governments to the population', signifying 'growing awareness ... of the idea that peoples are not merely the resources of states, but rather that they are worthy of being the subjects of international norms').

11 ICRC, 'General problems in implementing the Fourth Geneva Convention', Report to Meeting of Experts, Geneva, 27–29 October 1998, available at: <http://www.icrc.org/eng/resources/documents/misc/57jpf6.htm> (last visited 2 March 2012): 'the entire philosophy behind the Convention ... [stipulates] the respect due to the individual and the inalienable character of the individual's fundamental rights'.

12 T. Meron, above note 1, p. 46 (of the fifteen articles on occupation, 'only three relate to the physical integrity of civilian persons. The other provisions deal essentially with the protection of property'). By contrast, the Fourth Geneva Convention protects 'personal, rather than proprietary, rights of the population of occupied territory': Georg Schwarzenberger, 'The law of belligerent occupation: basic issues', in *Nordisk Tidsskrift International Ret*, Vol. 30, 1960, pp. 10, 12.

13 J. S. Pictet, above note 9, p. 273.

14 Nehal Bhuta, 'The antinomies of transformative occupation', in *European Journal of International Law*, Vol. 16, No. 4, September 2005, pp. 721, 723, rejects 'the common historical account which narrates the emergence of belligerent occupation as part of the progressive "humanization of warfare" by European civilization'. See also E. Benvenisti, above note 8, p. 28; Eyal Benvenisti, 'The origins of the concept of belligerent occupation', in *Law & History Review*, Vol. 26, No. 3, September 2008, p. 621.

15 E. Benvenisti, above note 14, p. 621.

however. It argues that, while the Code is undoubtedly crucial to understanding how the modern law of occupation evolved, a different sense of humanity pervades its provisions. Lieber's sense of humanity in war and occupation is not comparable to the individual-oriented sense of humanity associated with contemporary norms such as Article 27 of the Fourth Geneva Convention. Identifying his sense of humanity therefore paves the way for critical reflections on the forces, ideas, and visions that shaped the contemporary law of occupation; it also raises questions on how that law is historicized.

In order to trace Lieber's different sense of humanity, I first place his contribution to the development of the law in historical context, suggest a number of methodological imperatives for approaching the Lieber Code, and provide some background on its making. Next, I discuss the sense of humanity underpinning Lieber's political theory. Here I present his views on the relations between individuals, society, and the state; nationalism and inter-nationalism; and war and peace. These are essential for deciphering the sense of humanity underpinning the Code's provisions. I move on to demonstrate how these views inform Lieber's concept of occupation – and his sense of humanity in occupation. In evaluation of Lieber's different sense of humanity in occupation, I then argue that his humanitarian imperative was not the protection of individuals but, rather, the preservation of a modern vision of international order. In the conclusion, I discuss some implications of these findings.

## Approaching Lieber

A number of preliminary matters need to be addressed before delving into Lieber's sense of humanity. First, we need to consider its historical intellectual context. We need, in other words, to assess his ideas against some baseline in the development of the modern concept of humanity in war and occupation. Next, identifying Lieber's sense of humanity requires a broad inquiry into his other works and the context of the Code's making. These help expose, and avoid, some prevalent misconceptions about the Code, its authority, and its relevance to the law of occupation.

### Occupation before Lieber

The very advent of the modern occupation category commonly represents law's humanization and progress. Existing accounts trace its rise to late nineteenth-century codification of ideas and practices seeking to limit the right of conquest in the preceding two centuries: "The idea of occupation of enemy territory was formed when the right of conquest was rejected as too brutal".<sup>16</sup> The occupation category

16 Ernest Nys, 'Francis Lieber: his life and his work', in *American Journal of International Law*, Vol. 5, No. 1, 1911, pp. 84, 355, 379; D. A. Graber, above note 7, p. 14; E. Benvenisti, above note 14; Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice*, Oxford University Press, Oxford, 1996; Erich Kussbach, 'Conquest', in *Encyclopedia of Public International Law*, Vol. I, North-Holland, Amsterdam, 1992, p. 756.

formed a modern departure from and a limitation on conquest. Previously, conquerors were at liberty to acquire good title over territory and to ‘dispose’, as Vattel put it, of the inhabitants with equal licence.<sup>17</sup> The emerging new category of ‘mere’ occupation was driven, it is commonly perceived, by a desire to impose humanitarian restraints on the conqueror.<sup>18</sup>

There was, however, another potent motive for imposing procedural restraints on conquest. In Vattel’s 1758 *The Law of Nations* and Heffter’s 1844 *Das Europäische Völkerrecht der Gegenwart*,<sup>19</sup> occupation was conceptualized as a transient, indeterminate phase preceding final decision in the field. To limit the liberties of the conqueror vis-à-vis the peaceful civilian populace and private property during and after the campaign, Vattel proposed extending civilian immunity to their property in addition to their person:<sup>20</sup>

In the conquests of ancient times, even individuals lost their lands . . . the quarrel was in reality the common cause of all the citizens. But at present war is less dreadful in its consequences to the subject: matters are conducted with more humanity: one sovereign makes war against another sovereign, and not against the unarmed citizens. The conqueror seizes on the possessions of the state, the public property, while private individuals are permitted to retain theirs. They suffer but indirectly by the war; and the conquest only subjects them to a new master.<sup>21</sup>

Vattel’s allusion to humanity is visible and appealing, but he was equally concerned with ‘stability in the affairs of mankind’ and certainty in lawful acquisition by conquest.<sup>22</sup> Conquest, by itself, was insufficient to secure a stable transfer of title, but was a necessary preliminary to acquisition pending the outcome of the war. Rather than devising a novel category, Vattel sought to ensure order.<sup>23</sup>

Vattel dealt with territory; post-Revolutionary Heffter was attentive to public authority. In cases not involving complete subjugation, he wrote:

By the mere occupation of the other side’s territory or part thereof, the invading enemy does not immediately replace the former state authority, for as long as the invader continues the war, when it is still possible that the fortunes of the war will change. . . . From a legal perspective, the defeat of the enemy does not

17 Emmerich de Vattel, *The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns*, trans. and ed. Joseph Chitty, T. & J. W. Johnson, Philadelphia, 1853, Bk. III, Ch. 13, S. 201.

18 D. A. Graber, above note 7, pp. 13–14, 37. For Grotian justification of and limitations on conquest, see Rotem Giladi, *Occupation, Humanity, Order: A Critique of International Humanitarian Law*, unpublished SJD dissertation, University of Michigan Law School, 2011, p. 159. See N. Bhuta, above note 14.

19 August Wilhelm Heffter, *Das Europäische Völkerrecht der Gegenwart*, E. H. Schroeder, Berlin, 1844.

20 E. Benvenisti, above note 14; E. de Vattel, above note 17, Bk. III, Ch. 13, S. 201.

21 E. de Vattel, above note 17, Bk. III, Ch. 13, S.200, reflecting a growing distinction between public and private spheres and an emerging view of war as a contest between rulers, elaborated four years later by Jean-Jacques Rousseau in ‘The social contract, or principles of political right (1762)’, in George D. H. Cole (ed.), *Rousseau’s Social Contract and Discourses*, Dent & Sons, London, 1923.

22 E. de Vattel, above note 17, Bk. III, Ch. 13, S. 196 (stability); S. 194–195 (conquest acquires lawful title).

23 *Ibid.*, S. 197–198.

immediately bring about the complete subjugation of the enemy's state authority.<sup>24</sup>

Heffter therefore elaborated an explicitly novel distinction between conquest and occupation. Its rationale developed Vattel's emphasis on stability and certainty: fortunes of war may still change.<sup>25</sup> However, he then underscored the notion that the occupation category was to serve interests of order. For Vattel, by contrast, humanity and order both drove the identification of a provisional state of affairs preceding decision on the battlefield and the notion that possession by itself, unconsolidated and therefore reversible, could not be a sufficient requirement for a stable, legally certain change.<sup>26</sup> This nexus between considerations of order and humanity is crucial, as we shall see, for understanding the Lieber Code's treatment of occupation.

## The Code's context and its making

In the Code, Lieber entwined notions of humanity and order to forge a bold vision, now largely forgotten, of the future. He constructed a comprehensive, purposive system for the legal regulation of war, in which humanity was both a foundation and a progressive end product, yet, at the same time, was consciously designed as an instrument of order. Approaching Lieber and exposing his sense of humanity in occupation therefore requires some observations on methodology.

Allusions to humanity in the Code that Lieber prepared in the midst of the American Civil War cannot be lightly assumed to correspond to any sense in which the term is used today. The Code has had an enduring impact on the development of the law of occupation, but Lieber's sense of humanity and his sense of occupation significantly differ from all that was to follow his work. These are hard to discern without a broader inquiry. One must approach the Code as one item in a broad modernist theoretical – and ideological – manifesto consisting of Lieber's other published works, teaching, and correspondence.

Lieber never wrote a general treatise on international law or a topical tome on the laws of war. What we may read in the Code's provisions on occupation must come from the study of the Code's overall scheme and from other works that he authored. His letters contain useful telltales on his motives and reasoning.<sup>27</sup> His Columbia Law School lectures on the 'Law and usages of war' and pamphlets published during and after the Civil War often read as precursors to or a putative

24 A. W. Heffter, above note 19, pp. 220–221; translation by E. Benvenisti, above note 14, p. 630.

25 E. Benvenisti, above note 14, p. 631, observing that Heffter, who voiced a new principle of war limited by the need to re-establish peace, considered the occupant to have 'a legitimate expectation of acquiring sovereignty after a successful military campaign' forming the basis for the occupant's exercise of 'provisional authority over the territory also during the interim period between the end of hostilities and commencement of peace'.

26 Elsewhere, I trace this notion to Grotius: R. Giladi, above note 18, p. 169.

27 Lieber never published any commentary on the Code: James F. Childress, 'Francis Lieber's interpretation of the laws of war: General Orders No. 100 in the context of his life and thought', in *American Journal of Jurisprudence*, Vol. 21, 1976, pp. 34, 39–40.

commentary on the Code.<sup>28</sup> Finally, the Code draws heavily on Lieber's earlier works, most notably his *Manual of Political Ethics* (1838–1839).<sup>29</sup> These reveal the Code to be a product of a general and pre-existing ethical system, intellectual method, and political theory. They supply the insights necessary to decode Lieber.<sup>30</sup>

What likewise compels a broad inquiry is the aforementioned historiographical ambivalence to the Lieber Code. On the one hand, his contribution to the modern law of war is universally acknowledged, and 'founding father' designations are common. Lieber is credited for having authored the first modern codification of the laws of war, and is no less praised, by contemporaries and present commentators, for the 'spirit of humanity' that 'everywhere reigns' in the Code.<sup>31</sup> They note the Code's immense impact on the subsequent codification of the law of war, including occupation;<sup>32</sup> it inspired and gave impetus for private development of the law.<sup>33</sup> Others trace its visible imprint in the 1949 Geneva Conventions and the 1977 Additional Protocols.<sup>34</sup> Some point out that the question of occupation is the first addressed in the Code, others that a third of its 157 provisions concerns occupation.<sup>35</sup>

Other, progressive, accounts downplay the Code's humanizing effect. Many observe (erroneously, as I show below) that the Code was designed to deal with civil war and assume that it has limited relevance to the regulation of occupation, which is essentially an international armed conflict phenomenon.<sup>36</sup>

28 Francis Lieber, 'Law and usages of war' (1861–1862), Box 2, Folders 16–18, Milton S. Eisenhower Library, Johns Hopkins University, Baltimore, MD; I wish to thank the Library staff for their help.

29 Francis Lieber, *Manual of Political Ethics, Designed Chiefly for the Use of Colleges and Students at Law*, 1st edition, Little & Brown, Boston, 1838–1839.

30 Lieber's biography reveals too many irreconcilables to serve as a simple explanation for Code rules: Frank Freidel, *Francis Lieber: Nineteenth-century Liberal*, Baton Rouge, LA, Louisiana State University Press, 1947, pp. 320, 325; J. F. Childress, above note 27, p. 43.

31 J. C. Bluntschli, above note 7, p. 12; Theodor Meron, 'Francis Lieber's Code and principles of humanity', in *Columbia Journal of Transnational Law*, Vol. 36, 1998, pp. 269, 274; Elihu Root, 'Francis Lieber', in *American Journal of International Law*, Vol. 7, July 1913, p. 453; E. Nys, above note 16, pp. 379–380; R. R. Baxter, above note 5, p. 183; D. A. Graber, above note 7, p. 17; Silja Vöneky, 'Der Lieber's Code und die Wurzeln des modernen Kriegsvölkerrechts (Lieber and the evolution of the laws of war)', in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 62, 2002, p. 423.

