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Author(s): Burrus M. Carnahan

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# LINCOLN, LIEBER AND THE LAWS OF WAR: THE ORIGINS AND LIMITS OF THE PRINCIPLE OF MILITARY NECESSITY

By Burrus M. Carnahan\*

The roots of the modern law of war lie in the 1860s. Developments in this decade began in 1862 when Henry Dunant published *Un Souvenir de Solferino*,<sup>1</sup> which inspired the conclusion two years later of the first Geneva Convention on treatment of the sick and wounded.<sup>2</sup> Four years later came the first multilateral agreement to ban the use of a particular weapon in war.<sup>3</sup> And in 1863, before either of these agreements had been concluded, the earliest official government codification of the laws of war was promulgated by the United States. This codification was issued as General Orders No. 100, Instructions for the Government of Armies of the United States in the Field, more commonly known as the “Lieber Code.”<sup>4</sup>

Drafted by an academic intent on drawing general principles of human morality from empirical evidence, and issued by a President determined to found his policies on human reason, the Lieber Code may be considered the final product of the eighteenth-century movement to humanize war through the application of reason.<sup>5</sup> From this standpoint, the Lieber Code’s greatest theoretical contribution to the modern law of war was its identification of military necessity as a general legal principle to limit violence, in the absence of any other rule.<sup>6</sup> This principle soon achieved international recognition in the St. Petersburg Declaration of 1868.<sup>7</sup>

\* Senior Analyst, Science Applications International Corp., McClean, Va.; Lt. Colonel, USAF (ret.).

<sup>1</sup> See ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 226 (rev. ed. 1954); HENRY DUNANT, *A MEMORY OF SOLFERINO* (English ed. 1959).

<sup>2</sup> Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, reprinted in *THE LAWS OF ARMED CONFLICTS* 279 (Dietrich Schindler & Jifi Toman eds., 3d rev. ed. 1988) [hereinafter *ARMED CONFLICTS*]. The Convention, and the international Red Cross movement, grew out of a proposal by Henry Dunant of Geneva, Switzerland, who witnessed the suffering of the wounded after the 1859 battle of Solferino between France and Austria. See NUSSBAUM, *supra* note 1, at 224–27. In *Un Souvenir de Solferino*, Dunant called for “a special congress to formulate” an “international principle, with the sanction of an inviolable Convention, which . . . might constitute a basis for Societies for the relief of the wounded in the various countries of Europe.” DUNANT, *supra* note 1, at 126.

<sup>3</sup> Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, Nov. 29/Dec. 11, 1868, reprinted in *ARMED CONFLICTS*, *supra* note 2, at 101.

<sup>4</sup> U.S. War Department, General Orders No. 100, Apr. 24, 1863 [hereinafter *Lieber Code*], reprinted in *ARMED CONFLICTS*, *supra* note 2, at 3.

<sup>5</sup> See, e.g., NUSSBAUM, *supra* note 1, at 129–31, 139, 227; FRANK FREIDEL, FRANCIS LIEBER, NINETEENTH-CENTURY LIBERAL 147–51, 332–35 (1947); Phillip S. Paludan, *Lincoln and the Rhetoric of Politics, in A CRISIS OF REPUBLICANISM* 73 (Lloyd E. Ambrosius ed., 1990). In contrast, Dunant’s *A MEMORY OF SOLFERINO*, *supra* note 1, with its overt appeal to “noble and compassionate hearts and . . . chivalrous spirits,” *id.* at 118, represents a 19th-century Romantic approach to limiting war. Many of the Romantics (including Dunant) did not reject the Enlightenment appeal to reason as such but, rather, attempted to go beyond it to engage the emotions, cf. HUGH HONOUR, *ROMANTICISM* 280–82 (1979). Just as some Romantic artists and writers seem to have attempted to shock the public into religious faith, *id.* at 277–80, so Dunant, through gritty descriptions of individual suffering after Solferino, sought to shock the public into humanitarian action.

<sup>6</sup> Military necessity is widely recognized as one of the underlying principles of the modern law of war. See, e.g., MICHAEL BOTHE, KARL PARTSCH & WALDEMAR SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 194–95 (1982); U.S. DEPT OF THE AIR FORCE, *INTERNATIONAL LAW—THE LAW OF ARMED CONFLICT AND AIR OPERATIONS*, para. 1-3a(1) (AFP No. 110-31, 1976); 2 GEORG SCHWARZENBERGER, *INTERNATIONAL LAW* 9–13 (1968); MYRES S. McDUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 521–22 (1961); cf. U.S. DEPT OF THE ARMY, *THE LAW OF LAND WARFARE*, para. 3.a. (Field Manual No. 27-10, 1956) [hereinafter *FM 27-10*].

<sup>7</sup> Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, *supra* note 3.

## ORIGINS AND INFLUENCE OF THE LIEBER CODE

From the U.S. War Department's point of view, the Lieber Code was primarily a response to the expansion of the United States Army during the Civil War. The old army had been a band of thirteen thousand frontier professionals; in the war it expanded to a mass force of a million men. The prewar army had been small enough, and its pace of life slow enough, for junior officers to learn the fundamentals of military law and the customs of war from their more experienced colleagues. The Civil War army, however, was led by thousands of inexperienced volunteer officers who had nowhere to turn when faced with legal issues ranging from the drafting of court martial charges to the paroling of prisoners of war. Military law and the international legal environment of military operations were unfamiliar even to officers who had been lawyers in civilian life.

This unsatisfactory situation stimulated various reforms, including raising the status and expanding the powers of the army's chief legal officer (the Judge Advocate General) and deploying judge advocate officers to the staffs of field commanders. The specific response to the widespread ignorance of the laws and customs of war was the General Orders No. 100, the Lieber Code.<sup>8</sup> The code was named for its drafter, Dr. Francis Lieber, a professor of law at Columbia College (now Columbia University). A veteran of combat in Europe whose own family had been divided by the American Civil War, Lieber was uniquely qualified to codify the laws by which that war should be conducted. As a soldier, Lieber had served against Napoleon in the Waterloo campaign and participated in the Greek War of Independence. He emigrated to the United States in 1827 after facing political persecution in his native Prussia, and by 1857 he had been appointed Professor of Modern History, Political Science and International, Civil and Common Law at Columbia.<sup>9</sup>

A strong abolitionist, Lieber became an early and active backer of the Union side in the Civil War. In 1861 and 1862, he gave the U.S. Army valuable guidance on the treatment of Confederate prisoners and the handling of guerrillas and other irregular forces. Arguing that, under the laws of war, the federal Government could accord individual Confederates the privileges of belligerency for humanitarian reasons, without in any way recognizing the legitimacy of their government, he solved a difficult political problem for the Lincoln administration.<sup>10</sup>

Building on the quasi-official relationship he had developed with the War Department, he proposed to the General in Chief of the Army in November 1862 that the President "issue a set of rules and definitions providing for the most urgent issues occurring under the Law and usages of War." The President, he urged, "as Commander in Chief, through the Secretary of War, ought to appoint a committee, say of three, to draw up a code . . . in which certain acts and offenses (under the Law of War) ought to be defined and, where necessary, the punishment be stated."<sup>11</sup>

<sup>8</sup> See U.S. DEPT OF THE ARMY, *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975*, at 49-52 (1975) [hereinafter *THE ARMY LAWYER*]; HAROLD HYMAN, *A MORE PERFECT UNION 188-93* (Sentry 1975) (1973); Michael Hoffman, *Unplanned but Imperative: The Origins of the Judge Advocate General's Civil Authority*, *MIL. L. REV.*, Summer 1979, at 129, 132-35.

<sup>9</sup> See FREIDEL, *supra* note 5, at 11-18, 28, 52, 294. Two of Lieber's sons served in the U.S. Army, one losing an arm because of wounds. The third son died of wounds while in Confederate service.

<sup>10</sup> See RICHARD S. HARTIGAN, *LIEBER'S CODE AND THE LAW OF WAR* 9, 43 (1983); *THE ARMY LAWYER*, *supra* note 8, at 61-62. Lincoln regarded the Union as indivisible. The seceding state governments and the Confederacy they formed were merely combinations of treasonous individuals, and had no other international or domestic legal status. See, e.g., MARK GRIMSLEY, *THE HARD HAND OF WAR* 11-13 (1995); James McPherson, *Lincoln and the Strategy of Unconditional Surrender*, in *LINCOLN, THE WAR PRESIDENT* 31, 41 (Gabor Boritt ed., 1992).

