

# The Laws of War: Rules by Warriors for Warriors

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## Introduction

Judge advocates who teach the Laws of Armed Conflict in the field often encounter skepticism by soldiers who often ask: "Aren't these a bunch of rules made up by lawyers who sit behind a desk, rather than by real soldiers who have felt the sting of battle?"

The history of judge advocates as both warriors and lawyers provides the answer to this question. As was often stated by Major General Nardotti, the former Judge Advocate General, "Judge advocates are merely soldiers who happen to be lawyers." General Nardotti truly embodied this notion and reminded judge advocates of their military traditions. In addition to confirming a "soldier-lawyer" ethic, history provides the proof of an inextricable link between the laws of war and warriors. A study of the individuals who developed and codified the modern laws of war answers the skeptics' question.<sup>1</sup>

## The European Tradition

Warriors who were bloodied, captured, or wounded on the battlefield and had their lives spared by other combatants were

themselves instrumental in the development of the laws of war. In antiquity, warriors who were captured on the battlefield became the property of the capturing soldier. He could slaughter them, enslave them, or hold them for ransom.<sup>2</sup> The practice of not killing one's captives, however, was rooted in fiscal reasons, not humanitarian reasons.<sup>3</sup>

One of the earliest "humanitarians" was Richard Coeur de Lion, of Robin Hood fame.<sup>4</sup> After being spared for ransom by Leopold of Austria,<sup>5</sup> Richard deviated from the practice of wholesale slaughter.<sup>6</sup>

The fact that his life had been spared, even for a ransom, must have had some impact upon King Richard. Four years later, he captured fifteen French knights. Instead of killing them, he ordered that all of the knights be blinded, except for one, who would retain sight in one eye and lead the others back to the French Army.<sup>7</sup> While this may seem barbaric, it was standard practice to spare "neither age nor sex nor nun" in the wholesale slaughter that occurred after victory.<sup>8</sup>

Later in the middle ages, kings began issuing written rules by which their subjects must conduct themselves while waging war.<sup>9</sup> In 1385, King Richard II issued articles of war that regu-

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1. While the history of the law of war goes back millenniums, I have chosen to begin with a period with which most young soldiers have at least some familiarity. For a good discussion of the evolution of the treatment of prisoners of war in ancient Greece and Rome, see Reverend Robert F. Grady, *The Evolution of Ethical and Legal Concern for the Prisoner of War 1-30* (1970) (unpublished Ph.D. dissertation, Catholic Univ.) (copy maintained in the library of The Judge Advocate General's School, U.S. Army, in Charlottesville, Virginia, at the author's request).

Probably the first code to establish rules of warfare "was that of the Saracens and was based on the Koran." A.P.V. ROGERS, *LAW ON THE BATTLEFIELD 1* (1996), citing R.C. Algate, *Protection of Civilian Lives in Warfare: A Comparison Between Islamic Law and Modern International Law Concerning the Conduct of Hostilities*, MIL. L. AND L. OF WAR REV. 246 (1977). But see W.S. Armour, *Customs of Warfare in Ancient India*, 8 TRANSACTIONS OF THE GROTIUS SOCIETY 71 (1923).

2. See generally HERBERT C. FOOKS, *PRISONERS OF WAR 7-10* (1924); WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS 788* (2nd rev. ed. 1920).

3. HOWARD S. LEVIE, 59 INTERNATIONAL LAW STUDIES—PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICTS 2-5 (1978); George B. Davis, *The Prisoner of War*, 7 AM. J. INT'L. L. 521, 522-23 (1913).

4. See generally BRADFORD B. BROUGHTON, *THE LEGENDS OF KING RICHARD I COEUR DE LION* (1966) (describing the legends attributable to Richard I; for the Robin Hood association specifically, see pages 129-32).

5. Richard the Lion Heart's ship sank in the Adriatic Sea during his return from the Third Crusade in 1192. While crossing Europe in disguise, he was captured by Leopold, Duke of Austria. Leopold and Henry VI, the Holy Roman Emperor (and Leopold's ally), entered into a treaty with Richard on St. Valentine's Day, 1193. The terms of the agreement were that England would pay them £100,000 in exchange for their king. This amount then equaled England's revenues for five years. The sum was ultimately paid under the watchful eye of Richard's mother, Eleanor of Aquitaine. Richard was released on 4 February 1194 and returned to English soil on 13 March 1194. CHARLES MILLS, *THE HISTORY OF THE CRUSADES 168-69* (1844); JAMES A. BRUNDAGE, *RICHARD LION HEART 175-95* (1974); M. Foster Farley, *Prisoners for Profit: Medieval Intrigue Quite Often Focused upon Hopes of Rich Ransom*, MIL. HIST., Apr. 1989, at 12. See also MARION MEADE, *ELEANOR OF AQUITAINE: A BIOGRAPHY* (1977) (recounting the remarkable life of Richard I's mother). Leopold put the ransom money to good use; reportedly, the money was used to beautify Vienna and the two walls that surrounded the city. MILLS, *supra*, at 169.

6. See JOHN GILLINGHAM, *RICHARD COEUR DE LION: KINGSHIP, CHIVALRY AND WAR IN THE TWELFTH CENTURY 211-26* (1994) (containing a summary of King Richard's warfare strategy).

lated the methods and means of waging warfare. For example, articles XIII, XIX, and XXI provided specific rules which governed the capture, processing, and sharing of prisoners of war.<sup>10</sup> In 1621, King Gustavus Adolphus of Sweden personally drafted a code which incorporated several limitations on warfare.<sup>11</sup> He prohibited the pillage or damage of any hospital, church, school, or mill, except upon command. His code also protected the clergy, the elderly, and all those who did not take arms against him.<sup>12</sup>

At the end of the middle ages, during a period that coincided with the commencement of the Thirty Years' War,<sup>13</sup> scholars began to write about the laws and customs of warfare. Some of these early works impressed the warrior kings who led the nation-states that emerged from the middle ages. One promi-

nent scholar was Hugo Grotius. King Adolphus was so impressed by Grotius' seminal work on the laws of war and peace<sup>14</sup> that he "is said to have slept with the work under his pillow during his campaigns in Germany."<sup>15</sup> A copy of *De Jure Belli ac Pacis* was reportedly found in his tent after he was slain on the battlefield.<sup>16</sup> To King Adolphus, "the learning of Grotius . . . stood out as a star of the first magnitude, and, sometime before his death, he had given orders that, should he die before he could carry out the plan himself, Grotius should be employed in the service of Sweden."<sup>17</sup> King Adolphus was killed at the Battle of Lutzen,<sup>18</sup> but his request was carried out. Grotius served the rest of his life as Sweden's ambassador to France.<sup>19</sup>

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7. See PAT REID, PRISONER OF WAR 23 (1984). Major Reid states that the blinding of knights was in retaliation for earlier atrocities committed by the French and not for humanitarian reasons. *Id.* However, in the context of the Crusades, such conduct was an act of mercy. No example better explains this than the conduct of the Crusaders after they sacked Jerusalem in 1099:

No barbarian, no infidel, no Saracen, ever perpetrated such wanton and cold-blooded atrocities of cruelty as the wearers of the cross of Christ on the capture of that city. Murder was Mercy. Rape tenderness, simple plunder the mere assertion of the conqueror's right. Children were seized by their legs, some of them were plucked from their mother's breasts and dashed against the walls or whirled from the battlements. Others were obliged to leap from the walls; some tortured, roasted by slow fires. They ripped up prisoners to see if they had swallowed gold. Of 70,000 Saracens there were not left enough to bury the dead; poor Christians were hired to perform the office. Everyone surprised in the temple was slaughtered, till the reek from the dead bodies drove away the slayers. The Jews were buried alive in their synagogues.

