

Military Rules, Regulations & the Code of War

Francis Lieber and the
Certification of Conflict



RICHARD SHELLY HARTIGAN

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Preface

Francis Lieber influenced the minds and practices of lawyers, scholars and governments in Europe and America with what he himself termed “a little pamphlet” that did not even bear his name formally as its principal author.

Lieber’s work has not been forgotten. There exists an extensive bibliography on his life, his political philosophy, and his influence. Yet his two most important works are largely inaccessible to any but a very narrow academic community. He deserves a much wider audience. This book restores to general availability the two most mature and relevant of Lieber’s works.

I have added to the texts a number of letters that place Lieber in the context of the American Civil War, which provoked his civilizing labor. The reader who wishes a more complete view of his life and times will find them most adequately treated by authors cited in my introduction and bibliography.

I gratefully acknowledge the assistance of my research associates Sheli Lulkin and Terry Gough. My son Patrick and my daughter Jennifer helped me in many ways, at various stages. Ms. Harriet McLoone of the Huntington Library gave prompt and accurate responses to my research needs. Finally I must also thank the Earhart Foundation for its support, and in particular, Mr. Antony Sullivan.

Richard Shelly Hartigan
Chicago, 1982

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Introduction: Francis Lieber and the Law of War

by Richard Shelly Hartigan

If our Society, at once national and international, were about to choose a patron saint, and the roll were to be called, my voice for one would answer "Francis Lieber."

Elihu Root, "Presidential Address"
American Society of International Law
April 24, 1913

Fifty years to the day before the distinguished Elihu Root affirmed his preference for a patron saint, when the United States of America was in the throes of a civil war, the War Department published a landmark order:

General Orders, War Dept., Adjt. General's Office
No. 100. Washington, April 24, 1863.

The following instructions for the government of armies of the United States in the field, prepared by Francis Lieber, LL. D., and revised by a board of officers of which Maj. Gen. E. A. Hitchcock is president, having been approved by the President of the United States, he commands that they be published for the information of all concerned.

By order of the Secretary of War:
E. D. Townsend,
Assistant Adjutant-General¹

This document was to have a profound effect on the international law of land warfare. The governments of Prussia, France and Great Britain copied it. The Hague and Geneva Conventions were indebted directly to it. Though buried in voluminous United States government publications, the "General Orders, no. 100" remains a benchmark for the conduct of an army toward an enemy army and population. It will be cited hereafter simply as Lieber's Code.

The Code was the first instance in western history in which the government of a sovereign nation established formal guidelines

for its army's conduct toward its enemies. Previously, kingdoms, empires, and nation states had decreed how their armies should be internally disciplined, while international law theorists had written treatises on how belligerent states should treat each other's armies, prisoners and civilian populations; but never before had a government set down in clear, explicit, formal terms not only the rights and obligations of its own army, but of its enemy's army and civil population as well.

Dr. Francis Lieber was a highly regarded German immigrant law professor at the then Columbia College in New York. Among his admirers was Henry Wager Halleck, General-in-Chief of the Union Armies, himself a student and author in the field of international law.² On August 6, 1862, Halleck wrote to Lieber to request his assistance in defining guerrilla warfare.

My Dear Doctor: Having heard that you have given much attention to the usages and customs of war as practiced in the present age, and especially to the matter of guerrilla war, I hope you may find it convenient to give to the public your views on that subject. The rebel authorities claim the right to send men, in the garb of peaceful citizens, to waylay and attack our troops, to burn bridges and houses and to destroy property and persons within our lines. They demand that such persons be treated as ordinary belligerents, and that when captured they have extended to them the same rights as other prisoners of war; they also threaten that if such persons be punished as marauders and spies they will retaliate by executing our prisoners of war in their possession. I particularly request your views on these questions.³

Lieber's lengthy reply constituted an essay on the definition and nature of guerrilla war and the status and rights of the participants, with a compendium of historical examples. The essay remains today as relevant and sound in most of its definitions as when it was written.

