2 Codes, Conventions, Declarations, and Regulations

2.0. Introduction

The first of two foundational questions in the study of the law of armed conflict and international humanitarian law is: What is the conflict status? What law of war applies to the armed conflict being examined? In this chapter, we examine the beginnings of the modern laws of war, an understanding of which is necessary to answer this first foundational question. Where and when did the law of armed conflict, as we know it today, arise? Who was instrumental in its founding? What documentary history may we look to?

2.1. A Basic Rule of Warfare

The most basic rule of warfare is stated in the Armed Forces' guide to conduct in war, *The Law of Land Warfare*: "The right of belligerents to adopt means of injuring the enemy is not unlimited."[1] Just because an army has the means to defeat an adversary does not necessarily indicate that it may use that weapon or means to do so. The British law of war manual adds, "There are compelling dictates of humanity, morality, and civilization to be taken into account."[2] Accordingly, poison gas is outlawed as a means of warfare, despite its battlefield effectiveness. Blinding lasers, biological weapons, and hollow-point bullets are prohibited. They may be effective in a military sense, but their effects are so horrific that their use in combat is prohibited. They increase suffering without bringing military advantage. This basic rule for combatants was first articulated in Article 22 of 1907 Hague Regulation, Convention IV, which was itself taken from 1899 Hague Regulation, Convention II; both are examined in this chapter. The simple statement that the means of injuring and killing the enemy are not unlimited is a part of the customary law of war and an unspoken tenet of one of the principle documents on the law of war, the 1863 Lieber Code.

[1] Department of the Army, Field Manual (FM) 27–10, *The Law of Land Warfare* (Washington: GPO, 1956), para. 33.
[2] UK Ministry of Defense, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004), 102.

2.2. Francis Lieber

"The roots of the modern law of war lie in the 1860s."[3] During that decade, the first Geneva Convention was concluded, the first multilateral treaty banning a particular weapon was signed,[4] and the Lieber Code was adopted.

Francis Lieber was born either in 1798 or 1800 (sources differ because Lieber was given to "amending" his age to place himself at the battle of Waterloo) in Berlin, Germany, where, as a young boy in 1806, he saw Napoleon's French occupation troops arrive. At the age of fifteen, with a hatred of Napoleon, Lieber enlisted in the Prussian Army's Colberg regiment. In 1815, still little more than a child, he was seriously wounded at Namur while fighting the French. After a long convalescence, he returned to Berlin. Discharged from the army, he studied at several German universities, eventually earning a doctorate at Jena. As a young man, Lieber harbored a deep idealism that took him to Greece to fight the Turks. Following that conflict, he traveled to Italy to study further, after which he returned to Germany. His travels and his anti-authoritarian streak aroused government suspicions, and he was arrested, not for the first time. Charged with sedition and imprisoned for several months, Lieber was penniless when released. Not yet thirty, he had already fought in two conflicts, earned a doctorate, and developed a distrust for authority. He opted to leave his native Germany and, in 1826, emigrated to London.[5]

The next year, with a teaching offer in hand, he left England for Boston. Once in the U.S., Lieber took a variety of writing jobs in addition to teaching to maintain his growing family. One such endeavor involved the translation of the thirteen-volume Brockhaus *Conversations Lexicon* that later became the foundation of the first edition of the *Encyclopedia Americana*, which Lieber edited. Searching for greater financial security than occasional writing jobs offered, he became a professor of history and political economy at South Carolina College, now the University of South Carolina. While there, he published his 1853 two-volume *On Civil Liberty and Self-Government*, still considered the first systematic work on political science to appear in America. He wrote several other scholarly books, all to critical praise.

Never comfortable in the southern United States and actively opposed to slavery, in 1856, Lieber moved again, this time to Columbia College, in New York City, where he was Professor of History and Political Economy. By the outbreak of the Civil War, he was a somewhat prominent (and highly conceited, some said[6]) political philosopher and a frequent consultant to the Union government owing to his influential writings and lectures on military law.

2.3. Writing the Lieber Code

In 1861, with the Civil War looming, Lieber lectured at Columbia on the customs and usages of war, among other subjects. General Henry W. Halleck (adopted son of Baron

[3] Burris M. Carnahan, "Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity," 92–2 *AJIL* 213–231, 213 (April 1998).

[4] *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight* (Dec. 1868).

[5] Col. James R. Miles, "Francis Lieber and the Law of War," XXIX-1–2 *Revue de Droit Militaire et de Droit de la Guerre*, 256 (1990).

[6] Karma Nabulsi, *Traditions of War: Occupation, Resistance, and the Law* (Oxford: Oxford University Press, 1999), 166.

Frederic von Steuben) appointed general-in-chief of the Union forces in 1862, heard of Lieber's lectures and asked him for copies. Taking advantage of Halleck's interest, Lieber urged that he be allowed to write a pamphlet on guerrillas as a guide to Union officers who, even at the outbreak of the Civil War, were plagued by "irregulars." The Union government's acceptance of that twenty-two page work, *Guerrilla Parties considered with reference to the Law and Usages of War*, led to Lieber's next suggestion that he be assigned to write a compilation of the customary rules of warfare. In December 1862, the War Department agreed and appointed a board of senior officers, including Lieber, to propose "a Code of Regulations for the government of armies in the field."[7] Whereas the military officers for the most part worked on a revision of the Articles of War, Lieber, drawing on his wide knowledge of battlefield law and on personal experience, wrote the code that bears his name.

Lieber was a deeply moral and religious man and a "just war" traditionalist. Writing and publishing a law of war code while a civil war was looming was a significant accomplishment. "The full significance of the [Code] becomes apparent only when the Code is considered in light of the paucity of existing legal materials regarding the law of war."[8] By 1863, all armies had acknowledged some limitations on battlefield conduct. The welfare of civilians and prisoners had long been recognized, although precise limitations were not agreed on. Napoleon's recent Peninsular Wars in Spain and Portugal had blurred traditional concepts of combatant and civilian. "Lieber in his 1862 pamphlet on guerrilla warfare deplored the Spanish experience. He emphasized that combatants should be commanded, disciplined, follow the rules of war and distinguish themselves from civilians before they were entitled to be prisoners of war."[9] This perspective is found in Lieber's code, reflecting the customary practices of armies of that period – practices that had evolved over hundreds of years of warfare. "This work was prepared to meet the needs of the large numbers of commanders and staff officers in the Federal Forces, whose experience in the field was limited."[10]

> It could not yet be clear, when he [wrote his code], that the war would be a long one and that unprecedented masses of men would have to be raised to fight it, but from the start it was clear that most of the American professional officers were going to be on the Confederate side and that the generally less experienced men in charge of the Union's militias and volunteers would need all of the instruction they could get about how to fight . . . [11]

[7] R.R. Baxter, "The First Modern Codification of the Law of War," part I, 25 *Int'l. Rev. of the Red Cross* 171, 183 (April 1963). The other members of the board were Major General Ethan Allen Hitchcock, president; Major General George L. Hartsuff; Brigadier General John H. Martindale; and Major General George Cadwalader, a lawyer in civilian life. General Martindale retired and left the board before its work was completed.

[8] Id., 186. In 1847, Lieutenant General Winfield Scott, also a lawyer in civilian life, had published General Orders 20, as "a supplemental code" to the "rules and articles of war," but they were far less complete in their coverage than Lieber's Code.

[9] Miles, *Francis Lieber*, supra, note 5, at 260.

[10] G.I.A.D. Draper, "The Development of International Humanitarian Law," in Michael A. Meyer and Hilaire McCoubrey, eds., *Reflections on Law and Armed Conflicts* (The Hague: Kluwer Law, 1998), 70–71.

[11] Geoffrey Best, *War and Law Since 1945* (Oxford: Oxford University Press, 1994), 41.

Impressed by the final 157-article code, and with the Halleck board's endorsement of it, President Lincoln directed that Lieber's work be incorporated into the Union Army's General Orders, and in 1863 it became "General Orders 100."*

Francis Lieber, then, was the first to promulgate a codification of the law of war for soldiers. "The Instructions, which were to be read primarily by commanders in the field, fulfilled a dual purpose: They were at once a short text on the law of war and a set of rules."[12] Lieber colorfully described his Code as "short but pregnant and weighty like some stumpy Dutch woman when in the family way with coming twins."[13] He wrote little in the Code that was original, and it is not particularly well organized. The Code's genius lay in the gathering – in one accessible document – the gist of the writings of publicists and the customs of armed forces of the day: customs and usages of war that Lieber had not only studied, but experienced.[14]

Written for the Union forces, it was a military order rather than a law of general application – a significant distinction. Binding only on Union soldiers, its application went no further. But Lieber's Code was widely read and its value recognized far beyond the Union Army. Although the Confederacy initially denounced it as "confused . . . undiscriminating" and "obsolete," it later adopted the Code for the instruction of its own soldiers and commanders.[15] Lieber's Code became the basis of similar codes issued by Great Britain, France, Prussia, Spain, Russia, Serbia, Argentina, and the Netherlands.[16] Thus, a code written for a civil war ironically became a code for international armed conflicts. Today's United Kingdom *Manual of the Law of Armed Conflict* pays respect to Lieber, saying, "The most important early codification of the customs and usages of war generally was the Lieber Code issued by President Lincoln . . . "[17]

2.3.1. *The Combatant's Privilege*

The combatant's privilege has always been an important customary element of the law of war. In his landmark 1625 work, Grotius writes, "[A]ccording to the law of nations,

* Lieber had three sons, all of whom fought in the Civil War. Two of them, Hamilton and Guido, fought for the Union, Hamilton losing an arm in the battle of Fort Donelson. Lieber's other son, Oscar, was a geologist, eventually appointed state geologist of Mississippi. At the outbreak of the war, Oscar joined the Confederate army and was killed at the battle of Williamsburg. Before the war, Guido, sometimes known by his middle name, Norman, graduated from Harvard Law School. After fighting in the war as an infantry officer, he remained in the Army, serving as the Head of the Department of Law at West Point from 1878 to 1882, eventually rising to be the brigadier general Judge Advocate General of the U.S. Army.

[12] R.R. Baxter, "The First Modern Codification of the Law of War," part II, 26 *Int'l. Rev. of the Red Cross* 234, 235 (May 1963).

[13] Richard S. Hartigan, *Lieber's Code and the Law of War* (Chicago: Precedent, 1983), 1.

[14] In Article 13 of the Code, e.g., Lieber wrote, "Military jurisdiction . . . is derived from the common law of war."

[15] Sec. of War James Seddon to Col. Robert Ould, CSA (24 June 1863), reprinted in Hartigan, *Lieber's Code*, supra, note 13, at 120. Seddon also wrote that the Code was biased, condoning "a barbarous system of warfare under the pretext of military necessity."

[16] Thomas E. Holland, *The Laws of War on Land (Written and Unwritten)* (Oxford: Clarendon Press, 1908), 72–73.

[17] UK, *The Manual of the Law of Armed Conflict*, supra, note 2, at 7.

anyone who is an enemy may be attacked anywhere. As Euripides says: 'The laws permit to harm a foe where'er he may be found.'"[18]

To this day, the combatant's privilege remains basic to the fighting of armed conflicts. Lieber recorded the privilege in Article 57 of his Code: "So soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses. . . . " As recently as 2002, an inter-American human rights body noted, "[T]he combatant's privilege . . . is in essence a license to kill or wound enemy combatants and destroy other enemy military objectives."[19] "The [1907] Hague Regulations expressed [the combatant's privilege] in attributing the 'rights and duties of war'. . . . [A]ll members of the armed forces . . . can participate directly in hostilities, i.e., attack and be attacked."[20] One hundred years after the Lieber Code's promulgation, Brigadier General Telford Taylor, Nuremberg chief prosecutor, wrote: "War consists largely of acts that would be criminal if performed in time of peace . . . Such conduct is not regarded as criminal if it takes place in the course of war, because the state of war lays a blanket of immunity over the warriors. But the area of immunity is not unlimited, and its boundaries are marked by the laws of war."[21]

Combatants are privileged in the law of war to kill and wound without penalty. Presuming this privilege is not abused by an unlawful battlefield act, the privilege accrues to all lawful combatants. Captured soldiers who have engaged in combat and killed the enemy by lawful means are not held captive by that enemy for committing criminal acts because their killings and other warlike acts, in Lieber's words, "are not individual crimes or offenses." They are prisoners of war, held not as punishment, but solely to prevent their return to the fight. In contrast, fighters who are not lawful combatants are not privileged to exercise this exemption.

