

## Francis Lieber on Public War

Rotem Giladi\*

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\* SJD (University of Michigan). Post-Doctoral Fellow. Faculty of Law, Hebrew University of Jerusalem. Comments welcome: [rgiladi@umich.edu](mailto:rgiladi@umich.edu).

## Abstract

This paper examines Francis Lieber's concept of modern war as "public war" — in the Code he drafted for the 1863 Union Armies and in his earlier writings. Though Lieber was not the first to engage the distinction between private and public war, his treatment of modern war as exclusively public nevertheless deserves special attention. It became, in time, a foundational concept of the 19<sup>th</sup> Century effort to modernize and humanize the laws of war. Today, it remains embedded, albeit implicit, in contemporary international humanitarian law and its paradigmatic interstate war outlook.

Yet Lieber's public war definition was driven by the ideological sensibilities of his youth in *Vormärz* Germany: romantic nationalism, ardent republicanism, and profound faith in modernity and progress. It took normative form but was, essentially, an ideological assertion. Lieber's public war definition sought to offer ideological justification for the modern nation State, its formation and existence. It also sought to construct and justify, again in ideological terms, the formation, existence, and preservation of an international order comprised of nation States; such order, alone, could meet the challenges of modern conditions. For Lieber, limiting war to nations and States alone was an ideological imperative of progressive civilization in the modern age.

Reflection on Lieber's public war definition suggest lines of inquiry that may produce a richer understanding of the intellectual foundations and ideological motivation of modern international law. At the same time, such inquiries compel historical, normative, and policy reconsideration of interstate paradigm of war and its costs. They also promise to enrich contemporary normative and policy debates about the regulation of privatized warfare and non-state actors.

## A. Introduction

The 1863 Lieber Code<sup>1</sup> — commissioned by the Union government and promulgated by President Lincoln in the midst of the Civil War — is frequently referred to as "the first modern codification of the law of war".<sup>2</sup>

<sup>1</sup> F. Lieber, *Instructions for the Government of Armies of the United States in the Field, General Orders No. 100*, War Dept., 24 April 1863 [Lieber Code].

<sup>2</sup> R. R. Baxter, 'The First Modern Codification of the Law of War: Francis Lieber and General Orders No. 100', 25 *International Review of the Red Cross* (1963) 3, 171,

It has earned Lieber a place of honor among the founding fathers of modern international law, international humanitarian law (IHL) in particular.<sup>3</sup> It is often cited as evidence for the progress of the idea of humanity in warfare as well as its immanence in human civilization.<sup>4</sup> Its impact on the development of IHL is commonly noted. The precise detail, historical context, and ideological leanings of the Code (and those of its author) are, however, often lost in the noise of veneration. They are equally lost by indifference to what some consider as a normatively suspect authority: the product of a private person stemming, at that, out of a civil war.<sup>5</sup>

Veneration and indifference miss out, for example, the unique sense of humanity running through the Code — one that on close scrutiny appears quite unrelated, at times even reactionary to contemporary understandings of humanity in warfare.<sup>6</sup> Another (closely related) aspect of the Code that often goes unnoticed is the ideological vision of the international order it expressed. Still related, a third aspect of the Code that has drawn far less attention than it deserves is Lieber’s war definition. The Code — as well as Lieber’s earlier and later work — systematically promotes a legal understanding of modern war as war by States alone.<sup>7</sup> Consider, for example, Article 20:

“Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilized existence that men live in political, continuous societies, forming organized units, called states or nations, whose

171; “The ‘Lieber Instructions’ represent the first attempt to codify the laws of war”: D. Schindler & J. Toman (eds), *The Laws of Armed Conflicts* (1988), 3.

<sup>3</sup> E. Root, ‘Francis Lieber’, 7 *American Journal of International Law* (1913) 3, 453.

<sup>4</sup> Such views of the Lieber Code are traced in R. Giladi, ‘A Different Sense of Humanity: Occupation in Francis Lieber’s Code’, 94 *International Review of the Red Cross* (forthcoming, 2012) [Giladi, A Different Sense]; in *id.*, ‘Rites of Affirmation: Progress and Immanence in International Humanitarian Law Historiography’ (unpublished manuscript) [Giladi, Rites], I explore such trends against a broader historiographic context.

<sup>5</sup> Giladi, *A Different Sense*, *supra* note 4.