<sup>11</sup> Letter, Francis Lieber to Henry W. Halleck (Nov. 13, 1862), *quoted in* HARTIGAN, *supra* note 10, at 79. The General in Chief, Major General Henry W. Halleck, had himself published a treatise on international law, and Lieber addressed him "as the jurist, no less than as the soldier." *Id.*

A little over a month later, Lieber was himself appointed, together with four general officers, to a board charged with proposing “a code of regulations for the government of armies in the field, as authorized by the laws and usages of war.”<sup>12</sup> In practice, Lieber devoted himself to codifying the laws and customs of war, while the other members (two of whom had been lawyers in civil life) turned to a revision of military law and made only minor changes in Lieber’s drafts.<sup>13</sup> After its approval by President Lincoln, the code was issued on April 24, 1863.<sup>14</sup>

As both “the first attempt to check the whole conduct of armies by precise written rules”<sup>15</sup> and “a persuasively written essay on the ethics of conducting war,”<sup>16</sup> the Lieber Code projected its influence far beyond the ranks of the United States Army. In 1868 an international commission meeting in St. Petersburg, Russia, applied the code’s principle of military necessity to ban the use of small-caliber explosive bullets because they would cause “unnecessary suffering.”<sup>17</sup> In 1870 the Prussian Government adapted the code as guidance for its army during the Franco-Prussian War. The code also formed the basis of the Brussels Declaration of 1874, which in turn influenced the Hague Regulations on the Laws and Customs of War on Land of 1899 and 1907, the foundation of the law of land warfare for the entire twentieth century.<sup>18</sup>

#### DEFINING MILITARY NECESSITY

In drafting his code, Lieber drew upon a miscellany of historical and contemporary precedents and documents.<sup>19</sup> President Lincoln’s proclamations, and other public documents referring to military necessity, were undoubtedly among the resources he used in defining the doctrine of military necessity.

In particular, the general definition of military necessity in Article 14 appears to have drawn on one of President Lincoln’s proclamations. Lieber’s definition reads as follows: “Art. 14. Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.” Modern authorities on the law of war continue to refer to this definition, particularly the phrase “indispensable for securing the ends of the war.”<sup>20</sup> Its origins can be traced to the President’s response to a premature emancipation proclamation issued by Major General David Hunter.

<sup>12</sup> U.S. War Department, Special Orders No. 399, Dec. 17, 1862, para. 5, *quoted in id.* at 85.

<sup>13</sup> See FREIDEL, *supra* note 9, at 332–35.

<sup>14</sup> When published, the Lieber Code was officially described as “instructions for the government of armies in the field, prepared by Francis Lieber, LL.D., and revised by a board of officers.” The President ordered that they be published “for the information of all concerned.” See HARTIGAN, *supra* note 10, at 106–07. Although issued to all organizations of the U.S. Army as a general order, the Lieber Code was therefore informational, rather than directive, in nature. That is, President Lincoln was not ordering all members of the army to comply with the code; rather, he was issuing it as one source (albeit an officially approved source) of the laws and customs of war. See FREIDEL, *supra* note 9, at 334–35.

<sup>15</sup> NUSSBAUM, *supra* note 1, at 227.

<sup>16</sup> FREIDEL, *supra* note 9, at 335.

<sup>17</sup> Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, *supra* note 3.

<sup>18</sup> See Regulations annexed to Convention [IV] Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2227, *reprinted in* ARMED CONFLICTS, *supra* note 2, at 63; HARTIGAN, *supra* note 10, at 22. *Cf.* NUSSBAUM, *supra* note 1, at 227.

<sup>19</sup> See FREIDEL, *supra* note 9, at 333.

<sup>20</sup> See U.S. DEPT OF THE AIR FORCE, *supra* note 6; MCDUGAL & FELICIANO, *supra* note 6; FM 27-10, *supra* note 6. *But see* BOTHE, PARTSCH & SOLF, *supra* note 6 (defining military necessity as the principle justifying measures “relevant and proportionate” to securing the prompt submission of the enemy). They would reserve the term “indispensable” to cases of “urgent” or “imperative” military necessity. *Id.* at 194 n.7. On the other hand, MCDUGAL & FELICIANO, *supra*, at 528, appear to regard “relevant and proportionate” violence to be equivalent to “indispensable” violence.

On May 9, 1862, General Hunter, commanding federal forces in Union enclaves along the Carolina and Georgia coasts, issued a general order declaring all slaves held in Georgia, Florida and South Carolina to be free. Within six months, Lincoln himself would issue a preliminary emancipation proclamation, but in May the time was not yet ripe to declare emancipation a war aim of the Union.<sup>21</sup>

On May 19, therefore, the President issued a proclamation declaring Hunter's order void and noting that the Government had not authorized any military commander to declare slaves free. He also, however, held the door open to eventual adoption of emancipation as a uniform, national military measure:

I further make known that whether it be competent for me, as Commander-in-Chief of the Army and Navy, to declare the Slaves of any state or states, free, and whether at any time, in any case, it shall have become a *necessity indispensable to the maintenance of the government*, to exercise such supposed power, are questions which, under my responsibility, I reserve to myself, and which I can not feel justified in leaving to the decision of commanders in the field.<sup>22</sup>

As an ardent enemy of slavery, Lieber was undoubtedly familiar with Lincoln's proclamation of May 19 and would have been anxious to legitimize the President's power to free slaves as a military measure, despite the then widely held belief that the federal Government had no power over slavery in the states, even when those states were in active rebellion against it. By defining military necessity to include all measures "indispensable for securing the ends of the war," Lieber ensured that, whatever other limits this legal principle might place on military operations, it would be broad enough to include President Lincoln's standard for military emancipation—"a necessity indispensable to the maintenance of the government."

#### *Military Necessity as a Restraint*

Following the general definition in Article 14, Lieber illustrated the concept of military necessity with examples of measures that are justified by military necessity, as well as those that remain forbidden "according to the modern law and usages of war."

Art. 15. Military necessity admits of all direct destruction of life or limb of *armed* enemies, and of other persons whose destruction is incidentally *unavoidable* in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. 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.

Art. 16. 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. It does not admit of the use of poison in any war, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

<sup>21</sup> In addition, government policy on slavery had to be uniform, and not subject to the pro- or antislavery views of regional commanders. Before the Civil War, Hunter had been one of the few abolitionist officers in the U.S. regular army. See EDWARD MILLER, *LINCOLN'S ABOLITIONIST GENERAL* (1997).

<sup>22</sup> ABRAHAM LINCOLN, *SPEECHES AND WRITINGS 1859–1865*, at 318–19 (Library of America ed., 1989) (emphasis added).

Although not readily apparent today, recognition of military necessity as a legal precondition for destruction represented an enlightened advance in the laws of war in the nineteenth century. In the first half of that century, the law of nations permitted the capture or destruction of any and all property belonging to any person owing allegiance to an enemy government, whether or not these measures were linked to military needs. As Chief Justice Marshall had noted in 1814:

That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself.<sup>23</sup>

That the property might have no military significance was irrelevant. Military necessity was not a legal prerequisite to visiting indiscriminate destruction on the unarmed subjects of an enemy state, although the commentators agreed with the Chief Justice that this practice might not be a “humane and wise policy.” The unfettered discretion to enjoy enemy property, and to “take” noncombatant enemy nationals,<sup>24</sup> was put to rest by Lieber’s doctrine of military necessity.

*Military Necessity as a License for Mischief*

Unfortunately, the Confederate authorities did not welcome the Lieber Code as a favorable development. To the contrary, they used it for propaganda against the Lincoln administration.<sup>25</sup> A copy of the code was officially delivered to Colonel Robert Ould, the Confederate Agent for Exchange of Prisoners, on May 22, 1863.<sup>26</sup> On June 24, Confederate Secretary of War James Seddon issued a lengthy denunciation of the Lieber Code as a “confused, unassorted and indiscriminating compilation” of “obsolete” and “repudiated” views.<sup>27</sup> Seddon’s central target, however, was the doctrine of military necessity:

[I]n this code of military necessity . . . the acts of atrocity and violence which have been committed by the officers of the United States and have shocked the moral sense of civilized nations are to find an apology and defense.

<sup>23</sup> *Brown v. United States*, 12 U.S. (8 Cranch) 110, 122–23 (1814). As counsel before the Supreme Court in the case of *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796), John Marshall had unsuccessfully relied on this rule to argue that state governments, during the American Revolution, could “confiscate” private debts owed to British creditors because these were the property of enemy aliens. The Court rejected this argument as inconsistent with the terms of the Treaty of Paris ending the war. See FRANCES RUDKO, *JOHN MARSHALL AND INTERNATIONAL LAW* 26–30 (1991).

<sup>24</sup> By the 18th century, European powers no longer enslaved captured enemy nationals or held them for ransom, see *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825) (Marshall, C.J.), though the practice was still common in naval wars between those powers and the Muslim principalities of North Africa well into the 19th century, see ROBERT ALLISON, *THE CRESCENT OBSCURED/THE UNITED STATES AND THE MUSLIM WORLD 1776–1815*, at 107–26 (1995). Early 19th-century peace treaties between those states and the United States included guarantees that, in the event of another war, captives would not be enslaved but would be treated as prisoners of war. See *Treaty of Peace and Amity, U.S.-Algiers*, June 30, 1815, Art. 17, 6 Stat. 224; *Treaty of Peace and Amity, U.S.-Tripoli*, June 4, 1805, Art. 16, 8 Stat. 214. Slavery in the United States itself was the most tragic and longest lasting effect of the doctrine that war captives could be enslaved. Most of the Africans brought to America were originally enslaved as a result of their capture in wars between the kingdoms and nations of West Africa. See PETER KOLCHIN, *AMERICAN SLAVERY* 20 (1993). For an individual example, see TERRY ALFORD, *PRINCE AMONG SLAVES* 21–30 (Oxford paperback 1986). Cf. Marshall’s opinion in *The Antelope*, *supra*.