Amos S. Hershey, *The History of International Relations During Antiquity and the Middle Ages*, 5 AM. J. INT'L. L. 901, 927-28 n. 81 (1911) (citing 4 MILAN, HISTORY OF LATIN CHRISTIANITY 37 (Am. ed. 1881)). During the Third Crusade, Richard himself perpetrated perfidity. While negotiating with the Saracens about the exchange of Muslim prisoners of war, the negotiations stalled over how the ransom would be paid. Reaching an impasse, Richard I ordered his men to surround the 3,000 prisoners, who were bound together by rope, and to use swords and lances to slaughter the lot. He "only spared prisoners of note and such as were strong enough to work." T.A. ARCHER, THE CRUSADE OF RICHARD I 1189-1192, 126-31 (1889).

8. Sir William Wallace allegedly made this battle cry during the fight for Scottish independence from 1297 until his execution in 1305. ANDREW FISCHER, WILLIAM WALLACE 40 (1986). See generally, PETER REESE, WALLACE: A BIOGRAPHY (1996); G.W.S. BARROW, ROBERT BRUCE (1965) (alleging that Sir William Wallace gave these orders during the Scottish War of Independence from England).

9. See M.H. KEEN, THE LAWS OF WAR IN THE LATE MIDDLE AGES (1965); I THOMAS A. WALKER, A HISTORY OF THE LAW OF NATIONS (1899) (discussing the laws of war from the earliest times to the Peace of Westphalia in 1648).

10. These articles established procedures for dividing a prisoner's value between the king, the constable, and the capturing soldier. Articles of War of Richard II-A.D. 1385, reprinted in WINTHROP, *supra* note 2, at 905-06.

11. Kenneth Ogren, *Humanitarian Law in the Articles of War Decree in 1621 by King Gustavus II Adolphus of Sweden*, INT'L REV. RED CROSS, July-Aug. 1996, at 438.

12. Code of Articles of King Gustavus Adolphus of Sweden, arts. 96, 97, reprinted in WINTHROP, *supra* note 2, at 913.

13. The Treaty of Westphalia in 1648 (really a series of treaties) was the first international agreement between warring nations which called for the prompt release of prisoners of war, without ransom. 60 INT'L L. STUDIES, DOCUMENTS ON PRISONERS OF WAR 5-6 (Howard S. Levie ed., 1979) (Art. LXIII of the treaty between Spain and the Netherlands and article CX of the treaty between Spain and the Holy Roman Empire) [hereinafter DOCUMENTS ON PRISONERS OF WAR]. The Treaty of Westphalia ended the Thirty Years War. See generally C.V. WEDGWOOD, THE THIRTY YEARS WAR (1944).

14. See HUGO GROTIUS, DE JURE BELLI AC PACIA (F.W. Kelsey trans., 1925) (1642). This is an English translation of Grotius' work.

15. Amos S. Hershey, *History of International Law Since the Peace of Westphalia*, 6 AM. J. INT'L. L. 30, 31 n.2 (1912). See also HAMILTON VREELAND, JR., HUGO GROTIUS: THE FATHER OF THE MODERN SCIENCE OF INTERNATIONAL LAW 189-90 (1917).

16. VREELAND, *supra* note 15, at 189.

17. Hamilton Vreeland, Jr., *Hugo Grotius, Diplomatist*, 11 AM. J. INT'L. L. 580, 582 (1917).

18. King Adolphus was shot once in the left arm and, while being escorted from the battlefield, was mortally wounded by a musket shot in the back. THE WORKS OF FREDERICK SCHILLER: HISTORY OF THE THIRTY YEARS' WAR 237-39 (Rev. A.J.W. Morrison trans., 1885).

19. Grotius served as Sweden's ambassador from 1635 until his death in August 1645. See generally *id.*

International law scholars universally recognize Hugo Grotius as the father of modern international law, particularly the concepts of the laws of war and peace.<sup>20</sup> Although a lawyer, Grotius experienced not only the ravages of war in his homeland, but also sufferings as a prisoner.<sup>21</sup> Arrested in 1618 and held in close confinement at the Hague until his trial before a packed court in 1619, Grotius was sentenced to life imprisonment on 18 May 1619.<sup>22</sup> After serving two years of confinement,<sup>23</sup> his wife helped him escape Loevestein prison on 21 March 1621. He escaped by hiding in a book chest<sup>24</sup> and thereafter fled to France, arriving in Paris on 13 April 1621.<sup>25</sup> In Paris, Grotius resumed work on his famous book *De Jure Belli ac Paci*.

*De Jure Belli ac Paci*, which was first published in 1625,<sup>26</sup> was profoundly significant in the development of the laws of war, especially in the context of the era in which it was written. It was the period of intrigue. Cardinal Richelieu controlled France, and Machiavelli was writing *The Prince*. “One has but to compare Machiavelli’s ‘Prince’ with Grotius’ ‘Rights of War

and Peace’ to realize the great step the Dutch jurist took in the very face of all Europe, the one book founded upon deceit and trickery, the other on justice and truth.”<sup>27</sup> European kings and warriors adopted the latter approach for warfare, largely due to the influence of Hugo Grotius.

### The American Tradition

The American tradition of regulating warfare with law can be traced to the nation’s forefathers. Thomas Jefferson’s correspondence clearly demonstrates that he and General Washington embraced the laws and customs of warfare during the struggle for independence.<sup>28</sup> The 1785 Treaty of Amity and Commerce Between Prussia and the United States,<sup>29</sup> which was negotiated by Thomas Jefferson, John Adams, and Benjamin Franklin,<sup>30</sup> is a prime example of the early American attitude regarding the Law of War. Scholars consistently cite this treaty as being an early work in affording humanitarian treatment to prisoners of war.

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20. See, e.g., MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 4 (1959).

21. Grotius was “a fully qualified legal practitioner” in Holland before his seventeenth birthday. W.S.M. Knight, *Grotius’s Earliest Years as Lawyer*, 8 *TRANSACTIONS OF THE GROTIUS SOCIETY* 1, 1-3 (1923) [hereinafter *Earliest Years*]. The war referred to was between Spain and the Netherlands. Grotius’ imprisonment was due to political intrigue during a power struggle between provinces within Holland while he was a pensionary. W.S.M. KNIGHT, *THE LIFE AND WORKS OF HUGO GROTIUS* 150-56 (1925) [hereinafter *LIFE AND WORKS OF HUGO GROTIUS*].