<sup>6</sup> This is the core claim I make *id.*

<sup>7</sup> It is important to stress at this point that although commissioned in the US Civil War context, the Code was meant to and did regulate “regular war”; its tenth chapter on “Insurrection — Civil war — Rebellion” was a late addition derelished by Lieber. I present evidence for the Code’s relevance for interstate war in *id.*

constituents bear, enjoy, suffer, advance and retrograde together, in peace and in war.”

Today, the first sentence appears self-evident. Notwithstanding a growing corpus of rules regulating non-international armed conflict, the proliferation of non-state actors, or debates on the privatization of war, international law continues to view war, paradigmatically, as interstate business. Other categories of belligerents or participants in political violence — militias, national liberation movements or private military companies, to name a few — are assessed, regulated, included or excluded based on their affiliation or similarity to State actors exercising a public function.<sup>8</sup> The Code’s frequent reference to modern times, modern wars, modern nations, and modern law<sup>9</sup> implies, however, that this has not always been the case. It implies that the right to war, and consequently rights in war, may have in the past existed independently of state-affiliation and held by actors who were not States. The public, state-oriented nature of war, in short, is perhaps more of a modern innovation than commonly assumed today.<sup>10</sup>

History — to a limited extent, international legal history — tells us of the phenomenon of private war.<sup>11</sup> While the expression “private war” does

<sup>8</sup> Consider in this regard: *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, Arts 2 & 4, 75 U.N.T.S. 135, 136, 138, 140 [Third Geneva Convention]; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, Arts 1(4), 43-45 & 96(3), 1125 U.N.T.S. 3, 7, 23-24, 46 [Additional Protocol I]; and *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, Art. 1, 1125 U.N.T.S. 609, 611 [Additional Protocol II]. As G. Blum, ‘On a Differential Law of War’, 52 *Harvard International Law Journal* (2011) 1, 163, 169 observes, discussing Art. 1(4) of API, “The expansion of the regime to these types of armed conflicts further demonstrates, rather than weakens, the pro-state bias of the IHL system, as in all these cases, the non-state actors are those fighting on behalf of states-in-the-making.”

<sup>9</sup> The word “modern” appears in Code fifteen times: see Arts 14, 15, 25, 29, 30, 45, 60, 68, 70, 80, & 148.

<sup>10</sup> Cf. S. C. Neff, *War and the Law of Nations: A General History* (2005), 13 suggesting that “[p]erhaps the single most obvious and widely agreed feature of war, throughout its long history, has been its character as a public and collective enterprise [...]”. This appears contradictory with much of the evidence cited below.

<sup>11</sup> Without attempting to define this concept, one may usefully consider the diffuse entitlement to wage war in feudal systems as a salient example: J. Firnhaber-Baker, ‘Seigneurial War and Royal Power in Later Medieval Southern France’, 208 *Past and Present* (2010) 1, 37. See Part E below.

not appear in the Code, its presence as the contradistinction of “public war” is very much felt.<sup>12</sup> Examining Lieber’s war definition, in particular its limitation to one class of public actor (“sovereign nations or governments”), is necessary if we are to understand the underpinnings of the international legal transformation from private to public war. It can equally inform our understanding of the limited regulatory reach of international law today, and contemporary debates about the law’s relevance to non-state actors.

At the same time, familiarity with Lieber’s war definition promises to facilitate our understanding of the ideological aspects of the formation of the international legal order which in and since the second half of the 19<sup>th</sup> Century. Having survived the twentieth Century (less so, perhaps, legal positivism), we may tend to gloss over the second sentence of Article 20 as an arcane, outdated style of writing that has no place in truly modern, codified forms of international law. But the Code’s frequent allusions to modernity, civilization, or progress suggest such language expresses ideological preferences. A close reading of the Code in light of Lieber’s other works demonstrates just how important are such ideological preferences for the understanding of Lieber’s war definition. It demonstrates, moreover, that Lieber’s war definition was itself an ideological assertion.

This paper, then, explores some of the intellectual and ideological aspects of Lieber’s definition of public war exclusively limited to one class of participants: the modern nation State. It starts at the end: Part B. identifies implicit and explicit iterations of the public character of war since the Lieber Code. It demonstrates how the public character of war, following Lieber, in practice served as the conceptual stepping-stone of the laws of war/IHL — to this day. I also show that, with time, the public character of war became implicit in positive law, acquiring a technical appearance. This helped conceal the intellectual and ideological underpinnings of the public character of modern war. Part C examines in detail Lieber’s war definition. It reads relevant Code provisions in light of his other works, preceding and following the Code’s promulgation. I show that what marks the Code from earlier elaborations of the distinction between private and public war was that it used that distinction as a controlling principle of a systematic positive regulation. Lieber’s war definition offered, in addition, ideological justifications for the formation and existence of the modern nation State; it

<sup>12</sup> E.g. in discussing private relations (Arts 23 & 25), private revenge (Art. 11), or individual gain (Art. 11).

sought to construct and justify, along ideological lines, the formation, existence, and preservation of an international order for the modern age of nation States.