32 The Code also had enduring impact on official practice: it was reissued in 1898, and served as the baseline for similar manuals: Thomas E. Holland, *The Laws of War on Land*, Oxford University Press, Oxford, 1908, pp. 72–73; D. A. Graber, above note 7, pp. 20 ff.

33 Bluntschli's 1866 *Das moderne Kriegsrecht der civilisirten Staaten als Rechtsbuch dargestellt* was 'little more than a paraphrase of General Orders No. 100': R. R. Baxter, above note 5, p. 249; E. Nys, above note 16, p. 358; Betsy Rößen, *Johann Caspar Bluntschli, Francis Lieber und das Moderne Völkerrecht 1861–1881*, Nomos, Baden-Baden, 2003.

34 George B. Davis, 'Memorandum showing the relation between General Orders No. 100 and the Hague Convention with respect to the laws and customs of war on land', in E. Root, above note 31, p. 466; R. R. Baxter, above note 5, p. 171; and table in Richard Sallet, 'On Francis Lieber and his contribution to the law of nations of today', in Hans Werner Bracht *et al.*, *Recht im Dienste der Menschenwürde: Festschrift für Herbert Kraus*, Holzner-Verlag, Würzburg, 1964, pp. 279, 286.

35 D. A. Graber, above note 7, p. 15.

36 T. E. Holland, above note 32, pp. 71–72; R. R. Baxter, above note 5, p. 235; E. Nys, above note 16, pp. 378, 381 (the Code 'contemplated a civil war'; 'Lieber attributed to the occupant the rights which American practice gave to him: it was more than the occupation of war, such as it had been constituted in Europe'); E. Benvenisti, above note 14, p. 640 (the 'Code did not address the question of sovereignty: in this

Lieber's terminology – such as 'martial law' – facilitates such views.<sup>37</sup> Some critique the Code's expansive treatment of military necessity and the 'extreme views of the rights of the military occupant over the inhabitants of occupied territory' that it embodied.<sup>38</sup> Others highlight the 'cardinal position assigned to the notion of order... [which] was so absolute that it appeared to be reified', implying the inferiority of humanitarian values.<sup>39</sup> Various accounts note the low authority of a private individual. The ensuing tension commends reading the Code's provisions against a broader context and free, if possible, from ideological filters other than Lieber's own.

Finally, approaching Lieber requires some familiarity with the Code's making. For present purposes, it may be recalled that his interest in the laws of war long preceded the Civil War; but the war was what provided Lieber, who started teaching international law at Columbia College in 1857,<sup>40</sup> with an opportunity to put his views on war and law into the service of the Union cause.<sup>41</sup> After several attempts to convince Washington of the necessity of codifying the laws of war, Lieber was appointed, with four generals, to a board tasked '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'.<sup>42</sup> The Board left the laws of war to Lieber. He first proposed a 97-clause draft, requesting 'suggestions and amendments'.<sup>43</sup> This he revised, based on his own thoughts and some suggestions coming mainly from General Henry Halleck.<sup>44</sup> The new version was discussed in Washington; some changes were made,<sup>45</sup> but he

Civil War, it was not at issue'); George B. Davis, 'Dr. Francis Lieber's instructions for the government of armies in the field', in *American Journal of International Law*, Vol. 1, January–April 1907, pp. 13, 24.

- 37 R. R. Baxter, above note 5, p. 235. Lieber considered the term, used in earlier US practice, confusing: 'Much error and not a little mischief has arisen from the name. What is called Martial Law ought to be called Martial Rule: 'Martial law', handwritten note attached to 'Law and usages of war', above note 28, Box 2, Folder 18.
- 38 Percy Bordwell, *The Law of War between Belligerents: A History and Commentary*, Callaghan, Chicago, 1908, p. 74; Seddon to Robert Ould, 24 June 1863, in Richard S. Hartigan, *Lieber's Code and the Law of War, Precedent*, Chicago, 1983, p. 120 (Confederate critique).
- 39 Bernard Brown, *American Conservatives: The Political Thought of Francis Lieber and John W. Burgess*, Columbia University Press, New York, 1951, pp. 20–21.
- 40 F. Freidel, above note 30, p. 294. Lieber tried to teach a course on the laws of war at West Point in 1859; Frank Freidel, 'General Orders 100 and military government', in *Mississippi Valley Historical Review*, Vol. 32, March 1946, pp. 541–542.
- 41 F. Freidel, above note 30, pp. 342 ff. In 1863, Lieber co-founded a propaganda society: Frank Freidel, 'The Loyal Publication Society: a pro-Union propaganda agency', in *Mississippi Valley Historical Review*, Vol. 26, No. 3, December 1939, p. 359.
- 42 Lieber to Halleck, 7 December 1862, in R. S. Hartigan, above note 38, p. 84; War Dept. Adjutant General Office, Special Orders No. 399, 17 December 1862, in G. B. Davis, above note 36, p. 19.
- 43 Francis Lieber, *A Code for the Government of Armies in the Field as Authorized by the Laws and Usages of War on Land etc.*, February 1863; Lieber to Halleck, 20 February 1863, in Thomas S. Perry, *The Life and Letters of Francis Lieber*, Osgood, Boston, 1882, p. 330.
- 44 F. Freidel, above note 30, pp. 333–334; R. R. Baxter, above note 5, pp. 183–184.
- 45 '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 slipt [*sic.*] in. They are not mine': F. Lieber, cited in R. R. Baxter, above note 5, p. 185. On receipt of the final version, he wrote: 'the generals of the board have added some valuable parts; but there have also been a few things omitted, which I regret. This is natural': Lieber to Halleck, 20 May 1863, in R. S. Hartigan, above note 38, p. 108.

endorsed the final product without reserve.<sup>46</sup> Lincoln promulgated the Code in May 1863. It was largely the product of one man.

The Code's making clarifies that, though tasked with addressing the Civil War, Lieber authored a broader document. Many of its provisions bear the mark of the Civil War – both Lieber and Halleck were preoccupied, for different reasons, with the authority of military governors<sup>47</sup> – but there can be no doubt that Lieber sought to codify regular, inter-state wars. The evidence is conclusive: of the Code's ten sections, nine deal with 'regular war'; the last, 'Insurrection – Civil war – Rebellion', was not part of the February draft. It was added as 'something of an afterthought' and only at Halleck's insistence, based on instructions that he had previously issued.<sup>48</sup> Lieber 'derelished' the addition;<sup>49</sup> his '*projet*' was to have universal relevance, and so had to cover 'regular' war.<sup>50</sup>

Moreover, Lieber took care to clarify that the regular war institution of occupation could be imported to civil wars. The Code's rules were meant for regular war; but it explicitly foresees the 'partial or entire' discretionary 'adoption of the rules of regular war to war rebels' (Article 152). Among the rules that could be so adopted for rebels was that concerning 'proclaiming Martial Law in their territory' (Article 153). 'Martial Law' was Lieber's codeword for the occupant's military authority. He took equal care to emphasize that doing so or any 'act sanctioned or demanded by the law and usages of public war between sovereign belligerents' did not imply recognition of the rebels (Article 153).

46 Thus, 'my little code' or, affectionately, 'the old hundred': Lieber to Halleck, 20 May 1863, and Lieber to Thayer, 12 January 1871, in T. S. Perry, above note 43, pp. 333–334, 406.

47 As the Union was shifting from leniency towards propertied secessionists – abandoning prior assumptions about support for Southern leadership – to destruction of Confederate economic bases: Mark Grimsley, *The Hard Hand of War: Union Military Policy Toward Southern Civilians, 1861–1865*, Cambridge University Press, Cambridge, 1995, pp. 149 ff. See F. Freidel, above note 40, p. 548 (the Code provided Union Generals with a shield from both the lashing of Republican Radicals and critique of unwarranted harshness). The question of the authority of military governors was tied to the treatment of slaves, the source of divergent Union practices: Francis Lieber, 'The duty of provisional governors', in *New York Evening Post*, 16 June 1862, p. 1.

48 F. Freidel, above note 30, p. 334; F. Freidel, above note 40, p. 552. Lieber thought that civil war exceeded the Board's mandate: Lieber to Halleck, 20 February 1863, in R. R. Baxter, above note 5, p. 184: 'I have said nothing of rebellion and invasion of our country with reference to the treatment of our own citizens'; the response was: 'The civil war articles should by all means be inserted': J. F. Childress, above note 27, pp. 38–39.

49 '[P]robably 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': R. R. Baxter, above note 5, pp. 184, and 249. F. Freidel, above note 40, p. 550 ('applicable to all international wars in which the United States might be involved, with the exception of the final section [on] . . . rebellions. The basic premise of these earlier sections was that the army acquired its authority over occupied territory from international rather than municipal law. Limitations upon it could come only from that source'). Lieber hoped that the Code would 'be adopted as a basis for similar works by the English, French and the Germans. It is a contribution of the United States to the stock of common civilization': Lieber to Halleck, 20 May 1863, in T. S. Perry, above note 43, pp. 333–334; D. A. Graber, above note 7, pp. 19–20; J. F. Childress, above note 27, p. 35 (not 'merely a product of or excessively oriented toward the Civil War'); Rosemary Abi-Saab, 'Humanitarian law and internal conflicts: the evolution of legal concern', in Astrid J. M. Delissen and Gerard J. Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead: Essays in Honour of Frits Kalshoven*, M. Nijhoff, Dordrecht, 1991, pp. 209–211.

50 See above, note 36.

The Code, as indicated above, was largely the product of a single author.<sup>51</sup> What is more, Lieber's earlier writings are manifest in many of its provisions and give crucial hints as to the Code's interpretation.<sup>52</sup> It was original in many respects, not least in its integrative method.<sup>53</sup> Bluntschli – who transposed the Code to German – hailed Lieber's personal triumph in the scholarly synthesis of 'these opposing tendencies', positive and natural law, the 'union of the philosophical and historical methods'.<sup>54</sup> Outside the Code, Lieber indiscriminately quoted historical precedent, both classical and modern, but regularly shared with his reader an explicitly modern reasoning for the rules that he discussed.

The Code's enduring impact owes much to Lieber's synthetic methodology. For all its flaws in style and organization, it presents 'a mature and logically consistent system, developed and systematized over many years of thinking and teaching'.<sup>55</sup> He did not devise rules *ad hoc*, but rather based them on his own systematic interpretation of war and international law'.<sup>56</sup> As such, the Code cast many of the forms of today's law of war, its methods, philosophy, and ideology.

- 51 One may question the Code's validity. Did it constitute a 'codification' of pre-existing laws and usages and was thus authoritative only to the extent that it reflected positive law? Or was it 'progressive development' of the law of war, and so of diminished authority? The authority of the enterprise of a private individual can equally be challenged: see e.g. J. F. Childress, above note 27, p. 39. Yet the role that Lieber and his contemporaries assumed as the heralds of the modern law of nations, an 'alliance of leading international jurists from all civilized nations, for the purpose of working harmoniously together, and thus serving as an organ for the legal consciousness of the civilized world', challenges distinctions between codification and development, positive and natural law: J. C. Bluntschli, above note 7, p. 14. The formula describes the object of the Institut de Droit International, whose founding was credited to Lieber: Martii Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*, Cambridge University Press, Cambridge, 2002, pp. 38 ff. See also Betsy Baker Røben, 'The method behind Bluntschli's "modern" international law', in *Journal of the History of International Law*, Vol. 4, 2002, p. 249; B. Røben, above note 33, p. 241 ('both sought to show that international law was binding because based on shared humanity, and that this foundation necessarily led to legal protections for individual or human rights, in war and in peace'). See David W. Glazier, 'Ignorance is not bliss: the law of belligerent occupation and the U.S. invasion of Iraq', in *Rutgers Law Review*, Vol. 58, No. 1, 2005–2006, pp. 121, 129. Later generations did treat the Code as authoritative. Ironically, Lieber's work inspired and triggered diplomatic codification; for prudential and practical reasons, he himself preferred private codifications by scholars. See E. Root, above note 31, pp. 463–464; J. F. Childress, above note 27, p. 39; F. Lieber, above note 29, p. 651; E. Nys, above note 16, p. 110; Lewis R. Harley, *Francis Lieber: His Life and Political Philosophy*, Columbia University Press, New York, 1899, p. 142.
- 52 J. F. Childress, above note 27, *passim*; B. Røben, above note 33, *passim*; R. R. Baxter, above note 5, *passim*; F. Freidel, above note 30, p. 333.
- 53 See P. Bordwell, above note 38, p. 74: Lieber 'followed too closely the hard precedent of earlier wars'. Lieber wrote: I 'was obliged to spin the whole out of my own head following the Law of Nations and its principles[:] History Reason and Love of Justice and Humanity and conscience'. Lieber to Bates, 25 February 1863, in B. Røben, above note 33, p. 128. He claimed: 'nothing of the kind exists in any language. I had no guide, no groundwork, no text-book... [I was] laying down for the first time such a code... Usage, history, reason, and conscientiousness, a sincere love of truth, Justice, and civilization, have been my guides...': Lieber to Halleck, 20 February 1863, in T. S. Perry, above note 43, p. 330.
- 54 J. C. Bluntschli, above note 7, pp. 8–9; Charles B. Robson, 'Francis Lieber's theories of society, government, and liberty', in *Journal of Politics*, May 1942, Vol. 4, No. 2, pp. 227 ff; see B. Røben, above note 33, p. 250. E. Nys, above note 16, p. 107, was less benign ('an eclectic... willing to sacrifice either of... methods... to derive profit from both').
- 55 R. R. Baxter, above note 5, p. 250.
- 56 J. F. Childress, above note 27, p. 69.