But Lieber had a grander project in mind. In August 1861, he had written:

I desire to write a little book on the Law and Usages of War, affecting the combatants, some 200 pages 12 mo., but nothing of the sort having ever been written, so far as I know, it would re-

quire a good deal of hunting up, and God has denied me the two delectable things, a saddle horse and an amanuensis. Otherwise I would try to write something which Congress might feel inclined to recommend to the Army.⁴

It would be two years before his project was fulfilled as “General Orders, no. 100.” His initial public anonymity as its principal author has been redressed by the later influence of the Code.

i

Military commanders from time immemorial had set down rules and regulations to discipline their troops. From the Pharaohs on, commanders directed the strategy, tactics, and camp discipline of the often unruly hosts of soldiers under their command. They had one aim: to create an efficient fighting force. Centurions, camp-followers and cooks were all expected to perform their services according to mandate and in light of the best interests of the armed force and the fighting soldiery. Modern commanders have exemplified the same passion for military discipline to produce an effective combat machine.

St. Augustine, writing in the fifth century twilight of the Roman Empire, declared in his *City of God* that a Christian might engage without sin in a “just war,” which he then proceeded to define. In succeeding centuries Christian theologians and secular jurists redefined and elaborated Augustine’s views. The result was a body of theoretical treatises dealing with just war in its incidence, conduct and resolution. A high point was reached in the sixteenth and seventeenth centuries with the writing of Francisco de Vitoria and Hugo Grotius. Their works are acknowledged as the analytical bases of the contemporary international law of land warfare. They were followed by such theorists as Vattel and Bynkershoek. Their analyses, derived from Roman *jus gentium* (law of peoples) and containing enough historical examples to fill an encyclopaedia, were impressive. Yet, although addressed to the problems of their day, they generally remained the private counsel of scholars and had little impact on political and military decisions. Although Vitoria’s ideas of justice toward the New

World Indians under Spanish control did have some indirect policy effect in the sixteenth century, this was the exception rather than the rule. By the nineteenth century two parallel traditions of the warrior's code had developed among the military and civilians, sometimes overlapping, but usually separate.⁵

Through the centuries the civil theorists evolved a set of dicta based on natural law theory, religious and secular, combined it with their view of custom, practice and law, and pronounced a law of nations which ought to be binding on all societies. To a degree, and at times, their admonitions that "just war" should be conducted justly, that noncombatants should be spared outrageous violence, and that war should only serve a political purpose were coincidentally reflected in the policy of their times. Thus the Swiss jurist, Emrich von Vattel, could write in the middle of the eighteenth century that even though women, children, feeble old men and the sick were among the enemy, "the belligerent has no right to maltreat . . . them, much less to put them to death. There is today no Nation in any degree civilized which does not observe this rule of justice and humanity."⁶ If violations of immunity did occur, he enjoined officers to punish those of their men who were guilty. But the eighteenth century was an exceptional period and Vattel's optimistic reflection on the practice of civilized nations, though generally or partly correct, was also premature. Subsequent violations of the prisoners and civilian populations in European and American warfare would prove Vattel to have been too sanguine.

While the theorists of international law were developing a body of rules to govern warfare, the practitioners of conflict were largely moved by the motives of military necessity and pursued the means necessary to obtain the victory. Machiavelli and Clausewitz nicely summed up military necessity, the latter stating in his *On War*, "War therefore is an act of violence intended to compel our opponent to fulfill our will."⁷ This statement, taken out of context, gives the impression that the nineteenth century Prussian theoretician of war was a fanatic who raised war to the level of an end in itself. Nothing could be further from the truth, but the statement does convey the sense of grim determination con-

tained in the notion of military necessity. Under the dual auspices of military necessity and national self-interest, the code of the military commander was simple: maintain a disciplined fighting force in order to achieve military victory. His purposes had little in common with the scholarly ideas and ideals of theorists like Grotius and Vattel.

This does not mean that commanders and their soldiers regularly acted viciously toward their enemy and its civilian population. By the nineteenth century well disciplined national armies often showed an amazing forbearance toward the enemy, both on and off the battlefield. Yet restraint did not stem from a conscious articulation of principles of international law so much as from a kind of soldier's honor not unlike the medieval chivalric code of the fair fight. The theories of international legal writers had not substantially permeated the military and political policies of nations.