22. R.W. Lee, *The Family Life of Grotius*, 20 *TRANSACTIONS OF THE GROTIUS SOCIETY* 13 (1935). As for the proceedings themselves, “[t]here had been no indictment, no witnesses, no counsel, no argument. After the first examination, paper and ink were taken from him, and when he asked permission to write his defense, he was allowed five hours and one sheet of paper.” VREELAND, *supra* note 15, at 119 (footnote citing original source omitted); *Earliest Years*, *supra* note 21, at 12.

23. While serving his sentence, his wife and children were allowed to reside with him provided his wife did not leave more than twice a week. *LIFE AND WORKS OF HUGO GROTIUS*, *supra* note 21, at 162. For accommodations, the Grotius family was provided two rooms that contained a fireplace and five windows. VREELAND, *supra* note 15, at 124-25.

24. During his imprisonment, Grotius was permitted to receive books from friends. These books and his dirty linen were shuttled out of the prison in a large chest. His wife noticed that the guards, after a while, had stopped looking in the chest. Mrs. Grotius, with the aid of a valet and maid, placed her husband in the trunk. She then requested that two soldiers in the prison carry the chest down the stairs, through the thirteen doors that were normally bolted, out of the prison, and into an awaiting boat. To aid in her husband’s escape, Mrs. Grotius returned to the prison and pretended that she was caring for her husband who had fallen ill. Once the prison officials discovered her treachery, she was held in confinement until April. *LIFE AND WORKS OF HUGO GROTIUS*, *supra* note 21, at 162-63. VREELAND, *supra* note 15, at 130-49.

25. Lee, *supra* note 22, at 14; Jesse S. Reeves, *The First Edition of Grotius’ De Jure Belli ac Pacis*, 19 *AM. J. INT’L. L.* 12 (1925) (focusing on Grotius’ life from his arrival in Paris in 1621 until the first publication of his work in 1625).

26. WALKER, *supra* note 9, at 283-84. See also *supra* note 14.

27. VREELAND, *supra* note 15, at 177.

28. See Charles M. Wiltse, *Thomas Jefferson on the Law of Nations*, 29 *AM. J. INT’L. L.* 66, 75-81 (1935). However, probably none of our forefathers were better read on the law of war than Thomas Jefferson. See generally Burris M. Carnahan, *Reason, Retaliation, and Rhetoric: Jefferson and the Quest for Humanity in War*, 139 *MIL. L. REV.* 83 (1993). See also Catherine M. Prelinger, *Benjamin Franklin and the American Prisoners of War in England During the American Revolution*, *WM. & MARY Q.* 261-94 (Apr. 1975).

29. See, e.g., LEVIE, *supra* note 3, at 5. The correct name for this document is the Treaty of Amity and Commerce Between the King of Prussia and the United States of America, 8 *Stat.* 84, 8 *Bevans* 78. The provisions of Art. XXIV of the treaty controlled how prisoners could be quartered, fed, and confined; it also required a commissary for their use and permitted them to send correspondence and to receive items of comfort in the mail. *DOCUMENTS ON PRISONERS OF WAR*, *supra* note 13, at 8-9. The parties renewed this treaty in 1799, and it (not the Hague Regulations of 1907) was the law of war treaty in effect between the United States and Germany during World War I.

30. Davis, *supra* note 3, at 530. Besides negotiating treaties, John Adams had direct contact with the rules and customs imposed upon soldiers. He defended the British soldiers accused of, and later convicted for, firing upon Bostonians during the Boston Massacre. FREDERIC KIDDER, *HISTORY OF THE BOSTON MASSACRE, MARCH 5, 1770* (1870). See SHELDON COHEN, *YANKEE SAILORS IN BRITISH GAOLS: PRISONERS OF WAR AT FORTON AND MILL, 1777-1783*, 108-11, 115-18, 121-24, 148-51 (1995) (discussing Benjamin Franklin’s involvement in aiding escaping American prisoners of war). See also Prelinger, *supra* note 28.

Early American military leaders also recognized the importance of regulating war with law. These military officers were schooled in the laws and customs of warfare both on the battlefield and in the classroom. Several of these soldiers furthered their education and eventually became lawyers. Winfield Scott, who became general-in-chief of the Army, is an example of such a leader.

Winfield Scott came from a warrior heritage. His father fought in the American Revolution as a Captain, and his older brother served during the War of 1812.<sup>31</sup> After serving as a lawyer's apprentice in Virginia,<sup>32</sup> Winfield Scott enlisted in the cavalry in 1807. When Congress declared war in 1812, he was promoted to the rank of lieutenant colonel.<sup>33</sup> On 13 October 1812, during the Battle for Queenston Heights, a wounded Lieutenant Colonel Scott became a British prisoner of war.<sup>34</sup> He and several other regular Army officers were marched to

Canada with nine hundred other prisoners of war and were held at the Quebec Citadel until paroled on 20 November 1812 to embark for the Boston cartel ships.<sup>35</sup> In January 1813, he was exchanged at Washington,<sup>36</sup> and he returned to the northern frontier in time to plan and to lead the American amphibious attack against Fort Meade in May 1813. In late 1813, President Madison promoted the twenty-seven year old Scott to brigadier general.<sup>37</sup>

By 1841, Scott had risen to the rank of Major General and had become the general-in-chief of the Army.<sup>38</sup> In 1847, Major General Scott led the American forces during the war with Mexico. His decisions during this war were instrumental in establishing United States practices in the law of war in at least two areas: handling private property during warfare and establishing courts, both civil and military, during an occupation.<sup>39</sup>

31. 3 *DICTIONARY OF AMERICAN MILITARY BIOGRAPHY* 972 (Roger J. Spiller et al eds. 1984) [hereinafter *MILITARY BIOGRAPHY*].

32. 1 *WINFIELD SCOTT, MEMOIRS OF LIEUTENANT GENERAL SCOTT, LL.D.* 5 (1864). While Winfield Scott practiced law prior to entering the military, he did not receive a law degree until 1850. In that year, Columbia College conferred on him an honorary degree of LL.D. (Of note, Dr. Lieber was a professor at Columbia by this time.) In 1861, Harvard conferred upon him a like distinction. 2 *id.* at 628.

33. However, General Scott's career was not unblemished. In fact, in 1810, then Captain Scott was tried and convicted at a general court-martial for publicly announcing that his commander "was a traitor, a liar, and a scoundrel." R. ERNEST DUPUY and TREVOR N. DUPUY, *BRAVE MEN AND GREAT CAPTAINS* 75 (1959). The court sentenced him to "be suspended from all rank, pay, and emoluments for the space of twelve months." *Id.* The court recommended remission of nine months of their sentence, but the approving authority approved the twelve-month sentence. *Id.* The approving authority was the general against whom Captain Scott had made the accusations for which he was convicted. As a consequence of this conviction, he was dismissed from the service in 1810. 1 *SCOTT, supra* note 32, at 40. After the one-year period expired, he reentered the Army. *Id.* at 43. Immediately after his conviction, Captain Scott challenged his accuser, the unit surgeon, to a duel. The surgeon accepted the challenge. Scott fired first but missed. The surgeon returned fire but only grooved Scott's scalp. DUPUY AND DUPUY, *supra*, at 75.