2.3.2. *Parsing the Lieber Code*

Lieber adopted and expanded the core military concept of military necessity, perhaps the most significant aspect of the Code. He believed wars should be as brief as possible, although understanding that sharp wars call for more intense fighting and greater destruction. "Military necessity admits of all direct destruction of life and limb of armed enemies, and of other persons whose destruction is incidentally unavoidable . . . it allows all destruction of property . . . and of all withholding of sustenance or means of life from the enemy. . . . "[22] (Notice Lieber's reference to "incidentally unavoidable" destruction, describing in 1863 what today is called "collateral damage".) Although the specifics of military necessity were far from settled when the Lieber Code was written, the mere use of the term was significant, for it suggested limitations on what was permissible in warfare. Still, by endorsing military necessity with only the vaguest suggestion of what those

[18] Hugo Grotius, *The Law of War and Peace* (Buffalo, NY: Hein reprint of Kelsey translation, 1995), Book III, chapter IV, VIII.

[19] Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, OEA/Ser.L/-V/II.116 Doc. 5 rev. 1 corr., 22 Oct. 2002, para. 68, cited in Knut Dörmann, "The Legal Situation of 'Unlawful/Unprivileged Combatants,'" 85 *Int'l Rev. of the Red Cross*, 45 (March 2003).

[20] Yves Sandoz, Christophe Swinarski, Bruno Zimmermann, eds., *Commentary on the Additional Protocols of 8 June 1977* (Geneva: Martinus Nijhoff, 1987), 515. [Hereinafter *Protocols Commentary*]. 1977 Additional Protocol I, Art. 43.2, repeats the Hague Regulation formulation.

[21] Telford Taylor, *Nuremberg and Vietnam: an American Tragedy* (Chicago: Quadrangle Books, 1970), 19.

[22] Article 15.

limitations were, the Code essentially required only that belligerents act in their military self-interest. Military necessity, which remains a concept largely free of objective limits, would achieve greater recognition a few years later, in the St. Petersburg Declaration of 1868, which applied the Code and renounced the use of explosive projectiles in warfare.

Some point to Union Army General William T. Sherman and his 300-mile march to the sea, from Atlanta to Savannah, as a violation of military necessity and contrary to General Orders 100. Lieber, however, would have viewed the "destruction of property . . . and of all withholding of sustenance or means of life from the enemy" as "incidentally unavoidable." Article 29 of the Lieber Code says that "The more vigorous wars are pursued, the better it is for humanity. Sharp wars are brief." Lieber did not object to starvation of the enemy, civilian, and soldier. "War is not carried on by arms alone," he wrote in Article 17. "It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy."

How could Lieber, a religious moralist, justify the starving of noncombatants? He answers in Article 21: "The citizen or native of a hostile country is thus an enemy . . . and as such is subjected to the hardships of war."[23] Although that was the customary law of the period, Lieber ameliorates this harsh view, adding in Article 22, "Nevertheless . . . [civilization recognizes] the distinction between the private individual belonging to a hostile country and . . . its men in arms . . . [T]he unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit"; and in Article 25, ". . . [P]rotection of the inoffensive citizen of the hostile country is the rule. . . ."[24] Significantly, Lieber notes in Article 15, "Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God."

Lieber by no means gave license to a soldier's cruelty or criminality, as he makes clear in Article 44:

> All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery . . . all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death . . . A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior.

Today, the summary execution of an enemy soldier, never mind a soldier of one's own army, is anathema, clearly prohibited by LOAC. Lieber's guidance in Article 69 is open to discussion and disagreement, as well: "Outposts, sentinels, or pickets are not to be fired upon, except to drive them in . . . ," suggesting that individual enemy soldiers not actively engaged in combat should not be targeted. This interpretation of the law of war is more stringent than that asserted in the modern era.

[23] The same formulation is repeated in *The Law of Land Warfare*: "Under the law of the United States, one of the consequences of the existence of a condition of war between two States is that every national of the one State becomes an enemy of every national of the other . . . " FM 27–10, *The Law of Land Warfare*, supra, note 1, at para. 26.

[24] Even in his march to the sea, Union General Sherman ordered that private homes were to be left unmolested. His Field Orders of Nov. 14, 1864, directed that, "Soldiers must not enter the dwellings of the inhabitants, or commit any trespass; but, during a halt or camp, they may be permitted to gather turnips, potatoes, and other vegetables . . . " Burke Davis, *Sherman's March* (New York: Vintage Books, 1988), 31. Little was done to enforce the order's prohibitions, however.

Another departure from modern LOAC is the Code's assertion that "a commander is permitted to direct his troops give no quarter, in great straits, when his own salvation makes it *impossible* to cumber himself with prisoners."[25] To give no quarter means, of course, that surrender is not accepted; every enemy will be put to the sword. True, this language is preceded in the same article by a general rule to the contrary, "It is against the usage of modern war to resolve . . . to give no quarter. . . . " Today's LOAC is clear that quarter may never be denied, no matter how great the straits.[26] (The giving of quarter, or not, involves the initial acceptance of enemy surrender. The killing of prisoners already in one's control is another strictly prohibited act.)

In late 2001, President George W. Bush said of Osama bin Laden, "I want him – hell, I want – I want justice, and there's an old poster out west . . . 'Wanted: Dead or Alive.'"[27] That presidential statement is a departure from U.S. military policy[28] and is contrary to Article 148 of the Lieber Code: "The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor . . . " War is made on opposing states, not on individuals.

In keeping with then-prevailing customary law of war (and U.S. Supreme Court decisions[29]), the Code allows the destruction of noncombatant property that might later be used by the enemy (Article 38). A variation of that view is repeated in today's Geneva Convention IV: "Any destruction . . . of real or personal property belonging . . . to private persons . . . is prohibited, except where such destruction is rendered absolutely necessary by military operations."[30]

The same article of the Lieber Code permits the seizure of civilian property, if needed by the military: "Private property . . . can be seized only by way of military necessity, for the support or other benefit of the army or of the United States . . . [T]he commanding officer will cause receipts to be given . . . " This provision, repeated in later Hague regulations,[31] was tested in 2004, during the war in Iraq. In separate courts-martial, Army First Lieutenant Bradley Pavlik and Sergeant First Class James Williams were convicted of offenses related to Sergeant Williams's seizure of civilian property, an Iraqi-owned personal vehicle.

> Early in the war, soldiers were allowed to commandeer vehicles [belonging to civilians] for military purposes. They were instructed to leave a receipt so the vehicle could be returned to the owner or money could be given to him. Sergeant Williams said Lieutenant Pavlik was angry that his own vehicle had broken down and told squad

[25] Instructions for the Government of Armies of the United States in the Field (Army General Orders 100 of 24 April 1863), Art. 60. Emphasis in original.

[26] 1977 Additional Protocol I, Art. 40; 1913 *Oxford Manual of Naval War*, Art. 17(3); 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, Art. 23(d); and 1899 Hague Convention II Respecting the Laws and Customs of War on Land, Art. 23(d), for examples.

[27] CNN Newsroom, 21 Dec. 2001, available at http://transcripts.cnn.com/TRANSCRIPTS/0112/21/nr.00.html.

[28] FM 27–10, *The Law of Land Warfare*, supra, note 1, at para. 31.

[29] *Brown v. United States*, 12 U.S. 110, 122–23 (1814). "That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded." Marshall, C.J.

[30] Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, Art. 53.

[31] Hague Convention IV Respecting the Laws and Customs of War on Land, 1907, Art. 23(g): "It is especially forbidden . . . to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."

> leaders to find him another. The vehicle was taken without force, but no receipt was left. The Army later paid the owner $32,000.[32]

The members (military jury) sentenced the lieutenant to one month's confinement and dismissal from the Army. The sergeant was reduced to the grade of private and received a bad conduct discharge. The Lieber Code's vitality was demonstrated 140 years after its publication.

Through several provisions quite similar to the Geneva Convention protecting prisoners of war, the Code required humane treatment of prisoners.[33]

Anticipating "unlawful combatants" by nearly a century, the Code provided that:

> Men, or squads of men, who commit hostilities . . . without being part and portion of the organized hostile army . . . who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers . . . are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.[34]

This 1863 description neatly fits the Vietnam War's Viet Cong, Iraq's insurgents, and other modern-day enemy fighters around the world.

Interestingly, the Code did not address the issue of obedience of orders. Lieber did write on the subject elsewhere, saying that obedience is essential in any armed force but that obedience to unlawful orders cannot be mandated, and such obedience would not negate personal responsibility.[35] Professor L. C. Green considers that

> the most significant feature of the Lieber Code and its importance for the development of the law is in Article 71, which may well be regarded as the forerunner of what is today accepted as universal jurisdiction over those guilty of committing war crimes: "Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, *whether he belongs to the Army of the United States, or is an enemy captured after having committed his misdeed*."[36]

Praise for the Code has not been universal, of course. The offenses it specifies were already crimes in most national penal codes. "Lieber . . . liked to spell out the reasons for everything . . ."[37] making the Code overly detailed. "[I]t makes no reference to the need to ensure that members of the U.S. armed forces are made aware of what they may and may not do . . . ,"[38] a reference to an absence of a requirement that the Code be disseminated to the members of the military. One scholar opined that it lacked the clarity that a more militarily experienced writer might have provided.[39] Compared to

[32] Associated Press, "Jury Calls for Officer's Ouster Over S.U.V.," NY *Times*, 14 Aug. 2004, A7. The trial counsel (prosecutor) in the lieutenant's case was Capt. Howard H. Hoege III, the West Point 1994 First Captain.
[33] Arts. 55–57, 67, 72–80.
[34] Art. 82. See Chapter 6, section 6.5, for a discussion of unlawful combatants.
[35] Miles, "Francis Lieber," supra, note 5, at 272.
[36] Leslie C. Green, *Essays on the Modern Law of War*, 2d ed. (Ardsley, NY: Transnational, 1999), 63. Emphasis in original, although not in Prof. Green's source, Art. 71.
[37] Geoffrey Best, *Humanity in Warfare* (London: Weidenfeld & Nicolson, 1980), 170.
[38] Id., at 231.
[39] Percy Bordwell, *The Law of War Between Belligerents: A Commentary* (Chicago: Callaghan, 1908), 74.

the significance of its contributions, however, these are cavils that little detract from the international importance of the Lieber Code.

2.4. Lieber's Legacy

Following the Civil War, and after his tenure at the War Department ended, Lieber returned to Columbia University. He was appointed by Secretary of State Edwin Stanton as archivist of records of the Confederate government. Lieber's son Norman, still an army officer, was briefly appointed his assistant. Lieber never retired. A polymath in two languages, he continued to pursue his interests in penology, the jury system, and political ethics and published a volume of poetry, as well. In 1872, Francis Lieber died in New York City, aged seventy-two.

"[The Code] was many years ahead of its time . . . "[40] "Lieber's Code has long since been formally superseded by more elaborate (and sometimes not quite so clear) rules and regulations . . . It had, though, a remarkably long run, remaining virtually unchanged until 1949."[41] It continued to be America's law of war guide through the 1898 war with Spain, and through the Philippine insurrection. It was not until 1914, on the eve of World War I, that the United States published a new law of land warfare manual. Its opening reads: "It will be found that everything vital contained in G.O. 100 [the Lieber Code] . . . has been incorporated in this manual."[42] Until then, the Code remained in effect as an Army General Order. Its impact in the United States and internationally was great and long-lasting as the first codification for soldiers in the field of customary rules of battlefield conduct. Much of LOAC that has followed – the Hague Regulations of 1899 and 1907, the first Geneva Convention in 1864, even the 1949 Geneva Conventions, owe substantial debts to Francis Lieber and his 1863 Code.