Part D. briefly ponders the various sources that combined to form Lieber's public war definition, suggesting that primarily, it was driven by ideological convictions formed during Lieber's youth in *Vormärz* Germany. Part E. discusses some of the many implications of Lieber's public war theory and identifies new research directions.

## B. Public War Since the Lieber Code

Lieber's contribution to subsequent codification and development of the laws of war is commonly acknowledged.<sup>13</sup> It had served as inspiration for other commentators and countries.<sup>14</sup> It also served as a base text in subsequent codification attempts of the laws of war: the 1874 Brussels Declaration,<sup>15</sup> the 1880 Oxford Manual,<sup>16</sup> and the 1899 Hague Convention II.<sup>17</sup> In the course of the proceedings which produced the latter, F. F.

<sup>13</sup> Baxter, *supra* note 2, 183; J. C. Bluntschli, 'Lieber's Service to Political Science and International Law', in D. C. Gilman (ed.), *The Miscellaneous Writings of Francis Lieber*, Vol. II (1881), 12; D. A. Graber, *The Development of the Law of Belligerent Occupation 1863-1914* (1949), 17-20; T. E. Holland, *The Laws of War on Land* (1908), 72-73; T. Meron, 'Francis Lieber's Code and Principles of Humanity', 36 *Columbia Journal of Transnational Law* (1998) 1/2, 269, 274; E. Nys, 'Francis Lieber: His Life and His Work', 5 *American Journal of International Law* (1911) 1/2, 84, 379-80; Root, *supra* note 3, 453 & the annex, 466-469; G. B. Davis, 'Memorandum Showing the Relation between General Orders No. 100 and The Hague Convention with Respect to the Laws and Customs of War on Land'; R. Sallet, 'On Francis Lieber and His Contribution to the Law of Nations of Today', in Göttinger Arbeitskreis (ed.), *Recht im Dienste der Menschenwürde: Festschrift für Herbert Kraus* (1964), 279; S. Vöneky, 'Lieber and the Evolution of the Laws of War', 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2002), 423.

<sup>14</sup> *Id.*; B. Röben, *Johann Caspar Bluntschli, Francis Lieber und das Moderne Völkerrecht 1861-1881*.

<sup>15</sup> *Project of an International Declaration concerning the Laws and Customs of War, Brussels*, 27 August 1874, in D. Schindler & J. Toman (eds), *The Laws of Armed Conflicts*, 4th ed. (2004), 27.

<sup>16</sup> International Law Institute, 'The Laws of War on Land', in Schindler & Toman, *supra* note 15, 29.

<sup>17</sup> *Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, 29 July 1899, 187 C.T.S. 429 [Hague Convention II]; K. Nabulsi, *Traditions of War: Occupation Resistance, and the Law* (1999), 5, whose first chapter provides a useful brief

Martens, the Russian jurist-diplomat, invoked the precedent of the Lieber Code as the example which Alexander II followed when taking “the initiative in convoking the Brussels Conference of 1874”:

“The initiative of my august sovereign was not all due to a new idea. Already during the War of Secession, had President Lincoln directed Professor Lieber to prepare instructions for the armies of General Grant [...] Those are circumstances in which the very force of events called forth the idea of regulating the laws of war. The example had been set. The Brussels Declaration brought about by Alexander II was the logical and natural development thereof.”<sup>18</sup>

The Brussels Declaration, though its language often clearly borrowed from the Lieber Code, did not discuss public or private war. But it enacted the limitation of war to public parties. Under the heading “Who should be recognized as belligerents: combatants and non-combatants”, Article 9 expressed the view that the law of war, rights and duties in war and, implicitly, the right to wage war itself were all limited to state-parties. Like its progeny (*e.g.* Art. 4, Third Geneva Convention, 1949), Article 9 prescribed conditions requiring other actors to be affiliated with, or operate like States armies:

“The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. That they be commanded by a person responsible for his subordinates;
2. That they have a fixed distinctive emblem recognizable at a distance;
3. That they carry arms openly; and
4. That they conduct their operations in accordance with the laws and customs of war.