Above all, it rationalized the modern law of war, embedding in its provisions the author's distinct sense of humanity.

## Lieber's sense of humanity

Lieber's occasional allusions to 'humanity' in the Code and elsewhere often give rise to his appraisal as an early architect of the 'humanity in war' project. Yet, reading the Code as a whole, in light of his other works, reveals a unique sense of humanity that forms an integral part of an aggregate theory encompassing the individual, the nation-state, and international society. This sense of humanity compels a revision of how the Code (and the law of war) is historicized.

### Humanity as condition and as vocation: the individual, society, and the state

Lieber's essays reveal a dual sense of humanity: on the one hand, an observation on conditions of human nature from which emanates a theory of the individual, society, the state, and international society; on the other, a civilizational vocation to which individuals and their organizations are subordinate. Lieber started with the individual, but framed this discussion in societal and institutional contexts. His man<sup>57</sup> was a rational – hence an ethical and 'jural' – being, who 'consciously work[s] out his own perfection; that is, the development of his own humanity'.<sup>58</sup> Rationality, for Lieber, was a moral faculty to distinguish between good and evil; as such, it attested to man's humanity. Humanity expressed itself in the existence of human society. Society, embedded in the human nature (that is, in rationality), was therefore a necessary attribute of humanity; it was also a necessary instrument for achieving the 'great ends of humanity' at individual and collective levels alike.<sup>59</sup> Humanity, then, was also a vocation.

Liberty was one of the highest ends of society; it stemmed from the condition of humanity and fulfilled the vocation of humanity.<sup>60</sup> Lieber recognized some natural rights but these were neither predicated nor did they express a humanist perception of the inherent dignity of the individual or a theological interpretation of creation in god's image.<sup>61</sup> Rather, Lieber was concerned with civil liberty, a necessary, natural attribute of man as a member of a jural polity.<sup>62</sup> Civil liberty consisted of protection against interference with the rights of individuals in society.<sup>63</sup> The greatest danger to liberty was absolutism of any kind, 'whether

57 'Man' and 'mankind' in this section reflect Lieber's own usage.

58 F. Lieber, above note 29, p. 63 (development).

59 *Ibid.*, pp. 3 (rationality) and 176–179 (society).

60 Liberty is a condition of 'free agency as a member of society [and] an ingredient of... humanity': *ibid.*, p. 205.

61 F. Freidel, above note 30, pp. 152 ff; C. B. Robson, above note 54, *passim*.

62 B. Röben, above note 33, p. 247.

63 Francis Lieber, *On Civil Liberty and Self-government*, 1st edition, Lippincott & Grambo, Philadelphia, 1853, Vol. 1, p. 34 (meaning of civil liberty).

Monarchical or Democratic, intelligent and brilliant or coarse'.<sup>64</sup> Rampant individualism of rights, unencumbered by corresponding obligations, or unchecked majority rule were as dangerous as tyranny.<sup>65</sup> Man's societal nature was a source for individual and collective rights and obligations; not as a logical corollary, but as a moral-normative prescription.<sup>66</sup>

Lieber's theory of liberty rejected the French model of protection of individual rights as devoid of a 'system of institutions'. Hailing the organic growth of institutions in England, his notion of liberty was wedded to, and preconditioned on, institutional frameworks and regulation.<sup>67</sup> Thus, 'no liberty is possible without institutional polity'; he identified self-government, a notion embodied in the modern nation-state, as the institutional polity of modern times.<sup>68</sup> The modern nation-state was the principal institution necessary to safeguard civil liberty and meet the demands of modern conditions. The state was inherent in man's humanity and 'necessary to his nature'; Lieber therefore rejected the social contract and the notion of the state as a necessary evil.<sup>69</sup> Rather, the state was indispensable, through protecting liberty, to advance the vocation of humanity, individual and collective. That was the role of the state; it was instrumental to humanity:<sup>70</sup>

The state is aboriginal with man; it is no voluntary association, no contrivance of art, or invention of suffering, no company of shareholders; no machine, no

64 Francis Lieber, *Fragments of Political Science on Nationalism and Inter-Nationalism*, Scribner, New York, 1868, p. 5 (absolutism). Absolutism was 'the lowest phase in politics, and democratic absolutism the worst of all, and . . . no liberty is possible without institutional polity': Lieber to Mittermaier, 28 November 1857, in T. S. Perry, above note 43, p. 296.

65 Individualism 'would reduce society to loathsome despotism': F. Freidel, above note 30, pp. 152–154. Lieber rejected Rousseau's 'divine right of the majority' – 'inarticulated, unorganized, uninstitutional majority' – as 'almost invariably false in all vast and high spheres': F. Lieber, above note 63, p. 75.

66 F. Lieber, above note 29, p. 181 ('The state existing of necessity, and it being each man's natural society, it follows that each member singly owes some duties to each member collectively, and, of course, all members collectively have certain rights (and, consequently, duties) toward each man singly'); F. Lieber, above note 63, p. vi ('no right without a parallel duty, no liberty without the supremacy of the law, and no high destiny without earnest perseverance . . . no greatness without self-denial').

67 'By an "institution" Lieber meant any system of relationships among a number of individuals which had sufficient vitality to generate its own rules and organs': C. B. Robson, above note 54, p. 247, who notes that Lieber nonetheless focused mainly on the common law (or the courts), local self-government, and national representation (*ibid.*, p. 244). Institutional liberty therefore meant regulated liberty. See also F. Lieber, above note 63, p. 256.

68 F. Lieber, above note 63, pp. 302–303 (system of institutions); Lieber to Mittermaier, 28 November 1857, in T. S. Perry, above note 43, p. 296 (polity); F. Lieber, above note 63, p. 5 (state); C. B. Robson, above note 54, p. 242.

69 F. Lieber, above note 63, pp. 5 and 8 ('Civil Liberty resting on Institutional Self-Government is the high political calling of this period'; the nation is the only form 'adequate' to meet 'the high demands of modern civilization'). F. Lieber, above note 29, p. 179; F. Lieber, above note 63, Vol. 2, p. 17 (government consequence of 'jural nature of society and of man'). Lieber also rejected the 'state of nature': Jeremiah Hackett, 'Lieber's moral philosophy: freedom and institution', in Charles R. Mack and Henry H. Lesesne (eds), *Francis Lieber and the Culture of the Mind*, South Carolina University Press, Columbia, SC, 2005, p. 107.

70 F. Lieber, above note 29, p. 176 (i.e. supply 'protection of each member as that being who cannot otherwise but obtain conjointly with others, or through and in society his great ends of humanity – those ends which are necessary, and yet cannot be obtained singly').

work of contract by individuals who lived previously, out of it; no necessary evil, no ill of humanity which will be cured in time and by civilisation; no accidental thing, no institution above and separate from society, no instrument for one or a few – the state is a form and faculty of mankind to lead the species toward perfection – it is the glory of man.<sup>71</sup>

The role assigned to the state underpins Lieber's views on authority, law, obedience, and revolution. It equally controls his approach to suffering in war, for Lieber left little room for the individual in the 'Leviathan he had conjured up [which] might absorb all . . . social relationships (and thus . . . all the media for the realization of individuality) under its "protecting" wings'.<sup>72</sup> In essence, he reconciled liberty and nationalism by instrumentalizing both the individual and the state to the pursuit of modern progressive civilization, of humanity-as-vocation. Neither the state nor the individual was supreme; both were subordinate to that humanity's vocation. The state

always remains a means, yet it is the most indispensable means to obtain the highest end, that man be truly man. . . . On the one hand, the individual stands incalculably higher than the state; for that he may be able to be all that he ought to be, the state exists. . . . On the other hand, the state stands incalculably above the individual, is worthy of every sacrifice, of life, and goods, of wife and children, for it is the society of societies, the sacred union by which the creator leads man to civilization, the bond, the pacifier, the humanizer, of men, the protector of all undertakings in which and through which the individual has received its character, and which is the staff and shield of society.<sup>73</sup>

## Nationalism and inter-nationalism

If reconciling liberty and nationalism imparts the vocational, progressive, and un-individual nature of Lieber's sense of humanity, the way that he squared off nationalism and inter-nationalism (the dash is crucial) and the role that he assigned to inter-national law underscore the primacy of order in his sense of humanity. He saw no tension between nationalism and inter-nationalism; on the contrary, he considered the existence of national states a necessary condition for inter-national order in which civilization can advance. Thus, one of the 'main characteristics of the political development' marking modern times was:

the decree that has gone forth that many leading nations flourish at one and the same time, plainly distinguished from one another, yet striving together, with

71 *Ibid.*, pp. 183–184 ('The state does not absorb individuality, but exists for the better obtaining of the true ends of each individual, and of society collectively').

72 C. B. Robson, above note 54, p. 237.

73 F. Lieber, above note 29, pp. 180–181; see also F. Lieber, above note 63, p. 60.

one public opinion, under the protection of one law of nations, and in the bonds of one common moving civilization.<sup>74</sup>

The very inter-national order – the ‘multiplicity of civilized nations [with] their distinct independence’ – was one of ‘the great safeguards of our civilization’. Its virtue was its ability to create – and preserve – the conditions necessary to meet the demands of the age, the quest for ‘the Spreading Progress of our Kind’. The modern inter-national order – the existence of many nation-states – was a guarantee against a total war that would encompass and consume European civilization entirely, or the threat of hegemony, an ‘enslaving Universal Monarchy’.<sup>75</sup> ‘Modern nations of our family’, members of ‘one common moving civilization’, were bonded by ‘their increasing resemblance and agreement’, which produce legal, cultural, scientific, and political unities.<sup>76</sup> Inter-nationalization was not a fixed condition but an ongoing, self-preserving process, whose end result was not the ‘obliteration of nationalities’ (these were requisite for a ‘moving civilization’), for, if that happened, ‘civilization would be seriously injured. Hegemonies of “ancient times” were short lived. Once declining, they never recovered . . . Modern nations by contrast are long-lived, and possess recuperative energy’.<sup>77</sup>

### Inter-national law and the vocation of humanity

For Lieber, the modern inter-national order was as expressive of man's humanity and his faculty of reason as were the nation-state and modern society. Humanity, as an observed condition, gave rise to humanity as a calling. The existence of the nation-state and of a modern inter-national society was innate in and expressive of human nature. National and inter-national societies were, on different scales, two manifestations of the same attribute, two applications of the same principle of self-government; both were geared towards the same vocation.<sup>78</sup> And if, within a state, it was the role of government to preserve order by supplying protection against undue interference with liberty, protection against interference in the inter-national society was the role of inter-national law.<sup>79</sup> Inter-national law was essentially equivalent to

74 F. Lieber, above note 64, pp. 19–20 (other forms of order ‘obsolete’: ‘universal monarchy . . . ; a ‘single leading nation; an agglomeration of States without a fundamental law, with the mere leadership or hegemony of one State or another, which always leads to Peloponnesian wars; regular confederacies of petty sovereigns; . . . all these are obsolete ideas, wholly insufficient for the demands of advanced civilization, and attempts at their renewal have led and must lead to ruinous results’).

75 *Ibid.*, p. 21 (multiplicity), p. 20 (safeguard, monarchy, a clear reference to Napoleonic empire), p. 5 (progress).

76 *Ibid.*, pp. 19–21; Francis Lieber, ‘Twenty-seven definitions and elementary positions concerning the law and usages of war’ (1861), manuscript, Box 2, Folder 15, § 8 (in the Eisenhower Library, above note 28).

77 F. Lieber, above note 64, p. 21.

78 A fundamental, ‘all-pervading law of inter-dependence, without which men would never have felt compelled to form society . . . inter-dependence which like all original characteristics of humanity, increases in intensity and spreads in action as men advance, this divine law of inter-dependence applies to nations quite as much as to individuals’: *ibid.*, p. 22.