2.5. A First Geneva Convention

The 1859 Battle of Solferino was a significant battle in an insignificant war, the War of Austria against Piedmont (later the Kingdom of Sardinia) and France. Some historical accounts refer to it as the Second Italian War of Independence. The war lasted from March to July 1859, a mere four months, but most nineteenth-century wars were brief, fought perhaps to realign a national border or gain access to a seaport. "Warfare involved governments and armies, arousing surprisingly little interest in the majority of the population, who often did not notice a change in rulers that resulted from battles won or lost."[43] Citizens living in the countryside were sometimes unaware that their nation was even at war. "[A]nalysis of war prior to nineteenth-century industrialism and Napoleonic enthusiasm indicates that wars were less violent and less significant and were subject to cultural restraints."[44] Not so, the War of Austria against Piedmont and France. The objective of Piedmont/France was to end Austria's occupation of Sardinia and gain Northern Italian independence. King Victor Emmanuel II of Italy fought (with French

[40] Dieter Fleck, ed., *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: Oxford University Press, 1995), para. 116.
[41] Richard Shelly Hartigan, *Lieber's Code and the Law of War* (Bethesda, MD: Legal Classics Library, 1995), 24.
[42] War Department, *Rules of Land Warfare* (Washington: GPO, 1914), 7.
[43] John A. Nagl, *Learning to Eat Soup with a Knife* (Chicago: University of Chicago, 2002), 16.
[44] James Hillman, *A Terrible Love of War* (New York: Penguin, 2004), 168.

support from Napoleon III, who personally led a French army allied with the Italians) for Italian unification and independence from Austria.

Austria invaded Piedmont and, on June 24, 1859, the Battle of Solferino was fought alongside the Mincio River, in Lombardy, not far from Milan and Verona. In a battle involving more than 200,000 troops, the Piedmont/French force, commanded by Napoleon, defeated the Austrian force, led by the youthful Emperor Franz-Josef. Although numbers differ from account to account, there were roughly 17,200 French casualties and 22,000 Austrian – more dead and wounded than in any European battle since Waterloo. It was a costly victory for the French.

As was the military practice of the time, the wounded who were unable to keep up with their departing army, or who had no comrades to assist them in keeping pace, were left to their fates on the field of battle where they had fallen. A civilian observer of the battle was thirty-one-year-old Henry Jean Dunant, a well-to-do Swiss businessman who was horrified at the sight of the untended wounded and their pitiful cries. In Italy on business, Dunant delayed his departure to spend the next week helping to police the battlefield of wounded soldiers of both sides and to assist in their care. "The French forces had four vets for every thousand horses, but only one doctor for every thousand men. A week before the battle, one surgeon had reported that he had no instruments for amputations."[45] In such circumstances, Dunant did what little he could to alleviate the suffering of the wounded.

SIDEBAR. U.S. Army Major General Philip Kearny fought at Solferino with Napoleon's Cavalry Division of the Imperial Guard. Kearny, who earlier lost his left arm in the Mexican-American War (1846–8), was a major, medically retired and living in Paris when the war broke out. He appealed to Napoleon personally to join the French forces. Fighting in his U.S. Army uniform, Major Kearny so distinguished himself at Solferino that he was the first American ever awarded the Cross of the *Legion d'Honneur*, France's highest award for valor. Returned to active duty in the U.S. Army when the American Civil War broke out, Major General Kearny was killed at the Battle of Chantilly, three years later.[46]

2.5.1. *A* Memory of Solferino *and the International Committee of the Red Cross*

Three years after the battle, unable to forget the horror of that week, Dunant wrote a passionate book, *A Memory of Solferino*, describing what he had witnessed. Despite serious business reversals, Dunant paid for its publication with his own funds. The slim volume quickly became the *Gone With the Wind* of its day. Dunant's somewhat lurid descriptions of the battle and its aftermath shocked much of Europe, including kings, queens, and heads of state:

> Here is a hand-to-hand struggle in all its horror and frightfulness; Austrians and allies trampling each other under foot, killing one another on piles of bleeding corpses, felling their enemies with their rifle butts, crushing skulls, ripping bellies open with saber and

[45] Caroline Moorehead, *Dunant's Dream* (New York: Carroll & Graf, 1999), 3. Also see, Pierre Boissier, *Henry Dunant* (Geneva: Henry Dunant Institute, 1974).

[46] John Watts DePeyster, *Personal and Military History of Philip Kearny* (New York: Rice & Gage, 1869), 167–83.

> bayonet. No quarter is given; it is a sheer butchery; a struggle between savage beasts, maddened with blood and fury. Even the wounded fight to the last gasp. When they have no weapon left, they seize their enemies by the throat and tear them with their teeth.[47]

His description of the care given the wounded who survived to receive hospital care was no less disturbing. "The operating surgeon had removed his coat . . . With one knee on the ground and the terrible knife in his hand, he threw his arm round the soldier's thigh, and with a single movement cut the skin round the limb. A piercing cry rang through the hospital."[48]

A worldwide political arousal followed the publication of Dunant's book, the last few pages of which contain the seed of an idea for the formation of neutral relief committees in time of peace, to train volunteers who would treat the wounded in time of war, with an international agreement to recognize and protect those committees. There was a consensus that something had to be done.

In Geneva, three years and eight months later, in February 1863, Dunant and four others of the Geneva aristocracy, members of the Geneva Public Welfare Society, formed the International Committee for Relief to the Wounded, a politically neutral body to translate Dunant's ideas for the care of wounded soldiers into practice.[49] The Swiss government agreed to sponsor a diplomatic conference, and, in August 1864, delegates from sixteen countries gathered in Geneva to lay down the basic principles for the fledgling body. Groups of medical volunteers would be organized by societies in each subscribing country to bring aid to the wounded, regardless of their nationality. Similar branches soon formed all over Europe. In 1864, the International Committee became the International Committee of the Red Cross (ICRC), with their identifying emblem, the flag of Switzerland with colors reversed. (Contrary to 1949 Geneva Convention I,[50] there is no contemporary record confirming that the delegates to the 1863 meeting who adopted the ICRC's symbol actually had the Swiss flag in mind.[51])

2.5.2. *The 1864 Geneva Convention*

In August 1864, the first ICRC Convention met in Geneva, a year after America's adoption of the Lieber Code. At the meeting, the ICRC dedicated itself to establishing guidelines for the protection and care of the wounded, which it did through its first written convention of ten brief articles. "The Convention also was an expression of the European tradition of natural law that had started to emerge in the sixteenth century, under which legal experts strove to overcome the particularity of laws and practices and replace them with universally applicable principles."[52] Of the sixteen nations present,

[47] Henry Dunant, A *Memory of Solferino* (Geneva: ICRC reprint, 1986), 19.
[48] Id., at 90–1.
[49] François Bugnion, *The Emblem of the Red Cross* (Geneva: ICRC, 1977), 6; and, "From the Battle of Solferino to the Eve of the First World War," ICRC (28–12–2004), available at www.icrc.org/web/eng/siteeng0.nsf/html/57JNVP
[50] Art. 38: "As a compliment to Switzerland, the heraldic emblem of the red cross on a white ground, formed by reversing the Federal colours, is retained as the emblem and distinctive sign of the Medical Service of armed forces . . . "
[51] Bugnion, *The Emblem of the Red Cross*, supra, note 49, at 12–3.
[52] Daniel Thürer, "Dunant's Pyramid: Thoughts on the 'Humanitarian Space'," 865 *Int'l Rev. of the Red Cross*, 47, 50 (March 2007).

twelve (Baden, Belgium, Britain, France, Hesse, Italy, the Netherlands, Portugal, Prussia, Spain, Switzerland, and Wurttenberg) signed the Convention.[53] A U.S. representative was present but did not sign. America was still a young nation, wary of foreign entanglements, even humanitarian ones. In 1882, eighteen years later, the United States did ratify the first Geneva Convention.

For his efforts, his dedication, and his vision, in 1901 Henry Dunant shared the first Nobel Peace Prize.[54] He died in October 1910.

2.6. The 1868 St. Petersburg Declaration

There are many treaties, compacts, declarations, and protocols – some more significant than others – relating to the law of war. The St. Petersburg Declaration is among the more important.

For centuries, there have been efforts, largely unsuccessful, to ban particular weapons. "[I]n ancient times, the Laws of Manu . . . prohibited Hindus from using poisoned arrows; and the Greeks and Romans customarily observed a prohibition against using poison or poisoned weapons. During the Middle Ages the Lateran Council of 1132 declared that the crossbow and arbalest were 'unchristian' weapons."[55] The subject of the 1868 St. Petersburg Declaration was a type of bullet that exploded on contact with any hard surface. Such a bullet had been developed for the Russian Imperial Army's use in blowing up enemy ammunition wagons. An 1867 modification allowed the bullet to explode and shatter even on contact with soft targets – soldiers, for example. It was no more effective than an ordinary bullet; it wounded or killed only one soldier, but because of its explosive character the bullet caused particularly serious wounds. The Russians came to consider it an inhumane round, improper for use against troops in any circumstances. Despite having developed it, they strictly controlled its distribution, and Russia's War Minister urged the Czar to renounce its use entirely. In response, Czar Alexander II invited states to attend an international military commission to St. Petersburg to discuss the matter. Seventeen states attended, and all but one (Persia) signed the declaration.[56] The United States did not participate.[57]

The states that ratified the St. Petersburg Declaration Renouncing the Use in War of Certain Explosive Projectiles agreed to not use explosive bullets weighing less than 400 grammes. (Four hundred grammes equals 14.11 ounces, somewhat larger than a modern .50 caliber bullet and smaller than a 22 mm bullet.) Explosive bullets should not

[53] Moorehead, *Dunant's Dream*, supra, note 45, at 44–5.

[54] The Norwegian Nobel Institute records Dunant's name as "Jean Henry Dunant."

[55] Adam Roberts and Richard Guellf, *Documents on the Laws of War*, 3d ed. (Oxford: Oxford University Press, 2000), 53.

[56] The seventeen states at the St. Petersburg Commission were Austria-Hungary, Bavaria, Belgium, Denmark, France, Great Britain, Greece, Italy, the Netherlands, Persia, Portugal, Prussia and the North German Confederation, Russia, Sweden, Switzerland, Turkey, and Wurttemberg.

[57] The United States still has not ratified the Declaration, although it agrees that "bullets designed specifically to explode in the human body clearly are illegal . . . " The U.S. recognition of illegality does not extend, however, to high-explosive projectiles "designed primarily for anti-matériel purposes . . . which may be employed for anti-matériel *and* anti-personnel purposes." John B. Bellinger III and William J. Haynes II, "A US Government Response to the International Committee of the Red Cross Study of Customary International Humanitarian Law," 866 *Int'l Rev. of the Red Cross* 443, 460–1 (June 2007). Emphasis supplied.

be confused with "tracer" bullets, which allow the shooter to see the "trace" of his shot, or with dum-dum bullets, which expand upon contact rather than explode. Following the lead of the 1868 Declaration, dum-dums were the subject of their own international agreement at the 1899 Hague Peace Conference.

The St. Petersburg Declaration was the first international agreement in which the use of a weapon developed through advances in technology was banned on humanitarian grounds. A century later, Georg Schwarzenberger wrote, "It is the function of the rules of warfare to impose some limits, however ineffective, to a complete reversion to anarchy by the establishment of minimum standards on the conduct of war."[58] The St. Petersburg ban on explosive bullets was such a minimum standard.

The Declaration is also noteworthy because of its preamble. In fact, "the significance of the Declaration does not lie in its actual provisions which are no longer of any practical import . . . "[59] but in its preamble, which enunciated two of the basic concepts of warfare, unnecessary suffering and military necessity:

> That the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is sufficient to disable the greatest possible number of men; That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; That the employment of such arms would, therefore, be contrary to the laws of humanity.

For the first time, the core concept of unnecessary suffering – "the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable [is] contrary to the laws of humanity," – was embodied in an international agreement. The object of armed conflict is to defeat the enemy force, not simply to kill as many of the enemy as possible or to inflict the greatest possible wounds.