34. 1 *SCOTT, supra* note 32, at 72-73. For a more detailed account of this battle, see Theodore J. Crackel, *The Battle of Queenston Heights, 13 October 1812, in AMERICA'S FIRST BATTLES 1776-1965*, 33-80 (Charles E. Heller & William A. Stofft eds., 1986).

35. "A *cartel ship* is a vessel commissioned for the exchange or ransom of prisoners of war, or to carry proposals from one belligerent to the other, under a flag of truce." JOSEPH R. BAKER and LOUIS W. MCKERNAN, *SELECTED TOPICS CONNECTED WITH THE LAWS OF WARFARE AS OF AUGUST 1, 1914*, 522 (1919).

At the Battle of Queenston Heights, two prominent figures in American military history were captured: First Lieutenant Stephen W. Kearny and Captain John Wool. Lieutenant Kearny was wounded during the battle, captured, and held by the British in Canada until he was paroled along with Winfield Scott in early 1813. Both officers rose to the rank of brigadier general and served under General Scott during the Mexican War. DWIGHT L. CLARK, *STEPHEN WATTS KEARNEY, SOLDIER OF THE WEST* 16-17 (1961).

36. 1 *SCOTT, supra* note 32, at 72-73.

37. DUPUY AND DUPUY, *supra* note 33, at 77. During the War of 1812, Scott was wounded in battle twice—once during the capture of Fort Meade on 27 May 1813 and again on 25 July 1814 during the Battle of Lundy's Lane. See 3 *MILITARY BIOGRAPHY, supra* note 31, at 972.

38. This position is now called the chief of staff of the Army.

39. Part of the credit for the evolution of U.S. practices during the occupation belongs to Brigadier General Kearny. In 1846, General Kearny was the commander tasked by General Scott to conquer New Mexico and California from Mexico. In June 1846, Secretary of War Marcy sent a letter to General Kearney, directing him to establish temporary civil governments in New Mexico and Upper California, should his expedition be successful. H.R. EXEC. DOC. NO. 13-60, at 153-55 (1st Sess. 1848) (letter from Secretary of War Marcy to Colonel Kearny, dated 3 June 1846) (the letter also promoted Colonel Kearny to brevet brigadier general). See also *id.* at 164-65 (letter from Major General Scott to General Kearny, dated 3 Nov. 1846). As general-in-chief of the Army, General Scott directed that the senior officer of the land forces was to be the military governor of California. This caused considerable consternation between General Kearny and Commodore Stockton, commander of the naval forces that were supporting the effort in California. See CLARK, *supra* note 35, at 256-87 (chapter entitled "Who Is Governor of California?"). General Kearny was successful in establishing a new civil government. The "territorial constitution" mirrored the U.S. Constitution, in large measure, and even included a bill of rights. H.R. EXEC. DOC. NO. 13-60, at 177-83 (Doc. No. 24, Organic Law for the Territory of New Mexico, Compiled Under the Directions of General Kearney, dated 22 Sept. 1846). General Kearny also promulgated civil and criminal laws and procedures. *Id.* at 184-229. These laws and procedures were reviewed and approved by the U.S. Supreme Court in *Leitensdorfer v. Webb*, 20 How. 176, 15 L. Ed. 891 (1858). See also *Cross v. Harrison*, 16 How. 164, 14 L. Ed. 889 (1853). After placing California in firm U.S. control, General Kearny returned and became involved in the heated court-martial against the explorer John Fremont. In April 1848, General Kearny joined General Scott's forces at Vera Cruz, where he served for a short time as the military governor of Mexico City and the commander of the 2nd Division.

Although General Scott served solely as the general-in-chief of the Army at the outset of the war, he assumed command of the second major land force in Mexico in late 1846.<sup>40</sup> During his campaign into Mexico, Scott received an order to provision his troops by pillaging the Mexican countryside. General Scott balked, and Washington rescinded the order. “He thereupon directed reasonable prices to be paid for such articles as were needed for subsistence of his army, and experienced so little difficulty in obtaining them as to make resort to requisition unnecessary.”<sup>41</sup> The process of purchasing property in occupied areas, rather than pillaging, remains the hallmark of the treatment of property in the modern law of war.<sup>42</sup>

The issue of martial law confronted Scott before he even arrived in Mexico. Correspondence from the initial commander of the Mexican campaign, Major General Zachary Taylor, prompted General Scott to craft his famous general orders on martial law.

Reliable information reached Washington, almost daily, that the wild volunteers as soon as beyond the Rio Grande, committed, with impunity, all sorts of atrocities on the persons and property of Mexicans, and that one of the former, from a concealed position, had even shot a Mexican as he marched out of Monterey, under the capitulation. There was no legal punishment for any of these offenses, for by the strange omission of Congress, American troops take with them beyond the limits of their own country, no law but the Constitution of the United States, and the rules and articles of war. These do not provide any court for the trial or punishment of murder, rape, theft, &c., &c.—no matter by whom, or on whom committed.

To suppress these disgraceful acts abroad, [General Scott] drew up an elaborate paper, in the form of an order—called his *martial law order*—to be issued and enforced in Mexico, until Congress could be stimulated to legislate on the subject.<sup>43</sup>

Scott initially published his martial law order, in English and Spanish, after his amphibious landing at Tampico. He republished it as he occupied Vera Cruz, Puebla, and Mexico City.<sup>44</sup> According to his memoirs, General Scott published his general order, even without official approval, because he “could not have maintained the discipline and honor of the army, or have reached the capital of Mexico” without it.<sup>45</sup>

[Under this general order], all offenders, Americans and Mexican, were alike punished—with death for murder or rape, and for other crimes proportionally. [The] order did not in the least interfere with the administration of justice between Mexican and Mexican, by the ordinary courts of the country. It only proved a special American tribunal for any case to which an American might be a party. And further . . . military commissions in applying penalties to convicted felons, were limited to “*known* punishments, in like cases, in some of the United States.”<sup>46</sup>

In the words of General Scott and others, the equal treatment of the Mexican populace “worked like a charm.”<sup>47</sup>

Major General Scott’s general order is the foundation for contemporary military commissions.<sup>48</sup> By issuing this order, General Scott codified the commander’s right to convene tribunals in occupied areas, a right previously based solely on custom.<sup>49</sup> These military tribunals tried and punished Mexicans

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40. General Zachary Taylor was in command of the initial campaign. With his supply lines already overextended and the Polk administration desiring that Mexico City be captured, General Taylor was still three hundred miles of desert away from Mexico City. He realized that, even if he could complete the march across the desert, his men would not be fit to face the 20,000-man army confronting them. General Taylor recommended that a second force be gathered and sent to Vera Cruz. President Polk, aware of General Scott’s political ambitions, “reluctantly appointed Scott to command [the] forces in Mexico and authorized the proposed invasion by way of Vera Cruz.” DUPUY AND DUPUY, *supra* note 33, at 108.

41. See H.R. EXEC. DOC. NO. 13-60, at 937 (Major General Scott’s Proclamation at Vera Cruz, 11 April 1847); *id.* at 914 (General Order No. 87, Headquarters of the Army, Vera Cruz, dated 1 Apr. 1847). See also GEORGE B. DAVIS, THE ELEMENTS OF INTERNATIONAL LAW 309 (4th ed. 1915).