79 *Ibid.* (‘Without the law of nations . . . which . . . is at once the manly idea of self-government applied to a number of independent nations in close relation with one another, and the application of the fundamental

government: protecting and restraining nation-states, it was an empire overseeing their relations.<sup>80</sup> Rather than a product of sovereign states, law was the source of their sovereignty, their protection and restraints on their conduct. Rules of modern inter-national law, innate in human nature, drew directly from the fact of modern inter-national order and aimed at preserving it.<sup>81</sup> Expressing the condition of humanity, their role was to promote its vocation.<sup>82</sup>

This progressive ideology is explicit in the Code. Lieber's humanity-as-vocation required 'the existence, at one and the same time, of many nations and great governments related to one another in close intercourse' (Article 29). This was a fundamental feature of a stable, regenerative order, which was necessary to preclude the emergence of short-lived hegemonies and total war. Such order guaranteed a healthy, constant competition, catalyzing human progress to counter the challenges of modern conditions. This ideology formed the basis for Lieber's approach to peace and war.

## War and peace

Humanity, as both an observed condition and a vocation, pervades Lieber's theory of war and the law that he devised to regulate it. Though he preferred peace to war, Lieber rejected pacifism and did not consider war as necessarily evil; he recognized the suffering that it brings, but often expressed admiration for war's virtues.<sup>83</sup> In his theory, war was a force that could serve virtue. Though it caused suffering, war might have a moralizing, civilizing effect on individuals and nations.<sup>84</sup> War could bring nations 'to their senses and makes them recover themselves'; if just, it often

law of Good Neighborhood, and the comprehensive law of Nuisance, flowing from it, to vast national societies, wholly independent, sovereign, yet bound together by a thousand ties').

- 80 '[C]ivilized nations have come to constitute a community of nations, and are daily forming more and more, a commonwealth of nations, under the restraint and protection of the law of nations, which rules, *vigore divino*. They draw the chariot of civilization abreast . . .': L. R. Harley, above note 51, p. 142; Lieber Code, Art. 30; the notion of law as empire, entwining protection and restraint, appears in the Martens clause: Preamble, 1899 Hague Regulations.
- 81 F. Lieber, above note 76, § 20 ('the civilized nations of our race form a family of nations. If members of this family go to war with one another, they do not thereby divest themselves of the membership – neither toward the other members, nor wholly toward the enemy'); B. Röben, above note 33, pp. 246–247.
- 82 Lieber to Sumner, 27 December 1861, in T. S. Perry, above note 43, p. 324 ('International law is the greatest blessing of modern civilization, and every settlement of a principle in the law of nations is a distinct, plain step in the progress of humanity').
- 83 He dismissed peace societies and their 'principle of benevolence' seeking 'to prohibit all violent contest, even wars of defence and resistance, even . . . to acquire liberty': F. Lieber, 'Law and usages of war', above note 28, no. I; F. Lieber, above note 29, pp. 632–635. He admitted being 'no vilifier of war under all circumstances': Lieber to Hillard, 18 April 1854, in T. S. Perry, above note 43, pp. 270–271; J. F. Childress, above note 27, p. 44; F. Friedel, above note 30, p. 223. His approach to war is manifest in his war advocacy: F. Friedel, above note 30, p. 319; Francis Lieber, 'The disposal of prisoners', in *New York Times*, 19 August 1861, p. 5.
- 84 F. Lieber, above note 29, pp. 634 ff and 649 (wars historically disseminate civilization and cause 'exchange of thought and produce and enlargement of knowledge'); F. Lieber, above note 63, p. 26 ('Blood has always flowed before great ideas could settle into actual institutions, or before the yearnings of humanity could become realities. Every marked struggle in the progress of civilization has its period of convulsion'). J. F. Childress, above note 27, pp. 43–44.

catalyzed progress.<sup>85</sup> By the same token, long peace could have corruptive, stifling effects.<sup>86</sup>

Both war and peace had an inter-national function, and both were to be assessed in reference to that function. Lieber's imperative for modern times was not perpetual peace but the dynamic process of mankind's progress and the advance of civilization.<sup>87</sup> The value of peace and war depended on their effect on the stability of the modern inter-national order as a requisite for constant competition, their contribution to a dynamic interaction producing progress and fulfilling humanity's vocation. Peace was crucial to this order and its stability; yet, at times, peace might cause the inter-national society to wane, degenerate, or disintegrate; some wars might therefore preserve or regenerate the inter-national order. War – a 'human contest'<sup>88</sup> – was a necessary component of a dynamic process of human advance.<sup>89</sup>

As part of inter-national law, Lieber's law of war was aimed at neither states nor individuals, but at enabling and preserving the dynamic inter-national order as a prescription of human progress. For Lieber, war was neither cause nor symptom of an anarchical international society, but an instrument of order. It reinforced stability and produced 'a new set of obligations between the belligerents'. War was not in itself immoral; its morality drew largely on its service to order.<sup>90</sup>

War's service to order and the vocation of humanity explains both Lieber's recognition of a *droit de guerre* of states and the restraints that he imposed on that right.<sup>91</sup> He identified three types of restraints on war: the first was rooted in just war theory; the second, in the relation of war to peace; and the third, in the public character of modern war. All three flow from the instrumental nature of modern war, not its innate immorality, which he rejected. In Lieber's theory and law of war, it was the instrumental nature of war that generated restraints on its conduct. Such restraints were humanitarian, but they referenced progressive, vocational humanity and the order that it required.

### *Just war*

For Lieber, war was neither the realist's fact of force nor the humanist's vestige of barbarity requiring charitable moderation through law, but rather a moral and legal

85 F. Freidel, above note 30, pp. 299, 305.

86 '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': F. Lieber, cited in R. R. Baxter, above note 5, p. 178; F. Lieber, above note 29, pp. 645–646.

87 *On Perpetual Peace* was thus one of Kant's 'weaker productions': F. Lieber, above note 29, p. 653.

88 F. Lieber, above note 47; Lieber Code, Art. 15; J. F. Childress, above note 27, pp. 47–48.

89 Captured by an 1872 eulogy: 'he applauded the success of Germany, his first homeland but he did not desire for it an unlimited empire, and he was deeply impressed with the advantages which would result to civilization from the friendly rivalry [*rivalité pacifique*] of several great nations': Gustav Rolin-Jaequemyns, 'Nécrologie Francois Lieber', in *Revue de droit international et de législation comparée*, Vol. 4, 1872, pp. 700, 704.

90 F. Lieber, above note 29, pp. 640 ff.; R. R. Baxter, above note 5, pp. 175–176 (obligations).

91 'The law of nations allows every sovereign government to make war upon another ...': Lieber Code, Art. 67.

procedure ‘waged with justice not less than by force’.<sup>92</sup> His version of just war tradition had the basic premise that, to be just, war must have a just cause and that it was necessary to pursue that cause:

A just war implies that we have a just cause, and that it is necessary: for war implies sufferance in some parties, and it is a principle of all human actions that, in order to be justified in inflicting sufferance of any kind, we must not only be justified, but the evil must be necessary.<sup>93</sup>

A just cause was insufficient; circumstance must render it necessary to pursue it.<sup>94</sup> As is often the case with just war doctrines, neither Lieber’s criteria nor his examples of just causes produce a sufficiently close, objectively workable category.<sup>95</sup> Yet he did not fall into the tradition’s most obvious snare, elegantly avoiding the issue of objective/subjective assessment of justness: ‘there are wars where the right is on both sides’; in other words, ‘both sides in a war may be objectively right’.<sup>96</sup>

Restraints in war had little to do with the justice or injustice of the cause *per se*. Justice or injustice of cause was not the source of obligations towards the enemy, nor did it mandate inhumane treatment. Article 67 of the Lieber Code states that:

The law of nations allows every sovereign government to make war upon another sovereign state, and, therefore, admits of no rules or laws different from those of regular warfare, regarding the treatment of prisoners of war, although they may belong to the army of a government which the captor may consider as a wanton and unjust assailant.

This statement on the equality of belligerents cannot, however, be construed as insulating the manner of fighting from war’s causes. On the contrary, Lieber saw a direct nexus between the right to wage modern war and obligations concerning means and methods employed in its pursuit. For him, modern war was instrumental, *ad bellum* and *in bello* alike; its instrumental character was the basis for restraints on both recourse to war and the manner of fighting. As Article 30 provides,

[e]ver since the formation and coexistence of modern nations, and ever since wars have become great national wars, war has come to be acknowledged not to be its own end, but the means to obtain great ends of state, or to consist in defense against wrong; and no conventional restriction of the modes adopted to injure the enemy is any longer admitted; but the law of war imposes many limitations and restrictions on principles of justice, faith, and honor.<sup>97</sup>

92 F. Lieber, cited in R. R. Baxter, above note 5, p. 178.

93 F. Lieber, above note 29, p. 635.

94 See J. F. Childress, above note 27, p. 45.

95 F. Lieber, above note 29, pp. 653–656, enumerating just causes.

96 Lieber to Von Holtzendorff, 20 May 1872, in T. S. Perry, above note 43, p. 424; J. F. Childress, above note 27, p. 45.

97 F. Lieber, above note 76, § 14 (‘War being a physical contest, yet man remaining forever a moral and a rational being, and peace being the ultimate object of war, the following four conditions result: . . . b. All means to injure the enemy so far as [they?] deprive him of power to injure us or to force him to submit to the conditions desired by us are allowed to be resorted to, but c. Only so far as necessary for this object . . .’).

While the rules apply to all belligerents, for Lieber the causes and aims of the war were highly relevant to the determination of legality of conduct *in bello*. His law of war imposed limits on the manner of waging war by a belligerent as was necessary to the accomplishment of its war aims: 'I must injure him as enemy, that is, so far as he is there to oppose me in obtaining the ends which I consider as the next object of the war'.<sup>98</sup> The justice or injustice of the cause was irrelevant, but the nature of the cause dictated the scope of what was permissible.

Modern war was instrumental: not 'its own end, but the means to obtain great ends of state, or to consist in defense against wrong'.<sup>99</sup> For Lieber, those 'great ends' were a major source of restraint on the waging of war: ends limited permissible violence to what was necessary for victory. If war was instrumental, so was the right to wage war; in consequence, the Code permitted belligerents only such means, methods, and practices as were necessary for meeting their war aims, but proscribed those that were not (Article 68).<sup>100</sup> Much like today's distinction between *jus ad bellum* and *jus in bello*, the rules were the same for all belligerents; unlike current doctrine, the content and detailed application of the rules, *per* Lieber, varied between belligerents, depending on their respective war aims.

Lieber's notion of just war implies that human suffering may be necessary and justified by a just and necessary cause.<sup>101</sup> It also implies that constraints on the manner of fighting were not necessarily or directly concerned with the mitigation of human suffering. Moreover, the justness of a cause itself was not the source of obligations in war, even if the cause of war – war's instrumentality – was relevant to determining the legality of the manner of pursuing war and, presumably, to what was humane in war. This raises the question of the purpose of and basis for restraint in war. In both cases, the answer has to do with war's instrumental nature.

### *War and peace as instruments of order*

The right to wage war, and the right to choose the means in war, were also constrained by war's instrumentality to the modern inter-national order. Since war could preserve and invigorate the dynamic inter-national society in its march of progress, it was neither antithetical to civilization nor a moral abnormality, but only an exception to the 'normal state of civilized society' – that is, peace.<sup>102</sup> Departures from peace, however, are temporary. To be moral and justifiable, to serve its international public function, war had to be geared towards return to the normal order of things: 'the ultimate object of the war . . . among civilised nations is always peace',<sup>103</sup> so that 'Peace of some sort must be the end of all war – a return to the normal state.

98 F. Lieber, above note 29, p. 658.

99 F. Lieber, above note 76, § 5.

100 Lieber Code, Art. 68: 'The destruction of the enemy in modern war, and, indeed, modern war itself, are means to obtain that object of the belligerent which lies beyond the war. Unnecessary or revengeful destruction of life is not lawful'.