<sup>25</sup> See FREIDEL, *supra* note 5, at 339.

<sup>26</sup> Lt. Col. Ludlow to Col. Hoffman (June 6, 1863), reprinted in HARTIGAN, *supra* note 10, at 113. In 18th-century Europe, the practice developed of periodically exchanging prisoners of war during the conflict in which they were captured. This practice still prevailed during the Civil War, although it broke down repeatedly. Ould and Ludlow were, respectively, the Confederate and Union agents for concluding such exchanges, and were the one continuing channel of communication between the two sides. See generally WILLIAM HESSELTINE, *CIVIL WAR PRISONS* (1930).

<sup>27</sup> Seddon to Ould (June 24, 1863), reprinted in HARTIGAN, *supra* note 10, at 120.

. . . .  
 . . . They cannot frame mischief into a code or make an instituted system of rules embodying the spirit of mischief under the name of a military necessity.<sup>28</sup>

One prominent historian of the Lincoln assassination has even suggested that the Confederate government may have supported clandestine operations to kidnap or assassinate President Lincoln in part as a *tu quoque* response to this view of the Lieber Code's principle of military necessity:

It is foreign to the way Americans have been taught to think about the Civil War, but why should not Southern leaders have concluded at this time [1865] that the doctrine of military necessity, so often and so ruthlessly employed against them by Lincoln, justified direct attacks against him and members of his administration? The Union army's own General Order No. 100 looked "with horror upon the assassination of enemies," but condoned "military necessity," which it defined as "the necessity of those measures which are indispensable for securing the ends of the war . . . ."<sup>29</sup>

The later history of the doctrine in Germany lends support to Confederate Secretary Seddon's critique that it could mask questionable activities. Adoption of the Lieber Code by Prussia in 1870 has been hailed as one of the early triumphs of the code as a restraint on wartime behavior.<sup>30</sup> By 1902, however, Lieber's principle of military necessity had evolved there into the doctrine of *Kriegsraison*, which permitted the German army to violate many of the laws and customs of war on the basis of military necessity.<sup>31</sup>

This extreme form of military necessity was rejected by war crimes tribunals after World War II, and now finds no support among authorities on the law of war. As Article 14 of the Lieber Code stated, military necessity justifies only those actions "which are lawful according to the modern law and usages of war," i.e., those which do not violate some specific, positive obligation of that law, such as the rule against assassination.<sup>32</sup>

Much of the destruction incident to warfare, however, is not governed by specific legal rules, and in the Civil War era there were far fewer such rules than today. In the absence of any positive rule of war, military activity was, and is, to be restrained chiefly by the doctrine of military necessity. Does Confederate Secretary Seddon's critique remain valid in such cases? Does military necessity merely embody "the spirit of mischief" so as to

<sup>28</sup> *Id.* at 123–24.

<sup>29</sup> William Hanchett, *The Happiest Day of His Life*, in *CIVIL WAR TIMES ILLUSTRATED*, Nov./Dec. 1995, at 76, 82. The Confederate government believed that Lincoln had approved cavalry raids aimed at capturing or killing high Confederate officials. See WILLIAM TIDWELL, JAMES HALL & DAVID GADDY, *COME RETRIBUTION* 245–48 (1988).

<sup>30</sup> See HARTIGAN, *supra* note 10, at 22; cf. NUSSBAUM, *supra* note 1, at 227, 345 n.75.

<sup>31</sup> See FRITS KALSHOVEN, *BELLIGERENT REPRISALS* 366 (1971); JULIUS STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 351–52 (1954). For alternative views on the application of *Kriegsraison* in occupied Belgium during World War I, compare EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 32–48 (1993), with BARBARA TUCHMAN, *THE GUNS OF AUGUST* 313–32 (1962).

<sup>32</sup> See, e.g., U.S. DEP'T OF THE AIR FORCE, *supra* note 6; JAMES BOND, *THE RULES OF RIOT* 65–68 (1974); STONE, *supra* note 31, at 352; Denise Bindschedler-Robert, *Problems of the Law of Armed Conflicts*, in 1 *A TREATISE ON INTERNATIONAL CRIMINAL LAW* 295, 305–06 (M. Cherif Bassiouni & Ved Nanda eds., 1973). In this respect the doctrine of military necessity is to be distinguished from absolute necessity or *force majeure*, either of which might, in principle, excuse violation of any positive rule of international law, see BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 71 (1953). *Force majeure* includes only extraneous events that make performance impossible, while necessity always involves a deliberate choice to disregard a rule. See 1 SCHWARZENBERGER, *supra* note 6, at 642 (1957). Absolute necessity is also to be distinguished from military necessity in that the existence of the state, not merely military victory, must be in peril before the former doctrine will apply, see BIN CHENG, *supra*, at 71. Cf. 1 SCHWARZENBERGER, *supra*, at 538–41. This very high standard has rarely, if ever, been met. It is not clear whether absolute necessity would excuse violations of the laws and customs of war. STONE, *supra* note 31, at 352–53, suggests that it might. Query the impact of absolute necessity on obligations that are *jus cogens*; most of the authorities on absolute necessity predate development of the doctrine of *jus cogens*.

justify “acts of atrocity and violence which have . . . shocked the moral sense of civilized nations”? Or does it, if applied in good faith, impose real limits on atrocity and violence?

#### LINCOLN’S PRACTICE OF MILITARY NECESSITY

Another way to frame these questions is to ask what President Lincoln believed he was authorizing and prohibiting when he approved General Orders No. 100. Lincoln’s own decisions and practices as Commander in Chief constitute the best evidence on this issue.

In addition, these decisions hold more than historical interest. The principle of military necessity remains an important source of the contemporary law of war, even though many of the issues faced by Lincoln and his commanders are now governed by specific treaty rules. Knowing what military necessity was thought to mean when the principle was first formulated should be useful to those who must apply it in the future.

By the time he approved the Lieber Code in early 1863, Lincoln had already given considerable thought to the meaning of necessity in a military context, and he probably regarded military necessity as a general principle of law even before seeing Lieber’s draft. A lifelong proponent of reason over intuition and emotion,<sup>33</sup> Lincoln adopted a legal method marked by “directness of thought,” taking “the shortest distance between two legal points.”<sup>34</sup>

His mind worked in terms of basic ideas presented as fundamentals. There was about him no effulgent erudition, no fountain of learning, no spray of new thoughts and ideas flickering out like so many sparks from an emery wheel. . . . His was the mental process of a pile driver landing directly on point.<sup>35</sup>

For such a mind, the doctrine of military necessity had a powerful attraction as organizing principle and foundation for political and military action in defense of the Union. “Lincoln’s legal guideline was the preservation of the Union. He believed he had the power to do what was in his sober judgment necessary for that purpose. What was not necessary he would not attempt.”<sup>36</sup> Moreover, “[t]he borders of necessity were a practical, meaningful thing to him.”<sup>37</sup>

#### *Political Objectives*

The most fundamental limitation on military necessity revealed in Lincoln’s decisions was that it could be invoked only to attain a military objective, i.e., one that could have an impact on the battlefield, and never a political objective. This distinction may seem absurd to those who accept Clausewitz’s maxim that war is “a true political instrument, a continuation of political activity by other means.”<sup>38</sup> Yet the distinction was central to Lincoln’s constitutional theory of presidential war powers.

In the 1860 presidential election, Lincoln and the Republican Party had consistently run on the position that, under the Constitution, Congress could not interfere with the domestic institutions, including slavery, of any state, or take private property without compensation.<sup>39</sup> Because the Union was permanent, in his view, the states could not

<sup>33</sup> See DAVID HERBERT DONALD, *LINCOLN* 82–83 (1995); MICHAEL BURLINGAME, *THE INNER WORLD OF ABRAHAM LINCOLN* 7 (1994); Daniel Howe, *Why Abraham Lincoln Was a Whig*, 16 J. ABRAHAM LINCOLN ASS’N 27 (1995).

<sup>34</sup> JOHN FRANK, *LINCOLN AS A LAWYER* 144, 146 (Americana House 1991) (1961).

<sup>35</sup> *Id.* at 144.

<sup>36</sup> *Id.* at 150–51.

<sup>37</sup> *Id.* at 150.

<sup>38</sup> CARL VON CLAUSEWITZ, *ON WAR* 87 (Michael Howard & Peter Paret ed. and trans., 1976) (1832).

