The Laws of War: Rules by Warriors for Warriors

Major Scott R. Morris
Professor, International and Operational Law Department
The Judge Advocate General’s School, U.S. Army
Charlottesville, Virginia

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.

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. The practice of not killing one’s captives, however, was rooted in fiscal reasons, not humanitarian reasons.

One of the earliest “humanitarians” was Richard Coeur de Lion, of Robin Hood fame. After being spared for ransom by Leopold of Austria, Richard deviated from the practice of wholesale slaughter.

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. 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.

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

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).

2. See generally Herbert C. Fooks, Prisoners of War 7-10 (1924); William Winthrop, Military Law and Precedents 788 (2nd rev. ed. 1920).


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.

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. In 1621, King Gustavus Adolphus of Sweden personally drafted a code which incorporated several limitations on warfare.11 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.12

At the end of the middle ages, during a period that coincided with the commencement of the Thirty Years’ War, 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 prominent scholar was Hugo Grotius. King Adolphus was so impressed by Grotius’ seminal work on the laws of war and peace14 that he “is said to have slept with the work under his pillow during his campaigns in Germany.”15 A copy of De Jure Belli ac Pacis was reportedly found in his tent after he was slain on the battlefield.16 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.”17 King Adolphus was killed at the Battle of Lutzen,18 but his request was carried out. Grotius served the rest of his life as Sweden’s ambassador to France.19

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 perfidy. 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).


9. See M.H. Keen, The Laws of War in the Late Middle Ages (1965); 1 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.


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. Levy 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 Pacis (F.W. Kelsey trans., 1925) (1642). This is an English translation of Grotius’ work.


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. Although a lawyer, Grotius experienced not only the ravages of war in his homeland, but also sufferings as a prisoner. 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. After serving two years of confinement, his wife helped him escape Loevestein prison on 21 March 1621. He escaped by hiding in a book chest and thereafter fled to France, arriving in Paris on 13 April 1621. 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, 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.” 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. The 1785 Treaty of Amity and Commerce Between Prussia and the United States, which was negotiated by Thomas Jefferson, John Adams, and Benjamin Franklin, 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.


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.


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

27. Vreeland, supra note 15, at 177.


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.

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. After serving as a lawyer’s apprentice in Virginia, Winfield Scott enlisted in the cavalry in 1807. When Congress declared war in 1812, he was promoted to the rank of lieutenant colonel. On 13 October 1812, during the Battle of Queenston Heights, a wounded Lieutenant Colonel Scott became a British prisoner of war. 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. In January 1813, he was exchanged at Washington, 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.

By 1841, Scott had risen to the rank of Major General and had become the general-in-chief of the Army. 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.
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. 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.” 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.

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.

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).


43. 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).

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.

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. 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.

[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.”

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

Major General Scott’s general order is the foundation for contemporary military commissions. By issuing this order, General Scott codified the commander’s right to convene tribunals in occupied areas, a right previously based solely on custom. These military tribunals tried and punished Mexicans
and American soldiers alike.\textsuperscript{50} At least one soldier was executed for causing harm to Mexican citizens.\textsuperscript{51} With certain exceptions, this same order also authorized the continued function of local courts.\textsuperscript{52} When General Scott retired in 1861,\textsuperscript{53} he was succeeded by another soldier-lawyer, Henry W. Halleck, the adopted son of Baron Frederic von Steuben.\textsuperscript{54} Like Scott, Mr. Halleck was schooled at home, in the classroom, and on the battlefield about

\begin{itemize}

  \begin{itemize}
    \item[50.] 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!” \textit{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)). \textit{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 . . . .” \textit{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). \textit{See 2 Scott, supra note 32, at 549}.

    \item[45.] \textit{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. \textit{2 Smith, supra note 43, at 220}. However, in a letter to General Scott, Secretary Marcy later wrote:

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

\end{itemize}

\begin{itemize}
  \item[46.] \textit{2 Scott, supra note 32, at 395}.

  \item[47.] \textit{Id. at 395-96}.

  \item[48.] The policy here adopted by the American general worked like a charm. It won over the Mexicans by appealing to their self-interest, intimated 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.

\item[51.] Headquarters, U.S. Army, Vera Cruz, Mexico, Gen. Order No. 101 (9 Apr. 1847); \textit{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. \textit{See id.}

  \item[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.” \textit{Birkhimer, supra note 47, at 581, 583} (reprinting Gen. Order No. 287, para. 13). This reservation continued in American occupation practice during World War II. \textit{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 \textit{Doris A. Graber, The Development of the Law of Belligerent Occupation 1863-1914: A Historical Survey} (1949).

  \item[53.] Ultimately, General Scott was promoted to the rank of Lieutenant General, the first American officer to hold that rank since General Washington. \textit{3 Military Biography, supra note 31, at 974}.
\end{itemize}
the laws and customs of war. He studied law as part of the required curriculum at West Point, where he graduated third in his class in 1839. 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.”

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. General Kearney established a military government in California and appointed Halleck, a newly arrived first lieutenant, as the secretary of state. 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.* 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. 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. This sparse guidance was insufficient to...
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.”64 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,65 and Hallbeck 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.66

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.”67 Among Generals Cadwalader, Hartsuff, and Martindale, “[t]wo were lawyers, and one was a former instructor at West Point.”68 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.69 His peers called him “The Pen of the Army” because of his administrative and intellectual prowess.70 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.71 Instead,

63. Those provisions were:

745. [276]. 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. [277] 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, PRECH 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.72

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 100.73 Commonly referred to as the Lieber Code,74 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.75 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.76 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.77 In this battle, young Lieber observed the horror of war: “12,000 Prussians and 8500 French were killed or wounded” in the battle.78

At Waterloo, Lieber witnessed another 47,000 bodies lying on the battlefield with their horses and equipment.79 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.”80 It was not until that evening that fellow soldiers carried him to a nearby field hospital.81 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).82 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.”83

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

---


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.


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).


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.

mortal wounded while fighting for the Confederacy at Williamsburg. One of his other sons, Hamilton, lost an arm at the Battle of Fort Donelson. 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.

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. 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].” So complete was Lieber’s Code that it was the official guidance on the laws of war in all American conflicts until 1914.

Conclusion

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.

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.

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 Brussel’s 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.
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.