<sup>18</sup> description of the development of the laws of war in the 19<sup>th</sup> and early 20<sup>th</sup> Century. J. B. Scott (ed.), *The Proceedings of The Hague Peace Conferences: Translation of the Official Texts* (1920), 505-506 [Scott, Proceedings]. For context, see R. Giladi, ‘The Enactment of Irony: Reflections on the Origins of the Martens Clause’, *European Journal of International Law* (forthcoming, 2013) [Giladi, Enactment of Irony].

In countries where militia constitute the army, or form part of it, they are included under the denomination 'army'."

The drafters of the unratified Brussels Declaration were State representatives. Evidently, they saw no need to elaborate on the underlying assumptions of Article 9. Nonetheless, Article 9 was premised on a notion of war akin to Lieber's. This was obvious to Gustave Moynier, the ICRC President, who in 1880 prepared a commentary on the Brussels draft for the *Institut de Droit international* (IDI). The resulting Oxford Manual, a "statement of reasons" for the rules enunciated in the Brussels Declaration, begun with a statement of "General Principles". Article 1, containing the first of these, stated:

"The state of war does not admit of acts of violence, save between the armed forces of belligerent States. Persons not forming part of a belligerent armed force should abstain from such acts."

The right to wage war, in other words, was limited to the armed forces of belligerent States. Only then did Moynier proceed to restate and somewhat elaborate, in Article 2, the terms of Article 9 of the Brussels Declaration:

"The armed force of a State includes:

1. The army properly so called, including the militia;
2. The national guards, landsturm, free corps, and other bodies which fulfil the three following conditions [...]"<sup>19</sup>

Twenty-five years later, the First Hague Peace Conference repeated, almost verbatim, the language of Article 9 of the Brussels text.<sup>20</sup> Although the language was the subject of fierce debate, this did not concern the principle of limitation of war rights to public actors. Rather, the controversy was about the practical translation of the principle to the specific

<sup>19</sup> Moynier, rather than set the condition of conforming with the laws of war, stated it as a duty binding on "[e]very belligerent armed force". Both the Brussels and Oxford text recognized an important but limited exception of the rights of noncombatants to use force: *levée en masse*.

<sup>20</sup> In Art. 1 of the Regulations annexed to the Hague Convention II.

circumstances of resistance to the occupier.<sup>21</sup> The language remained practically unchanged, but again, the subject-matter of the principle acquired a technical aspect: it was no longer, as in the Oxford Manual, a statement of a “general principle”. This, too, was reversion to the Brussels Declaration, where the public character of war was implicit in the question of “Who should be recognized as belligerents: combatants and non-combatants”. In both versions of the Hague Regulations, the heading under which the provision was inserted was “The qualifications of belligerents”.<sup>22</sup> This will remain the case with future applications of the principle, in Article 4 of the Third Geneva Convention or in Additional Protocol I. And although none of these instruments gave explicit credit to Lieber’s principled limitation of the right to wage war, they all, in practice, put it into operation. All were premised, in other words, on the conception of war as, primarily, a relationship “between sovereign nations or governments”.<sup>23</sup>

In short, the 19th Century project to modernize the laws of war, to humanize war through legal restraints, and to introduce “humanity in warfare”, proceeded on the basis of the assumption that restraint starts with, and is only possible, limiting legitimate violence to States alone. This assumption is today expressed in traditional conditions required for belligerent status. These are modeled after the organizational forms of State armies precisely because such organization is required, so it is assumed, for compliance with IHL. At its historical outset and intellectual point of departure, and notwithstanding the subsequent development of the distinction between *jus in bello* and *jus ad bellum*, the IHL project draws a foundational distinction between legitimate and illegitimate violence based on the identity of its authors. Today, experience may help us question whether or not the limitation of legitimate violence to States alone in fact help restrain the conduct of war. Yet to understand this assumption and its provenance we must turn to the Lieber Code and the ideology driving its author.

<sup>21</sup> Giladi, *Enactment of Irony*, *supra* note 18. See Scott, *Proceedings*, *supra* note 18, 54-55, 419-420 (similarity to Art. 9), 548-549 (resistance).

<sup>22</sup> *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, 18 October 1907, 205 C.T.S. 277 [Hague Convention IV].

<sup>23</sup> Art. 20 *Lieber Code*, *supra* note 1.