<sup>39</sup> See, e.g., First Inaugural Address (Mar. 4, 1861), in *LINCOLN*, *supra* note 22, at 215; Speech at Cincinnati, Ohio (Sept. 17, 1859), in *id.* at 59–61.

secede, and relations between the federal Government and the states were governed by the Constitution throughout the Civil War.<sup>40</sup>

If the Civil War was a war for the federal Constitution, it had to be conducted in a manner consistent with that document. Lincoln had to demonstrate to the people of the North, and to pro-Union elements in the wavering border states, that “law would rule this conflict” and that “the government was being steered by a hand stronger than partisan caprice.”<sup>41</sup> The constitutional definition of treason suggested that individuals might “levy war” against the United States.<sup>42</sup> Once a relationship of “war” existed, the President could deal with American rebels on the basis of the international law of war.<sup>43</sup> Unfortunately, that body of law placed few real limits on the treatment of enemy civilians or their property.

Hence the political appeal, to Lincoln, of the doctrine of military necessity as part of the law of war. Interference with property, slavery, civil government and other state institutions for *military* purposes could be constitutionally justified as an exercise of the President’s war powers. To take the same actions for *political* purposes, however, might go beyond the powers even of Congress. The identification of a narrowly military purpose for federal acts in relation to rebel civilians was therefore essential, in Lincoln’s view, to the constitutionality of those acts. Two of Lincoln’s letters, one from early in the war and the other from its final months, illustrate the continuity of his reasoning on this issue.

At the end of August 1861, General John C. Fremont declared martial law in Missouri. He then issued a proclamation that confiscated the property of Missourians supporting the Confederate cause and freed their slaves. At that time, Lincoln was making special efforts to keep Kentucky, a slave state that had declared itself neutral in the war, within the Union.<sup>44</sup> Concerned that Fremont’s emancipation decree would alienate Kentucky, Lincoln first suggested, and then ordered, that the decree be modified.<sup>45</sup>

Lincoln later justified this action to Senator Orville Browning in terms of both the political need to mollify slaveholders in Kentucky and the proper application of military necessity:

Genl. Fremont’s proclamation, as to confiscation of property, and the liberation of slaves, is *purely political*, and not within the range of *military* law, or necessity. If a commanding General finds a necessity to seize the farm of a private owner, for a pasture, an encampment, or a fortification, he has the right to do so, and to so hold it, as long as the necessity lasts; and this is within military law, because within military necessity. But to say that the farm shall no longer belong to the owner, or his heirs forever; and this as well when the farm is not needed for military purposes as when it is, is purely political, without the savor of military law about it. And the same is true of slaves. If the General needs them, he can seize them, and use them; but when the need is past, it is not for him to fix their permanent future condition. That must be settled according to laws made by law-makers, and not by military proclamations. . . .

<sup>40</sup> See DONALD, *supra* note 33, at 302–03.

<sup>41</sup> PHILLIP S. PALUDAN, THE PRESIDENCY OF ABRAHAM LINCOLN 79, 75 (1994).

<sup>42</sup> “Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.” U.S. CONST. Art. II, §3.

<sup>43</sup> “I think the constitution invests its commander-in-chief, with the law of war, in time of war.” Letter, Lincoln to James Conkling (Aug. 26, 1863), in LINCOLN, *supra* note 22, at 495, 497. Cf. LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 52 (1972): “He [the President] can exercise the rights which the state-of-war accords the United States under international law in regard to the enemy as well as to neutrals.”

<sup>44</sup> See JAMES MCPHERSON, BATTLE CRY OF FREEDOM 352–53 (1988); STEPHEN OATES, WITH MALICE TOWARD NONE 280–83 (New American Library 1978) (1977).

<sup>45</sup> See Letters, Lincoln to John C. Fremont (Sept. 2 and 11, 1861), in LINCOLN, *supra* note 22, at 266–67. As modified, Fremont’s proclamation affected only property and slaves directly used in the Confederate war effort. See MCPHERSON, *supra* note 44, at 353.

I do not say that Congress might not with propriety pass a law, on the point, just such as General Fremont proclaimed. . . . What I object to, is, that I as President, shall expressly or impliedly seize and exercise the permanent legislative functions of the government.<sup>46</sup>

Lincoln may appear to have repudiated this reasoning when he issued his own preliminary emancipation proclamation exactly one year later. On September 22, 1862, acting on his authority as Commander in Chief, the President declared that after January 1, 1863, “all persons held as slaves” in any area in rebellion against the U.S. Government would be “forever free.”<sup>47</sup> Yet there are crucial differences between Fremont’s proclamation and Lincoln’s that make the latter more justifiable as a measure of military necessity.

Fremont’s order would have freed slaves to punish disloyal activities of the slaveholder, regardless of whether those slaves were used, or were available to be used, in support of the Confederate war effort. Insofar as it established a specific penalty for individual disloyalty, the order was political and legislative, rather than military, in character. Lincoln’s order, on the other hand, applied only to slaves in areas under rebel control, whose labor was thus available to support the Confederate war effort. The promise of freedom encouraged those slaves to escape to Union territory, denying their services to the Confederacy.

Lincoln’s distinction between political and military measures had a distant echo after the so-called Christmas Bombing of North Vietnam in 1972. On December 13 of that year, negotiations to end the long American involvement in the Vietnam War ended without an agreement, largely because of the last-minute intransigence of the North Vietnamese delegation. Five days later, the United States began an eleven-day bombing campaign in Hanoi and Haiphong, North Vietnam.<sup>48</sup> The targets of the campaign, known as Linebacker II to the U.S. military but dubbed the Christmas Bombing in the popular media, were military installations or war-supporting industries, all within the traditional definition of military objectives in international law.<sup>49</sup> The purpose of the campaign, however, was not to respond to a new military threat from North Vietnam. Rather, it was to induce the North Vietnamese Government to return to the negotiating table. One official history summarized the purposes of Linebacker II as follows: “Heavy bombardment on a concentrated, massive scale against the North Vietnamese ability to make war was the method selected to bring the point home.”<sup>50</sup>

Three years later, Hamilton DeSaussure and Robert Glasser questioned the international legality of the Linebacker II raids on the basis of their political motivation: “[C]an air attacks ever be justified when the predominant purpose of the raid is political and when political, not military, advantages are the immediate end sought by the specific attacks . . . ?”<sup>51</sup> They later suggested that “even attack on military objectives may be

<sup>46</sup> Letter, Lincoln to Orville H. Browning (Sept. 22, 1861), in LINCOLN, *supra* note 22, at 268–69 (emphasis in original).

<sup>47</sup> Preliminary Emancipation Proclamation (Sept. 22, 1862), in *id.* at 368. Concern over charges that Lincoln was usurping legislative functions, a concern he had denounced to Senator Browning a year earlier, may account for the President’s decision to include lengthy statutory quotations in the proclamation, *see id.* at 369–70.

<sup>48</sup> See MARTIN HERZ, *THE PRESTIGE PRESS AND THE CHRISTMAS BOMBING*, 1972, at 6–12 (1980).

<sup>49</sup> *See id.* at 23 (air bases, rail yards and shipyards, antiaircraft sites, communications facilities, vehicle repair shops, warehouses, power plants, railway bridges, truck parks and radar installations); JAMES MCCARTHY & GEORGE ALLISON, *LINEBACKER II: A VIEW FROM THE ROCK* 41–42, 97–98, 101, 122–23 (U.S. Air Force Southeast Asia Monograph Series Vol. VI, monograph 8, 1979) (airfields, surface-to-air missile storage sites, petroleum product storage, railroad yards, transformer station).

<sup>50</sup> MCCARTHY & ALLISON, *supra* note 49, at 1.

<sup>51</sup> Hamilton DeSaussure & Robert Glasser, *Air Warfare—Christmas 1972*, in *LAW AND RESPONSIBILITY IN WARFARE* 119, 133 (Peter D. Trooboff ed., 1975).

unjustified when the military advantage to be gained is not significant and political motives for the attack predominate."<sup>52</sup>

This critique, however, presses the distinction between military and political acts too far for practical application. As Clausewitz noted, war itself is a political act. Any major military operation will emanate from both military and political motivations. In World War II, for example, the "predominant purpose" of the Normandy invasion of June 6, 1944, might be considered a military goal (defeating the German army in France), a political goal (the unconditional surrender of Germany) or a mixed goal (liberation of France).

Similarly, in the American Civil War, the "predominant purpose" of all federal offensive operations was the political goal of reestablishing U.S. government authority over the states that had seceded from the Union. According to one historian, President Lincoln's role in "shaping a national strategy of unconditional surrender by the Confederacy" was his most important strategic contribution to the Union victory. This national strategy, in turn, gave purpose to "a military strategy of total war."<sup>53</sup>

Finally, if the legality of an attack turns on the motivation or predominant purpose of the highest governmental authority approving it, it will be impossible for an objective observer to determine whether the attack was justified by military necessity. Governments do not willingly publicize the records of their innermost councils, especially during wartime.