101 See quote above at note 92.

102 F. Lieber, above note 76, § 1 ('Peace is the normal state of civilized society. War is the exception').

103 F. Lieber, above note 29, p. 658.

They who would carry on war for its own sake are enemies to civilization and to mankind'.<sup>104</sup>

Modern war, as the destruction it wrought and the suffering it caused, drew its very legitimacy from its service to that overarching goal: peace, not as its own end, but as an instrument of order, progress, and civilization. When Lieber stated that 'peace is the end of war', he did not merely describe the formal practice of terminating wars in a treaty of peace, but rather commented on war's legitimacy.<sup>105</sup> War's exceptional legitimacy drew on its instrumentality to order. Lieber therefore used 'return to peace' as a restrictive yardstick of war's legitimacy *in bello*. As an instrument of order, the conduct of war was constrained by the degree to which it facilitated (or jeopardized) the achievement of peace: thus, military necessity 'in general . . . does not include any act of hostility which makes the return to peace unnecessarily difficult' (Article 16).<sup>106</sup> Today, we draw law's legitimacy from its role in facilitating the resumption of peace;<sup>107</sup> for Lieber, return to peace was a yardstick of legality but at the same time legitimized war – and its more vigorous pursuit.

For, at the same time, the instrumentality of war to inter-national order legitimized and required the energetic pursuit of war. This notion, prevalent in Lieber's writing throughout his life, underscores in Article 29 (succinctly containing Lieber's theory on the nexus between the inter-national order), the instrumentality of war and peace, and *in bello* rules:

Modern times are distinguished from earlier ages by the existence, at one and the same time, of many nations and great governments related to one another in close intercourse. Peace is their 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.

The nexus to order is distinct and unequivocal; short, intense wars are a surety against protracted suffering once war breaks out:

being an exceptional state of things, the shorter . . . [war] 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 . . .<sup>108</sup>

Moreover, they guarantee the scarcity of war. Lieber advised, on a point of morality: 'First, settle whether the war be just; if so carry it out vigorously; nothing diminishes the number of wars so effectually.'<sup>109</sup>

104 F. Lieber, above note 76, §§ 4, 14. See also Lieber Code, Art. 29, considered below.

105 F. Lieber, above note 29, pp. 661–662.

106 *Ibid.* (armistice violations censured); Lieber Code, Arts. 11, 15, 30 (faith in warfare crucial to resumption of peace).

107 Marco Sassòli, Antoine A. Bouvier, and Anne Quintin, *How Does Law Protect in War*, 3rd edition, ICRC, Geneva, 2011, Vol. 1, p. 442.

108 F. Lieber, above note 29, p. 660; F. Lieber, above note 76, § 19. This and similar statements on the nature of modern war have without doubt proven fallacious.

109 F. Lieber, above note 29, p. 661.

This prescription encapsulates Lieber's sense of humanity. If justified and required at all, greater violence is not only just but also meritorious as a humanitarian imperative: vigorously pursued wars are, in Article 29, 'better . . . for humanity'.<sup>110</sup> Albeit exceptional, war is required for preserving the modern international order; because it is exceptional, it must be limited to that which is necessary to its conclusion. When Lieber references humanity, he addresses a collective condition, or vocation, of humankind, not a standard measuring the position of individuals.<sup>111</sup> The humanitarian imperative that emerges from the instrumentality of war to order is war's finality.

### *The public character of modern war*

Third, Lieber drew restraints on the instrumental conduct of modern war from its public character. This, too, drew heavily on the relationship between nationalism and inter-nationalism. The entirety of Lieber's work on war demonstrates a deliberate effort to limit the legal institution of war, *ad bellum* – and, consequently, war rights, *in bello* – to a class of participants. He explicitly rejected as illegitimate uncontrolled war over fief, creed, or throne; violence for private ends; and war controlled by religious or medieval class ethics.<sup>112</sup> Rather, through a pervading distinction between public and private war, he reconstructed war to fit modern conditions and the needs of the nation-state.<sup>113</sup>

Thus, the Code addresses 'the law and usages of public war between sovereign belligerents' (Article 153); war is defined only as 'public war' – 'a state of armed hostility between sovereign nations or governments'.<sup>114</sup> The public aspect of modern war served Lieber to impose further restraints on the waging and the manner of war, for it narrowed the class of just causes and legitimate war aims, and so, too, the scope of legitimate destruction. Permissible injury to the enemy flows from 'that which serves the public good, and what is not allowed is that which serves private ends'.<sup>115</sup> The collective, public character of war restrains its conduct but also justifies suffering and destruction:

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

110 'I am not only allowed . . . but it is my duty to injure my enemy, as enemy, the most seriously I can, in order to obtain my end. . . . The more actively this rule is followed out the better for humanity, because intense wars are of short duration. If destruction of my enemy is my object, it is not only right, but my duty, to resort to the most destructive means' (*ibid.*, p. 660).

111 See, for example, the discussion following note 81, above.

112 Lieber Code, Art. 30, rejects past 'conventional restriction of the modes adopted to injure the enemy'; F. Lieber, above note 29, pp. 660–661 (derision for chivalry-based limitations); F. Lieber, above note 76, § 12 ('Wars and battles are not duels, nor appeals to the deity to decide by the award of victory who is right').

113 Consider, in this respect, the language of Lieber Code, Arts. 20, 29–30, 67–68. Lieber was not the first to make the distinction between public and private war; but he asserted its consequences to the fullest, harnessing law to the requirements of the national age.

114 Lieber Code, Arts. 11, 15, 46.

115 James T. Johnson, 'Lieber and the Theory of War', in C.R. Mack and H.H. Lesesne, above note 69, pp. 61–63.

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. All suffering inflicted upon persons who do not impede my way, for instance surgeons, or inoffensive persons, if it can possibly be avoided, is criminal; all turning the war to private ends... as, for instance, the satisfaction of lust; the unnecessary destruction of private property is criminal... for I do not do it as public enemy, because it is not serviceable to the general object of war, it is not use, but abuse of arms, which, nevertheless, I only carry in consequence of that public war.<sup>116</sup>

Just causes are reasons of state; wars are 'but the means to obtain great ends of state' (Article 30); therefore, only public ends can justify war and give rise to war rights. This public instrumentality of war is crucial to deciphering the 'public enemy' status and treatment of non-combatants (or 'noncombatants', as Lieber wrote the term) in the Code; we shall return to it shortly.

Deriving restraints from the public character of modern wars underlines the revolutionary currents in the work of an ostensible conservative.<sup>117</sup> Rather than an inadvertent servant of the old European regime, Lieber here appears as a disciple of Edmund Burke and a voluntary draftsman of international order dedicated to consolidating, in the nation-state, a monopoly of external force and its attendant entitlements.<sup>118</sup> He wields restraint not as a shield of the individual but as a sword against past wars by private sovereigns, nobility, and men of the cloth;<sup>119</sup> it is his answer to these, but also to the totality of modern war, with its marshalling of all national resources and harnessing of science and industry. Lieber sought to restrain war; he did so by imposing on war a cast of instrumentality that was tailor-made to fit the modern nation-state. Instrumentality reined modern war into legal reason but, at the very same time, it espoused and justified the expanded aims of modern national wars.

### *Military necessity*

The three types of restraints emanating from war's instrumentality combine to form Lieber's doctrine of military necessity. If the Code's main achievement has been to systematize the modern law of war, nowhere is this more patent than in that doctrine. It was Lieber's central method to constrain – that is, humanize – war.<sup>120</sup> This perception of military necessity as a limiting principle is, however, at odds with current literature that posits military necessity and humanity as opposing

116 F. Lieber, above note 29, p. 659; J. F. Childress, above note 27, p. 57.

117 K. Nabulsi, above note 8, pp. 137 ff.

118 C. B. Robson, above note 54, p. 230.

119 F. Lieber, above note 76, § 19 (contrasting modern war's brevity to long destructiveness of 'religious wars').

120 Burrus M. Carnahan, 'Lincoln, Lieber and the laws of war: the origins and limits of the principle of military necessity', in *American Journal of International Law*, Vol. 92, No. 2, April 1998, p. 213: 'the Lieber Code's greatest theoretical contribution to the modern law of war was its identification of military necessity as a general legal principle to limit violence, in the absence of any other rule', but Carnahan fails to account for war's instrumentality in Lieber's theory.

values, the balance of which yields norms that are, on the one hand, pragmatic and expedient and, on the other, humane. The sense of humanity emerging from Lieber's works serves as a reminder that military necessity is also permissive.

The Code's first section – the same that contains its concept of occupation – lays the general principle of military necessity (Articles 14–17). Here the language is both permissive ('military necessity admits, allows') and prohibitive ('does not admit'). This choice of words is more than a structural device; it reflects an understanding of the essentially dual character of military necessity. It is permissive, as it 'consists in the necessity of those measures which are indispensable for securing the ends of the war' (Article 14). For Lieber, modern war itself is instrumental, not 'its own end, but the means to obtain great ends of state' (Article 30). Yet the 'ultimate object of all modern war is a renewed state of peace' (Article 29). Military necessity permits only that which is necessary for attaining war aims in order to secure the speedier return to peace. Hence the sanctification of the finality of war and the advocacy of sharp, brief, vigorous wars as a humanitarian imperative. Starvation, for example, is permitted 'so that it leads to the speedier subjection of the enemy' (Article 17); likewise, 'it is lawful, though an extreme measure' to force back non-combatants expelled from a 'besieged place' in order to increase demand for limited provisions and 'hasten' surrender (Article 18).

The same instrumental rationale makes military necessity also prohibitive, limiting the choice of means and methods in war. Lieber's premise is that in modern wars 'the killing of the enemy is [not] the object', but that the 'destruction of the enemy [is a] means to obtain that object of the belligerent which lies beyond the war'. The conclusion that follows is that 'Unnecessary or revengeful destruction of life is not lawful' (Article 68). Hence the prohibition on cruelty, 'the infliction of suffering for the sake of suffering or for revenge' rather than for military advantage, or the prohibition on 'wanton' destruction or devastation:<sup>121</sup> recourse to such practices is not required to secure the aims of war, and does not qualify as militarily necessary.

The dual nature of necessity is essential to Lieber's sense of humanity. Lieber drew restraints on war from war's instrumentality – to just cause, and hence war aims; to war's finality and the restoration of inter-national order; and to the public character of war. The scope of actual restraint, however, was as wide or as narrow as the war aims. Lieber's just war theory, under which just causes are abundant, and both belligerents may be objectively just, leaves room for the widest war aims. All that was necessary to accomplish a belligerent's war aims and victory was permitted, in fact mandated: it was expedient, just, and lawful. Military necessity comprised all 'measures which are indispensable for securing the ends of the war' (Article 14, with an important proviso that I discuss below). If 'the injury done in war beyond the necessity of war is at once illegitimate, barbarous, or cruel',<sup>122</sup> then that which is necessary is, necessarily, humane.

121 Lieber Code, Arts. 16 (wanton devastation), 36, 44, 68.

122 F. Lieber, above note 29, p. 663.

The counter-argument is, of course, that military necessity is relevant only in the absence of specific prohibition.<sup>123</sup> This finds some support in the proviso in Article 14: ‘Military necessity . . . consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war’. Yet the language, though apparently clear, does not really resolve the matter: are measures ‘which are indispensable for securing the ends of the war’ required to be also ‘lawful according to the modern law and usages of war’ or are they, *ipso facto*, ‘lawful, etc.’?<sup>124</sup> In fact, absolute prohibitions are scarce in the Code; even provisions whose text appears unqualified are subject to Lieber’s circular hierarchy of values.<sup>125</sup> The counter-argument ignores the bases of Lieber’s military necessity, namely the various aspects of war’s instrumentality, and the sources of restraint in the Code and in Lieber’s theory. Even if absolute prohibitions can be identified in the Code, and if lawfulness is cumulative to necessity, nothing in the Code suggests that this is grounded in humanity or human dignity in the sense used today.

When it came to war, and to the law of war, Lieber’s sense of humanity was flexible and relative to various facets of war’s instrumentality. It had no fixed boundaries and little autonomous meaning. It therefore had little existence independently of that which is necessary to the ends of war. Its content was not immutable; Lieber’s sense of humanity in war was not a value opposed to military necessity, but rather a derivative of the belligerents’ war aims – and subordinate to them. In that, Lieber’s ‘humanity’ is quite dissimilar to the contemporary associations of the term. In the Code, humanity in the sense of the ‘dignity and worth of the human person’<sup>126</sup> is neither a direct nor a significant source of restraint on the conduct of belligerents. Lieber’s sense of humanity was rational in method, not sentimental in proclivity.<sup>127</sup> Fundamentally, his sense of humanity in war was instrumental to humankind’s progressive vocation and the order – societal, national, and inter-national – necessary to attain it.

