

# INTRODUCTION TO PANEL II: HUMANITARIAN LAW: THE LINCOLN- LIEBER INITIATIVE

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## I. LIEBER'S CODE

I know of no better way to introduce this panel in honor of Dean Rusk than by referring to a seminal work of Francis Lieber, one of my predecessors on the faculty at the University of South Carolina. Lieber's *Instructions for the Government of Armies of the United States in the Field (Instructions)*,<sup>1</sup> commonly known as Lieber's Code, was prepared in consultation with a Board of Officers, approved by President Lincoln, and issued by Secretary of War Stanton on April 24, 1863. Fifty years later, Elihu Root, in his presidential address to the seventh annual meeting of the American Society of International Law, paid tribute to Lieber and the rules he promulgated.<sup>2</sup> In describing the *Instructions*, Root observed:

[W]hile the instrument was a practical presentation of what the laws and usages of war were, and not a technical discussion of what the writer thought they ought to be, in all its parts may be discerned an instinctive selection of the best and most humane practice and an assertion of the control of morals to the limit permitted by the dreadful business in which the rules were to be applied.<sup>3</sup>

The instinctive selectivity that Root refers to is evidenced by the many instances in which Lieber based his Code articles on what he refers to as the modern law and usages of war.<sup>4</sup> Although many

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<sup>1</sup> F. LIEBER, *General Order No. 100, Adjutant-General's Office, Instructions for the Government of Armies of the United States in the Field*, in 2 THE MISCELLANEOUS WRITINGS OF FRANCIS LIEBER 245-74 (1881) [hereinafter cited as LIEBER, *Instructions*].

<sup>2</sup> ADDRESSES ON INTERNATIONAL SUBJECTS BY ELIHU ROOT 89 (R. Bacon & J. Scott eds. 1916).

<sup>3</sup> *Id.* at 92.

<sup>4</sup> See LIEBER, *Instructions*, *supra* note 1, at 245-274. Examples of articles based on modern concepts of war include: articles 14-15 (the indispensable nature of military necessity); articles 22-25 (protection of unarmed and inoffensive individuals); article 27 (limitation on

articles of the Code conveyed Lieber's view that modern warfare was becoming more humane, several important parts of the Code were based on rules which Lieber considered to be unchanging.<sup>5</sup> Many of these modern and traditional rules of war which Lieber set down are now recognized as principles of humanitarian law. The term humanitarian law is of relatively recent origin, dating back only to the 1950's.<sup>6</sup> However, Lieber captured the essence of the term in the words and spirit of his *Instructions*.

The importance of the modern laws of war as Lieber set them out was almost immediately apparent. At the close of the Civil War, the Code articles dealing with military necessity and retaliation on the one hand,<sup>7</sup> and the articles dealing with the principle of avoiding unnecessary destruction on the other,<sup>8</sup> were debated in reference to Sherman's march to the sea.<sup>9</sup> The articles concerning the rights of prisoners of war<sup>10</sup> were cited in support of the conviction and execution of Henry Wirtz, commandant of the Confeder-

the use of retaliatory measures); article 29 (preference for brief and vigorous wars); article 33 (prohibition of forced servitude for enemy subjects); article 45 (prohibition of private booty); article 54 (permissible use of hostages only in rare circumstances); article 60 (limited prohibition on giving no quarter); article 68 (unlawful to unnecessarily or revengefully destroy life); article 70 (prohibition of the use of poison); article 75 (proper treatment of prisoners of war); article 80 (prohibition of the violent extortion of information from prisoners); and article 148 (prohibition of the assassination of enemies).

<sup>5</sup> *Id.* at 255, art. 42. In its entirety, article 42 reads:

Slavery, complicating and confounding the ideas of property (that is of a *thing*), and of personality (that is of *humanity*), exists according to municipal law or local law only. The law of nature and nations has never acknowledged it. The digest of the Roman law enacts the early dictum of the pagan jurist, that "so far as the law of nature is concerned, all men are equal." Fugitives escaping from a country in which they were slaves, villains, or serfs, into another country, have, for centuries past, been held free and acknowledged free by judicial decisions of European countries, even though the municipal law of the country in which the slave had taken refuge acknowledged slavery within its own dominions.