Similarly, the preamble enunciates the core concept of military necessity: "[T]he only legitimate object . . . during war is to weaken the military forces of the enemy. . . . " If the object of military action is other than to weaken opposing military forces, it is illegitimate. Military necessity had been enunciated in prior documents – the Lieber Code, for example – but it was emphasized in this Declaration, reinforcing the point that there are limits to what is permitted on the battlefield. LOAC is about those limits.*

The St. Petersburg Declaration led to other declarations renouncing specific means of warfare at the 1899 and 1907 Hague Peace Conferences. Although one searches in vain for an example of a weapon actually withdrawn from use because it violated the Declaration, or because it caused unnecessary suffering, "the St. Petersburg Declaration remains a significant influence upon the modern law of war – not as a precedent for the prohibition of a specific weapon, but as a statement of fundamental principles. These

[58] Georg Schwarzenberger, *International Law: As Applied by International Courts and Tribunals*, vol. II, *The Law of Armed Conflict* (London: Stevens, 1968), 10.

[59] Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge: Cambridge University Press, 2004), 50.

* The limits defined at St. Petersburg have not been applied to aerial warfare, unknown in 1868, of course. Today, aircraft lawfully use high explosive rounds weighing less than 400 grams against enemy aircraft and other nonhuman targets. There is no body of international law specific to aerial warfare, but well-known customary limitations regarding targeting apply in aerial combat as in land warfare.

principles have helped shape the modern law [of armed conflict] and retain still the potential to affect the future of that law."[60]

2.7. The 1899 and 1907 Hague Peace Conferences

In the nineteenth century, the European world, along with the United States, developed a confidence in modern progress that extended to a hope that the abolition of war was possible. A popular belief arose that the establishment of a permanent international court would be a major step toward the abolition of war. The work of Clara Barton, Florence Nightingale, and Henry Dunant had captured the world public's attention. A peace movement arose, most strongly in Europe. "[I]t was the carnage of the Napoleonic war that gave rise to the simultaneous outburst of peace societies to be signaled in Britain, the Continent and the United States alike from 1815 onwards."[61] The movement was a significant force for political action aimed at the abolition, or at least control, of war in part because warfare had changed so dramatically in the nineteenth century, making it more horrific than ever. Combat moved from muzzle-loading flintlock muskets to repeating rifles; from wooden sailing ships to steel dreadnought steamships. The machine gun was born. The Industrial Revolution led to greater interaction between states through investment and trade, allowing arms industries to flourish. It also enhanced states' ability to wage war by allowing the mass production of the new weapons, and the creation of the means to transport them in large volume.

2.7.1. *The First Hague Peace Conference*

The 1899 Peace Conference, held at The Hague, in the Netherlands, was an international effort to move beyond the ad hoc international arbitration that had been the recent model and to advance toward a permanent international court for the settlement of national disputes. Today, arbitration is not the first consideration when seeking a means to end armed conflict. In the eighteenth and nineteenth centuries, however, arbitration was successfully employed, for example, in the Jay Treaty of 1794 between America and Great Britain, and the *Alabama*-United States-Great Britain case, in 1871–1872. America, too, became an advocate for the establishment of a permanent court of arbitration.

An August 1898 circular was issued by Russian Czar Nicholas II, proposing a conference of governments having diplomatic representatives at the Russian Imperial Court. The proposal set disarmament, and the peaceful settlement of disputes, as the issues for discussion; not dispute resolution but the avoidance of war in the first place. "The present moment would be very favorable for seeking, by means of international discussion, the most effective means of ensuring to all peoples the benefits of a real and lasting peace, and, above all, of limiting the progressive development of existing armaments."[62]

[60] George H. Aldrich, "From the St. Petersburg Declaration to the Modern Law of War," in Nicolas Borsinger, ed., *125th Anniversary of the 1868 Declaration of St. Petersburg* (Geneva: ICRC, 1994), 50–1.

[61] Arthur Eyffinger, *The Peace Palace: Residence for Justice – Domicile of Learning* (The Hague: Carnegie Foundation, 1988), 14.

[62] James Brown Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907* (New York: Oxford University Press, 1918), v, citing the Russian note.

An unspoken impetus for the Czar's call for a conference was his sense that Russia's economy could not bear the burgeoning costs of new weapons, particularly rifled artillery.* His circular proposing the peace conference heavily stressed the financial burdens of warfare: "The ever-increasing financial charges strike and paralyze public prosperity at its source . . . hundreds of millions are spent in acquiring terrible engines of destruction . . . economic progress, and the production of wealth are either paralyzed or perverted in their development."[63]

> The first to put in an official answer was the United States. The event actually constitutes a landmark in America's foreign policy, for it was on this occasion that the United States first abandoned its policy of splendid isolation. Admittedly, the armaments and navy built up by the [U.S.] were not yet of any real impact on world politics. Still, the increasing capitalism and rapidly expanding international trade had opened the eyes of United States politicians and captains of industry to the world markets and had already resulted in conflict with the Spanish over Cuba and the Philippines.[64]

The first peace conference was held at The Hague from May through July 1899, attended by representatives of twenty-eight nations. One of the six American delegates to the 1899 conference was the naval warfare theorist, Navy Captain Alfred Thayer Mahan. Also participating was a Russian delegate, Fyodor F. Martens, about whom more would be heard. There were three conference "commissions," one concerned with the primary issue, the creation of a permanent international court of arbitration, another with armaments, and the third with the laws of war.[65]

From the outset, arms limitation was a conference dead letter. Even before the conference convened, delegates of the major powers had been instructed to reject any attempt at weapons regulation.[66] One author has written, "One hundred years later, the legacy of the 1899 conference continues most obviously in the institution it created, the Permanent Court of Arbitration."[67] Indeed, a court of arbitration was raised, after a fashion, but in reality it was a phantom, in that only a secretariat was established. It would be eighty years before this weak beginning became the basis for the Permanent Court of Arbitration. At the time, however, the sentiment of the German delegation was prevalent: "The German delegation declares that it cannot adhere to any of the projects which tend to establish universal obligatory arbitration . . . [C]ertain controversies . . . must necessarily be withdrawn from arbitration. They are those which concern honor, independence, and vital interests of States"[68] (in other words, those matters often giving rise to war, which the peace conference had hoped to consign to obligatory arbitration).

* Austria had developed a rapid-firing field gun with a rate of fire six times that of any Russian artillery. The gun was already in use by the French and Germans, and its use showed that Russia could not match their expenditures. An international peace conference seemed a prudent alternative.

63 Id., xv.

64 Eyffinger, *The Peace Palace*, supra, note 61, at 11.

65 See, generally, "Symposium: The Hague Peace Conferences," 94–1 *AJIL* 1–98 (Jan. 2000).

66 U.S. Dept. of State, Instructions to the American Delegates to the Hague Conference of 1899, cited in James B. Scott, ed., *The Proceedings of the Hague Peace Conference* (Whitefish, MT: Kessinger Publishing Reprint, 2007), 6–7.

67 David D. Caron, "War and International Adjudication: Reflections on the 1899 Peace Conference," 94–4 *AJIL* 4 (2000).

68 Cited in Shabtai Rosenne, ed., *The Hague Peace Conference of 1899 and 1907: Reports and Documents* (The Hague, Asser Press, 2001), 294.

A more fruitful result of the 1899 conference was Declaration (IV, 2) Concerning Asphyxiating Gases. It declared, in part, "... inspired by the sentiments which found expression in the Declaration of St. Petersburg [in its preamble] ... The contracting Powers agree to abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases." Among the states that ratified the declaration were Austria-Hungary, France, Germany, and Great Britain, all of which would employ poison gases less than fifteen years later in World War I.

Included in the 1899 Preamble to Convention II on land war was what came to be known as the Martens Clause, named for its Russian author, the conference organizer, diplomat, and humanist who, in 1902, received the ICRC's Distinguished Service Award.[69] The Martens Clause read:

> Until a more complete code of the laws of war is issued, the high contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles on international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.[70]

A common article in each of the four 1949 Geneva Conventions repeats the Martens Clause, and it is found in most LOAC/IHL treaties. The significance of this reference to humanitarian principles is indicated by its continuing relevance and citation in cases adjudicating law-of-war issues.[71]

The 1899 Peace Conference notwithstanding, peace remained as elusive as ever. Between the 1899 and 1907 Conferences, there was war between Britain and the Boers, Russia and Japan, and the United States and the Philippines.

2.7.2. *The Second Hague Peace Conference*

In 1904, U.S. President Teddy Roosevelt called for a second conference, which was formally proposed on behalf of the Czar. The conference again convened in The Hague from June to mid-October 1907; this time forty-four of the world's fifty-seven states participated. The U.S. delegation included Brigadier General George B. Davis, Judge Advocate General of the Army, and Rear Admiral Charles H. Sperry, former president of the Naval War College. As in the first Peace Conference, no African state was represented. Once again, the primary matter of concern was the establishment of a permanent international court of arbitration to settle disputes between states that might otherwise lead to war, rather than a juridical body to be convened only in specific cases. Again, the effort ultimately failed, sunk on the shoals of judicial selection; each country feared exclusion and distrusted the proposed systems of choosing judges. Arms limitations went unmentioned in the Czar's conference proposal; his recent defeat in the 1905 Russo-Japanese War required Russia's massive rearmament.

The conference met with greater success in considering weapons and rules of war, a result unforeseen by the Czar. "Before 1899, treaties relating to the laws of land warfare had only addressed specialized areas of the law (such as the wounded, and

[69] Vladimir V. Pustogarov, "Fyodor Fyodorovich Martens (1845–1909) – A Humanist of Modern Times," 312 *Int'l Rev. of the Red Cross*, 300–14 (1966).
[70] Scott, *The Hague Conventions*, supra, note 62, at 101–2.
[71] See, e.g., *The Corfu Channel Case* (Merits), [1949] *ICJ Rpt.* 4, 260.

explosive projectiles)."[72] In 1907, the three conventions agreed on at the 1899 conference were revised and ten new conventions and one declaration were adopted. The 1899 conference included an attachment to Convention II: a listing of rules for land warfare. In 1907, that listing was repeated as "Convention IV Respecting the Laws and Customs of War on Land," and Convention IV's annex of the same title listed those laws and customs as they were observed in 1907.[73] Although Annex IV, today usually referred to as "Hague Regulation IV," contains few provisions for the protection of civilians, those laws and customs formed the basis for much of the 1949 Geneva Conventions.

2.7.3. *Parsing 1907 Hague Regulation IV*

Hague Regulation IV continued the "modern" codification of customary battlefield law that began with the Lieber Code.[74] Long-established law of war practices that had matured into custom were, practice by practice, becoming embodied in written codes and multinational treaties – were becoming positive international law of war.

Notably, there is a penalty clause in Article 3 of 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land convention: "A belligerent party which violates the provision of the said Regulations shall . . . be liable to pay compensation [to the injured belligerent party]." Accepting that "compensation" constitutes a form of penalty, this was the first time a penalty provision is found in a multinational treaty involving the regulation of battlefield conduct; the first time, one might argue, that rules of war became laws of war, in that Hague Regulation IV specifies conduct that is unlawful, and Hague Convention (IV) assesses a penalty for violation: monetary compensation. "However, the Convention did not provide for the prosecution of individuals who violated the Regulations. Trials of those persons were conducted," if at all, "by national tribunals applying customary international law, the Hague Regulations, or, in the case of their own personnel, the national military or criminal code."[75] The words "crime" and "breach" do not appear in the Convention. Instead, as is common in international law, the penalty for any breach is imposed on the state of the offending individual. It had to wait until the post–World War II Nuremberg International Military Tribunal for *individual* punishment to be imposed,[76] but it was a beginning. Although the 1907 Convention contains no enforcement clause, other than the solemn promises of the signatories, Hague Convention (IV) and Regulation IV were an initial effort to fix responsibility and levy a penalty for battlefield misconduct.

Drawing from historical precedent, such as the 1874 Brussels Declaration concerning the Laws and Customs of War, and the 1880 Oxford Manual, *The Laws of War*

[72] Roberts and Guelff, *Documents on the Laws of War*, supra, note 55, at 67.

[73] Col. G.I.A.D. Draper notes, "The Hague Regulations of 1907 have been seen, perhaps erroneously, as an instrument governing the conduct of hostilities on land. In fact, they also dealt with the protection of prisoners of war, spies, pacific relations between belligerents and military authority in occupied territory. Thus the isolation of Hague Convention IV from the main stream of the development of humanitarian law is erroneous." Draper, "The Development of International Humanitarian Law," in Meyer and McCoubrey, *Reflections on Law and Armed Conflicts*, supra, note 10, at 74.