From humanity as a commentary on attributes of human nature, Lieber constructed a theory in which humanity was ultimately to serve as mankind’s progressive, civilizational vocation. Though individuals stood at the foundation of this theoretical edifice, they also carried its full weight: Lieber’s humanity-as-vocation left little room for any variety, however rudimentary, of individual humanity or entitlement under any doctrine of human dignity.<sup>128</sup> Lieber instrumentalized and subordinated the individual to humanity’s vocation: order

123 B. M. Carnahan, above note 120, p. 218.

124 J. T. Johnson, above note 115, pp. 64–65. The February draft, above note 43, supports this.

125 Lieber Code, Art. 5: ‘To save the country is paramount to all other considerations’.

126 Universal Declaration of Human Rights, UN General Assembly Res. A/RES/217, 10 December 1948, preamble.

127 J. C. Bluntschli, above note 7, pp. 12–13, lauded Lieber for remaining ‘fully aware’ that ‘to those engaged in [war], the harshest measures and most reckless exactions cannot be denied; and that tender-hearted sentimentality is here all the more out of place, because the greater the energy employed in carrying on the war, the sooner will it be brought to an end, and the normal condition of peace restored’.

128 See discussion on non-combatants, below.

and the progress of civilization. What remains to be seen is how Lieber's sense of humanity informs his sense of occupation.

## Humanity in occupation

Lieber was familiar with his predecessors' attempts to restrain the liberties of conquest. His successors, acknowledging their debt to his Code, would use his formulae – in the Hague Regulations and beyond – to give the modern law of occupation a more humane face.<sup>129</sup> But his sense of humanity in war, instrumental to the order of modern nation-states, translated to a concept of occupation that was itself subordinate to requirements of vocational order. Though different – in fact, diametrically opposed – notions of humanity now explain the law and concept of occupation, the Lieber Code had crucial impact on their formation, fundamental assumptions, and expression.

### The Code's concept of occupation

Despite its curious terminology,<sup>130</sup> the Code's occupation provisions raise a strong sense of familiarity. Thus, martial law in the Code – 'simply military authority exercised in accordance with the laws and usages of war' (Article 4) – is 'the immediate and direct effect and consequence' of the presence of 'a hostile army' in territory (Article 1). The Code, much like today's law, recognizes that, since occupation stems from a hostile presence, it exists independently of proclamations or other formalities,<sup>131</sup> and corresponds to the temporal and spatial limitations of that presence.<sup>132</sup> Likewise, the Code's discussion of the legal effects of occupation appears akin to subsequent treatment. Under Articles 3 and 6 of the Code, the functions of the existing government cease, and the 'military rule and force' of the 'occupying military authority' substitutes 'the domestic administration and government in the occupied place or territory'; 'criminal and civil law' is suspended, replaced by the occupant's legislative authority 'as far as military necessity requires' (Article 3).<sup>133</sup> Local law continues to 'take its usual course' (Article 6) at the discretion of the occupant. As with later instruments on the law of occupation, the Code recognizes the material needs of the occupying army, 'its safety, and the safety of its operations' (Article 10).<sup>134</sup> The dissimilarities between the Code and its progeny, however, are more instructive.

129 In 1899, Martens acknowledged the Code as 'the basis of all subsequent efforts in . . . the humanization of war': Fredrick William Holls, *The Peace Conference at The Hague and its Bearings on International Law and Policy*, Macmillan, New York, 1900, p. 150.

130 See also above note 37.

131 Compare Arts. 42–43 of the 1907 Hague Regulations to the Code's Art. 1.

132 Compare Arts. 42–43 of the 1907 Hague Regulations, as well as Art. 2 of the Fourth Geneva Convention, to Arts. 1 and 3 of the Lieber Code; see also F. Lieber, above note 47, *passim*.

133 Compare to Art. 43, 1907 Hague Regulations; Art. 68, Fourth Geneva Convention.

134 See also Arts. 15 and 134 of the Code.

## The occupant's duty to restore and maintain public order and public life

Striking in its absence from the Code is the fundamental duty of the occupant to restore and maintain public order and public life in occupied territory. Having rendered existing state institutions 'incapable of publicly exercising its authority' in the occupied area, the Occupying Power is today required to assume the role of government as provider of order and security.<sup>135</sup> The occupant's duty to administer the territory positively is now perceived as a humanitarian justification of its authority:<sup>136</sup> it is central to the contemporary sense of humanity in occupation.

The Code contains all elements used to construct this duty in the 1874 Brussels Declaration, itself the basis of the Hague Regulations: the authority of the occupant stemming from the fact of its presence and control; the curtailing of public power; and the substitution of existing law and authority by military law and authority.<sup>137</sup> Yet the Brussels text imports a sense of purpose connecting the occupant's entitlement to its obligation: it is '[w]ith this object' – namely, to restore and ensure public order, and so forth – that the occupant has authority. The Hague Regulations described 'replacement' and 'substitution' of public power as a transition; the Brussels text an intermediary, semi-continuous transition;<sup>138</sup> in the Code, no such transition is envisaged. Under Article 3, the occupant's authority does not derive from that of the 'legitimate power'. Its existence requires no justification:<sup>139</sup> it is original, unrestrained by limits on the authority of the ousted government.<sup>140</sup>

The occupant's authority, *per* Lieber, was not encumbered by any sense of purpose directed at the inhabitants' entitlement to public order. Indeed, the notion of a general public duty owed by the occupant to the inhabitants is entirely missing from the Code.<sup>141</sup> When Lieber observed that 'Martial Law affects chiefly the police and collection of public revenue and taxes' (Article 10), he referenced only the occupant's right, not its public duty, to police (that is, maintain public order in) occupied territory: it 'refers mainly to the support and efficiency of the army, its

135 1907 Hague Regulations, Art. 43; UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford University Press, Oxford, 2004, p. 275.

136 Myres S. McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion*, Yale University Press, New Haven, CT, 1961, p. 740 (duty to administer territory primary 'manifestation of the humanitarian principle').

137 See 1874 Brussels Declaration, Arts. 2–3: '2. The authority of the legitimate Power being suspended and having in fact passed into the hands of the occupants, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety. 3. With this object he shall maintain the laws which were in force in the country in time of peace, and shall not modify, suspend or replace them unless necessary'.

138 '[H]aving actually passed into the hands of the occupant' (Hague Regulations, 1899); 'having in fact passed into the hands of the occupant' (Hague Regulations, 1907); 'being suspended and having in fact passed' (Brussels Declaration, 1874).

139 Military necessity is absent from Art. 1 of the Code (existence of authority) but appears in Art. 3 (its exercise and effects).

140 Following Heffter, Lieber did not require the occupant 'to respect the bases of power of the ousted government': E. Benvenisti, above note 14, p. 631.

141 It could be argued that such a duty is implied in Art. 3 of the Code; but neither text nor systemic interpretation of the Code's provisions on occupation support this position.

safety, and the safety of its operations' (Article 10) – not to the role of the occupant as surrogate, temporary sovereign charged with safeguarding the civil liberty of the inhabitants by reason of having replaced the sovereign.<sup>142</sup>

Whereas, in the Code, the existence of the occupant's original authority required no justification, its exercise did require grounding in military necessity: martial law 'consists in the suspension' of law and domestic administration, and its substitution by military rule, and the dictation of 'general laws' 'as far as military necessity requires' (Article 3). Given Lieber's concept of military necessity, its invocation in relation to the exercise of the occupant's authority implies that while not constrained by the authority of the former government the exercise of that authority is limited – and legitimized – by the occupant's war aims, to which occupation itself is instrumental.<sup>143</sup> The reference to military necessity also explains the express mention of 'humanity' as guiding the occupant's exercise of authority. Humanity in Article 4 does not import an independent entitlement to human dignity on the part of individuals. Rather, humanity entirely depends on that which is necessary to accomplish war aims. Given the sources of Lieber's concept of military necessity and his sense of humanity in war, it is hard to see how can Article 4 be interpreted any differently.<sup>144</sup> Humanity in occupation, as in war, was contingent on the necessary.

The absence of the duty to administer the territory signifies that Lieber did not prioritize order within the occupied territory as service to the human dignity of the occupied. His sense of humanity in occupation was rooted in the instrumentality of occupation to the occupant's war aims. War aims serve, for the occupant, as a source of both authority and restraint. Order is a humanitarian value in occupation, but under a different sense of humanity, illustrated by the Code's treatment of the occupied.

## Non-combatants: status, restraints on treatment, and protection

An equally instructive dissimilarity to subsequent law is the absence from the Code of a standard of protection akin to that of 'humane treatment' of civilians in occupied territories in Article 46 of the 1907 Hague Regulations and, more elaborately, Article 27 of the Fourth Geneva Convention.<sup>145</sup> Notwithstanding the allusion to 'humanity' in Article 4, it is hard to find in the Code a civilian status

142 He was concerned with 'subsistence' of the occupation army, not the population: 'Self-support of the army as by Napoleon. First much cried against & cannot be helped that the individual suffers': F. Lieber, 'Law of war', handwritten notes attached to 'Law and usages of war', above note 28.

143 '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*': in R. R. Baxter, above note 5, p. 265.

144 Art. 4 Lieber Code (administering martial law ought 'be strictly guided by the principles of justice, honor, and humanity').

145 J. S. Pictet, above note 9, pp. 200–201 (Art. 27 of the Fourth Geneva Convention proclaims 'respect for the human person and the inviolable character of the basic rights of [the] individual').

predicated on a human dignity ideology. Rather, the treatment of non-combatants is instrumental, not a goal on its own. Restraints on the occupant are not predicated on the status of non-combatants, nor do they present a standard of protection ideologically comparable to what the law offers today.

### *Status: the non-combatant as enemy*

The Code contained ‘little that dealt explicitly with a belligerent’s obligations towards civilians’.<sup>146</sup> It spoke of ‘non-combatants’, ‘persons’, ‘citizens’, and ‘inhabitants’; more significantly, it lacked non-combatant status, at least as a source of treatment.<sup>147</sup> This flows directly from Lieber’s theories of war and politics and the role to which they reduced individuals in the quest for vocational humanity. Since modern war draws its legitimacy from its public character, it is an affair of the collective. As such, the civilian of a belligerent is never an uninvolved bystander. Rather, he is the enemy. ‘Public war’ is a contest between states or nations ‘whose constituents bear, enjoy, suffer, advance and retrograde together, in peace and in war’ (Article 20). Article 21 spells out the consequences: ‘The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war.’

The individual non-combatant was an enemy not so much by virtue of formal nationality or allegiance as by being a member (‘constituent’) of the whole. For Lieber, the treatment of non-combatants was predicated on a sense of collective responsibility. As parts of the whole, non-combatants contributed to, and must also suffer with, the whole. War was not hardship visited upon hapless civilians who ‘find themselves . . . in the hands’ of the occupant (Fourth Geneva Convention, Article 4). As members of collective society, innate in and expressive of their humanity, and so possessed of concomitant rights and obligations, they enjoyed the ‘fruit’ of war and paid its price.<sup>148</sup> ‘Individual citizens’ of the enemy, therefore, ‘cannot be made to suffer in person and property, as individuals. As such they are not the enemies in truth’;<sup>149</sup> but as members of the collective, they are made to suffer so, for they are the enemy.<sup>150</sup>

146 M. Grimsley, above note 47, p. 150; J. T. Johnson, above note 115, p. 65 (the Code did not provide an ‘extensive discussion of how to treat enemy noncombatants . . .’); J. F. Childress, above note 27, p. 52 (Lieber ‘in principle emphasize[d]’ rules on ‘military operations and methods of warfare’, not rules on ‘war casualties and noncombatants’; ‘did not elaborate the category of the noncombatant’). The term ‘civilian’ would only appear in the twentieth century.

147 Though a form of non-combatant category was appended to the Code (Art. 155), it is of little substance: see discussion below. This classification is not central to Lieber’s treatment of non-combatants and does not ground their protection in status: e.g. Lieber to Halleck, 13 June 1864, in T. S. Perry, above note 43, pp. 347–348.

148 ‘Man . . . owes what he is in a great measure to his social state – the society in which he actually lives, and to the continuity of that society. Man does not merely enjoy benefits owing to his social character, but he must also bear many evils in consequence, in peace as much as in war’: F. Lieber, above note 76, § 7.

149 *Ibid.*, § 12.

150 F. Lieber, above note 29, p. 659 (‘So soon as an enemy is rendered harmless by wounds or captivity, he is no longer my enemy, for he is no enemy of mine individually’); similarly, the treatment of prisoners of war as ‘public enemy’, in Lieber Code, Arts. 49, 74, 56, 76, is contingent on public function, not individual humanity.

The collective responsibility of non-combatants in public war provides the theoretical basis, moral justification, and a legal measure for their suffering. Lieber's base legal standard for assessing the treatment of non-combatants justifies that the 'hardships of the war' should fall on them by reason of the political organization inherent in their humanity.<sup>151</sup> That standard was permissive, but also a source of restraint.<sup>152</sup> The harshness of this base standard may be mitigated: elsewhere, Lieber articulated the collective responsibility of non-combatants in functional terms, assessing whether they, notionally or actually, contributed to their nation's war effort or impeded the enemy's war aims. The functionality test opens, as we shall see shortly, the possibility of finer distinction and some leniency in treatment.<sup>153</sup> Nonetheless, constraints on war practices affording protection to non-combatants are couched in instrumental terms.