<sup>6</sup> Partsch, *Humanitarian Law and Armed Conflict*, in 3 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 215, 216-17 (R. Bernhardt ed. 1982). For a contemporary definition of the scope of the term humanitarian law see *id.* at 216: "Humanitarian law deals with such matters as the use of weapons and other means of warfare in combat . . . and the treatment of war victims by the enemy, i.e. the direct impact of the war on the life, personal integrity and liberty of human beings." An earlier and much narrower definition of humanitarian law, used by publicists in 1956, was "'rules in international law, deriving in particular from the instruments of Geneva and The Hague.'" *Id.*

<sup>7</sup> LIEBER, *Instructions*, *supra* note 1, at 250-51, arts. 14-17.

<sup>8</sup> *Id.* at 252-53, arts. 27-30.

<sup>9</sup> See Wright, *The American Civil War*, in *THE INTERNATIONAL LAW OF CIVIL WAR* 54-65 (R. Falk ed. 1971).

<sup>10</sup> LIEBER, *Instructions*, *supra* note 1, at 257-62, arts. 48-80.

ate prison at Andersonville, Georgia.<sup>11</sup>

Lieber's concern with making the waging of war as humane as possible may have stemmed from his own experiences. As a soldier under the command of Marshall Blücher, he was wounded (as was his brother) in the Battle of Ligny, and shot in the neck at the Battle of Namur, immediately after the Battle of Waterloo.<sup>12</sup> Lieber also had three sons who fought in the United States Civil War. Two of these were killed, one on each side. After visiting his son Hamilton, who lost an arm at Fort Donelson, Lieber wrote to his friend Senator Charles Sumner of Massachusetts that "I knew war as [a] soldier, as a wounded man in the hospital, as an observing citizen, but I had yet to learn it in the phase of a father searching for his wounded son, walking through the hospitals, peering in the ambulances."<sup>13</sup>

## II. SIGNIFICANCE AND INFLUENCE OF THE CODE

The *Instructions for the Government of the Armies of the United States in the Field* is an important, pioneering work whose influence has persisted to the present day. Upon completing his work on the Code, Lieber wrote to General Halleck:

I had no guide, no groundwork, no text-book. I can assure you, as a friend, that no counsellor of Justinian sat down to his task of the Digest with a deeper feeling of the gravity of his labor, than filled my breast in the laying down for the first time such a code, where nearly everything was floating. Usage, history, reason, and conscientiousness, a sincere love of truth, justice, and civilization, have been my guides; but of course the whole must be still very imperfect.<sup>14</sup>

Lieber was not alone in regarding his work as a pioneer effort. Nuremberg prosecutor Telford Taylor noted that up until the time of the promulgation of the *Instructions*, "the laws of war had remained largely a matter of unwritten tradition," and that with Lieber's work the United States "took the lead in reducing them to systematic, written form."<sup>15</sup> The late Justices Lauterpacht and

<sup>11</sup> See S. LEVITT, *THE ANDERSONVILLE TRIAL, A PLAY* (1960); Taubenfeld, *The Applicability of the Laws of War in Civil War*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 499, 505-06 (J.N. Moore ed. 1974).

<sup>12</sup> F. FREIDEL, *FRANCIS LIEBER: NINETEENTH-CENTURY LIBERAL* 12-15 (1947); L. HARLEY, *FRANCIS LIEBER: HIS LIFE, TIMES AND POLITICAL PHILOSOPHY* 17-21 (1970).

<sup>13</sup> F. FREIDEL, *supra* note 12, at 325-26; L. HARLEY, *supra* note 12, at 163-64.

<sup>14</sup> L. HARLEY, *supra* note 12, at 149-50. See also F. FREIDEL, *supra* note 12, at 317.

<sup>15</sup> T. TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* 21 (1970).