[74] Geoffrey Best, *War and Law Since 1945* (Oxford: Oxford University Press, 1994), 41.

[75] U.K., *The Manual of the Law of Armed Conflict*, supra, note 2, at para. 1.25.3 (references deleted).

[76] George P. Fletcher and Jens David Ohlin, *Defending Humanity* (New York: Oxford University Press, 2008), 187.

on Land, the 1899 and 1907 Hague Regulations specify the criteria for entitlement to combatant and prisoner of war status, laying out the four preconditions to be met by volunteer fighters and resistance movements that remain familiar to today's LOAC/IHL students.

For the first time in a multinational treaty, Hague Regulation IV addresses the status of spies. Contrary to the opinion of many soldiers of the twentieth century (and today?), an enemy captured behind his opponent's lines in wartime is not automatically a spy. The state representatives at The Hague defined a spy as a person "acting clandestinely or on false pretenses [who] obtains or endeavors to obtain information . . . with the intention of communicating it to the hostile party."[77] So, commando raiders in uniform, escaping prisoners of war, and soldiers having broken through enemy lines who are captured behind those enemy lines are not necessarily spies but are lawful combatants entitled to prisoner of war protections. Of course, the simple recitation of the formulation was not the end of international dissension on the topic. Forty years later, after World War II, spies were again the subject of discussion and argument as 1949 Geneva Convention IV was hammered out. Spies were only one of many customary battlefield practices codified in Hague Regulation IV.

2.7.4. *Parsing 1899 Hague Declaration 3*

Hague Declaration 3, Concerning Expanding Bullets, is another annex to the 1899 Hague Regulations. It was written with dum-dum bullets in mind. "Expanding bullets" are described in the Declaration as, "bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions." Dum-dum bullets, a form of expanding bullet, were named for bullets first manufactured at the British Indian arsenal at Dum-Dum, near Calcutta.[78] They were bullets whose hard jackets did not cover their core, or whose tips were scored, both causing a mushrooming of the bullet on impact, producing wounds of much greater severity than similar wounds involving unscored and fully jacketed rounds. "The contracting Parties agree to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions." Both Britain and the United States objected to the 1899 prohibition. Britain, the manufacturer of the bullets, used them in her African colonial wars and argued that they were needed to disable the "savages."[79] Britain and the United States were overruled, and the provision was left in Declaration 3.[80] In 1907, Britain finally signed and ratified the Declaration. The United States never has. Regardless, the prohibition of dum-dums became customary law long ago, binding all states regardless of their ratification or nonratification of the 1907 Declaration.[81]

[77] Art. 29, Hague Regulation IV.
[78] Lassa Oppenheim, *International Law: A Treatise*, vol. II, *Disputes, War and Neutrality*, 7th ed., H. Lauterpacht, ed. (London: Longman, 1952), 341.
[79] Scott, *Proceedings*, supra, note 66, at 343.
[80] Britain also objected to the prohibition because she believed the rounds did not produce wounds of exceptional cruelty. The United States objected for several reasons, including the belief that dum-dums were not inhumane. Roberts and Guelff, *Documents on the Laws of War*, supra, note 55, at 63.
[81] Ratifications by accession have continued since 1907. The last state to ratify was Fiji, in April 1973.

Some experts suggest that today's high-velocity combat rifle ammunition, said to tumble end over end on striking its target, is essentially the same as a dum-dum bullet. This argument was advanced by several European states, particularly Switzerland, with regard to the bullet fired by the M-16 rifle during its initial adoption as the standard U.S. infantry weapon. There is no prohibition of the use of high-velocity ammunition against human targets, all such bullets tending to yaw or tumble to one degree or another. The argument persisted that, by analogy to dum-dums, the M-16's 5.56 × 45 mm round was prohibited. Other countries, the United States obviously included, contest that analogy, pointing out the difference between a bullet tumbling (arguably unlawful) and a bullet yawing (arguably lawful). No consensus has been reached, and the issue remains controversial. The United States is firm in contending that the M-16 round presents no LOAC violation in fact or spirit.[82]

The U.S. manual on the law of land warfare only mentions the illegality (established through "usage,") of the scoring or filing the ends from bullets.[83] Meanwhile, the International Criminal Court's list of war crimes criminalizes the use of "bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions."[84]

2.7.5. *The Peace Conferences' Legacy*

The Peace Conference did not restrict the development or use of a single weapon or tactic but was nevertheless generally judged a significant accomplishment. "Not unlike its predecessor, this Second Conference was hailed as a success and condemned as an utter failure. . . . Mr. Elihu Root, the American Secretary of State . . . concluded, 'The work of the Second Hague Conference presents the greatest advance ever made at any single time toward the reasonable and peaceful regulation of international conduct . . . '"[85]

A hundred years on, many Hague Regulation IV mandates remain binding. Not all of the Hague Regulations and Declarations have stood the test of time, some Articles being superseded by the 1949 Geneva Conventions. Many, however, have become unquestioned elements of customary international law,[86] cited as such by, for example, the 1946 Nuremberg and 1948 Far East International Military Tribunals.[87] As the International Military Tribunal at Nuremberg held, "The rules of land warfare expressed in the Convention [IV] undoubtedly represented an advance over existing international law at the time of their adoption. [B]y . . . 1939 these rules laid down by the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war."[88] In the 2006 U.S. Supreme Court decision, *Hamdan*

[82] For a review of the arguments from the U.S. viewpoint, see W. Hays Parks, "Annual Report on International Efforts to Prohibit Military Small Arms" address (2002), available at http://www.dtic.mil/ndia/2001smallarms/parks1.pdf

[83] Dept. of the Army, FM 27–10, *The Law of Land Warfare* (Washington: GPO, 1956), para. 34.b.

[84] Rome Statute of the International Criminal Court, War Crimes, Art. 8.2 (b) xix.

[85] Eyffinger, *The Peace Palace*, supra, note 61, at 91.

[86] FM 27–10, *Law of Land Warfare*, supra, note 1, at para. 6; and Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2004), 10.

[87] *Trial of German Major War Criminals* (Nuremberg, 1947), vol. 1, at 254; *In re Hirota*, 15 Ann. Dig. (1948), 356, 366.

[88] International Military Tribunal, Nuremberg, Judgment and Sentences, 1946, 41 *AJIL* 172, 248–9 (1947).

v. Rumsfeld, the Court cites 1907 Hague Convention IV, nearly a hundred years old, as authoritative and relevant law.[89] Along with other tribunals, the International Criminal Tribunal for the Former Yugoslavia has, from its earliest to its final opinions, cited Hague Convention IV as binding law, the violation of which still constitutes punishable offenses.[90]

Perhaps the most enduring aspect of the 1899 and 1907 Hague Conferences is found in Article 22 of 1907 Convention IV: "The right of belligerents to adopt means of injuring the enemy is not unlimited." That humanitarian admonition, read in conjunction with the Preamble's Martens Clause, serves as a moral reference point for considering new weapons, unknown at the time of the Conferences. Just because you can does not mean you should.

At the conclusion of the second Conference, although a permanent court of arbitration was defeated, the delegates began planning for a third conference, where another effort to form a court would be initiated. World War I derailed that conference.

The work of the Hague Peace Conferences was, in no small part, the basis not only for the 1949 Geneva Conventions, but for the creation of the Permanent Court of International Justice (PCIJ), the League of Nations' adjudicatory body. The PCIJ, in turn, became today's International Court of Justice, the United Nations' adjudicatory body. In 1976, the Permanent Court of Arbitration was revived, and it remains a working body.

The law of war is a young and evolving body of law, essentially having been initiated only in 1899, with the Hague Conventions of that year.

2.8. Summary

The second half of the nineteenth century was a LOAC watershed. For hundreds of years there were rules of war, and battlefield regulations, and codes imposed by this or that king, commander, or marshal. In the 1863 Lieber Code this polyglot mass was assembled in a single government-sponsored document. For the first time, customary battlefield law was made accessible to the ordinary soldier in the field. The utility of the Code was clear, and led to similar codes throughout Europe, further rationalizing the law of war on an international basis. On the continent, only months behind Lieber, a simmering public concern over the inhumanity of warfare was given voice by a Swiss businessman, and the ICRC issued its first Convention. The Red Cross movement rapidly spread 'round the world, and a new wave of humanitarian concern for wounded combatants was amplified in the United States by the work of Florence Nightingale, Mary Walker, and Clara Barton. In St. Petersburg, in 1868, there was another first: a multinational treaty limiting the weaponry of war, along the way referring to military necessity and unnecessary suffering as limiting factors on the battlefield. These advances were capped by the 1899 and 1907 Hague Peace Conferences, a lasting result of which is Hague Regulation

[89] *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), at 603 and 604.

[90] E.g., *Trial of Albert Wagner*, French Military Tribunal, XIII *LRTWC* 118, 119 (1946); *Prosecutor v. Duško Tadić*, IT-94–1-A, appeals sentencing judgment of 15 July 1999, para. 98, fn. 117; *Prosecutor v. Tihomir Blaškić*, IT-95–14-A, appeals sentencing judgment of 29 July 2004, para. 147; and *Prosecutor v. Naser Orić*, IT-03–68-T, trial sentencing judgment of 30 July 2006, para. 252.

IV, still good law and arguably the first true *law* of war. The stage was set for finding personal responsibility for violation of laws of war that were on the international legal horizon.

CASES AND MATERIALS

THE TRIAL OF CAPTAIN HENRY WIRZ

A Military Commission Convened at Washington, D.C.,
August 23 – October 24, 1865[91]

Introduction. *The exact number of Union prisoners of war who died at Andersonville prisoner-of-war camp will never be known. At Andersonville National Cemetery the number given is 12,914. Overcrowding and lack of proper food, water, and shelter at Camp Sumter, the camp's actual name, all contributed to the deaths of the prisoners. Considering that the camp existed for slightly less than fourteen months, the death rate was appalling.*

At the war's outbreak, neither side was prepared to handle prisoners of war. Initially, captured soldiers were simply exchanged at the conclusion of the battle. Then a formal exchange system was accepted by both sides. That system collapsed over procedural disagreements and racial issues. Permanent confinement facilities were constructed. Camp Sumter, approximately sixty miles south of Macon, Georgia, was the largest prisoner of war camp. At sixteen and one half acres, it was designed to hold 6,000 enlisted Union soldiers. It eventually held 45,000.

At war's end, while unburied Union prisoners lay dead of starvation and exposure at Andersonville, tons of supplies were found at Confederate commissaries less than twenty miles away.

> *[T]he Confederacy's inept bureaucracy and inadequate, often corruptly operated railroads kept those supplies from reaching [Andersonville]. . . . almost one-third . . . of the men who entered its gates rest in its cemetery. Thousands more died from the effects of staying at Camp Sumter after they had been released. . . . In August [1864] . . . the death count rose to 2,992 men for the month . . .* [92]

Confederate Captain Henry Wirz, a Swiss-born doctor, was in charge of the stockade interior. His superior officer was Brigadier General W. Sidney Winder. Winder died two months before the war ended. Wirz, arrested at the camp after the war ended, was brought to Washington, D.C. for trial before a military commission.[93] *The nine-officer commission consisted of four Union major generals, three brigadier generals, a colonel, and a lieutenant colonel. The senior member was Major General Lew Wallace, later the author of the novel,* Ben Hur. *The judge*

[91] The account of the trial is from: John D. Lawson, ed., *American State Trials*, vol. VIII (St. Louis: F.H. Thomas Law Book Co., 1916), 666.

[92] Robert S. Davis, "Escape from Andersonville: A Study in Isolation and Imprisonment," 67-4 *J. of Military History* 1065, 1067, 1069 (Oct. 2003).

[93] Michael A. Marsh, *Andersonville: The Story Behind the Scenery* (Las Vegas: KC Publications, 2000), 4–29.

advocate (prosecutor) was Colonel N. P. Chipman, assisted by Major A. A. Hosmer. Wirz's counsel were civilians James Hughes, James W. Denver, Charles F. Peck, and Louis Schade. The commission was conducted in the Court of Claims room of the Capitol, in Washington.