To remedy this gap between theory and practice, a practical guide was needed which would briefly describe for commanders in the field the rights and obligations of belligerents as custom and theory had developed them. Then political and military policy could be expected to conform to the theoretical law of nations. This was the synthesis that the Lieber Code proposed.

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Lieber was born in Berlin at the turn of the nineteenth century and lived through its most turbulent years in Europe and America.⁸ Before emigrating to the United States in 1827 he had already enjoyed a full life. He fought under Blücher at Waterloo, was seriously wounded at the battle of Namur, was imprisoned for expressing anti-state sentiments in Prussia, received a Doctor of Philosophy degree in 1820 from the University of Jena, and fought in the Greek War of Independence. He left Greece for Rome and became a tutor to the family of Georg Niebuhr, the Prussian ambassador and historian, whose friendship was to be of great help after Niebuhr's return to Prussia when he was imprisoned. Niebuhr secured his release and Lieber moved to England, where he stayed for a year before emigrating to Boston

in 1827.⁹ He became head of the Boston Gymnasium, editor of the *Encyclopaedia Americana*, and in 1835 accepted the Chair of History and Political Economy at South Carolina College, where he taught for twenty-two years. In 1857 he became Professor of Modern History, Political Science and International, Civil and Common Law at Columbia College in New York, a post which he held until his death twenty-five years later. After the Civil War, he worked on the Confederate archives for the War Department and as an umpire under the Mexican Claims Commission.

Lieber's life and career seem somewhat ambivalent. He was a life-long foe of slavery, but muted his feelings during his lengthy stay at South Carolina College. He coined the term "publicist" to describe himself, but he was a scholar and as such his works, especially *Political Ethics* (1838) and *Civil Liberty and Self Government* (1853), earned him a well-deserved reputation. In Europe he had been vehemently active against authoritarianism; he became an ardent nationalist spokesman and apologist for a strong central government in America. One of his biographers describes him as a nineteenth century liberal while another writes of him as an American conservative.¹⁰ In fact, he was both liberal and conservative, in the sense of being passionately committed to individual liberty on the one hand and communal stability on the other. Lieber's dual commitment explains his desire to see his adopted country at peace, unified, with all its members free; like many citizens, he set aside the first of these goals to secure the latter two.

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On March 4, 1863, Lieber wrote to General Halleck that "either the North simply and plainly conquers the South . . . or the North must submit in abject, vile serfdom. We must conquer the South not for a crown, as a province, but for the *country* and the *National* Constitution."¹¹ Lieber had mixed personal and ideological motives during the Civil War. His three sons were engaged in the fighting on both sides. Hamilton lost an arm as a Union soldier at the battle of Fort Donelson. Norman, also

a Union soldier, fought against his Confederate brother, Oscar, at the battle of Williamsburg where Oscar died from his wounds, cursing his father and the Northern cause. Throughout his personal tragedy, Lieber maintained a steadfast commitment to the twin goals of preserving the Union and freeing the slaves. To accomplish these civilized ends by civilized means he felt it was essential to bring order and discipline to the Union armies and to define precisely the status of the enemy troops and population.

Lieber's concern for army discipline was provoked 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 troops. Complicating this situation was the question of belligerent status. Were the Confederates rebels and therefore traitors, or were they, as they claimed, secessionists who could validly enjoy the belligerent rights of a sovereign state at war under international law?

Here some distinctions must be made between kinds of violence against the state authority from within the community. A coup d'état forces a sudden change in governmental leadership: one regime is supplanted by another, with violence usually limited to the leadership and would-be leaders of the existing state, and their close adherents. Rebellion attempts to overthrow existing leadership by war, often prolonged. Revolution may involve these forms of violence, but includes the ingredient of ideology. The vital impuse in revolution is a reorientation of the value system based on a new world-view. The French and Bolshevik revolutions remain archetypes of this kind of political change, which commonly requires years for its completion. What coups d'état, rebellions, and revolutions share in common is their internality; they take place within a political community and seek a rearrangement of its power and authority.

A civil war of the American model is distinct from these kinds of violence in that those who commence it do not seek a rearrangement of power or ideology within the community, but rather a separate sovereignty over a particular geographical area. The parties seeking independence from a central authority usually share

basic interests, background, beliefs and culture, and reject the established sovereign. The American Civil War was, in this special sense, a civil war, not a rebellion. (The American Revolution was also, strictly speaking, a civil war, not a revolution; no great value reorientation was intended or occurred in the territorial separation of sovereignty.)

