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For those of you who have not read *Flags of Our Fathers*, do so immediately. You will want to keep it on your library shelf and read it again at a later date. For those of you who did not see the movie, wait for the DVD and rent it. Problems aside, it is worth seeing once.

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## AMERICAN EMPIRE

# Lincoln, the Leiber Code, and Total War

by Joseph E. Fallon

The American Civil War was an unparalleled tragedy for the United States and the world. For it ensured that, thereafter, civilians everywhere were treated as “legitimate” targets in time of war.

As in all wars, the victor wrote the official history of the conflict to extol its virtue and to demonize its opponent. Unlike in earlier wars, however, the victorious North also exonerated its conduct by successfully rewriting international law governing warfare. This was achieved through the adoption of the Leiber Code, which declared total war—the deliberate targeting of civilians, women and children, the sick and the elderly—“lawful,” even justifiable on “humanitarian” grounds. The Leiber Code was a repudiation of our civilization’s traditional rules of engagement, developed over the previous millennium, which limited the scope of war and protected the life, liberty, and property of civilians.

Lincoln’s strategy was to defeat the Confederacy by targeting Southern civilians. One of his first acts of war was to order a blockade of Southern ports on April 19, 1861, to deny food and medicine, among other items, to civilians. Because such acts violated traditional U.S. military rules of conduct, Lincoln needed a new code to justify this behavior. So he commissioned Francis Leiber, a prominent Northern attorney and scholar, and a former advisor to Otto von Bismarck, to write it.

Leiber was the perfect choice. The Prussian immigrant was contemptuous of the Constitution. He dismissed the federal

order it had established as a union of “confederacies of petty sovereigns” based on the “obsolete ideas” of Thomas Jefferson. He shared Lincoln’s drive to centralize political power in the executive branch. Together, they alleged that, in wartime, implied powers in the Constitution grant the president authority to enact legislation as well as to interpret the Constitution—to deny or suspend constitutional rights as the chief executive sees fit.

The new military code Leiber produced was entitled “Instructions for the Government of Armies of the United States in the Field.” A catalogue of 157 rules, it was promulgated by Lincoln on April 24, 1863, as “General Orders No. 100.” The code had two functions. First, it provided the needed “rules” to justify Lincoln’s conduct of the war. Second, it further consolidated power in the office of the president by usurping key constitutional prerogatives of Congress.

According to Article I, Section 8, of the Constitution, only Congress can “make laws for the Government and Regulation of land and naval Forces,” and only Congress can “provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States.” Lincoln had already usurped the powers to declare war and to suspend *habeas corpus*—powers also reserved to Congress.

Of his “Instructions,” Leiber claimed at the time that “nothing of the kind exists in any language. I had no guide, no ground-work, no text-book.” This assertion is championed by many of his admirers, including PBS. A section of its website devoted to the documentary *Berga: Soldiers of Another War* includes a resource page entitled “POWs and the Laws of War,” which states,

The Lieber Code broke new ground in dictating military conduct during warfare. Principally, it created a clear distinction between permissible conduct towards combatants . . . and non-combatants. Non-combatants—the civilian population—were to receive fundamentally different treatment during armed conflict, including protection from the conflict.

Both claims are false. Rules on warfare existed in Greek, Latin, and French. They are derived from the works of Aristotle and Cicero. The proper legal and moral grounds for going to war and

how to conduct war, including proportionality and noncombatant immunity, had been extensively described in the writings of Augustine, Aquinas, Grotius, Suarez, Vattel, and Vitoria.

These writings formed the legal foundation for national ordinances and bilateral treaties, which became increasingly more comprehensive in their scope and together constituted what became customary international law on warfare. Among such early laws were “Constitutions to be Made in the Army of our Lord the King,” by King John (1214); the Durham Ordinances of War, by King Richard II (1385); the Mantes Ordinances of War, by King Henry V (1419); and “Prevent Pillage and Abuses by Soldiers,” by King Charles VII (1439).