In media presentations, Henry Wirz is often presented as a sympathetic figure, unfairly persecuted by a vengeful Union military commission. The record of the trial reveals a far different depiction of Wirz. His defense, like that of Peter von Hagenbach, three hundred ninety years before, was that he was only following orders and that he did the best he could with what he had. Although not the first time the defense had been raised by an American officer,[94] *Wirz's case is the most well known. Tried and convicted, Wirz was sentenced to death and executed, hanged on gallows specially erected in front of the U.S. Capitol building. He was the only Civil War soldier on either side to be convicted of war crimes.*

Extracts from the Record of Wirz's Military Commission

The specification of Charge 1 against Captain Wirz was that he maliciously, wilfully and traitorously, and in aid of the armed rebellion against the United States of America, on or before 1 March 1864, and on diverse other days until 10 April 1865, conspiring with John H. Winder, Richard B. Winder, W. S. Winder, Joseph White, R. R. Stevenson and unknown others, to injure the health and destroy the lives of United States soldiers being prisoners of war, to the end that the armies of the United States might be weakened and impaired, in violation of the laws and customs of war.

The first specification of Charge 2: Captain Wirz, on or about 8 July 1864, as commandant of a prison by authority of the so-called Confederate States for the confinement of prisoners of war from the armies of the United States, feloniously, wilfully and of his malice aforethought, did make an assault with a loaded revolver upon an unknown soldier of the United States, a prisoner of war in his custody, inflicting a mortal wound upon the said soldier.

The fifth specification of Charge 2: Captain Wirz, on or about 20 August 1864, feloniously, and with malice aforethought, did confine and bind within an instrument of torture called "the stocks," an unknown soldier of the United States, a prisoner of war in his custody, in consequence of which said cruel treatment, maliciously and murderously inflicted, the said soldier, soon thereafter, died.*

Witnesses for the Government[95]

Dr. John C. Bates: "was a contract surgeon at Andersonville prison . . . saw men lying partially naked, dirty and lousy in the sand; others were crowded together in small tents . . . The men would gather around me and ask for a bone. Clothing we had none; the living were supplied with the clothing of those who had died. Of vermin and lice there was a prolific crop . . . Sat down and made a report on the condition of things I found at the hospital; for some of the things I said I received a written reprimand . . . My attention was called to a patient who was only sixteen years; he would ask me to bring him a potato, bread or biscuit, which I

[94] That distinction goes to Naval Captain George Little, in *Little V. Barreme*, 6. U. S. (2 Cranch) 170 (1804). See Chapter 9, section 9.1.

* There were thirteen specifications of Charge 2. The three specifications repeated here are paraphrased.

[95] Witness accounts recorded before the military commission, and Wirz's statement and that of the judge advocate, are from Leon Friedman, ed., *The Law of War: A Documentary History*, vol. I (New York: Random House, 1972), 785–98.

did . . . He had the scurvy and gangrene . . . he became more and more emaciated, his sores gangrened, and for want of food and from lice he died . . . saw but little shelter excepting what ingenuity had devised; found them suffering with scurvy, dropsy, diarrhoea, gangrene, pneumonia and other diseases . . . if persons whose systems were reduced by inanition should perchance stump a toe or scratch the hand, the next report to me was gangrene . . . 50 or 75 per cent of those who died might have been saved . . . There was much stealing among them. All lived each for himself. . . .

"The rations were less than 2 ounces in 24 hours. Think a man would starve to death on it. Sometimes the meat was good, and sometimes it was bad . . . the amputations and reamputations, owing to gangrenous wounds, were numerous . . . [men] hobbled along on crutches; others crawled on the ground with tin cups in their mouths, because they could carry these articles in no other way . . . I made several reports as to conditions, but none of them were heeded."

James Mahan: "Was in the Confederate army, and on duty at Andersonville, took 13 men to the blacksmith shop to have iron collars and chains fastened on them; received the order from Capt. Wirz; one of the men called Frenchy made his escape; Capt. Wirz said, when he heard of it, That d – d Frenchy has escaped again, and he sent for the dogs, which got on the trail of the man, who was captured near the stream; Wirz got off his horse and went alongside of the dogs and fired his pistol at the man; the man's trousers were torn by the dogs; do not know whether the flesh was injured; have heard Wirz remark that he wished all the prisoners were in hell, and himself with them."

Abner A. Kellog: "Am of the 40th Ohio. When we were at Andersonville we were robbed of blankets, canteens and watches, which were removed to Capt. Wirz's headquarters; they were never returned. A crazy man having been shot, the sentry was asked why he did so; he replied he was acting under orders of Capt. Wirz. The latter, on being asked by a prisoner whether he expected the men to live with such usage and unwholesome food as was shown to him replied, it is good enough for you – Yankees. In August, 1864, saw a sick man at the gate for 24 hours with a sore on him as large as the crown of my hat, filled with maggots, fly-blown; the sergeant asked Capt. Wirz to have the man carried to the hospital; No, said Wirz; let him stay there and die. The man was afterward carried out a corpse."

Grottfeld Brunner: "Am of the 14th Connecticut. Prisoners were treated well until Capt. Wirz assumed command. Wirz used to come into the stockade every morning, and if one man was missing, the whole detachment would be deprived of food until he was accounted for. Being sick one day, I was not at morning roll-call; Wirz came into my tent and called me a Yankee –, drew his revolver and threatened to kill me on the spot; I replied it would be better if Wirz would kill me, whereupon he kicked me out of bed. . . . "

Sidney Smith: "Am of the 14th Connecticut. Saw Wirz knock a man down with his revolver; another man, who was sick, received a severe bayonet wound; almost every time a sentry shot a man he was relieved on thirty days furlough.

The Prisoner Wirz's Written Statement

"In this closing scene of a trial which must have wearied the patience of this honorable commission, and which has all but exhausted the little vitality left me, I appear to put on

record my answer to the charges on which I am arraigned, and to protest and vindicate my innocence. I know how hard it is for one, helpless and unfriended as I am, to contend against the prejudices produced by popular clamor and long-continued misrepresentation, but I have great faith in the power of the truth. . . . "

"Of the one hundred and sixty witnesses who have testified, no one ever heard a syllable, or saw an act indicative of his knowledge of the existence of such a hellish plot [of conspiracy with John H. Winder and others]; nor was there the least scrap of paper found in his office, or a word in the archives of the Confederacy to show that such a conspiracy existed . . . and if there was guilt anywhere, it certainly lay more deep and damning on the souls of those who held high positions than on him who was a mere subaltern officer. . . . Furthermore, if he, as a subaltern officer, simply obeyed the legal orders of his superiors in the discharge of his official duties, he could not be held responsible for the motive that dictated such orders. And if he ovestepped them and violated the laws of war, and outraged humanity, he should be tried and punished according to the measure of his offense."

"From his position at Andersonville, he should not be held responsible for the crowded condition of the stockade, the unwholesome food, etc., . . . he was not responsible for the location . . . that he did not assume command until March 1864 . . . that Colonel Parsons' testimony fully exonerated him (Wirz) from complicity in the selection of the location, overcrowding the stockade, or failure to provide proper shelter for the prisoners . . . "

"As to the third charge, that of murder . . . The specifications accused him of no less than thirteen distinct crimes of the grade of murder; yet in no instance were the name, date, regiment or circumstances stated. . . . "

The Judge Advocate's Argument

"May it please the Court. . . . Before advancing further in the argument, let me define briefly the laws of war, which, it is alleged by the government in its indictment against this prisoner and his co-conspirators, have been inhumanely and atrociously violated. . . . Whatever the peculiar forms or rights of this or that government, its subjects require no control or power other than is sanctioned by the great tribunal of nations. We turn, then, to the code international . . . "

"Grotius derived the *jus gentium* from the practice of nations. . . . he, in Books three and four, insists that all acts of violence, which have no tendency to obtain justice or determinate the war, are at variance both with the duty of the Christian and with humanity itself. . . . "

"Whatever the form of government may have been to which the leaders of the Confederacy so-called aspired . . . the moment they asked a place among nations they were bound to recognize and obey those laws international, which are, and of necessity must be, applicable alike to all. . . . "

"Thus far we have not pretended to enter with any particularity into the questions of the cruel treatment of prisoners. . . . There was another mode of punishment instituted at that prison and carried on under the direction of this prisoner which we must notice; and that is the stocks."

"These implements of torture were of two kinds: in the one the prisoner was lashed to a wooden frame-work, his arms extended at right angles from his body, and his feet closely fastened; and in this condition, unable to move either hand or foot, he was compelled to stand erect, or, as was sometimes the case, to lie upon the ground with his face turned upwards,

exposed to the heat of the sun and to the rain; in the other the prisoner's feet were fastened in a wooden frame, and so much elevated above the center of gravity that it was difficult for him to sit, and he was therefore compelled to lie on his back with his face exposed to the sun. . . . "

"I know that it is urged that during all this time he [Wirz] was acting under General Winder's orders, and for the purposes of argument I will concede that he was so acting. A superior officer cannot order a subordinate to do an illegal act, and if a subordinate obeys such an order and disastrous consequences result, both the superior and the subordinate must answer for it. General Winder could no more command the prisoner to violate the laws of war than could the prisoner do so without orders. The conclusion is plain, that where such orders exist both are guilty, and *a fortiori* where the prisoner at the bar acted upon his own motion he was guilty.

"We now come to notice charge second, alleging 'murder in violation of the laws of war,' under which there are laid numerous specifications, alleging, with all the particularity that was possible, the circumstances in each case. . . . The various cases of death which are justly to be laid to the charge of this prisoner as murders, may be considered under four heads:

1. The cases of death resulting from mutilation by the hounds.
2. The instances of death resulting from confinement in the stocks and the chain-gang.
3. The cases of killing of prisoners by the guards, pursuant to the direct order of the accused given at the time; and
4. The cases of killing by the prisoner's own hand.

"This classification does not embrace those very numerous cases (which it is not deemed necessary to recount in detail) where prisoners at or near the dead-line were shot by the guards when the accused was not present. . . . "

"May it please the court, I have hastily analyzed and presented the evidence under Charge Second . . . Mortal man has never been called to answer before a legal tribunal to a catalogue of crime like this. One shudders at the fact, and almost doubts the age we live in. I would not harrow up your minds by dwelling farther upon this woeful record. The obligation you have taken constitutes you the sole judge of both law and fact. I pray you administer the one and decide the other. . . . "

Verdict and Sentence

October 24.

Today the Court announced its decision as follows:

It finds the accused, Henry Wirz, of Charge I, "Guilty," viz.: that he did combine, confederate and conspire with John H. Winder, Richard B. Winder, W. S. Winder, R. Stevenson, and others, names unknown, engaged in armed rebellion against the United States, against the laws of war, to impair and injure the health, and to destroy the lives of large numbers of Federal prisoners, to-wit: 45,000 at Andersonville.

Of Specification first to Charge II, "Guilty."

Of Specification second to Charge II, "Guilty."

Of Specification third to Charge II, "Guilty."

Of Specification four to Charge II, "Not Guilty."

Of Specification five to Charge II, "Guilty."

Of Specification six to Charge II, "Guilty."
Of Specification seven to Charge II, "Guilty."
Of Specification eight and nine to Charge II, "Guilty."
Of Specification ten to Charge II, "Not Guilty."
Of Specification eleven to Charge II, "Guilty."
Of Specification twelve to Charge II, "Guilty."
Of Specification thirteen to Charge II, "Not Guilty."

And the Commission does therefore sentence him, the said Henry Wirz, "to be hanged by the neck until he be dead, at such time and place as the President of the United States may direct, two-thirds of the court concurring therein."

November 3, 1865.

The proceedings, findings, and sentence of the court in the within case are approved, and it is ordered that the sentence be carried into execution by the officer commanding the Department of Washington on Friday, the 10th day of November, 1865, between the hours of 6 o'clock a.m., and 12 o'clock noon.

Andrew Johnson, President.