In distinguishing the military from the political in his letter to Senator Browning on General Fremont's decree, Lincoln took a more practical approach. He never speculated on Fremont's motives for freeing the slaves and confiscating the property of rebel sympathizers. Rather, he looked to the effects that under ordinary circumstances could logically be inferred from Fremont's actions. A military commander may seize whatever his command needs, and "so hold it, as long as the necessity lasts." A field commander, however, would ordinarily have no need to change the ownership of real property or the status of enslaved persons permanently; "when the need is past, it is not for him to fix their permanent future condition."<sup>54</sup> The proper punishment for disloyalty was a political question for the legislature and the courts, not the military.

Lincoln's distinction between acting for military advantage and acting to punish disloyalty emerged more clearly in another letter, written over three years later. On January 20, 1865, Lincoln ordered the federal military commander in Arkansas to look into the complaint of a woman whose house and furniture had been seized by his forces in the name of the U.S. Government. The President noted that she claimed to own this property "independently of her husband," who was a member of the rebel army.

It would seem that this seizure has not been made for any Military object, as for a place of storage, a hospital, or the like, because this would not have required the seizure of the furniture, and especially not the return of furniture previously taken away.

The seizure must have been on some claim of *confiscation*, a matter of which the courts, and *not* the Provost-Marshal, or other military officers are to judge.<sup>55</sup>

Noting that the questions raised by this case involved the ownership of the property, whether either spouse was a traitor, and whether the husband's treason made the wife's property confiscable, the President continued:

<sup>52</sup> *Id.* at 137.

<sup>53</sup> McPherson, *supra* note 10, at 40.

<sup>54</sup> See text at note 46 *supra*.

<sup>55</sup> Letter, Lincoln to Joseph J. Reynolds (Jan. 20, 1865), in LINCOLN, *supra* note 22, at 667, 668 (emphasis in original). A provost-marshal is "the head of the military police of any post, camp, city or other place in military occupation, or district under the reign of martial law." BLACK'S LAW DICTIONARY 1391 (4th ed. 1951).

The true rule for the Military is to seize such property as is needed for Military uses and reasons, and let the rest alone. Cotton and other staple articles of commerce are seizable for military reasons. Dwelling-houses & furniture are seldom so. If Mrs. Morton is playing traitor, to the extent of practical injury, seize her, but leave her house to the courts.<sup>56</sup>

### *Civil Justice*

In 1865, as in 1861, Lincoln believed that punishment of treason was not within military necessity, even though armed force might be required to suppress treason.<sup>57</sup> Similarly, the demands of according civil justice to loyal citizens of the United States did not create a military necessity. Following precedents from the American Revolution, in May 1861 the Confederate government confiscated, as enemy property, all debts owed by persons in its territory to creditors in federal territory, and directed that payment be made to the Confederate treasury.<sup>58</sup> As federal armies began to take control of more and more rebel territory in the latter half of 1861, the administration was urged to use military power to assist loyal creditors.

In his 1861 annual message to Congress, President Lincoln noted that there were “no courts nor officers to whom the citizens of other States may apply for the enforcement of their lawful claims against citizens of the insurgent States” in enemy territory recently occupied by federal forces, and that some had estimated the debt owed “from insurgents, in open rebellion, to loyal citizens” as being as high as two hundred million dollars. He nevertheless refused to regard this as a proper sphere for military action:

Under these circumstances, I have been urgently solicited to establish, by military power, courts to administer summary justice in such cases. I have thus far declined to do it, not because I had any doubt that the end proposed—the collection of the debts—was just and right in itself, but because I have been unwilling to go beyond the pressure of necessity in the unusual exercise of power. But the powers of Con-

<sup>56</sup> Letter, Lincoln to Reynolds, *supra* note 55, at 668.

<sup>57</sup> As Lincoln was aware, military trial and punishment for certain war-related offenses are generally regarded as justified by military necessity. Such offenses include espionage and sabotage, *see, e.g., Ex parte Quirin*, 317 U.S. 1 (1942); Lieber Code, *supra* note 4, Art. 88; war crimes (i.e., violations of the laws and customs of war, such as the murder of civilians and prisoners of war), *see, e.g., In re Yamashita*, 327 U.S. 1 (1946); Trial of Captain Henry Wirz (U.S. Mil. Comm’n 1866), in 1 *THE LAW OF WAR: A DOCUMENTARY HISTORY* 783 (Leon Friedman ed., 1972); *cf.* Lieber Code, *supra*, Art. 59 (“A prisoner of war remains answerable for his crimes committed against the captor’s army and people, committed before he was captured . . .”); and assassination. The assassins of President Lincoln, for example, were tried and convicted by a military commission on the theory that they had acted to aid the Confederate government during the Civil War. *See* U.S. War Department, General Court-Martial Orders No. 356 (July 5, 1865), in 6 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS* 342–48 (James Richardson ed., 1907).

In the war with Mexico of 1846–1848, General Winfield Scott initiated the practice of using military commissions to try offenses against the law of war. *See* K. JACK BAUER, *THE MEXICAN WAR* 253, 326–27 (1974). “Military commissions,” General Halleck wrote, “differ from courts-martial in that the latter are established by statute and have only such jurisdiction as the law confers, while the former are established by the President, by virtue of his war power as commander-in-chief, and have jurisdiction in cases arising under the laws of war.” In addition, “courts-martial exist in peace and war, but military commissions are war courts and can exist only in time of war.” Henry W. Halleck, *Military Tribunals and Their Jurisdiction*, *MIL. L. REV. BICENTENNIAL ISSUE* 15, 21 (1975). General Halleck was Commanding General of the U.S. Army in 1862–1864; the article quoted was probably written in 1864. *See id.* at 15 note. The United States continued to use military commissions through World War II to try offenses against the law of war. *See In re Yamashita* and *Ex parte Quirin*, *supra*. The 1949 Geneva Conventions, however, require that prisoners of war be tried by the same courts, using the same procedures, as try members of the detaining power’s own armed forces. *See* Convention on Treatment of Prisoners of War, Aug. 12, 1949, Art. 102, 6 UST 3316, 75 UNTS 135. This requirement probably precludes the use of military commissions to try members of the enemy’s armed forces.

<sup>58</sup> *See* MCPHERSON, *supra* note 44, at 437. This action provided short-term financial relief to the Confederate war effort. By confiscating private property of enemy civilians, however, it also set a precedent that Lincoln turned against the Confederacy in the Emancipation Proclamation.

gress I suppose are equal to the anomalous occasion, and therefore I refer the whole matter to Congress . . . .<sup>59</sup>

Congress did not act, however, and as the war progressed, the U.S. Army found that it could not operate in the midst of a civilian population and simply ignore that population's demands for justice. Civil chaos provoked crimes against the army and its property, undermined discipline within the army, and created fertile ground for guerrilla activity. Under the "pressure of necessity," federal commanders therefore established "provost courts" to administer justice in occupied regions, and Lincoln himself approved the creation, by U.S. military authorities, of a provisional civil court in occupied Louisiana.<sup>60</sup>

Later, of course, Article 43 of the Hague Regulations declared the obligation of an occupying commander to "take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."<sup>61</sup> The American army, however, had already discovered that military necessity itself often dictated the need for such measures.

Recently, peacekeeping forces in Somalia and the former Yugoslavia have found themselves facing similar issues. International peacekeeping forces have occasionally exercised law enforcement powers over a population or territory.<sup>62</sup> If such powers are not included in the force's mandate, however, pressure may build for the force to assume them as a matter of necessity.

In particular, such pressure has arisen when an effective civilian government that the peacekeeping force can deal with is lacking. In 1993, for example, substantial military resources were devoted to an unsuccessful effort to arrest clan leader Mohamed Aidid for attacks on the United Nations peacekeeping force in Somalia.<sup>63</sup> The civil chaos in Somalia undoubtedly played a role in undermining the discipline of the peacekeeping forces there, some of whom committed atrocities against the very population they were sent to protect.<sup>64</sup>

Similar, but less serious, difficulties have been raised by the presence in Bosnia of persons charged with war crimes by the International Criminal Tribunal for the former Yugoslavia. The official policy of the Stabilization Force maintained by the United Nations and the North Atlantic Treaty Organization in the former Yugoslavia is that it should not go out of its way to apprehend such persons. On the other hand, the force has been directed to detain these suspects if they are encountered in the course of routine peacekeeping operations. Pressure has nevertheless mounted for the force to take a more active role in pursuing war criminals, and on at least one occasion NATO responded to that pressure by launching a special operation that captured one suspect and killed another.<sup>65</sup>

During the Civil War, President Lincoln and his commanders turned to the doctrine of military necessity as authority for provost courts when they found that their armies

<sup>59</sup> Annual Message to Congress (Dec. 3, 1861), in LINCOLN, *supra* note 22, at 279, 287.

<sup>60</sup> See HYMAN, *supra* note 8, at 199-202.

<sup>61</sup> Regulations, *supra* note 18, Art. 43. For extended commentary on this obligation, see BENVENISTI, *supra* note 31.

<sup>62</sup> See THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 588 (Bruno Simma ed., 1994).