42. See, e.g., Annex to Hague Convention No. IV, 18 October 1907, Embodying the Regulations Respecting the Laws and Customs of War on Land, arts. 46, 51-53, 36 Stat. 2277 (reprinted in U.S. DEP’T OF ARMY, PAM. 27-1, TREATIES GOVERNING LAND WARFARE, at 16-17 (7 Dec. 1956)). See also Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 55, T.I.A.S. No. 3365, 75 U.N.T.S. 135 (reprinted in U.S. DEP’T OF ARMY, PAM. 27-1, TREATIES GOVERNING LAND WARFARE, at 152 (7 Dec. 1956)).

43. 2 SCOTT, *supra* note 32, at 392-93. In his memoirs, General Scott states that he presented a draft of his order to Secretary of War Marcy for approval, but Mr. Marcy returned it, saying the order was “too explosive for safe handling.” *Id.* at 393. The attorney general requested a copy of General Scott’s order and rendered an opinion that supported General Scott’s views. The attorney general’s opinion, however, was not issued until seven years after the hostilities in Mexico ended. 5 Op. Att’y Gen. 55 (1855) (stating that a United States court does not have jurisdiction over a murder committed in Perote, Mexico by an officer who was part of the occupying force under General Scott’s command).

See H.R. EXEC. DOC. NO. 13-60, at 336-38 (letter from Major General Taylor to the President, dated 1 Aug. 1846, complaining about undisciplined soldiers); *id.* at 369-71 (letter from Secretary of War Marcy to Major General Zachary Taylor, dated 25 Nov. 1846). See also 2 JUSTIN H. SMITH, THE WAR WITH MEXICO 210-20, 450-54 (1919) (recounting the discipline problems Generals Taylor and Kearney faced during their campaigns).

and American soldiers alike.<sup>50</sup> At least one soldier was executed for causing harm to Mexican citizens.<sup>51</sup> With certain exceptions, this same order also authorized the continued function of local courts.<sup>52</sup>

When General Scott retired in 1861,<sup>53</sup> he was succeeded by another soldier-lawyer, Henry W. Halleck, the adopted son of Baron Frederic von Steuben.<sup>54</sup> Like Scott, Mr. Halleck was schooled at home, in the classroom, and on the battlefield about

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44. 2 SCOTT, *supra* note 32, at 392-93. Headquarters, U.S. Army Tampico, Mexico, Gen. Order No. 20 (19 Feb. 1847), as amended by Headquarters, U.S. Army, Tampico, Mexico, Gen. Order Nos. 190, 287 (reprinted in NATIONAL ARCHIVES RECORDS GROUP, MILITARY ORDERS—MEXICAN WAR, entry 134). See 2 SCOTT, *supra* note 32, at 540-46 (reprinting Headquarters, U.S. Army, National Palace of Mexico, Gen. Order No. 247 (17 Sept. 1847)). General Order 247 is essentially an improved version of the original order. See H.R. EXEC. DOC. No. 13-60, at 937 (Major General Scott's Proclamation at Vera Cruz, 11 April 1847). In addition, General Scott published regulations to supplement this order. These regulations protected hospitals, schools, mills, post offices, and churches. 2 SCOTT, *supra* note 32, at 547-49. See also H.R. EXEC. DOC. No. 13-60, at 914 (Headquarters, U.S. Army, Vera Cruz, Mexico, Gen. Order No. 87 (1 Apr. 1847)).

Probably his most successful regulation involved the strict protection of the church. Mexico has historically been a devout Catholic nation. General Scott realized the value of protecting the church and issued a separate proclamation at Jalapa on 11 May 1847. In his proclamation, General Scott exclaimed: "The Army of the United States respects, and will ever respect private property of every class, and the property of the Mexican Church. Woe to him who does not, where we are!" *Id.* at 968-74 (Proclamation by the general-in-chief of the armies of the United States of America, to the Mexican people, Headquarters of the Army, Jalapa, Mexico (11 May 1847)). See 2 SCOTT, *supra* note 32, at 549. The Mexican people were elated by this address and flooded the various military headquarters to obtain copies of the proclamation. The response was so overwhelming that General Worth wrote to General Scott, stating: "my doors are crowded for it—with the people (of all classes) it takes admirably and has produced more decided effects than all the blows from Palo Alto to Cerro Gordo. I have scattered them far and wide . . ." H.R. EXEC. DOC. No. 13-60, at 967 (extracts from an unofficial letter from Major General Worth to Major General Scott, dated at Puebla, 19 May 1847). See 2 SCOTT, *supra* note 32, at 549.

45. 2 SCOTT, *supra* note 32, at 395. Recognizing this void in criminal jurisdiction in foreign lands, Secretary of War Marcy recommended to Congress that it extend military jurisdiction in such instances. 2 SMITH, *supra* note 43, at 220. However, in a letter to General Scott, Secretary Marcy later wrote:

[I]t is not reasonable to expect that an additional article of war, giving authority to military tribunals to try and [to] punish certain offenses not expressly embraced in the existing articles, will be enacted. I have had a conversation on the subject with the chairman of the committee of the Senate, and understand from him that he had given it his attention, and did not consider legislation necessary, as the right to punish in such cases necessarily resulted from the condition of things when an army is prosecuting hostilities in an enemy's country.

H.R. EXEC. DOC. No. 13-60, at 873-74 (letter from Secretary of War Marcy to Major General Winfield Scott, dated Feb. 15, 1847).

46. 2 SCOTT, *supra* note 32, at 395.

47. *Id.* at 395-96.

The policy here adopted by the American general worked like a charm. It won over the Mexicans by appealing to their self-interest, intimidated the vicious of the several races, and, being enforced with impartial rigor, gave high moral department and discipline to the invading army . . . . [W]e have the evidence of the commander himself that valor and professional science could not alone have accomplished all this with double the number of troops, in double the time, and with double the loss of life, without the adoption and carrying into execution these and other similar measures at once deterrent of crime in all classes and conciliating the people conquered.

WILLIAM E. BIRKIMER, MILITARY GOVERNMENT AND MARTIAL LAW 139 (2nd rev. ed. 1904).

48. WINTHROP, *supra* note 2, at 832; A. Wigfall Green, *Military Commissions*, 42 AM. J. INT'L. L. 832, 833 (1948).

49. WINTHROP, *supra* note 2, at 832.

50. One soldier was tried and convicted of public drunkenness and assaulting a woman with kicks and blows. He was punished by being strapped over a wagon, given twelve lashes and then forced to labor at a fort, while strapped to a ball and chain, until the end of the war. 2 SMITH, *supra* note 43, at 221. In another case, a private who was convicted of breaking into a Mexican home and stealing ladies' clothing "was sentenced to receive fifty lashes on his bare back 'well laid on with a rawhide,' to be confined at hard labor during the rest of his term, to be then dishonorably discharged and drummed out," and his pay was confiscated, with \$250 going to the person robbed. *Id.* Mexicans as well as Americans were publicly flogged. *Id.* In extreme cases, hanging was the punishment. *Id.* at 459, n. 39. See *id.* at 220-32, 455-62 (detailing General Scott's enforcement of discipline within Mexico).