Lincoln steadfastly maintained that the original compact of states was an intended and ratified union of people, not a contract among sovereign political units. He cited the *Preamble* to the Constitution, "We the People of the United States, in order to form a more perfect Union . . ." as proof that the founders' intent was an indissoluble union of citizens. The Articles of Confederation had joined the states in compact, but its successor, the Constitution, was intended to provide what its *Preamble* declared: a more perfect union of all citizens, regardless of geographical location or previous state allegiance. It followed logically that for one group of citizens to seek dismemberment of their established union was an act of treason against the whole community and consigned its perpetrators to the category of rebels, that is, criminals. The conclusion of this line of reasoning was that the conflict was an internal matter, to be settled by the policing force, that is, the Union Army, the agent of the authority of the whole union.

Constitutional scholars have contended that Lincoln's position was at least questionable; it rested on one of several interpretations of the intentions and motives of the founding fathers and was neither more nor less valid than the opposing interpretations of Southern spokesmen like John C. Calhoun, who argued for the abrogation of a contract among the states if, as in any legal contract, one or the other party failed to live up to its agreed obligations. The debate was resolved historically, mere arguments failing, and Lincoln preserved the Union partly by denying the Confederate states public status in international law. Had the Confederacy gained this status, which it avidly sought, and had France and Great Britain, the chief European powers, recognized the Confederacy as a sovereign country, the complete Union naval blockade of Confederate ports might have been challenged in international law, and a stoppage or seizure of neutral ships by

the North could have been considered an act of war against the nations whose ships were so abused. But the neutral powers would not risk Union hostility (nor, perhaps, would Britain interpret international law in a way that might limit her own dominant sea power). The international stature and material resources which recognition would have provided were denied to the Confederacy. The Southern uprising was doomed.

Meanwhile, more local questions of prisoner exchange and parole arose. After the battle of Bull Run in 1861, the issue was whether or not prisoners could be exchanged between the warring parties without implicit recognition of Confederate sovereignty. Lieber solved the difficulty. After consulting international legal texts, he concluded that the customary rules of war and prisoner treatment should be observed for humanitarian reasons but would not constitute recognition of the rebels as true belligerents in international law, nor would the United States forfeit the right to try the rebels for treason. He published his opinions in an open letter to U.S. Attorney General Edward Bates in the New York newspapers in August 1861. It subsequently became official policy.¹²

A thornier problem ensued: the definition of guerrilla warfare and the status of the guerrilla. Union Army attitude and policy tended to equate all irregular troops with guerrillas, who in turn were classified as criminals. This vague generalization not only applied to those who actually bore arms in the Confederate cause, but also to noncombatant civilians who either actively or passively supported irregular troops. It was to this situation that Lieber's concise and lucid essay, *Guerrilla Parties Considered with Reference to the Laws and Usages of War*, was addressed. In the form of a lengthy letter, it was a response to Halleck's request accomplished in a remarkably few pages and with a precision of definition and historical example which modern treatises have hardly improved.

After reviewing the origin and meaning of the term "guerrilla" from its Spanish origin, he says:

It is universally understood in this country at the present time that a guerrilla party means an irregular band of armed men, carry-

ing on an irregular war, not being able, according to their character as a guerrilla party, to carry on what the law terms a regular war.

Lieber goes on to distinguish the following as “irregulars:”

The freebooter, the marauder, the brigand, the partisan, the free corps, the spy, the rebel, the conspirator, the robber, and especially the highway robber, the rising en masse, or the “arming of the peasants.”¹³

The originality of Lieber, not so much in military practice as in law, is accurately conveyed in his opening paragraph:

The subject is substantially a new topic in the law of war, and it is, besides, exposed to the mischievous process . . . of throwing the mantel of a novel term around an old and well-known offense, in the expectation that a legalizing effect will result from the adoption of a new word having a technical sound . . .¹⁴ The question how captured guerrilleros ought to be treated was not much discussed in the last century and . . . the whole discussion in the law of war is new. This will not surprise us when we consider that so justly celebrated a publicist as Bynkershoeck defended, as late as the beginning of last century, the killing of common prisoners of war.¹⁵