<sup>63</sup> See LOUIS FISHER, PRESIDENTIAL WAR POWER 153-54 (1995).

<sup>64</sup> See Ben Barber, *U.S. officers concede knowing of atrocities*, WASH. TIMES, July 27, 1997, at A1. "There was constant pressure from the looters and thieves," Gen. Zinni said. "They attempted to snatch weapons and food. We had to be constantly on the alert. At night they came over the walls to steal." *Id.* at A10. Lt. General Tony Zinni had been director of operations of the UN force in Somalia. Cf. THE CHARTER OF THE UNITED NATIONS, *supra* note 62, at 586 ("UNOSOM soldiers also killed civilians. All this led to a very serious political controversy over the mandate of the force.").

<sup>65</sup> See Bradley Graham & Rick Atkinson, *NATO Remains Uncertain About Future Pursuit of Suspected War Criminals*, WASH. POST, July 19, 1997, at A16; Bradley Graham, *U.S. Push Against Bosnian War Criminals Urged*, WASH. POST, July 16, 1997, at A15; Edward Cody & Jonathan C. Randal, *NATO Moves on War Crimes Suspects*, WASH. POST, July 11, 1997, at A1; John F. Harris & Dana Priest, *Alliance Gets Aggressive on Arrests*, *id.*

could not operate effectively in a lawless environment. Despite the negative reaction that followed the futile effort to capture General Aidid in Somalia, it seems likely that similar legal powers may be inferred where civil chaos prevents international peacekeepers from functioning.<sup>66</sup>

### *Religion*

Religion was another subject that President Lincoln had placed off limits to Union commanders in the Civil War. In 1862, for example, federal military authorities ordered the Reverend Samuel McPheeters of the First Presbyterian Church in Saint Louis to leave Missouri because of his “rebel wife, rebel relatives” and Confederate sympathies.<sup>67</sup> Control of his church was also taken away from the regular trustees. Mr. McPheeters went to Washington to appeal personally to the President, who thereafter wrote to the federal commander in Missouri that, “after talking to him, I tell you frankly, I believe he does sympathize with the rebels; but the question remains whether such a man, of unquestioned good moral character, . . . can, with safety to the government be exiled, upon the suspicion of his secret sympathies.”<sup>68</sup> Despite these misgivings, Lincoln deferred to the commander “on the spot . . . if, after all, you think the public good requires his removal.”<sup>69</sup> On one point, however, Lincoln was firm:

But I must add that the U.S. government must not, as by this order, undertake to run the churches. When an individual, in a church or out of it, becomes dangerous to the public interest, he must be checked; but let the churches, as such[,] take care of themselves. It will not do for the U.S. to appoint Trustees, Supervisors, or other agents for the churches.<sup>70</sup>

He made the point in the last month of the war, in relation to churches in occupied Louisiana; church property may be seized for military reasons, but church institutions should not be controlled by the military.

While I leave this case to the discretion of Gen. Banks, my view is, that the U.S. should not appoint trustees for or in any way take charge of any church as such. If the building is needed for military purposes, take it; if it is not so needed, let its church people have it, dealing with any disloyal people among them, as you deal with other disloyal people.<sup>71</sup>

A similar aversion to dealing with military problems on the basis of religious concerns was evidenced by the President’s revocation of General Grant’s bizarre order expelling “Jews as a class” from his area of operations.<sup>72</sup>

### *Destruction of Property*

Lincoln’s letters to Senator Browning and General Reynolds reflect a distinct expansion of his thought on the actions military necessity would justify. In 1861 Lincoln

<sup>66</sup> A U.S. Department of Defense spokesman has already stated that the NATO Stabilization Force in Bosnia is authorized to use “whatever means they need to” in order to detain indicted war criminals. See News Briefing by Assistant Secretary of Defense Kenneth Bacon, Dep’t of Defense News Release (June 11, 1996).

<sup>67</sup> See RICHARD S. BROWNLEE, *GRAY GHOSTS OF THE CONFEDERACY* 164 (U. of Missouri 1984) (1958).

<sup>68</sup> Letter, Lincoln to Samuel R. Curtis (Jan. 2, 1863), in LINCOLN, *supra* note 22, at 426, 426–27.

<sup>69</sup> *Id.* at 427. General Curtis responded to the President’s unsubtle hint and revoked the exile order. See BROWNLEE, *supra* note 67, at 164.

<sup>70</sup> Letter, Lincoln to Curtis, *supra* note 68, at 427. Almost a year later, Lincoln received a petition from several citizens of Saint Louis to restore McPheeters “to all his ecclesiastical rights.” Clearly irritated, and suspecting that he was being drawn into an internal dispute between members of the congregation, he replied by quoting his directions to General Curtis, and went on to write that he had “never interfered, nor thought of interfering, as to who shall preach in any church . . . . If any one is so interfering, by color of my authority, I would like to have it specifically made known to me.” Letter, Lincoln to Oliver D. Filley (Dec. 22, 1863), in LINCOLN, *supra* note 22, at 562, 563.

<sup>71</sup> Endorsement Concerning New Orleans Churches (Mar. 15, 1864), in *id.* at 580.

<sup>72</sup> See, e.g., MARK NEELY, *THE LAST BEST HOPE OF EARTH* 149 (1993).

conceived of military necessity as covering the seizure of resources primarily for the use of U.S. forces. By 1865, however, he was noting that “[c]otton and other staple articles of commerce are seizable for military reasons.” How did seizure of “staple articles of commerce” come to be considered a matter of military necessity?

At the beginning of the war, Lincoln recognized military necessity as a limitation on the old doctrine that all private or public property of the enemy could be confiscated. This restraint gradually loosened as the war progressed. Thus, in his proclamation calling out the militia after the fall of Fort Sumter, the President ordered that “the utmost care . . . be observed . . . to avoid any devastation, any destruction of, or interference with, property, or any disturbance of peaceful citizens in any part of the country.”<sup>73</sup> A year later, however, he ordered federal commanders to “seize and use any property, real or personal, which may be necessary or convenient for their several commands, as supplies, or for other military purposes.”<sup>74</sup> A year after that, defending the Emancipation Proclamation as a proper war measure, he argued that depriving the enemy of usable resources was justified by military necessity:

The most that can be said, if so much, is, that slaves are property. Is there—has there ever been—any question that by the law of war, property, both of enemies and friends, may be taken when needed? And is it not needed whenever taking it, helps us, or hurts the enemy? Armies, the world over, destroy enemies’ property when they can not use it; and even destroy their own *to keep it from the enemy*.<sup>75</sup>

The seizure and destruction of cotton was a logical step in the expansion of military necessity. Union armies seized cotton not for their own use, or because of its intrinsic military value to the Confederate army, but to deny it to the enemy as an “article of commerce.” As an agricultural region with little manufacturing capability, the Confederacy relied on exports, primarily of cotton, to finance foreign purchases of arms and other war matériel. Lincoln was therefore claiming a right, under military necessity, to destroy not merely military goods, but economic resources that could buy those goods.

This right was upheld by a U.S.-British arbitral tribunal after the war. Several claims were submitted for the destruction of British-owned cotton by federal raiding parties in the South. The United States successfully defended the destruction as justified by military necessity, in light of the special position of cotton as the South’s staple crop.<sup>76</sup> Other cases upholding the destruction of British-owned economic resources in the South include the burning of a sawmill that had provided ties for Confederate railroads<sup>77</sup> and the razing of an iron and brass foundry.<sup>78</sup>

By the end of the Civil War, then, the scope of destruction authorized by military necessity extended not only to property of direct military use, but, as Lincoln had written to Conkling, to any property that “helps us, or hurts the enemy,” including the economic infrastructure supporting the enemy war effort. The destructive implications of this doctrine were not fully realized until the development of strategic bombing in the twentieth century.<sup>79</sup>

<sup>73</sup> Proclamation Calling Militia and Convening Congress (Apr. 15, 1861), in LINCOLN, *supra* note 22, at 232.

<sup>74</sup> Lincoln, order to Edwin M. Stanton (July 22, 1862), in *id.* at 342, 342–43.

<sup>75</sup> Letter, Lincoln to James C. Conkling (Aug. 26, 1863), in *id.* at 495, 497 (emphasis added).

<sup>76</sup> See Report of the U.S. Agent, 6 PAPERS RELATING TO THE TREATY OF WASHINGTON 52–53 (1874). The widely recognized position of cotton in the Southern economy had also led even conservative Union generals like McClellan to approve its destruction. See GRIMSLEY, *supra* note 10, at 55–56.

<sup>77</sup> See Cox’s Case (U.S. v. Gr. Brit.), 6 PAPERS RELATING TO THE TREATY OF WASHINGTON, *supra* note 76, at 51.