As far as status is concerned, Lieber assesses non-combatants not as individuals, but by their instrumentality. Non-combatants are not the objects of his humanity; subordinated to war aims, they are its subjects.<sup>154</sup> Their suffering – the 'moral and physical calamities of conquest'<sup>155</sup> – if only 'serviceable to the general object of war', is necessary and justified; as such, it is humane.<sup>156</sup> Humanity is not individual entitlement inherent in a non-combatant's status; rather, it is a source of collective liability.

### *Treatment: protection of non-combatants*

Nor does the Code's concept of protection correspond to contemporary views of entitlement rooted in human dignity. Its treatment of non-combatants was predicated mainly on their classification as enemy. True, the Code acknowledges the emergence of a practice by which unarmed individuals are spared. Immediately after classifying even non-combatants as enemies, it states:

22. Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the

151 F. Lieber, above note 29, p. 644, conceded that 'In war those suffer generally most who were least the cause of wrong', but argued: 'the evil, though great, as has been admitted, is not so great as is often supposed. For it is the plan of the creator that government and people should be closely united in weal and woe; no state of political civilisation, no high standard of national liberty and general morality is possible' otherwise.

152 'Enemies . . . [t]he contending parties are the political societies. The hostile States are the real belligerents. In regular wars each citizen of a warfaring state is reputed to be an enemy of each citizen of the hostile state, but this is only because member of the hostile society, and not on account of individual hostility. . .': F. Lieber, above note 76, § 11.

153 'Properly speaking, the enemy is the hostile state . . . represented . . . also in all its citizens, from whom the means of carrying on the war are drawn, or who furnished them . . . [The enemy, therefore, includes] the unarmed enemy . . . supplying the means for the war, directly or indirectly': F. Lieber, above note 29, pp. 650, 658–659.

154 J. T. Johnson, above note 115, p. 63 ('avoidance of harm to noncombatants followed not from the rights of noncombatants themselves . . . but in . . . uses of armed force for public as opposed to private ends. . .').

155 F. Lieber, above note 29, p. 661.

156 *Ibid.*, p. 659; J. F. Childress, above note 27, pp. 52–53, underplaying collective responsibility ('Lieber's distinction between combatant and noncombatant has nothing to do with a person's subjective guilt or innocence, but with his objective position, impeding or obstructing the opposing belligerent in his war aims').

private individual belonging to a hostile country and the hostile country itself, with its men in arms. 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.

23. Private citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war.<sup>157</sup>

These and other provisions may offer non-combatants in occupied territory a measure of protection. Yet whether historical observation or statement of law (with Lieber's method, it is hard to tell), they do not entail status-based protection of non-combatants as an imperative transcending their enemy character. Nor do they posit protection of individual dignity autonomous from what is necessary to meet the ends of war.<sup>158</sup> The emergent practice of protection that Lieber records is subordinate to military necessity and, through it, to war aims. Thus, the 'unarmed citizen is to be spared in person, property, and honor', yet only 'as much as the exigencies of war will admit' (Article 22).<sup>159</sup> In these provisions, unlike their equivalent in subsequent codifications, protection does not represent a specific compromise between the rights of the occupant and those of the occupied population; rather, it is entirely contingent on what is necessary to accomplish the aims of the war.<sup>160</sup>

Protection of non-combatants' person or property is not only subordinate; it also appears quite illusory.<sup>161</sup> We saw how subjection of the enemy allows subjecting its population, in Articles 17 and 18, to starvation and siege tactics. Similarly, commanders may give notification prior to bombardment to allow the evacuation of non-combatants 'especially the women and children', but it is perfectly legal and justifiable not to do so: 'Surprise may be a necessity' (Article 19); if private citizens are 'no longer . . . carried off to distant parts (Article 23), public officers declining to take an 'oath of temporary allegiance or an oath of fidelity' may still be expelled (Article 26); for 'civilized nations', retaliation – presumably, including against non-combatants – is the 'sternest feature of war'; yet it is permitted in order to preclude 'repetition of barbarous outrage' (Article 27). In the final analysis, the inoffensive individual is hostage to 'the overruling demands of a vigorous war' (Article 23).

157 Note the civilizational limits in Lieber Code, Arts. 24–25.

158 News of wanton property destruction by Union troops caused Lieber to warn against 'incalculable injury. It demoralizes our troops; it annihilates wealth irrevocably and makes a return to a state of peace . . . more and more difficult'; Lieber to Halleck, 20 May 1863, in R. S. Hartigan, above note 38, p. 109. What caused alarm was force efficiency, wastefulness, and the war's conclusion, not the plight of civilians.

159 Similarly, Lieber Code, Arts. 23 ('overruling demands of a vigorous war'), 25 ('privation and disturbance of private relations'), and 37.

160 Compare Arts. 7, 15, 16 22, 32, 37, and 38 of the Lieber Code to Arts. 4 and 6 of the 1899 Hague Regulations; Art. 46 of the 1907 Hague Regulations; and Art. 38 of the Brussels Declaration. With small variations, these use the Code's language to posit autonomous values.

161 As has been argued in the scholarly – and Confederate – critique of the Code: see P. Bordwell, above note 38; R. S. Hartigan, above note 38.

Such severities demonstrate the subordination of non-combatant protection to the vast requirements of military necessity; they do not permit reading into the Code any system of mitigation of harm to non-combatants based on human dignity. Lieber's concept of non-combatant protection is not predicated on their status, but rather on their instrumentality.<sup>162</sup> This instrumentality is manifest in the adjectives and modifiers that the Code uses to describe non-combatants and in the consequences that it prescribes. Being 'unarmed' (Article 22) or 'inoffensive' (Article 25) is not a guarantee of protection. Thus, notwithstanding the Article 25 suggestion that 'protection of the inoffensive citizen of the hostile country is the rule; privation and disturbance of private relations are the exceptions', the Code systematically upholds and expands these exceptions.

Yet the instrumentality of non-combatants and their treatment to war aims does not sufficiently explain the Code's limited scope of protection. If their protection depended only on the extent of their contribution to the war effort, or the degree to which they impeded the occupant's war aims, a simple actual contribution test would be apt; protection of non-combatants based on this test, though subordinate to necessity and narrow in scope, could tangibly mitigate the suffering of non-combatants in occupied territory. Such a test would also, to some extent, mitigate the harshness of collective responsibility of non-combatants embedded in their enemy character: under an actual contribution test, non-combatants could elect to remain unarmed and inoffensive and so gain the protection of the occupant. Lieber, however, did not give non-combatants this choice; he implicated them as enemies by using a broader test that included potential contribution. The citizenry furnishes the 'means of carrying on the war'; and so, they are the 'unarmed enemy . . . supplying the means for the war, directly or indirectly'.<sup>163</sup> The conduct of non-combatants, however harmless, is insufficient to assure them protection; hence the relations that the Code foresees between the Occupying Power and the population under its control.

### *Submission and the instrumentality of occupation*

In a handwritten note discussing the Women Order, Lieber observed that it was 'obvious that the conquered must conduct themselves decently . . . toward the victor'.<sup>164</sup> This vignette illustrates the role that the Code assigns to non-combatants in occupied territories. In order to gain its protection, they must manifest submission to the occupant.<sup>165</sup> The submission requirement is mentioned in

162 Status-based humanitarian protection (prisoners of war) may appear in Lieber Code, Art. 76, but see above note 147.

163 Quoted in full above, note 152.

164 F. Lieber, 'Law of war', note attached to 'Law and usages of war', above note 28. See James M. McPherson, *Battle Cry of Freedom: The Civil War Era*, Oxford University Press, New York, 1988, pp. 551–552.

165 F. Lieber, above note 29, p. 643.

Section X on ‘a war of rebellion’; yet it borrows explicitly from conditions in a ‘regular war’. Under Article 155 of the Code:

All enemies in regular war are divided into two general classes – that is to say, into combatants and noncombatants, or unarmed citizens of the hostile government. The military commander of the legitimate government, in a war of rebellion, distinguishes between the loyal citizen in the revolted portion of the country and the disloyal citizen. The disloyal citizens may further be classified into those citizens known to sympathize with the rebellion without positively aiding it, and those who, without taking up arms, give positive aid and comfort to the rebellious enemy without being bodily forced thereto.

Article 156 lists the considerable consequences of lack of submission: ‘common justice’ and ‘plain expediency’ require the protection of the ‘manifestly loyal citizens . . . against the hardships of the war as much as the common misfortune of all war admits’. But ‘stricter police’ applies ‘on the disloyal citizens’ on whom ‘the burden of the war’ is thrown; commanders may ‘expel, transfer, imprison, or fine the revolted citizens who refuse to pledge themselves anew as citizens obedient to the law and loyal’ to the government.

Protection of person and property is not an entitlement based on non-combatant status or individual humanity. Still, submission is required of the populace. The same requirement applies in occupied territories: ‘protection’ pertains only to the ‘inoffensive individual’, the ‘inoffensive citizen’; by contrast, the property of the offensive citizen may be forfeited (Article 38).<sup>166</sup> Lieber emphasized the significance of submission immediately after the provisions setting the enemy character of non-combatants and their protection; in Article 26:

Commanding generals may cause the magistrates and civil officers of the hostile country to take the oath of temporary allegiance or an oath of fidelity to their own victorious government or rulers, and they may expel everyone who declines to do so. But whether they do so or not, the people and their civil officers owe strict obedience to them as long as they hold sway over the district or country, at the peril of their lives.<sup>167</sup>

Submission of the population, then, may result in protection. Lack of submission may result in loss of life and property, or deportation. Yet submission, whether rendered voluntarily or upon demand, is insufficient to guarantee protection. The occupant is not bound even then to accord ‘the protection which, by the modern law of war, the victor extends to the persons and property of the conquered’.<sup>168</sup> Protection is, essentially, a matter of utility or discretion. There is no balance between the occupant’s interests and those of the populace. There is no reciprocal

<sup>166</sup> The condition of submission is most apparent in the treatment of resistance to the occupant, spies, war-rebels and war-traitors in occupied territories: Francis Lieber, ‘Guerrilla parties considered with reference to the laws and usages of war’ (1862), in D. C. Gilman, above note 7, p. 275; J. F. Childress, above note 27, pp. 53–58; Lieber Code, Arts. 10, 15, 38.

<sup>167</sup> Also Lieber Code, Art. 134.

<sup>168</sup> F. Lieber, above note 166, pp. 283–284.

relationship: the occupant's position, and authority, is unilateral. Lieber assigns non-combatants individually, and the occupied population collectively, no independent value, and recognizes in them no interest.

## Occupation according to Lieber: instrumentality to imperatives of order

The Occupying Power's duty to administer the territory, and a status-based concept of protection predicated on human dignity, represent the two conceptual bases for humanitarian restraints in subsequent developments of the law of occupation. In the Hague Regulations, the duty temporarily to administer the territory expresses the role of the occupant as a provider of surrogate order, and serves as a humanitarian justification of its authority. The Fourth Geneva Convention retains this conceptual base, but emphasizes protection based on human dignity and elaborates restraints on treatment of civilians. Their absence from the Lieber Code is not coincidental. The Code's concept of occupation does not represent a stage antecedent to these conceptual bases of humanity in occupation. Rather, in the Code, Lieber reacted to the emergence of these conceptual bases – human dignity and transient, surrogate order – for restraining the liberties of conquest.

In identifying the whole citizenry of the belligerents as enemies, Lieber directly rejected Rousseau's doctrine, which became a theoretical keystone of the sense of humanity in occupation under present-day law. In *The Social Contract*, Rousseau argued:

War is then a relation, not between man and man, but between State and State, and individuals are enemies only accidentally, not as men, nor even as citizens, but as soldiers; not as members of their country, but as its defenders. Finally, each State can have for enemies only other States, and not men; for between things disparate in nature there can be no real relation.<sup>169</sup>

Rousseau and Lieber alike harnessed reason to find in the public nature of modern war a vehicle of moderation. Both used the necessity device to restrain war among civilized nations. Yet, while Rousseau discerned in 'the practice of civilized people' the principle that once enemies 'lay [their arms] down and surrender, they cease to be enemies or instruments of the enemy and become once more merely men, whose life no one has right to take',<sup>170</sup> Lieber's non-combatant, even if unarmed, even if inoffensive, forever retains his or her enemy character and is 'made to suffer' on account of the place that he or she occupies in the political organization of the international order, itself an expression of his or her humanity. For Lieber, there could be no autonomous, individual 'civilian' status as a basis of protection.