Baxter of the International Court of Justice regarded Lieber's Code as "the first endeavor to codify the laws of war,"<sup>16</sup> and as the first modern effort to do so.<sup>17</sup> Nobel Prize winner and former Secretary of War Elihu Root cites Russian diplomat-scholar Frederick de Martens and publicist Sheldon Amos in support of the contentions that the *Instructions* represents the "first official attempt to codify the customs of war and to collect in a code the rules binding upon military forces," and "the first attempt to make a comprehensive survey of all the exigencies to which a war of invasion is likely to give rise."<sup>18</sup> Parisian legal scholar Edouard-Rene Lefebvre de Laboulaye hailed the *Instructions* as "a small masterpiece [which] . . . established law in the empire of force, by bringing under the yoke of law the customs and even the excesses of war."<sup>19</sup> Oxford Professor Thomas Erskine Holland called the *Instructions* drawn up by Lieber the "first body of rules of the kind."<sup>20</sup> Daniel Gilman, President of Johns Hopkins University, credited Lieber with originating "the idea of codifying the laws of war."<sup>21</sup> Similarly, Professors Nussbaum of Columbia, Bond of Wake Forest, and von Glahn of Minnesota have characterized the Code as "the first attempt to check the whole conduct of armies in the field by precise written rules,"<sup>22</sup> "the first detailed military regulation,"<sup>23</sup> and "the true beginning of present-day rules applicable to land warfare."<sup>24</sup>

Francis Lieber's work<sup>25</sup> is important and influential, as well as original. In the first issue of the *American Journal of International Law*, George B. Davis expressed his doubt as to whether any of Lieber's colleagues in the field of international law "have ren-

<sup>16</sup> 2 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 228 (H. Lauterpacht 7th ed. 1965).

<sup>17</sup> Baxter, *The First Modern Codification of the Law of War: Francis Lieber and General Order No. 100*, 1963 *INTERNATIONAL REVIEW OF THE RED CROSS* 171.

<sup>18</sup> Root, *Francis Lieber*, 7 *AM. J. INT'L L.* 453, 457 (1913).

<sup>19</sup> Nys, *Francis Lieber—His Life and His Work* (pt. 2), 5 *AM. J. INT'L L.* 355, 359 (1911) (quoting Laboulaye's Preface to the French translation of J. BLUNTSCHLI, *DAS MODERNE VOLKERRECHT DER CIVILISIRTEN STATEN ALS RECHTSBUCH DARGESTELLT* (Nordlingen ed. 1868)) [hereinafter cited as Nys, *Part 2*].

<sup>20</sup> T. HOLLAND, *STUDIES IN INTERNATIONAL LAW* 85 (1898).

<sup>21</sup> Gilman, *Francis Lieber*, 10 *YALE L.J.* 271, 274 (1901).

<sup>22</sup> A. NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 227 (1964).

<sup>23</sup> J. BOND, *THE RULES OF RIOT: INTERNAL CONFLICT AND THE LAW OF WAR* 17 n. 49 (1974).

<sup>24</sup> G. VON GLAHN, *LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW* 582 (3d ed. 1976).

<sup>25</sup> For bibliographies of works by and about Lieber, see Nys, *Francis Lieber—His Life and His Work* (pt. 1), 5 *AM. J. INT'L L.* 84, 87 (1911) [hereinafter cited as Nys, *Part 1*]; F. FRIEDEL, *supra* note 12, at 418-21.

dered a more important service to humanity and to international good neighborhood, than has Dr. Francis Lieber in his memorable 'Instructions for the Government of the Armies of the United States in the Field.' " As such colleagues, Davis named "Marshall, Story and Field, Kent, Wheaton, with his able commentators, Dana and Lawrence, Halleck . . . and Taylor, Moore and Snow."<sup>26</sup> To this "illustrious" list, the French writer Edward Nys added the names of Woolsey and Wharton. Nys also said that Lieber's ideas had "penetrated not only the scientific world through the works of Bluntschli, but through the work of the conferences of Brussels in 1874, and The Hague in 1899 and 1907, they have penetrated international politics."<sup>27</sup>

Soon after the United States issued the *Instructions* to its armies, other countries issued similar manuals.<sup>28</sup> Many of the manuals issued by other governments incorporated large sections of the *Instructions*.<sup>29</sup> Article 1 of the Hague Conventions of 1899 and 1907 required states to issue instructions for armed forces which complied with the regulations in those conventions.<sup>30</sup> In response, many major powers revised their manuals to include those regulations, which in turn were heavily influenced by Lieber's Code.<sup>31</sup> In the United States, Lieber's Code was reissued in 1898 during the Spanish-American War, in 1917 during World War I, and in 1940 after the outbreak of World War II. In 1956, it was replaced with a revision, *The Law of Land Warfare*,<sup>32</sup> which had a more constricted version of the concept of "military necessity."