<sup>78</sup> See Smyth’s Case (U.S. v. Gr. Brit.), *id.*

<sup>79</sup> Article 2 of the Hague Convention [IX] on Bombardment by Naval Forces in Time of War, Oct. 18, 1907, 36 Stat. 2351, reprinted in ARMED CONFLICTS, *supra* note 2, at 811, retreated from Civil War practice by authorizing destruction only of “military or naval establishments, depots of arms or war matériel, workshops or plant which could be utilized for the needs of the hostile fleet or army.” Article 24(2) of the draft 1922/23 Hague Rules

*The Expanding Limits of Military Necessity*

After beginning the Civil War with a promise to respect private property and not interfere with slavery in the rebellious states, President Lincoln eventually supported, as military necessities, the destruction of cotton, railroads and other economic resources, and the freeing of all slaves in rebel areas. The continually expanding reach of military necessity might seem to support Confederate Secretary of War Seddon's assertion that the doctrine was merely codified mischief. This progression was not an inherent process, or a case of Lincoln's gradually learning the "true" limits of military necessity. Rather, the proper limits of military necessity changed as Lincoln's national war strategy developed.

The historian James B. McPherson has identified four stages in this development. At first, Lincoln viewed the war as a domestic insurrection whose suppression would require little more than a police action. This limited war strategy was based on the assumption that a majority of Southerners were loyal to the Union, and had merely been swept away by the passions of the moment when they voted for secession.<sup>80</sup> This strategy ended with the Union defeat at Bull Run, Virginia, in 1861. It was replaced by a second limited war strategy that aimed at conquering and occupying Confederate territory, without altering slavery or other fundamental Southern institutions.<sup>81</sup> In 1862 this strategy was abandoned in the face of Confederate victories in battle, to be replaced in turn by a strategy that focused on the destruction of the Confederate armies. Almost simultaneously, the final stage was reached, extending to the destruction of any resources, including the institution of slavery, that supported those armies, and the utilization of any resources, including the enlistment of freedmen, that could support the federal armies.<sup>82</sup> In the starkest terms, private property and Southern institutions would be destroyed as a means of destroying Southern armies.

## THE CONTINUING LIMITS OF MILITARY NECESSITY

It has recently been suggested that the "object of [a] war" is no longer a suitable factor to consider in assessing the military necessity of an action, because "its meaning may be indefinitely extended," which permits greater destruction as the war aims expand on one or both sides.<sup>83</sup> While superficially appealing, this suggestion, if generally adopted, could easily have the opposite effect to that intended. Applying military necessity without regard to the political goals of the conflict would inevitably authorize all

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of Air Warfare were similarly restrictive of attacks against economic infrastructure, authorizing destruction only of "factories constituting important and well-known centres engaged in the manufacture of arms, ammunition or distinctively military supplies; [and] lines of communication or transportation used for military purposes." ARMED CONFLICTS, *supra*, at 207, 210. The Hague Rules never entered into force, and were disregarded by all sides in World War II. See, e.g., MCDUGAL & FELICIANO, *supra* note 6, at 640–52. The current state of the law is summarized in the official U.S. Air Force publication on the law of war as follows:

Controversy exists over whether, and the circumstances under which, . . . objects, such as civilian transportation and communications systems, dams and dikes can be classified properly as military objectives. The inherent nature of the object is not controlling since even a traditionally civilian object, such as a civilian house, can be a military objective when it is occupied and used by military forces during an armed engagement. A key factor in classification of objects as military objectives is whether they make an effective contribution to an adversary's military action so that their capture, destruction or neutralization offers a definite military advantage in the circumstances ruling at the time. . . . Destruction as an end in itself is a violation of international law, and there must be some reasonable connection between the destruction of property and the overcoming of enemy military forces.

U.S. DEPT OF THE AIR FORCE, *supra* note 6, para. 5-3b(2) (citation omitted).

<sup>80</sup> See McPherson, *supra* note 10, at 41–42.

<sup>81</sup> See *id.* at 43–44.

<sup>82</sup> See *id.* at 45–48.

<sup>83</sup> Henri Meyrowitz, *The Principle of Superfluous Injury or Unnecessary Suffering*, INT'L REV. RED CROSS, Mar.–Apr. 1994, at 98, 106–07.

destruction that could be linked in any way to military advantage; in the eyes of the law, all wars would be total wars.

To be sure, the objects of wars have always tended to expand or shift in ways that permit greater destruction at the end of conflicts than at the beginning. Yet this process has not always been taken to its logical extreme, and even toward the end of lengthy conflicts, certain levels of destruction may be considered unnecessary in light of the belligerents' goals. If military necessity were completely cut off from the objects of war, these residual restraints would presumably be jettisoned as well.

As an example, consider again the strategic stages Professor McPherson identified in the American Civil War. At each stage of strategy, military necessity dictated the imposition of different limits on the destruction and seizure of civilian property. Even at the final stage, destruction was not indiscriminate and military necessity did not amount to *Kriegsraison*. The fundamental distinction between combatants and noncombatants was maintained throughout the war.<sup>84</sup> Even in the final stage, President Lincoln insisted on a rational connection between military action and defeat of the enemy. He consistently rejected military interference with religious institutions and the destruction of property merely to harass or punish persons of opposing loyalties.

The status of private houses and their furnishings is one "bright line" that most Union officers and soldiers observed.<sup>85</sup> As Lincoln stated, "Cotton and other staple articles of commerce are seizable for military reasons. Dwelling-houses & furniture are seldom so."<sup>86</sup>

In Virginia, General David Hunter's burning of the home of former Governor John Letcher in 1864 was widely criticized in both the North and the South. Confederate forces then burned Chambersburg, Pennsylvania, in retaliation.<sup>87</sup> Thereafter, President

<sup>84</sup> See GRIMSLEY, *supra* note 10, at 222–25. After reviewing the historical evidence, Grimsley rejects characterizing the Civil War as a "total war" in the 20th-century sense.

<sup>85</sup> See *id.* at 174–79, 198–99. The march of Sherman's army through South Carolina was an exception. The average federal soldier regarded South Carolina as responsible for the war, and destruction of private houses was far more widespread than it had been in Georgia, or would later be in North Carolina. *Id.* at 201–02.

<sup>86</sup> See text at note 56 *supra*. Even General Sherman, whose campaigns in Georgia and the Carolinas have become a byword for "hard," destructive war, ordered that private homes were not to be molested:

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, and to drive in stock in sight of their camp. To regular foraging-parties must be intrusted [*sic*] the gathering of provisions and forage, at any distance from the road traveled.

BURKE DAVIS, *SHERMAN'S MARCH 31* (Vintage Books 1988) (1980) (quoting Sherman's Field Orders, Nov. 14, 1864). Unfortunately, General Sherman did little to enforce this order, and may have correctly concluded that its enforcement would be impossible in a volunteer army of individualistic 19th-century Americans. Most of the looting and destruction of private homes on Sherman's march was carried out by unofficial foraging parties. See GRIMSLEY, *supra* note 10, at 191–93; DAVIS, *supra*, at 36–37. One of the weaknesses of the Lieber Code was that it did not deal with a commander's responsibility for ensuring that his soldiers comply with the laws of war. The issue was not widely recognized until the war crimes trials following World War II. See, e.g., *The High Command Case*, 15 ILR 376, 384–92 (U.S. Mil. Trib. Nuremberg, 1948); *In re Yamashita*, 327 U.S. 1 (1946). Query whether Sherman would be responsible under contemporary concepts of command responsibility. Some of Sherman's subordinate generals did punish looting in a few cases, see DAVIS, *supra*, at 42–43, and even Sherman himself made some efforts to prevent looting and return stolen property, *id.* at 189–90. During the night of February 17–18, 1865, when Columbia, South Carolina, was burned and looted, 370 looters were arrested and 30 wounded by military guards. On the other hand, in at least one incident General Sherman had direct knowledge of the destruction of an abandoned private home (it was set on fire as he left after having slept there) and took no action to punish those responsible, see *id.* at 142. For the current state of international law on this issue, see W. Hays Parks, *Command Responsibility for War Crimes*, MIL. L. REV., Fall 1973, at 1.

<sup>87</sup> See GRIMSLEY, *supra* note 10, at 179–80. Hunter claimed that the house had been burned in lawful retaliation for Letcher's effort to incite guerrilla warfare in Hunter's rear:

I found here a violent and inflammatory proclamation from John Letcher, lately Governor of Virginia, inciting the population of the country to rise and wage a guerrilla warfare on my troops, and ascertaining

Lincoln asked General Ulysses Grant to conclude an agreement with Confederate Commanding General Robert E. Lee “for a mutual discontinuance of house-burning and other destruction of private property.”<sup>88</sup>

By proposing, even at the latest stages of the Civil War, that special consideration be given to the treatment of private houses, Lincoln was taking a position that would continue to live into the twentieth century. The 1907 Hague Regulations on land warfare specifically forbade bombardment of undefended “dwellings,” as did the 1907 Convention on naval bombardment.<sup>89</sup> The commission of jurists that drafted the 1923 Rules of Air Warfare similarly listed “dwellings” as immune from air attack if situated outside the neighborhood of land operations.<sup>90</sup> Most recently, Protocol Additional I to the Geneva Conventions cites “a house or other dwelling” as the type of objects that should be “presumed” not to be military objectives.<sup>91</sup>

One need not go back as far as the Civil War to see how a close link between the objectives of war and the principle of military necessity can restrain destruction even late in a lengthy conflict. For example, during most of the Korean War of 1950–1953, irrigation dams in North Korea were not subject to aerial attack. By 1953, however, an apparent impasse had been reached in the Panmunjom truce negotiations. The targeting staff at U.S. Far East Air Force (FEAF) proposed attacking these dams so that the resulting flooding would destroy much of the North Korean rice crop. The Commanding General of FEAF, however, was unwilling to approve attacks against enemy food crops as such, though he did approve air strikes against dams located where the flooding would cut enemy lines of communication. Attacks against food crops were considered a possible option if the enemy should entirely break off the truce negotiations.<sup>92</sup> In fact, a truce was concluded in 1953, and food was never directly targeted.