169 J.-J. Rousseau, above note 21, p. 11. See E. Benvenisti, above note 14, pp. 625–626. The Code rejects this in Arts. 20 and 21. For Lieber's ridicule of Rousseau, see L. R. Harley, above note 51, p. 126; F. Freidel, above note 30, pp. 154–155.

170 J.-J. Rousseau, above note 21, p. 12.

At the same time, the Code was a reaction to the emergence of a category of occupation as a transient phase restricting other liberties of the conqueror. Lieber was familiar with Rousseau's repudiation of the legality of acquisition by conquest, Vattel's attempt to contain the liberties of the conqueror to the public sphere, and Heffter's distinction between conquest and 'mere' occupation, during which the occupant did not acquire sovereignty.<sup>171</sup> He was equally acquainted with French Revolutionary practices leaving the decision on the disposition of the territory to liberated populations.<sup>172</sup> His successors combined some or all of these trends to restrain the liberty of the conqueror by imposing a duty to provide temporary and surrogate order, however harsh, as a humanitarian commodity. In so doing, they underlined the incidence of occupation to the war aims of the occupant.<sup>173</sup> Lieber, however, was predominantly concerned with order of another sort altogether, external to conditions in the occupied territory and predicated on an altogether different sense of humanity. For him, occupation was not an incident of war any more than conquest, or the fate of individuals, were. Rather, it was instrumental to the belligerent's war aims.

The Code uses occupation and conquest almost interchangeably.<sup>174</sup> While it may appear to accept a distinction between these categories, careful reading reveals that its provisions do not sustain such a distinction in substance.<sup>175</sup> Lieber described a temporary concept of occupation, but its provisional nature was not preparatory to the possible reversion of the territory to the original sovereign. Rather, it was preparatory to making conquest complete if the victor but chose to follow that path: Lieber recognized a right of conquest, unlimited.<sup>176</sup> Thus, even if commanders should leave to the treaty of peace the final settlement of some matters,<sup>177</sup> all the 'victorious government' has to do to in pre-emption is to proclaim 'that it is resolved to keep the country . . . permanently as its own' (Article 33). Lieber therefore sought to reinstate, not limit, the right of conquest.<sup>178</sup>

Having learned of the Anglo-French declaration of war on Russia in April 1854, Lieber was riled by the evident general good feeling

for Louis Napoleon in England. It is disgraceful to England . . . It is so unEnglish to repeat and re trumpet a word of that crowned scamp, and call his Speech 'The

171 B. Röben, above note 33, p. 69. Lieber was dismissive of Vattel: J. F. Childress, above note 27, p. 59.

172 Francis Lieber, 'The value of plebiscitum in international law' (1871), in D. C. Gilman, above note 7, p. 301.

173 See discussion above notes 137–140; Henry Wager Halleck, *International Law, or, Rules Regulating the Intercourse of States in Peace and War*, Bancroft, San Francisco, 1861, p. 776 ('The rights of one belligerent to occupy and govern the territory of the enemy while in its military possession, is one of the incidents of war, and flows directly from the right to conquer').

174 Lieber Code, Arts. 1, 5, 9, 85, and 92.

175 The Code often mentions 'conquest' or the victorious army while addressing matters preceding final settlement: consider, e.g., Arts. 31, 33, and 36.

176 Francis Lieber, *The Arguments of Secessionists*, Loyal Publication Society, New York, 1863 ('if the South had a right to secede, . . . they constitute a sovereign nation, and we . . . have, according to all law of nations, the right of conquering another sovereign nation'); F. Lieber, above note 172, p. 301.

177 Lieber Code, Arts. 31 and 36.

178 D. A. Graber, above note 7, p. 5, on Art. 33 (in the Code, 'annexation is possible prior to the conclusion of peace').

age of conquest is past,' a noble *dictum*, and all that. Fudge! The age of conquest is not past, as we shall presently see; and whether he says so or not is not worth the snap of a finger.<sup>179</sup>

Just how reactionary were his views on conquest is evident in his 1871 campaign to refute the fashionable claim that Prussian annexation of Alsace-Lorraine required popular consent. Lieber dismissed plebiscites as a 'recent Bonaparte innovation', non-binding in law, invariably rigged by those in control, involving no true democratic process, and unsuitable to people wanting democratic culture.<sup>180</sup> Rather, he argued, Prussian annexation would serve European peace and stability(!).<sup>181</sup> He urged his collaborator Bluntschli – Swiss by birth, Prussian by choice – to 'be firm, keep Alsace and Lorraine'.<sup>182</sup> Lieber found no more use for protection of collective rights – self-determination in this case, cultural property in Article 36 – than he did for individual entitlement to human dignity.

For Lieber, the transience of occupation did not imply any limitation on the occupant's authority, either in favour of the ousted government (as under the Hague Regulations) or in favour of the inhabitants (as in the Fourth Geneva Convention). Such notions were irreconcilable with the occupant's original authority. Rather, the transience of occupation confirmed its original character. Lieber's concept of occupation embodied a rejection of emerging theories that identified a quasi-contractual relationship between the occupant and the inhabitants, exchanging temporary obedience for protection.<sup>183</sup> Even if lack of submission justified the harshest measures, submission of the populace did not in any way bind the occupant's hands: protection was discretionary. After all, commanders could make public servants in the occupied territory take either 'the oath of temporary allegiance' or 'an oath of fidelity to their own victorious government or rulers' (Article 26). Lieber would have wholeheartedly endorsed Oppenheim's 1917 *dictum*: 'a just and humane, albeit stern and not indulgent, rule is apt to reconcile the population to their inevitable fate and make them submit to it, although they may chafe under its yoke'.<sup>184</sup> 'Fate', here, meant a new master. In the Code, there could be no duty towards the populace limiting the occupant's authority in any way: that authority was not incidental to temporary possession of the territory, but rather

179 Lieber to Hillard, 18 April 1854, in T. S. Perry, above note 43, p. 27.

180 F. Lieber, above note 172, p. 306 ('a change of the political status [does not require] ... in all cases the so-called consent of the people': European practices changing the population's allegiance and mastery, 'given and taken like chattel' 'by scheming diplomatists', was distasteful, but could happen 'by simple conquest': Lieber to Hammond, 14 February 1859, in Chester Squire Phinney, *Francis Lieber's Influence on American Thought and Some of His Unpublished Letters*, International Print, Philadelphia, 1918, p. 74.

181 F. Lieber, above note 172, p. 301 ('necessary for the safety of Germany, as well as for the peace of Europe').

182 Lieber to Bluntschli, 5 November 1870, in E. Nys, above note 16, p. 88; F. Freidel, above note 30, p. 409. On the Lieber–Bluntschli collaboration, see B. Röben, above note 33.

183 H. W. Halleck, above note 173, pp. 793–794 ('implied', 'tacit agreement ... mutual and equally binding upon both parties', whereby the populace forego further resistance and the conqueror is obliged not to slaughter males and allow the populace 'freely and peacefully to pursue their ordinary avocations'); Lassa Oppenheim, 'The legal relations between an Occupying Power and the inhabitants', in *Law Quarterly Review*, Vol. 33, October 1917, p. 368.

184 Oppenheim, above note 183, p. 370.

instrumental to its conquest. A ‘conquering or occupying power’ was ‘the victorious government’ (Articles 9 and 26).

For Lieber, restraints on the occupant and its authority drew on, and were designed to serve, the same purpose as any other restraint on belligerents. His sense of occupation and conquest was embedded in his sense of humanity, in its service to vocational order. The Code therefore prioritized the finality of war in occupied territory. Within the territory, the occupant’s temporary authority was preparatory to the new order that the conqueror would impose once it had ‘resolved to keep the country . . . as its own’ (Article 33). It was not a means of instating a surrogate, provisional order. Despite his sympathy to national liberation, Lieber was suspicious of resistance ‘after having been conquered’.<sup>185</sup> The harsh treatment that the Code prescribes for the spy or war rebel in occupied territory is rooted in the ‘peculiarly dangerous character’ of the activities of ‘this renewer of war within an occupied territory’.<sup>186</sup> The authority of the occupant, unconstrained, serves the reinstatement of peace, stability, and a permanent order within the territory: conquest brings the war to its conclusion.<sup>187</sup> The conqueror’s authority serves humanitarian imperatives – in Lieber’s sense of humanity.<sup>188</sup>

Outside the territory, Lieber’s concepts of occupation and conquest were *sine qua non* to inter-national order and the constant ‘human contest’ that it generates to catalyze human progress under modern conditions (Article 29). If war catalyzes a healthy competition between modern nations, conquest – through which the victor’s will, territorial or otherwise, is imposed on the vanquished<sup>189</sup> – is the instrument that harnesses war to order and progress. Without the right of conquest, the occupant cannot accomplish its war aims, and war cannot regenerate the international order. Recognition of the right of conquest, and consequently, the broad authority of the occupant, are essential to the progress of human civilization and the vocation of humanity. Here lies the justification for both the unfettered liberty of the conqueror and civilian suffering. Neither is incidental; both are instrumental to victory through occupation. Once victory has been decided, and the conqueror allowed to accomplish its aims, peace can be reinstated and order restored.<sup>190</sup> For the vocation of humanity, conquest was an imperative of progressive humanity, both logically and as a matter of historical necessity.<sup>191</sup>

185 F. Lieber, above note 166, pp. 283–285.

186 *Ibid.*; Lieber Code, Art. 52.

187 Lieber Code, Art. 153 (‘victory in the field . . . ends the strife and settles the future relations between the . . . parties’).

188 Lieber to Thayer, 3 February 1864, in T. S. Perry, above note 43, p. 340 (‘nothing can decide but victory in the field. The more efficient, therefore, the army is made, and the more unequivocally [*sic*] the conquest of the South, the better for all, North and South’).

189 Francis Lieber, *No Party Now But All for Our Country*, Westcott, New York, 1863 (‘Either the North conquers the South and re-establishes law, freedom, and the integrity of our country, or the South conquers the North. . . and covers our portion of the country with disgrace and slavery’).

190 F. Lieber, above note 29, p. 658 (‘the ultimate object of the war . . . among civilised nations is always peace, on whatever conditions that may be’).

191 Francis Lieber, *Essays on Property and Labour*, Harper, New York, 1842, p. 132 (‘present political societies arose out of conquest’); his South Carolina inaugural lecture appreciated ‘the conquests which our own age may have made in the cause of civilization’: D. C. Gilman, above note 7, p. 185.

## Conclusion

Lieber's sense of humanity, embedded in his political theory, did not concern individuals; rather, it was instrumental to a progressive, civilizational vision of international order that could meet humanity's vocation. Neither accounts that mark the Code's humanity nor those identifying therein a rudimentary version of humanity in war can capture Lieber's unique sense of humanity or, indeed, the role that it played in his law of occupation. His sense of humanity in occupation was not a precursor of contemporary notions of human dignity restricting the authority of the occupant; rather, it was a reaction inimical to ideological trends that would later generate them. Nonetheless, it remains embedded, hidden but potent, in the contemporary law of occupation, providing an enduring but questionable humanitarian justification for the occupant's authority.

The relevance of Lieber's different sense of humanity is not limited to historical anecdote. Historicizing the Code as an antecedent to or affirmation of today's human dignity conceals its essential difference; with no understanding of this difference, our ability to appraise today's law critically is impoverished. International humanitarian law, the law of occupation included, has certainly changed significantly over the last century and a half. But it is disconcerting to realize that a highly similar language depicting an essentially identical concept of occupation, then and now, is capable of supporting such ideologically divergent approaches. The transience of occupation lends itself with equal facility to both authoritarian, conquest-based order and the human dignity creed. Both offer ample justification for the occupant's authority.

This compels critical reflection: one wonders, for example, whether the current law of occupation, notwithstanding its association with the human dignity creed, likewise serves political or ideological imperatives of order. So does the instrumentality of occupation: doctrine today asserts, as in the Preamble to the 1977 First Additional Protocol, that the law applies without regard to 'the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict'.<sup>192</sup> Lieber underscored the instrumentality of occupation to the occupant's war aims; his law of occupation meant to render them service. Does occupation remain instrumental today, or is it an incident of war? What goals, other than humanitarian, does it render service to? Whatever the answers to these questions, reducing the complex history of international humanitarian law to celebration or derision of the humanity of the past is not likely to reveal them.

192 Rotem Giladi, 'The *jus ad bellum/jus in bello* distinction and the law of occupation', in *Israel Law Review*, Vol. 41, October 2008, p. 246.