51. Headquarters, U.S. Army, Vera Cruz, Mexico, Gen. Order No. 101 (9 Apr. 1847); H.R. EXEC. DOC. No. 13-60, at 935-37 (Major General Scott's Proclamation at Vera Cruz, 11 April 1847) (referring to a soldier, named Isaac Kirk, who was hung for raping a Mexican female and for stealing ten dollars and a comb from his victim on 4 April 1847). The proclamation refers to several others who were punished by fine for other unspecified acts of indiscipline against Mexican nationals. See *id.*

52. Those exceptions being: "(1) in cases to which an officer, soldier, agent, servant, or follower of the American Army may be a party; and (2) in political cases—that is, prosecutions against other individuals on the allegations that they have given friendly information, aid, or assistance to the American forces." BIRKIMER, *supra* note 47, at 581, 583 (reprinting Gen. Order No. 287, para. 13). This reservation continued in American occupation practice during World War II. Allied Kommandatura, Law No. 7 (copy on file with author). For a discussion of the evolution of the law of occupation between the Mexican War and World War II, see DORIS A. GRABER, THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION 1863-1914: A HISTORICAL SURVEY (1949).

53. Ultimately, General Scott was promoted to the rank of Lieutenant General, the first American officer to hold that rank since General Washington. 3 MILITARY BIOGRAPHY, *supra* note 31, at 974.

the laws and customs of war.<sup>55</sup> He studied law as part of the required curriculum at West Point,<sup>56</sup> where he graduated third in his class in 1839.<sup>57</sup> In 1846, he published his first book, entitled *Elements of Military Art and Science; or, Course of Instruction in Strategy, Fortification, Tactics of Battles, & c.* The work was considered to make Halleck, along with Dennis Hart Mahan, “one of the two founders of American professional military scholarship and thought.”<sup>58</sup>

Halleck’s battlefield experience began during the Mexican War. While General Scott was conducting operations in Mexico in 1846-1847, General Kearney conquered California from Mexican forces.<sup>59</sup> General Kearney established a military government in California and appointed Halleck, a newly arrived first lieutenant, as the secretary of state.<sup>60</sup> It was in this capacity that Lieutenant Halleck rekindled his interest in the law.

After the war ended, Halleck established the San Francisco law firm of Halleck, Peachy, and Billings in 1849. Wanting to devote more time to his law practice, he resigned his commission in 1854. In 1861, Mr. Halleck wrote his first law book, *International Law, or Rules Regulating the Intercourse of*

*States in Peace and War.*<sup>61</sup> He returned to military life when the Civil War broke out, and President Lincoln appointed him to the rank of Major General in the regular Army. From 1861 to 1862, General Halleck served as the commander of the Union Army in Missouri and received a “baptism by fire” in the bloody internecine warfare between Kansas Jayhawkers and the Missouri Bushwackers.<sup>62</sup> In July 1862, General Halleck became the general-in-chief of the U.S. Army and held that position until he was replaced by General Grant.

During his tenure as general-in-chief of the Army, Halleck realized that the unwritten laws and customs that existed at the time were insufficient to deal with the war that raged between the North and the South. Prior to the American Civil War, little public information was available about the laws and customs of war. Even less information was available to the practitioners of warfare. It was the unwritten practice that controlled the conduct of combatants. For example, when war broke out between the states, the United States Army regulations provided only two vague paragraphs on the obligations towards, and the rights of, prisoners of war.<sup>63</sup> This sparse guidance was insufficient to

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54. Baron Von Steuben had personal experience on the laws and customs of warfare. He was instrumental in the training of the American Continental Army during the Revolutionary War. He had also been a prisoner of war after being captured by the Russians in 1761. *Id.* at 1050.

Another notable Prussian also experienced being a prisoner of war prior to writing his influential work. His name was Carl von Clausewitz. In 1806, Clausewitz led one-third of Prince August’s battalion against Napoleon during the battle of Auerstedt. After the battle, his unit served as the retreating Prussian rear guard until it ran out of ammunition and surrendered. After their surrender, Napoleon held Clausewitz and Prince August as prisoners of war for ten months and eventually permitted them to return to Prussia in the fall of 1807. Peter Paret, *Clausewitz, in MAKERS OF MODERN STRATEGY FROM MACHIAVELLI TO THE NUCLEAR AGE* 191 (Peter Paret ed., 1986). Clausewitz wrote his definitive work, *On War*, eighteen years later. *See generally* CARL VON CLAUSEWITZ, *ON WAR* (Michael Howard and Peter Paret eds., rev. ed. 1984).

55. Unless otherwise noted, the information on General Halleck comes from the second volume of the *DICTIONARY OF AMERICAN MILITARY BIOGRAPHY*, pages 421-25. *See supra* note 31.

56. Since 16 March 1802, the West Point curriculum has included the articles of war. 2 *MILITARY BIOGRAPHY, supra* note 31. *See* 2 *CENTENNIAL OF THE UNITED STATES MILITARY ACADEMY AT WEST POINT, 1802-1902* (Edward S. Holden ed., 1904) (including a bibliography of all books used as part of student studies at West Point during the 19th Century). However, there is some question as to whether the laws and customs of warfare were properly taught prior to 1817. During that year, West Point’s new superintendent, Sylvanus Thayer, made the study of law a distinct part of the curriculum. *See* JOHN W. MASLAND and LAURENCE I. RADWAY, *SOLDIERS AND SCHOLARS: MILITARY EDUCATION AND NATIONAL POLICY* 77 (1957).

57. Telephone interview with Alan Aimone, Assistant Librarian for Special Collections, United States Military Academy at West Point (June 25, 1997).

58. 2 *MILITARY BIOGRAPHY, supra* note 31, at 424. Dennis Hart Mahan was a professor of military and civil engineering at West Point from 1830 until his death in 1871. As the primary instructor on the science of war at West Point, he taught “nearly all the West Point graduates who commanded in the Civil War.” *Id.* at 714. His writings in engineering “became the foundation of engineering literature in the United States.” *Id.* at 715. His book, commonly called *Out-Post*, (along with Halleck’s tactics book) “was the foundation of American professional military literature.” *Id.*

During his career, Professor Mahan’s favorite pupil was Cadet Henry W. Halleck. Professor Mahan took Cadet Halleck under his academic wing and had him teaching classes while still a cadet. After Cadet Halleck’s graduation, Halleck was appointed as an assistant professor in the engineering department, where he served for one year. *Id.* at 421.

Professor Mahan is also the father of Captain Alfred Thayer Mahan. Captain Mahan, besides being the father of modern naval strategy, was a U.S. delegate to the Hague Peace Conference in 1901. *Id.* at 712.

59. CLARK, *supra* note 35.

60. WINTHROP, *supra* note 2, at 802.

61. The book was updated, renamed *THE ELEMENTS OF INTERNATIONAL LAW*, and published in 1866.

62. *See* 2 *MILITARY BIOGRAPHY, supra* note 31, at 422-23.

address the myriad of prisoner of war and law of war issues that arose during the Civil War.