Until the Leiber Code, the preeminent legal authority on war for the government and the military of the United States was Emmerich de Vattel’s *Law of Nations* (1758), which declared:

Women, children, feeble old men, and sick persons, come under the description of enemies; and we have certain rights over them, inasmuch as they belong to the nation with whom we are at war . . . But these are enemies who make no resistance; and consequently we have no right to maltreat their persons or use any violence against them, much less to take away their lives. This is so plain a maxim of justice and humanity, that at present every nation in the least degree civilized, acquiesces in it. . . .

Vattel continues,

At present, war is carried on by regular troops: the people, the peasants, the citizens, take no part in it, and generally have nothing to fear from the sword of the enemy. Provided the inhabitants submit to him who is master of the country, pay the contributions imposed, and refrain from all hostilities, they live in as perfect safety as if they were friends: they even continue in possession of what belongs to them: the country people come freely to the camp to sell their provisions, and are protected, as far as possible, from the calamities of war.

In his book *International Law, or, Rules Regulating the Intercourse of States in Peace*



and War (1861), used by the faculty of West Point in the classroom, America's leading expert in the field, Gen. Henry W. Halleck, reaffirmed Vattel's legal opinions.

But customary international law was overthrown by the Leiber Code's advocacy of total war based on "military necessity." Article 15 of the Leiber Code states that

Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army . . .

To justify total-war tactics, Article 29 claims that, "The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief."

In place of Vattel's "maxim of justice and humanity," the Leiber Code declared (Article 17) that "It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy." In addition,

When a commander of a besieged place expels the noncombatants,

in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten on the surrender [Article 18].

Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the noncombatants, and especially the women and children, may be removed before the bombardment commences. But it is no infraction of the common law of war to omit thus to inform the enemy. Surprise may be a necessity [Article 19].

The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war [Article 21].

. . . The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit [from Article 22].

The law of war can no more wholly dispense with retaliation than can the law of nations, of which it is a branch [Article 27].

. . . No body of troops has the right to declare that it will not give, and therefore will not expect, quarter; but a commander is permitted to direct his troops to give no quarter, in great straits, when his own salvation makes it impossible to cumber himself with prisoners [from Article 60].

The Leiber Code schizophrenically claims to promote humanitarian principles while deliberately undermining them with qualifications and obfuscations. For instance, Article 16 states, "Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge . . ." This implies the infliction of suffering is permitted for other reasons.

Article 38 proclaims, "Private property, unless forfeited by crimes or by offenses of the owner, can be seized only by way of military necessity, for the support or other benefit of the army or of the United States." Since *military necessity* is effectively defined by the whim of the commander in the field, there is, in fact, no protection for private property.

In Article 44, Leiber decrees that "all

destruction of property not commanded by the authorized officer" is "prohibited under the penalty of death." Therefore, destruction of any and all property is lawful, as long as it is "commanded by the authorized officer."

Excerpts from two letters written in 1864—one, by General Sherman; the other, by General Sheridan—bear witness to the reality of the Leiber Code. Sherman ordered a subordinate to "burn ten or twelve houses" and "kill a few at random," and "let them know that it will be repeated every time a train is fired upon." Sheridan, in turn, wrote to Grant that his troops, whom he described as "barn burners" and "destroyers of homes," had already "destroyed over 2200 barns . . . over 70 mills . . . have driven in front of the army over 4000 head of stock, and have killed . . . not less than 3000 sheep. . . Tomorrow I will continue the destruction."

It is sad that the statesmen who signed the Declaration of Independence and authored the Constitution and the *Federalist* were succeeded by the politicians who created and promulgated the Leiber Code. And it is alarming that the concepts propounded therein remain acceptable under international law. As long as they are, no civilians are safe from the terrors of "military necessity" and total war.

Joseph E. Fallon writes from Rye, New York.

## FOREIGN AFFAIRS

### Kosovo in the Crosshairs

by James Bissett

Serbian voters have approved a new constitution that, among other things, reaffirms Serbian sovereignty over Kosovo, which, since the NATO bombing of 1999, has been administered by the United Nations with the help of NATO troops. The referendum's passage will further complicate the efforts of Western policymakers to grant independence to Kosovo since to do so without Serbia's consent would violate the U.N. Charter's protection of territorial integrity and the inviolability of borders. Nevertheless, there have been indications that U.N. Special Envoy Martti Ahtisaari will rec-