Later, in a letter on his “General Orders, no. 100” to Halleck on February 20, 1863, he added:

. . . you, well-read in the literature of this branch of international law, know that nothing of the kind exists in any language. I had no guide, no groundwork, no text-book . . . Usage, history, reason, and conscientiousness, a sincere love of truth, justice and civilization have been my guides.¹⁶

Perhaps the most important distinction which Lieber attempted was that between “partisan” and “guerrilla:” “It has been stated that the word guerrilla is not only used for individuals engaged in petty war, but frequently as an equivalent of partisan.” “General Halleck,” he remarks, “seems to consider partisan troops and guerrilla troops as the same and seems to consider ‘self-constitution’ a characteristic of the partisan; while other legal and military writers define partisan as I have stated, namely, a soldier belonging to a corps which operates in the manner given . . .¹⁷

Sometimes . . . partisan is used for a self-constituted guerrilla; more frequently it has a different meaning . . . The partisan leader commands a corps whose object is to injure the enemy by action separate from that of his own main army; the partisan acts chiefly upon the enemy's lines of connection and communication, and outside of or beyond the lines of connection of his own army, in the rear and on the flanks of the enemy. Rapid and varying movements and surprises are the chief means of his success; but he is part and parcel of the army, and, as such, considered entitled to the privileges of the law of war, so long as he does not transgress it.¹⁸

The clear implication in Lieber's discussion is that he views "partisans" as part of an official army and, though detached from it, *officially identifiable as such*. Though he does not mention him it is likely that Col. John Mosby, the Confederate known as the "Gray Ghost," who harassed Sheridan's troops, would have satisfied Lieber's criteria as a partisan; so too would the Yugoslavs commanded by Mihailovich and by Tito in World War II. "If the term partisan is used in the sense in which I have defined it, it is not necessary to treat of it specially."¹⁹

But the guerrilla is another matter:

It is different if we understand by guerrilla parties, self-constituted sets of armed men in times of war, who form no integral part of the organized army, do not stand on the regular pay-roll of the army, or are not paid at all, take up arms and lay them down at intervals, and carry on petty war (guerrilla) chiefly by raids, extortion, destruction, and massacre, and who cannot encumber themselves with many prisoners, and will therefore generally give no quarter.²⁰

Again Lieber gives no specific examples, but certainly a group such as the notorious Quantrill's Raiders operating in the Kansas and Missouri territories would have met his definition of guerrilla (as well as his definitions for "free-booters" and "bush-wackers").

Lieber was not presuming to lay down fixed dicta from theory to apply without question to any international situation, much less to the existing conflict, which he deemed internal. He was

flexible and circumspect, if humane in intention, in the application of his concepts.

I have thus endeavored to ascertain what may be considered the law of war or fair rules of action toward so-called guerrilla parties. I do not enter upon a consideration of their application to the civil war in which we are engaged. . . .²¹

In an internal war the treatment of the insurgents “is always undefined, and depends upon relaxations of the municipal law, suggested by humanity. . . .”

Yet we see again his ambivalence and a will to punish for crimes:

How far rules which have formed themselves in the course of time between belligerents might be relaxed with safety toward the evil-doers in our civil war; or how far such relaxation or mitigation would be likely to produce a beneficial effect upon an enemy who, in committing a great and bewildering wrong, seems to have withdrawn himself from the common influences of fairness, sympathy, truth, and logic—how far this ought to be done at the present moment must be decided by the executive power, civil and military, or possibly by the legislative power. It is not for me in [this] place to make the inquiry. So much is certain, that no army, no society engaged in war, any more than a society at peace, can allow unpunished assassination, robbery, and devastation without the deepest injury to itself and disastrous consequences which might change the very issue of the war.²²

iv

Lieber's essay *Guerrilla Parties* was intended to place the making of policy in the definition and treatment of guerrillas in the hands of the civilian authority, providing guidelines, but with considerable latitude for intelligent interpretation according to circumstances. In so doing, it also brought him into close cooperation with official Washington, especially with Halleck. With this task completed he turned his attention to his “little book on the Laws and Usages of War” and an important correspondence with Halleck.