### C. Lieber on Public War

Lieber was not the first to draw a distinction between public and private war; classical writers on the law of nations and greater and lesser lights of the Enlightenment have done so for more than two centuries before him.<sup>24</sup> Nor was he the first to advocate the legitimacy of the latter or brand the illegitimacy of the former.<sup>25</sup> Other publicists have so argued before him, to various degrees and with varying forcefulness. Rousseau's famous definition of war as "a relation, not between man and man, but between State and State" is one such example: for it is accompanied by the rarely-noted observation that

"[i]ndividual combats, duels and encounters, *are acts which cannot constitute a state*; while the private wars, authorised by the Establishments of Louis IX, King of France, and suspended by the Peace of God, are abuses of feudalism, in itself an absurd system if ever there was one, and contrary to the principles of natural right and to all good polity."<sup>26</sup>

Two matters, however, distinguish Lieber's public war definition from those who engaged the distinction between private and public war before him. First, in the Code and in Lieber's other work, the public aspect of war is not a casual remark on its character. Rather, the limitation of modern war

<sup>24</sup> On the enlightenment and the laws of war, see G. Best, *Humanity in Warfare* (1980). Vitoria normally limited war rights to sovereigns. While arguing for a very limited private right to self-defense, he did exclude it from the definition of "war": J. B. Scott, *The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations* (1934), 150. See also D. Kennedy, 'Primitive Legal Scholarship', 27 *Harvard International Law Journal* (1986) 1, 1, 31-35. Grotius, by contrast, advocated the justness of private war causes – more openly in his earlier writings but still noticeable in his latter works: M. J. van Ittersum, 'Hugo Grotius in Context: Van Heemskerck's Capture of the Santa Catarina and its Justification in *De Jure Praedae* (1604–1606)', 31 *Asian Journal of Social Science* (2003) 3, 511; *id.*, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies, (1595-1615)* (2006).

<sup>25</sup> Nabulsi, *supra* note 17, 77 suggests that "As the Grotian tradition was 'index-linked' to legitimate power, its central ambition was to limit the rights of belligerency to a particular class of participant (the soldier), and to exclude all others from the right to become actively involved in political violence in times of war."

<sup>26</sup> Emphasis added; J-J. Rousseau, 'The Social Contract, or Principles of Political Right' (1762), in G. D. H. Cole (ed.), *Rousseau's Social Contract and Discourses* (1923), 11.

to States alone formed part of a systematic positive regulation.<sup>27</sup> In the Code, it served as a yardstick justifying resort to war or its denunciation and censure. The Code's public character of war, moreover, was the source of restraints on the conduct of belligerents or what made such conduct permissible. With Lieber, the definition of war as an assertion of *legal* State monopoly over the use of (external) violence had left the realm of political philosophy and entered the realm of codified, positive law.<sup>28</sup> This was, perhaps, the most important aspect of Lieber's impact on subsequent evolution and codification. Second, as we shall see, Lieber's public war definition formed a crucial part of an overall ideological vision, however naïve or misguided, of a modern international law for the age of nation States.

## I. The Public Ends of War

First, there is the place of Lieber's war definition in the systematic regulation of the laws of war. In this respect, the first sentence of Article 20 only States the principle by way of definition: "Public war is a state of armed hostility between sovereign nations or governments".<sup>29</sup> That war definition underscores, in turn, many of the Code's provisions.

<sup>27</sup> Lieber did not devise rules "*ad hoc*, but rather based them on his own systematic interpretation of war and international law": J. F. Childress, 'Francis Lieber's Interpretation of the Laws of War: General Orders No. 100 in the Context of His Life and Thought', 21 *American Journal of Jurisprudence* (1976) 1, 34, 39-40; the Code represented "a mature and logically consistent system, developed and systematized over many years of thinking and teaching": Baxter, *supra* note 1, 250.

<sup>28</sup> I explore this notion in Part E. Notably, the Paris Declaration, which purported to codify a ban on privateering, preceded the Lieber Code. Nonetheless, the Code's public war definition was based on Lieber's works preceding 1856: *Paris Declaration Respecting Maritime Law*, 16 April 1856, 155.

<sup>29</sup> The consequent limitation of war rights to States is spelled out in Art. 67, first sentence ("The law of nations allows every sovereign government to make war upon another sovereign state [...]").

## 1. The Public Instrumentality of War

War, for Lieber, was instrumental. Following Clausewitz, Lieber considered war as a means to an end.<sup>30</sup> The instrumental nature of war is explicitly stated in Articles 30 and 68 of the Code:

“30. Ever since the formation and coexistence of modern nations, and ever since wars have become great national wars, war has come to be acknowledged not to be its own end, but the means to obtain great ends of state, or to consist in defense against wrong; and no conventional restriction of the modes adopted to injure the enemy is any longer admitted; but the law of war imposes many limitations and restrictions on principles of justice, faith, and honor.