Conclusion. *Captain Wirz's case, a century and a half ago, illustrates elements of war crime trials that have been repeated virtually unchanged through World Wars I and II, the conflict in the former Yugoslavia, and in Iraq. The law of war concerning the torture and mistreatment of prisoners, the giving of unlawful orders, and obeying unlawful orders, is little changed. That law has been adjudicated in courts-martial, military commissions, ad hoc international tribunals, and in domestic courts. As in Wirz's case, arguments as to the fairness of the proceedings continue long after judgment: Did Wirz realistically have a choice in the provisions and shelter he provided prisoners? Were the circumstances in Andersonville inevitable, given the subordinate position of Wirz? What should, or could, he have done? Did the Union Army have options other than convening a military commission?*

THE COURT-MARTIAL OF GENERAL JACOB H. SMITH

Manila, Philippine Islands, April 1902

In the nineteenth and early twentieth centuries, courts-martial were far more common (and far less fatal to one's military career) than in today's armed forces. Still, some courts-martial were notable for their offenses, unusual outcomes, or their accused. The court-martial of a general officer has always been of special note because of its rarity. The 1902 general court-martial of General Smith remains not only interesting, but relevant.

In 1901, Army Brigadier General Jacob Smith commanded Army and Marine Corps troops on the Philippine island of Samar, during the 1899–1902 U.S.-Philippine War. Samar had proven a difficult area to subdue, the *insurrectos* a battle-hardened lot not given to observing the law of war, such as it was. Smith, "a short, wizened 62-year-old who had earned the nickname 'Hell-Roarin' Jake,"[96] had been seriously wounded in the Civil War battle of

[96] Max Boot, *The Savage Wars of Peace* (New York: Basic Books, 2002), 120.

Shiloh. He had also spent twenty-seven years in grade as a captain, a dishearteningly long time between promotions but not unheard of in a day when Army advancement was based strictly on seniority.

General Smith was determined to succeed where his predecessors had failed and quell all enemy resistance. Smith summoned one of his more aggressive subordinates, Marine Major Littleton W. T. Waller, who was about to initiate a patrol against the *insurrectos*. According to his court-martial charge sheet, before witnesses General Smith told Waller, "I want no prisoners. I wish you to kill and burn. The more you kill and burn, the better you will please me. The interior of Samar must be made a howling wilderness." He added that he wanted all persons killed who were capable of bearing arms, anyone ten years of age or older.[97]

Referred to a general court-martial when his statements became public, Smith already had a record marred by, not one, but two prior general court-martial convictions. Five years earlier, he had been saved from dismissal from the Army pursuant to a court-martial sentence only by the intervention of President Grover Cleveland, who granted clemency on the understanding that, after such a close call, Smith would retire. Smith confounded both President Cleveland and his Army superiors (who were eager to end the service of such a continually troublesome officer) by remaining on active duty.

At his court-martial, General Smith admitted that he instructed Major Waller "not to burden himself with prisoners, of which he, General Smith, already had so many that the efficiency of his command was impaired."[98] In mitigation of his unlawful instructions to Waller, the cruel nature of the enemy was repeated by court-martial witnesses:

> The [American] dead were mutilated. This is shown in the evidence of Major Combe, surgeon of volunteers, who accompanied the relief expedition to Balangiga, and who found a smoldering fire still burning about the head and face of Captain Connell. A deep wound across the face of Lieutenant Bumpas had been filled with jam, and one of the enlisted men "had his abdomen cut open and codfish and flour had been put in the wound" . . . No prisoners were taken [by the *insurrectos*].[99]

Nevertheless, there was testimony from several officers, including Major Waller, that *insurrectos* who attempted to surrender were indeed taken prisoner. The same witnesses expressed doubt that, despite his clear directions, General Smith actually meant to instruct subordinate officers that no quarter be given. Major Waller testified, "Always when prisoners came in and gave themselves up, they were saved, they were not killed – not slaughtered at that time. But in the field, whenever they opposed us, we fought until there was nothing else to fight."[100]

General Smith was convicted of a single charge and specification of "conduct to the prejudice of good order and military discipline," and he was sentenced merely to be admonished.[101] The very lenient sentence no doubt reflected the court's deference to his many years of Army service, which included being twice seriously wounded in the Civil War and once in the

[97] S. Doc. No. 213, 57th Cong., 2nd Sess. (1903), at pp. 5–17.
[98] Id., at 804, quoting from the post-trial review by the Judge Advocate General of the Army, BGen. George B. Davis.
[99] Id.
[100] Id., at 811.
[101] National Archives and Records Administration, record group 94, file 309120.

Cuban-American War. But, after his third general court-martial conviction, he was still a brigadier general and he was still on active duty.

A court-martial sentence is not final until it has been reviewed and approved by the officer or individual who ordered the court convened. In the early twentieth century, the President of the United States was the convening authority for general officer courts-martial, unusual as they were. In his July 1902 court-martial review, President Theodore Roosevelt, aware of continuing public concern over accounts of cruelties in the war by U.S. forces, as well as by the enemy, wrote:

> The findings and sentence of the court are approved. I am well aware of the danger and great difficulty of the task our Army has had in the Philippine Islands and of the well-nigh intolerable provocations it has received from the cruelty, treachery, and total disregard of the rules and customs of civilized warfare on the part of its foes. I also heartily approve the employment of the sternest measures necessary to put a stop to such atrocities, and to bring the war to a close . . . But the very fact that warfare is of such character as to afford infinite provocation for the commission of acts of cruelty by junior officers and the enlisted men, must make the officers in high and responsible position peculiarly careful in their bearing and conduct so as to keep a moral check over any acts of an improper character by their subordinates. Almost universally the higher officers have so borne themselves . . . But there have been exceptions; there have been instances of the use of torture and of improper heartlessness in warfare on the part of individuals or small detachments. . . . It is impossible to tell exactly how much influence language like that used by General Smith may have had in preparing the minds of those under him for the commission of the deeds which we regret. Loose and violent talk by an officer of high rank is always likely to excite to wrongdoing those among his subordinates whose wills are weak or whose passions are strong . . .
>
> [I]t is deeply to be regretted that [General Smith] should have so acted in this instance as to interfere with his further usefulness in the Army. I hereby direct that he be retired from the active list.[102]

Hell-Roarin' Jake Smith's forty-one years of active military service were ended by order of President Roosevelt, who was himself a former Army brigadier general, and a Medal of Honor holder, as well.

UNITED STATES V. PVT. MICHAEL A. SCHWARZ

45 CMR 852 (NCMR, 1971)

Introduction. *In June 1970, at DaNang, Republic of South Vietnam, the first of four related general courts-martial began. The accused, U.S. Marine Corps Private Michael Schwarz, was charged with sixteen specifications (counts) of premeditated murder committed in the course of a patrol in contested territory. One of the issues considered by the court was the briefing given the patrol by a superior officer. Was the briefing inciting and reminiscent of General Smith's briefing of Major Waller, sixty-eight years earlier, or was it no more than encouragement to be aggressive and careful?*

[102] Friedman, *The Law of War*, supra, note 95, at 799–800.

It was the fifth year of the Vietnam War. Schwarz's unit, B Company, had been on patrol for several days, "in the bush" looking for Viet Cong (VC), and often under fire. The unit operated in a highly contested area where enemy contact was constant. In the past five months, B Company had suffered fourteen killed in action and eighty-five wounded in action. On February 19, B Company bivouacked for the night. As they were settling into their nighttime perimeter, a VC booby-trap killed a Marine, Private First Class Whitmore. Later, the company commander, twenty-three-year-old 1st Lieutenant A___, directed that a defensive patrol be sent out. A patrol leader was designated, Lance Corporal H___, and a five-checkpoint route assigned that would take several hours to traverse. Before the patrol left, Lieutenant A___ spoke to the five men. At Schwarz's later court-martial, Lieutenant A___ testified about his briefing:

Q: Now, what sort of briefing did you give this team before it went out?
A. I gave them a pep talk, sir.
Q. Would you briefly relate to the court exactly the contents – what you remember of that pep talk?
A. I was talking to H___ [the patrol leader]. I told him, I went over it very, very in detail. I didn't want any casualties. I wanted him to keep his people spread out. I didn't want any booby-trap incident. Since they [the patrol] were out there alone, there wouldn't be much I could do. And I emphasized the fact to him not to take any chances, to shoot first and ask questions later. I reminded him of the nine people that we had killed on the 12th of February, and I reminded him of Whitmore, who had died that day. I said, "Don't let them get us any more. I want you to pay these little bastards back." That's about it.[103]

Shortly after nightfall, the patrol left Hill 50. At their first checkpoint, a small hamlet named Son Thang (4) on U.S. maps, the patrol forced Vietnamese noncombatants from three "hooches" in turn. One of the patrol members later testified that at the first hooch,

A. H___ [the patrol leader] gave the order to kill the . . . people, and I told him not to do it. . . . Then he says, "Well, I have orders to do this by the company commander, and I want it done," and he said it again, "I want these people killed!" And I turned to PFC Boyd, and I said to PFC Boyd, "Is he crazy, or what?" And Boyd said, "I don't know, he must be."
Q. And what happened then?
A. And then everybody started opening up on the people and by the time it was all over, all the people were on the ground.[104]

Conclusion. *The same scenario was repeated at two more hooches: Vietnamese forced outside, H___'s orders to open fire, victims left where they fell. In all, sixteen women and children (no adult males) were killed.*

At Schwarz's trial, the primary issues were Lance Corporal H___'s repeated orders to fire on noncombatants, the legality of those orders, and whether they should have been obeyed. Lieutenant A___'s briefing was properly a secondary issue. The briefing nevertheless recalls President Theodore Roosevelt's admonition in General Smith's case: "It is impossible to tell exactly how much influence language like that . . . may have had in preparing the minds of

[103] *U.S. v. Schwarz*, record of trial, p. 348.
[104] Id., at 287.

those under him for the commission of the deeds which we regret. Loose and violent talk by an officer of high rank is always likely to excite to wrongdoing those among his subordinates whose wills are weak or whose passions are strong . . . "

*Should the Lieutenant have been charged? If so, with what offense? What would the probability of conviction have been? Does the probability of conviction matter in considering offenses that might have been charged?**

UNITED STATES V. MAJOR EDWIN F. GLENN

Samar, Philippine Islands, April 1902

Introduction. *During the 1899–1901 Philippine insurrection, at least eight U.S. Army and Marine Corps officers were court-martialed for acts constituting war crimes, in most instances for subjecting prisoners to the "water cure," a variation on today's "waterboarding." Among the most notorious of the convicted officers was Army Captain Edwin Glenn, a "completely unprincipled" officer.*[105] *Besides torturing prisoners, Glenn was alleged to have burned to the ground the pueblo (town) of Igbarras while it was still occupied by its 10,000 inhabitants. Ironically, although not a lawyer, Glenn was the judge advocate of the island of Panay,*[106] *even while committing the war crime of which he was convicted.*[107] *During Glenn's assignment to the Philippine Islands, "the most notorious method of interrogation was the 'water cure,' described by one witness thus: 'The victim is laid flat on his back and held down by his tormentors. Then a bamboo tube is thrust into his mouth and some dirty water, the filthier the better, is poured down his unwilling throat.' . . . some intelligence officers, such as Edwin F. Glenn, were eager practitioners."*[108] *The water cure causes a frantic, panic-inducing sense of suffocating and drowning, the cure repeated until the desired result, information, true or false, is obtained. It has the added diabolical advantage of leaving no mark on the victim, who is soon mobile and apparently physically unscathed.*

As you read this century-old report of the trial, see how often you are reminded of events and legal arguments regarding the conduct of operations in the recent conflict in Iraq.

* The actions of Lieutenant A___, a well-respected and effective young combat officer, were formally investigated. After lengthy consideration, it was decided to impose nonjudicial punishment, rather than initiate a trial by court-martial. Lieutenant A___ received a letter of reprimand from the Commanding General of the 1st Marine Division, and forfeitures of half a month's pay, $250, for two months. It was, at that time, the maximum punishment imposable at nonjudicial punishment. Gary D. Solis, *Marines and Military Law in Vietnam* (Washington: GPO, 1989), 183.

[105] Brian M. Linn, *The Philippine War: 1899–1902* (Lawrence, KS: University of Kansas Press, 2000), 253.