Throughout most of the Korean War, the United Nations command did not regard destruction of the irrigation dams, in legal terminology, to be a military necessity. In the final days of the conflict, when it became clear that heavier destruction of military objectives was necessary to meet the goals of the war, some attacks were authorized, but there was still no military necessity for attacking food crops as such.

A similar set of events occurred nineteen years later, at the end of U.S. participation in the Vietnam conflict. As noted above,<sup>93</sup> a considerable number of military targets in the vicinity of Hanoi and Haiphong had never been subject to air attack. When peace negotiations broke down in October 1972, President Nixon in effect decided that this new situation created a military necessity for the destruction of those targets, and they were attacked.

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that after having advised his fellow-citizens to this course the ex-Governor had himself ignominiously taken to flight, I ordered his property to be burned under my order, published May 24, against persons practicing or abetting such unlawful and uncivilized warfare.

Report of Major General David Hunter (Aug. 8, 1864), in 37 WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, pt. 1, at 96, 97 (Robert Scott ed., ser. 1, 1891).

<sup>88</sup> Telegram, Lincoln to Lt. General Grant (Aug. 14, 1864), in LINCOLN, *supra* note 22, at 427, 428.

<sup>89</sup> See Regulations, *supra* note 18, Art. 25; Convention Concerning Bombardment by Naval Forces in Time of War, *supra* note 79, Art. 1.

<sup>90</sup> See Rules of Air Warfare, *supra* note 79, Art. 24(3).

<sup>91</sup> See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, Art. 52, 1125 UNTS 3, *reprinted in* ARMED CONFLICTS, *supra* note 2, at 621.

<sup>92</sup> See ROBERT FUTRELL, THE UNITED STATES AIR FORCE IN KOREA 1950–1953, at 666–69 (rev. ed. 1983). The FEAF staff argued that the rice, most of which was destined for the enemy armed forces, was a legitimate military target, a position with respectable roots in the Lieber Code, *supra* note 4, Article 17: “War is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy.”

<sup>93</sup> See text at notes 48–50 *supra*.

This is not the place to discuss whether or not the previous U.S. assessment (i.e., that attacking Hanoi and Haiphong was not militarily necessary) was correct. The point is that such a judgment had been honestly made by President Johnson, and that this decision effectively limited certain types of destruction until the last days of American participation in the Vietnam War.

#### CONCLUSION: THE PRINCIPLE TODAY, AND IN THE FUTURE

In military manuals and academic texts, military necessity is formally acknowledged as one of the primary foundations of the modern law of war. One would expect, therefore, that the principle would have been frequently invoked whenever that body of law has faced new challenges, such as protecting the environment during combat or responding to the widespread abuse of land mines in the 1980s.

In fact, however, the principle has been notably absent from discussion of these issues. That military necessity was originally a limit on state action, and should still function as a limit, seems to have been forgotten. The modern denigration of military necessity goes back at least to the Nuremberg trials after World War II, where some defendants argued that military necessity justified their atrocities against civilian populations.<sup>94</sup> In an echo of Confederate criticisms of 130 years ago, military necessity is widely regarded today as an insidious doctrine invoked to justify almost any outrage. As a result, the principle has not been allowed to play the creative role that it is capable of playing.

The U.S. Government's response to the land-mine crisis serves as an example. This humanitarian crisis arose from the indiscriminate wartime use of antipersonnel land mines, which have endangered civilians for years or even decades after the conflict has ended. Part of the U.S. response to this situation was a presidential prohibition on the use of antipersonnel land mines by the American armed forces, unless the mines are fitted with devices that will neutralize them after a set period of time.<sup>95</sup>

The only exception to this policy allows the use of permanent land mines in defense of the Korean Demilitarized Zone (DMZ). Since 1953 this zone has followed the course of the cease-fire line that ended hostilities between North and South Korea. In the context of a long-standing, heavily fortified de facto demarcation line separating hostile armies, permanent land mines have obvious military advantages, while the danger to civilians is low.

On its face, this policy appears to be a clear example of the application of the principle of military necessity. The President's military advisers presumably told him that such mines were necessary in Korea but not elsewhere, and the President acted accordingly. Nowhere, however, is this or any other legal principle invoked as a basis for the policy. The President's ban on land-mine use is nothing more than a policy, albeit one adopted in the hope of encouraging the negotiation of a legally binding ban on antipersonnel land mines. As evidence of United States practice in international law, its juridical value is low, since its adoption was not anchored to any acknowledged legal obligation.

From a juridical standpoint, the land-mine policy would have been much stronger had it been clearly based on the principle of military necessity. Suppose the President had adopted a slightly different approach. He might have announced that, in view of the surge in civilian suffering produced by the indiscriminate use of land mines in recent conflicts, he had asked the Secretary of Defense and the Joint Chiefs of Staff to apply the principle of military necessity to reassessing the military need for permanent antipersonnel mines. In response, he could say, they had advised him that in only one location—

<sup>94</sup> See, e.g., *In re Von Leeb* (High Command Case), 15 ILR 376, 397 (U.S. Mil. Trib. Nuremberg, 1948); *In re List* (Hostages Trial), *id.* at 632, 646–47 (U.S. Mil. Trib. Nuremberg, 1948).

<sup>95</sup> See Statement by President Bill Clinton (May 16, 1996), in *New U.S. Mine Policy*, DEFENSE ISSUES No. 40.

the Korean DMZ—was the use of such weapons still necessary. As formulated in the Lieber Code and contemporary military manuals, military necessity permits only that degree of force necessary to defeat the enemy.<sup>96</sup> In accordance with the country's obligations under international humanitarian law, the President would therefore order an end to the use of permanent antipersonnel mines by the United States Armed Forces. As an act reflecting obligations under an existing legal principle, this juridically stronger approach would have been a mightier blow against the use of antipersonnel land mines.

Discussions of environmental warfare have also seen a reluctance to apply the principle of military necessity as a limitation on state action. After the 1991 Persian Gulf war, the U.S. Congress requested that the Defense Department assess various issues that had arisen during that conflict, including the legality of Iraqi "environmental terrorism." After consultation with allied governments, the Department reported that Iraq's deliberate release of crude oil into the Persian Gulf was a war crime under existing international law because it had caused unnecessary destruction of property under Article 23(g) of the 1907 Hague Regulations.<sup>97</sup> While not incorrect, this analysis focused on a collateral effect (loss of property) rather than the central problem (injury to the gulf ecosystem). It is the equivalent, on the international level, of charging a gangster with failure to pay income taxes rather than with the extortion, usury, drug dealing and other crimes that gave rise to the income. What is even more disturbing is that this analysis may suggest that the wild animal and plant life of the gulf are entitled to no protection under the customary laws of war, because they are neither the public property of any government nor the private property of any person.

Iraq's environmental attack appears to have served no military purpose whatsoever, and was a palpable violation of the principle of military necessity. Yet the principle was not invoked in this part of the Defense Department's report to Congress, even though it would have stated a broader and more appropriate legal basis for denouncing Iraq's action.

Today, military necessity is widely regarded as something that must be overcome or ignored if international humanitarian law is to develop, and its original role as a limit on military action has been forgotten. As a result, the principle has not been applied in new situations where it could serve as a significant legal restraint until more specific treaty rules or customs are established.

The reminder that military necessity can limit the destruction of war, beyond serving as a justification for destruction, is the most important legacy of Lieber's development and Lincoln's application of military necessity over 130 years ago. The combination of political prudence, moral care and military realism with which Lincoln used military necessity should serve as a model for military and civilian officials so that the principle may again be applied in situations not governed by any specific rule of humanitarian law.

<sup>96</sup> See U.S. DEPT OF THE NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, para. 6.2.5.5.2 (Naval Warfare Pub. No. 1-14M, 1995); FM 27-10, *supra* note 6, para. 3.a.; Lieber Code, *supra* note 4, Art. 14.

<sup>97</sup> See Department of Defense Report to Congress on the Conduct of the Persian Gulf War—Appendix on the Role of the Law of War, 31 ILM 612, 636-37 (1992); Regulations, *supra* note 18, Art. 23(g).