Lieber's Code continues to be reflected not only in the work of

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<sup>26</sup> Davis, *Doctor Francis Lieber's Instructions for the Government of Armies in the Field*, 1 AM. J. INT'L L. 13 (1907).

<sup>27</sup> Nys, *Part 2, supra* note 19, at 391-92. See also F. FRIEDEL, *supra* note 12, at 402 (in the Preface to his *DAS MODERNE VOLKERRECHT DER CIVILISARTEN STAATEN ALS RECHTSBUCH DARGESTELLT*, Bluntschli acknowledged Lieber's *Instructions* as the influence for his full-length code on international law); Root, *supra* note 18, at 457-58 (Baron Jomini, President of the Brussels Conference of 1874, stated that the Conference had its origins in Lieber's work); 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, reprinted in* Root, *supra* note 18, at 466-69 app.; *Introduction to LAW AND RESPONSIBILITY IN WARFARE* 15 (P. Trooboff ed. 1975).

<sup>28</sup> THE INTERNATIONAL LAW OF CIVIL WAR, *supra* note 9, at 448-49. Governments that issued manuals similar to Lieber's include: The Netherlands, 1871; France, 1877; Serbia, 1879; Spain, 1882; Portugal, 1890; and Italy, 1896.

<sup>29</sup> G. VON GLAHN, *supra* note 24, at 664.

<sup>30</sup> See J. SCOTT, *THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907*, at 102 (1915).

<sup>31</sup> THE INTERNATIONAL LAW OF CIVIL WAR, *supra* note 9, at 448-49.

<sup>32</sup> U.S. WAR DEPARTMENT, *THE LAW OF LAND WARFARE* (1954).

the Executive and Congress but also in the opinions of the United States Supreme Court. That Court, for example, has dealt with questions regarding the treatment of enemy civilians and enemy spies, respectively, in the cases of *The Paquete Habana*<sup>33</sup> and *Ex Parte Quirin*.<sup>34</sup> The former case was decided in the spirit of Lieber Code articles 22-25, which dealt with the protection of unarmed and inoffensive individuals, rather than article 86, which stated a general rule that "[a]ll intercourse between the territories occupied by belligerent armies, whether by traffic, by letter, by travel, or in any other way ceases" and that "contraventions of the rule are highly punishable." The Court held that "it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of mutual convenience of belligerent states, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as a prize of war."<sup>35</sup> In the latter case, which involved the capture of a Nazi spy on United States soil in 1942, the Court specifically cited articles 83 and 84 of "General Order No. 100 of April 24, 1683."<sup>36</sup> Article 83 provides: "Scouts or single soldiers, if disguised in the dress of the country, or in the uniform of the army hostile to their own, employed in obtaining information, if found within or lurking about the lines of the captor, are treated as spies, and suffer death."

### III. CONCLUSION

The penetration of Lieber's ideas into world politics through the Hague Conventions was noted seven decades ago by Nys. Lieber's ideas have continued to be important and have influenced the London International Military Tribunal Charter of 1945,<sup>37</sup> the Geneva Conventions on Civilians<sup>38</sup> and Prisoners of War,<sup>39</sup> and the Hague Cultural Property Convention.<sup>40</sup>

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<sup>33</sup> 175 U.S. 677 (1900).

<sup>34</sup> 317 U.S. 1 (1942).

<sup>35</sup> *The Paquete Habana*, 175 U.S. at 708.

<sup>36</sup> *Ex Parte Quirin*, 317 U.S. at 32-33.

<sup>37</sup> Agreement for the Prosecution of the Major War Criminals of the European Axis, signed Aug. 8, 1945, 59 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 279.

<sup>38</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, done Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

<sup>39</sup> Convention Relative to the Treatment of Prisoners of War, done Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135.

<sup>40</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict,

The leaders of this world of wars and guerrilla campaigns must sometimes decide questions of humanity and necessity, retaliation and proportionality. Such problems were faced by Seward and Stanton, later by Rusk and McNamara, and now by Haig and Weinberger. Their tasks have been and will continue to be less burdensome because of the availability of a legal framework, at the base of which are the rules formulated by Lieber for Lincoln.