The problem was underscored “by the fact that both the Union and Confederate armies were manned by untrained volunteers and conscripts and largely commanded by politically appointed officers whose military and legal training rarely, if at all, rose above the level of their corps.”<sup>64</sup> The general lack of military experience created a need for a practical guide to the customs and laws of warfare, to be distributed to the soldiers of both belligerents. Thus the Civil War laid the foundation for the first comprehensive codification of the laws of war,<sup>65</sup> and Halleck recommended the creation of such a codification. At the behest of Secretary of War Stanton, Dr. Francis Lieber compiled the customary laws of war into one succinct document.<sup>66</sup>

It is generally believed that Dr. Lieber was solely responsible for his famous code, but this is not the case. In fact, the Secretary of War appointed a board to develop the code, and Dr.

Lieber happened to be part of the distinguished panel. The composition of the panel demonstrates the “warrior” influence of the code. In addition to Dr. Lieber, the board included four general officers: Major General Ethan Allen Hitchcock, Major General George Cadwalader, Major General George L. Hartsuff, and Brigadier General J.H. Martindale. Their mandate was 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>67</sup> Among Generals Cadwalader, Hartsuff, and Martindale, “[t]wo were lawyers, and one was a former instructor at West Point.”<sup>68</sup> As for General Hitchcock, he graduated from West Point in 1817, taught military tactics at West Point for three years, and fought in both the Seminole Wars of the 1830s and the Mexican War.<sup>69</sup> His peers called him “The Pen of the Army” because of his administrative and intellectual prowess.<sup>70</sup> When General Hitchcock came out of retirement in 1862, President Lincoln offered him command of the Army of the Potomac, but he declined the offer because of poor health.<sup>71</sup> Instead,

63. Those provisions were:

745. [726]. Prisoners of war will be disarmed and sent to the rear, and reported as soon as practicable to the headquarters. The return of the prisoners from the headquarters to the Army to the War Department will specify the number, rank, and corps.

746. [727.] The private property of prisoners will be duly respected, and each shall be treated with the regard due to his rank. They are to obey the necessary order given them. They receive for subsistence one ration each, without regard to rank, and the wounded are to be treated with the same care as the wounded of the Army. Other allowances to them will depend on convention with the enemy. [Prisoner’s horses will be taken for the Army.]

[728. *Exchanges of prisoners and release of officers on parole depend on the orders of the general commanding in chief under the instructions of Government.*]

*Compare House Report on the Treatment of Prisoners of War by the Rebel Authorities During the War of the Rebellion*, H.R. REP. No. 40-45, at 24 (3d Sess. 1869) (original U.S. Army regulation) (copy on file with author) with 3 U.S. WAR DEP’T, *THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND THE CONFEDERATE ARMIES*, ser. 2, at 691 (Confederate Army Regulation of 1861) [hereinafter OFFICIAL RECORDS]. The Confederate States merely adopted the Union’s regulations with slight additions. Those modifications are reflected in the italicized and bracketed portions of the regulation above. The U.S. Army eventually expanded its regulatory guidance to twelve paragraphs by General Order Number 32, dated 2 April 1862. See 3 OFFICIAL RECORDS, *supra*, at 417-18. However, these regulations provided no further guidance on the discipline and security of prisoners of war. It was not until 7 July 1862 that the Office of the Commissary-General of Prisoners issued guidance on this matter. Its circular provided that each prison camp commander was accountable for the “discipline and good order of his command and for the security of the prisoners.” 4 *id.* at 152.

64. RICHARD SHELLY HARTIGAN, *LIEBER’S CODE AND THE LAW OF WAR* 7 (1983).

65. Frederic de Martens describes the historical significance of Dr. Lieber’s code as follows:

So it is to the United States of North America and to President Lincoln that belongs the honor of having taken the initiative in defining with precision the customs and laws of war. This first official attempt to codify the customs of war and to collect in a code the rules binding upon military forces has notably contributed to impress the character of humanity upon the conduct of the northern states in the course of that war.

Elihu Root, Address Before the American Society of International Law at the Seventh Annual Meeting, Washington, D.C. (Apr. 24, 1913), *reprinted in* 7 AM. J. INT’L L. 453, 457 (1913) (quoting Frederic de Martens, but citing no source for the quote). See also HARTIGAN, *supra* note 64, at 23 (citing F. DE MARTENS, *PRECIS DU DROIT DES GENS MODERNE DE L’EUROPE* (1879)).

66. Actually, Dr. Lieber was appointed in large measure because of the efforts of the Union chief of staff of the Army, General Halleck. General Halleck was an accomplished scholar of international law who had already published a book on the subject. See HENRY W. HALLECK, *INTERNATIONAL LAW* (1861); H.W. HALLECK, *ELEMENTS OF INTERNATIONAL LAW AND LAWS OF WAR* (1866).

Dr. Lieber described the difficulty of collecting and codifying the customary laws of war. In the letter he sent to General Halleck when transmitting the completed codification, he stated: “I have earnestly endeavored to treat these grave topics conscientiously and comprehensively . . . nothing of the kind exists in any language. I had no guide, no groundwork, no textbook . . . use, history, reason, and conscientiousness, a sincere love of truth, justice, and civilization have been my guides . . .” Root, *supra* note 65, at 459.

67. HARTIGAN, *supra* note 64, at 85 (reprinting Headquarters, War Dep’t, Adjutant Gen. Office, Spec. Orders No. 399 (17 Dec. 1862)). See also Root, *supra* note 65, at 454.



he accepted a position as an advisor to President Lincoln and Secretary of War Stanton. While serving in this capacity, he was not only appointed to the Lieber Board, but also served as commissioner for the exchange of prisoners of war.<sup>72</sup>

President Lincoln adopted the panel's codification of the laws of war and, on 24 April 1863, issued the *Instruction for the Government of Armies of the United States in the Field, War Department General Order 100*.<sup>73</sup> Commonly referred to as the Lieber Code,<sup>74</sup> this order was so complete that the Confederacy adopted it as its own, substituting the words "Confederate States" where the words "United States" appeared in the document.<sup>75</sup> The fact that almost one-third of the articles address prisoner of war issues is no coincidence and is explained by Dr. Lieber's personal experience and investment in the war.

Professor Lieber was no stranger to warfare. In 1815, at the age of 15, Lieber enlisted in the Prussian army in response to Napoleon's escape from the Island of Elbe. He experienced first-hand the sufferings of an infantryman. He vividly recounted the suffering he endured while marching hungry, in a downpour, and arriving the afternoon of 18 June 1815 at a place called Waterloo.<sup>76</sup> Only days earlier, Lieber's company fought

in the Battle of Ligny, where only thirty out of 150 men in Lieber's unit survived and continued on to Waterloo.<sup>77</sup> In this battle, young Lieber observed the horror of war: "12,000 Prussians and 8500 French were killed or wounded" in the battle.<sup>78</sup>

At Waterloo, Lieber witnessed another 47,000 bodies lying on the battlefield with their horses and equipment.<sup>79</sup> While his regiment pursued the remnants of Napoleon's army to Namur, he was seriously wounded in the neck. He was wounded a second time and "had the strange and vital discipline of lying long on the battlefield in expectation of death."<sup>80</sup> It was not until that evening that fellow soldiers carried him to a nearby field hospital.<sup>81</sup> By the time he was twenty-six years old, he had fought in two wars—one in Continental Europe, the other in Greece (the Greek War of Independence).<sup>82</sup> Lieber's experience as a soldier inspired one author to note that "[i]f, as seems not unreasonable, he who is to write of war must first experience it, this much of Lieber's qualifications as a codifier of the Law of War had been established."<sup>83</sup>