[106] U.S. War Department, *The Military Laws of the United States, 1915*, 5th ed. (Washington: GPO, 1917), para. 194. "469. Acting judge-advocates . . . shall be detailed from officers of the grades of captain or first lieutenant of the line of the Army, who, while so serving, shall continue to hold their commissions in the arm of the service to which they permanently belong. Upon completion of a tour of duty, not exceeding four years, they shall be returned to the arm in which commissioned. . . . " The author and military law expert, Army Col. Winthrop, describes the duties of a judge advocate of that day: "The designation of 'judge advocate' is now [1896], strictly, almost meaningless; the judge advocate in our procedure being neither a judge, nor, properly speaking, an advocate, but a prosecuting officer with the added duty of legal adviser to the court, and a recorder." William Winthrop, *Military Law and Precedents*, 2d ed. (Washington: GPO, 1920), 179.

[107] Moorfield Storey and Julian Codman, *Secretary Root's Record: "Marked Severities" in Philippine Warfare* (Boston: Ellis Co., 1902), 62.

[108] Linn, *The Philippine War*, supra, note 105, at 223.

From the July 18, 1902, Judge Advocate General's report on the verbatim record of trial of Major Glenn:[109]

The Secretary of War:

Sir: I beg leave to submit the following report. . . . Major Glenn was tried on the following charge and specification.

Charge

Conduct to the prejudice of good order and military discipline, in violation of the sixty-second article of war.

Specification

In that Maj. Edwin F. Glenn, Fifth U.S. Infantry (promoted from captain, Twenty-fifth U.S. Infantry), being on duty commanding the United States troops while at the pueblo of Igbarras, province of Iloilo, island of Panay, Philippine Islands, and having in his charge one Tobeniano Ealdama, presidente of the town of Igbarras aforesaid, did unlawfully order, direct, and by his presence and authority, cause an officer and soldiers, subject to his the said Glenn's command, to execute upon him, the said Tobeniano Ealdama, a method of punishment commonly known in the Philippine Islands as the "water cure;" that is, did cause water to be introduced into the mouth and stomach of the said Ealdama against his will.

This at Igbarras, Panay, on or about the 27th day of November, 1900.

The accused pleaded "Not guilty" to the charge and specification, but submitted the following [written] statement, in the nature of an admission of fact, in connection with his arraignment.

> The defendant is prepared to admit that he is Maj. Edwin F. Glenn . . . and had in his charge one Tobeniano Ealdama, presidente of the town of Igbarras; that he did order and direct, and by his presence and authority did cause an officer and soldiers subject to his command to execute upon the same Tobeniano Ealdama a method of punishment commonly known in the Philippine Islands as the "water cure". . . .
>
> I would like to state to the court, in explanation of this plea, the facts and circumstances that brought it about . . . [A] short time since the commanding general of the Division of the Philippines called me into his office and said that he has just received a cablegram from the United States informing him that two enlisted men, now citizens, but formerly of the Twenty-sixth U.S. Volunteer Infantry, had testified before the United States Senate committee that I, while in command at Igbarras, Panay, of a detachment of United States troops had caused the water cure, so called, to be given to the presidente of that town. And the general added that his orders were to prefer charges against me and bring me to trial . . . I stated to him that I thought it would be an injustice to me to send me to the town of San Francisco, in the United States, to be tried there for an alleged offense committed in the Philippine Islands, for two reasons:
>
> First. Because of the then high state of excitement in the United States upon the subject of the so-called water cure and the consequent misunderstanding of what was meant by that term, and for the additional reason that any court organized in the United

[109] Friedman, ed., *The Law of War*, supra, note 95, at 814–29.

States from the officers there would be absolutely unprepared to pass upon any question involving so important a point as the action of officers in the field in the Philippine Islands.

This he told me was fair and he would ask for a court here.

The question came up as to whether these two men should be brought out, and my remarks to him were, in substance, that I was bitterly opposed to having these men come out on a pleasure jaunt at the expense of the United States Government; that I did not propose to avoid responsibility for anything I had done, and that I would admit, as I have admitted here, the facts, but I reserved the right to bring before the court all the facts by witnesses, so that they might pass on this question intelligibly.

Subsequently this question came up between myself and the judge-advocate, and it was insisted that I should admit the word "water cure," and I have admitted it. My only reason for objection was that the word "water cure" is not a fixed term in its meaning. . . .

Tobeniano Ealdama, the native who was subjected to the water cure by Major Glenn's order, was called as a witness for the prosecution and testified (in Spanish) that . . . Major Glenn arrived in Igbarras in command of a detachment of United States troops, established his headquarters at the convent, and sent for witness (Ealdama). The witness was asked where [the *inserrecto*] General Delgado was, and replied that he was not in the town of Igbarras. He was then asked:

What did they do to you then? A: They told me if I did not tell I would be punished. They told me to take my shirt off, and they tied my arms. The captain and doctor and lieutenant sat at the table and there were some soldiers in the hall way. They laid me on my back and had some water with a faucet, and held my arms tight and proceeded to open my mouth. After they gave me some water for a little while the doctor told them to stop, and then asked me whereabouts of General Delgado. I told them that I did not know where the general was, and they proceeded again with the water. They gave me water, some through the nose and some through the mouth. I had shortness of breath and pain in the stomach.

Q: Did it have any other effect on you? A: My throat also hurt me on account of so much water put through it.
Q: How much water did you take in? A: Four bottles, about four bottles, as best I know . . .
Q: Did you retain this water on your stomach? A: Yes, sir; I did vomit some.
Q: What did they do with you then? A: They asked me quite a number of questions and I did not know the answer to them, and the Major said, "All right, let him up."
Q: What did they do to you then? A: I went to the table and sat down and waited, and they administered water to the school-teacher while I was waiting . . .
Q: What did they do to you there? A: They asked me if I was in communication with the insurrectos. I said that I was not.
Q: What did they do to you then? A: They said, "You are a liar. Take off your clothes."
Q: Well, go on. A: Then I was sleeping. (The interpreter said that he thought the witness meant that he was in a recumbent position.) They brought a kind of syringe.
Q: What did they do with it? A: Open my mouth and put water in my mouth.
Q: What kind? A: Salty.
Q: How much did they put in? A: About one bottle.
Q: What effect did that have? A: It was very bitter.
Q: Did it have any other effect? A: My stomach and throat pained me, and also the nose where they passed the salt water through.

It is proper to say that subsequent to the occurrences above testified to, the witness (Tobeniano Ealdama), was tried by a military commission . . . under the charge of "being a war traitor," the specification alleging holding intercourse with the enemy by means of letters, contributing money, and food to the insurrectionary forces, and directing others, members of said forces, to collect contributions. He was also charged with "violating the laws of war" by joining and becoming a captain in the insurrectionary forces and recruiting and swearing into the Insurgent service the members of the local police force of Igbarras. He was found guilty of the offenses charged and sentenced to confinement at hard labor for ten years. He was released from confinement to enable him to testify as a witness in this case.

The accused admitted the facts in connection with the administration of the water cure, but undertook to show, in defense, that his act was not unlawful; that is, it was justified by military necessity and was warranted as a legitimate exercise of force by the laws of war. . . .

The law governing the case is set forth in paragraph 16, General Orders, No. 100 [the Lieber Code], which provides that –

> Military necessity does not admit of cruelty, that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding, except in fight, nor of torture to extort confessions.

The offense of the accused consisted in a resort to torture with a view to extort a confession. The question is, did an emergency exist, so instant and important to justify the disobedience of the plain requirements of General Orders, No. 100? I think not. A rare or isolated case can be conceived of in which the movement of an army or a military operation of importance may depend upon obtaining the unwilling service of an inhabitant of the enemy's country . . . In such a case a similar resort to force may be justified as a measure of emergency, but no such case existed in the vicinity of Igbarras at the date of the specifications.

It must be remembered also that the resort to torture is attempted to be justified, not as an exceptional occurrence, but as the habitual method of obtaining information from individual insurgents. The accused took considerable pains to establish the fact that torture was the usual practice of the Spaniards; that it was practiced by the insurgents . . . If this be admitted, the accused was attempting to justify his conduct, not as an act dictated by military necessity, but as a method of conducting operations.

When looked at from this point of view the defense falls completely, inasmuch as it is attempted to establish the principle that a belligerent who is at war with a savage or semicivilized enemy may conduct his operations in violations of the rules of civilized war. This no modern State will admit for an instant; nor was it the rules in the Philippine Islands. It is proper to observe that the several general officers who have exercised chief command in the Philippine Islands have, all of them, expressly forbidden practices like that of which the accused is here charged. Their principle subordinates have given similar instructions forbidding a resort to cruelty in the most positive terms. . . .

The rules respecting the treatment of guerrillas contemplate the existence of large armies which are annoyed in their operations by the presence of small guerrilla bands . . . This was not the case in the Philippine Islands, generally, where there were no large armies operating against each other as organized bodies. The [U.S.] troops were operating in detachments against isolated bands or bodies of insurgents, all of which were acting as guerrillas and were conducting their operations in flagrant disregard of the rules of civilized war. The situation thus presented was difficult and to the last degree exasperating, but it did not relieve the officers and men of the occupying forces of their obligation to adhere to the rules of war. . . .

The accused was found guilty upon both charge and specification, and the following sentence was imposed:

> To be suspended from command for the period of one month, and to forfeit the sum of $50 for the same period. The court is thus lenient on account of the circumstances as shown in the evidence.

Although the accused was tried for but a single administration of the water-cure – not for habitually resorting to it in the conduct of operations against the insurrectionary forces – the sentence imposed, in my opinion, was inadequate to the offense established by the testimony of the witnesses and the admission of the accused. The sympathy of the court seems to have been with the accused throughout the trial; the feeling of the [jury] members in that respect is also indicated by qualifying words which are added to the sentence, and by the unanimous recommendation to clemency which is appended to the record.

I am of the opinion that the court upon reconsideration[110] would adhere to the sentence originally imposed, and it is therefore recommended that the sentence be confirmed and carried into effect.

Very respectfully,

George B. Davis*
Judge-Advocate-General

Conclusion. *As Major General Davis suggests, Glenn's risible sentence, a mere fifty dollars,*[111] *and a month off, appears woefully inadequate to the offense of which he was convicted and illustrates the members' – the military jury's – permissive view of the water cure. The torture technique is at least as old as the Inquisition, during which its use is documented.*

[110] Strange as it sounds today, in the U.S., until enactment of the Uniform Code of Military Justice in 1950, under both the Articles of War and the Articles for the Government of the Navy, court-martial results that dissatisfied the convening authority could be returned to the trial court for revision – euphemistically referred to as "reconsideration." In practice, reconsideration meant the convening authority expected either that "not guilty" findings should be changed to "guilty," or that there be an upward revision of the sentence, or both. During World War I, fully one-third of all Army court-martial acquittals were "revised" to findings of guilty in reconsideration sessions. William T. Generous, Jr., *Swords and Scales* (New York: Kennikat Press, 1973), 12–13. Also see: Articles of War 1920 (as amended Dec. 15, 1942) Article 50 ½. For an account of proceedings in revision provided for in Regulations of the Navy, 1870, see Winthrop, *Military Law and Precedents*, supra, note 106, at 454–9. The U.S. Supreme Court approved the practice in Ex Parte *Reed*, 100 U.S. 13 (1879).

* Brigadier General Davis's ire was not that of an armchair warrior. General Davis enlisted in the cavalry at age 16. After participating in seventeen Civil War battles as an enlisted cavalryman, he attended West Point, graduating in 1871. As an officer, he fought Indians on the Western frontier for five years, served two tours as a West Point professor and, as a major, was transferred to Washington, D.C. and the Judge Advocate General's Department. While in Washington he earned two law degrees at what is now George Washington University, then returned to West Point for a third time. Promoted to brigadier general in 1901, he served as Judge Advocate General of the Army for ten years, during which time he represented the United States at the 1907 Hague Peace Conference. He was promoted to major general upon his retirement in 1911. Dept. of the Army, *The Army Lawyer: A History of the Judge Advocate General's Corps, 1775–1975* (Washington: GPO, 1975), 101–2.

[111] One critic noted that the fifty-dollar fine was, "one-half the fine that may be imposed for spitting in a street-car in Boston . . ." Storey and Codman, *Secretary Root's Record: "Marked Severities" in Philippine Warfare*, supra, note 107, at 66.

Edwin Glenn, who was promoted from the grade of captain to that of major while his charges were pending, continued his military career and retired a brigadier general.

Is military necessity a defense to charges of torture? If not, should it be? Does Article 2.2 of the 1984 Convention Against Torture, ratified by the United States in 1994, provide guidance?