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

George D. Haimbaugh, Jr.*

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), 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. 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.

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. Although many

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*David W. Robinson Professor of Law, University of South Carolina.
1 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].
2 ADDRESSES ON INTERNATIONAL SUBJECTS BY ELIHU ROOT 89 (R. Bacon & J. Scott eds. 1916).
3 Id. at 92.
4 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. 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. 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, and the articles dealing with the principle of avoiding unnecessary destruction on the other, were debated in reference to Sherman's march to the sea. The articles concerning the rights of prisoners of war were cited in support of the conviction and execution of Henry Wirtz, commandant of the Confeder-
ate prison at Andersonville, Georgia.\textsuperscript{11}

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.\textsuperscript{12} 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."\textsuperscript{13}

\textbf{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.\textsuperscript{14}

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."\textsuperscript{15}

\begin{footnotes}
\textsuperscript{13} F. FREIDEL, supra note 12, at 325-26; L. HARLEY, supra note 12, at 163-64.
\textsuperscript{14} L. HARLEY, supra note 12, at 149-50. See also F. FREIDEL, supra note 12, at 317.
\textsuperscript{15} T. TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 21 (1970).
\end{footnotes}
Baxter of the International Court of Justice regarded Lieber's Code as "the first endeavor to codify the laws of war," and as the first modern effort to do so. Nobl 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." 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." Oxford Professor Thomas Erskine Holland called the Instructions drawn up by Lieber the "first body of rules of the kind." Daniel Gilman, President of Johns Hopkins University, credited Lieber with originating "the idea of codifying the laws of war." 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," "the first detailed military regulation," and "the true beginning of present-day rules applicable to land warfare.

Francis Lieber's work 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-
ordered a more important service to humanity and to international
good neighborhood, than has Dr. Francis Leiber 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.”

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 in-
ternational politics.”

Soon after the United States issued the Instructions to its
armies, other countries issued similar manuals. Many of the manu-
als issued by other governments incorporated large sections of the
Instructions. 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. In response,
many major powers revised their manuals to include those regula-
tions, which in turn were heavily influenced by Lieber’s Code. 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, which had a more con-
stricted version of the concept of “military necessity.”

Leiber’s Code continues to be reflected not only in the work of

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27 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 (F. Trooboff ed. 1975).
29 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.
30 G. VON GLAHN, supra note 24, at 664.
32 THE INTERNATIONAL LAW OF CIVIL WAR, supra note 9, at 448-49.
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* and *Ex Parte Quirin.* 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.” 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.” 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, the Geneva Conventions on Civilians and Prisoners of War, and the Hague Cultural Property Convention.
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.

*done May 14, 1954, 249 U.N.T.S. 240. See also Lieber, Instructions, supra note 1, arts. 34, 35, 36, 118.*