Dr. Lieber's interest in the conduct of the Civil War stemmed from the fact that he had three sons engaged in the fight: two for the North and one for the South. His oldest son, Oscar, was

68. HARTIGAN, *supra* note 64, at 14. Brigadier General Cadwalader served as a brigade commander under Major General Scott during the War with Mexico in 1846-1847 and led his brigade in several engagements. H.R. EXEC. DOC. NO. 13-60, at 924-25 (1st Sess. 1848) (Attached Statement No. 1, dated Mar. 3, 1847, in letter from Secretary of War Marcy to Major General Scott, dated Apr. 30, 1847); N.C. BROOKS, A COMPLETE HISTORY OF THE MEXICAN WAR 447-52 (1851). *See generally*, 2 SMITH, *supra* note 43.

69. 2 MILITARY BIOGRAPHY, *supra* note 31, at 475-76. Hitchcock, who was then a lieutenant colonel, served as part of General Scott's cabinet during the march from Vera Cruz to Mexico City. 2 SCOTT, *supra* note 32, at 422.

70. 2 MILITARY BIOGRAPHY, *supra* note 31, at 475.

71. *Id.* at 476. President Lincoln wanted General Hitchcock to replace General McClellan as the commander of the Army of the Potomac. After General Hitchcock declined, President Lincoln eventually relieved McClellan and appointed General Burnside to the position. *Id.*

72. *Id.* at 476-77.

73. *See* THE HENRY DURANT INSTITUTE, THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS 3 (Dietrich Schindler & Jimi Toman eds., 1988) (reprinting General Order 100).

74. Of note, 48 of the 157 articles deal with obligations towards, and rights of, prisoners of war. *See id.* at 10-14, 18-19 (reprinting arts. 48-80 and 119-133 of the Lieber Code).

75. William E. Boyle, Jr., *Under the Black Flag: Execution and Retaliation in Mosby's Confederacy*, 144 MIL. L. REV. 148, 156 (1994), *quoting* 1 OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES IV 131 (1900).

76. Ernest Nye, *Francis Lieber—His Life and His Work*, 5 AM. J. INT'L. L. 84, 92 (1911) (extract from the book written in French, as translated by Charles G. Fenwick).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 93; Root, *supra* note 65, at 459.

81. Nye, *supra* note 76, at 93.

82. *Id.* at 98.

83. James G. Garner, *General Order 100 Revisited*, 27 MIL. L. REV. 1, 3 (1965), *quoting* Richard Baxter, *The First Modern Codification of the Law of Land Warfare*, INT'L REV. RED CROSS 3 (Supp. 1953).

## Conclusion

mortally wounded while fighting for the Confederacy at Williamsburg. One of his other sons, Hamilton, lost an arm at the Battle of Fort Donelson.<sup>84</sup> The third son, G. Norman, was a civilian lawyer until 1861, when he joined the Union Army. As an infantry officer, he fought in several major engagements prior to 1863, including the Battle of Gaines Mill and the Second Battle of Bull Run. G. Norman Lieber eventually rose to become The Judge Advocate General of the U.S. Army.<sup>85</sup>

Between the American Civil War and World War I, warriors made great strides in building on Lieber's work to codify the customs of warfare. These steps were largely due to Dr. Lieber's code. After reviewing his work, other nations adopted his code as their own. For example, in 1870, the German government adopted the code for use in its war with France.<sup>86</sup> This codification movement culminated when, in 1874, Czar Nicholas of Russia convened a conference in Brussels for the Continental Nations to gather for the purpose of codifying the laws and customs of war. Russia's delegate and president of the convention, Baron Jomini, "declared that the project of an international convention then presented had its origin in the rules of President Lincoln [the Lieber Code]."<sup>87</sup> So complete was Lieber's Code that it was the official guidance on the laws of war in all American conflicts until 1914.<sup>88</sup>

This short exposé of the evolution of the laws of war is intended to assist the soldier-lawyer in answering the warrior's question presented in the introduction. History demonstrates that the laws of war were developed by warriors for warriors. The law of war has always been, and should continue to be, within the province of, and from the perspective of, the warrior. The laws of war are just that, rules of conduct by warriors for warriors.<sup>89</sup>

Wars happen. It is not *necessary* that war will continue to be viewed as an instrument of national policy, but it is likely to be the case for a very long time. Those who believe in the progress and perfectability of human nature may continue to hope that at some future point reason will prevail and all international disputes will be resolved by nonviolent means, perhaps ultimately through the agency of an international structure beyond the level of the nation-state. Unless and until that occurs, our best thinkers must continue to pursue the moral issues related to war. Those who romanticize war do not do mankind a service; those who ignore it abdicate responsibility for the future of mankind, a responsibility we all share even if we do not choose to do so.<sup>90</sup>

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84. Telford Taylor, *Foreword to I THE LAW OF WAR: A DOCUMENTARY HISTORY XV* (Leon Friedman ed., 1972).

85. *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975*, 85-86 (U.S. Gov't Printing Office 1975).

86. Root, *supra* note 65, at 456. Lieber's instructions were so complete that "it is said on good authority that, with one exception (that of concealing in an occupied district arms or provisions for the enemy), no case presented itself during the Franco-German War of 1870 which had not been provided for in the American Instructions." *Id.* at 457 (quoting SHELDON AMOS, *POLITICAL AND LEGAL REMEDIES FOR WAR*). The Franco-German War of 1870-1871 was a catalyst in bringing together the continent's national Red Cross and was instrumental in bringing the European nations to the Brussels Conference of 1874. *See generally*, VICTOR SEGESVARY, *THE BIRTH OF RED CROSS SOLIDARITY: THE FRANCO-PRUSSIAN WAR OF 1870-1871* (The Henry Durant Institute, 1971).

87. Root, *supra* note 65, at 457.

88. DONALD A. WELLS, *THE LAWS OF LAND WARFARE: A GUIDE TO THE U.S. ARMY MANUALS 4* (1992).

89. Currently, a movement exists, led by the International Committee of the Red Cross, which advocates the softer term "International Humanitarian Law." I oppose the use of this term by warriors. Citizens who aid the victims of war deserve much admiration, but their perspective is that of the victim, not the soldier fighting the battle. The use of even the term "International Humanitarian Law" creates a danger, by confusing the end desired by the warrior with that desired by the humanitarian. True warriors are chivalrous, but their role is not humanitarian. If those who do not practice the profession of arms pontificate about what the laws of war should be (as opposed to what is practicable in warfare), they will lose credibility with those who must implement the laws of war, and, in the end, it is the victims of war who will pay for the confusion of the two concepts.

90. Malham M. Wakin, *Introduction to War and Morality, in WAR, MORALITY, AND THE MILITARY PROFESSION* 224 (Malham M. Wakin ed., 2nd rev. ed. 1986).