68. Modern wars are not internecine wars, in which the killing of the enemy is the object. The destruction of the enemy in modern war, and, indeed, modern war itself, are means to obtain that object of the belligerent which lies beyond the war. Unnecessary or revengeful destruction of life is not lawful.”

It is noteworthy that, according to these provisions, modern war is not instrumental to just any ends. It is, rather, instrumental to public, national, State ends: “great national wars” are but “means to obtain great ends of state”. “Modern wars are not internecine wars” precisely because they were means to *public* ends. In the Code as in Lieber’s other writings, war’s instrumentality to public ends was one of the primary yardstick measuring its permissibility and, at the same time, the permissibility of measures taken in its pursuit.<sup>31</sup> The language of both articles clearly indicates that the public, or national, ends of war are the basis of “limitations and restrictions” imposed by law of war (Article 30). Modern war, and the destruction of values in modern war, was lawful precisely because it did not go beyond what the object requires (Article 68). War

<sup>30</sup> On Clausewitzian construction of war in the formation of the modern law of war, see R. Giladi, ‘Reflections on Proportionality, Military Necessity, and the Clausewitzian War’, 45 *Israel Law Review* (2012) 2, 323.

<sup>31</sup> Other yardsticks used by Lieber to justify and restrain war were war’s finality and its service to the international order as described by Lieber: Giladi, *A Different Sense*, *supra* note 4.

itself was justified by its service to the ends of nations.<sup>32</sup> The ends of nations, politically organized in States, justified in turn destruction and suffering in war.

In the Lieber Code, the instrumentality of war to public ends (as well as to the finality of war and to the international order described by Lieber) constituted the controlling principle of legality.<sup>33</sup> It was, moreover, the sole principle controlling legality: the instrumentality of war to national ends, in Article 30, meant that “no conventional restriction of the modes adopted to injure the enemy is any longer admitted”.<sup>34</sup>

In Lieber’s writing, the public ends of war served to limit war conduct and, at the same time, justify such conduct serving such ends. Public — that is, national — ends provided equal justification for destruction and human suffering in war. In essence, what was necessary for the pursuit of public ends of war was permissible; that which was not, was unlawful. Thus, in Article 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.”<sup>35</sup>

And, as Lieber wrote in 1861, in a short text laying out the essence of his concept of war:

<sup>32</sup> Hence Lieber’s critique of past cabinet wars: F. Lieber, *Manual of Political Ethics: Designed Chiefly for the Use of Colleges and Students at Law*, Vol. I (1838), 441 [Lieber, Political Ethics I].

<sup>33</sup> Together with the finality of war and service to order: see Giladi, *A Different Sense*, *supra* note 4.

<sup>34</sup> It can be argued that the last words of Art. 14 attest to the existence of additional limitations on belligerents: see, e.g., B. M. Carnahan, ‘Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity’, 92 *American Journal of International Law* (1998) 2, 213, 218. Why this interpretation is inconsistent with the Code’s system and other writings is discussed in Giladi, *A Different Sense*, *supra* note 4; see also Art. 40: “There exists no law or body of authoritative rules of action between hostile armies, except that branch of the law of nature and nations which is called the law and usages of war on land”.

<sup>35</sup> Emphasis added.

“War being a physical contest, yet man remaining forever a moral and a rational being, and peace being the ultimate object of war, the following four conditions result:

[...]

b. All means to injure the enemy so far as [they?] deprive him of power to injure us or to force him to submit to the conditions desired by us are allowed to be resorted to, but

c. Only so far as necessary for this object [...]<sup>36</sup>

This was not a principle elaborated by Lieber for the American Civil War: rather, like most of the Code, it was formulated more than twenty years earlier, in his two-volume *Manual of Political Ethics* (1838-1839): “the injury done in war beyond the necessity of war is at once illegitimate, barbarous, or cruel”.<sup>37</sup> Elsewhere in *Political Ethics* Lieber elaborated on the license and limits of public ends:

“I have not the right to injure my enemy privately, that is, without reference to the general object of the war, or the general object of the battle. We do not injure in war, in order to injure, but to obtain the object of war. All cruelty, that is, unnecessary infliction of suffering, therefore, remains cruelty as among private individuals. All suffering inflicted upon persons who do not impede my way, for instance surgeons, or of inoffensive persons, if it can possibly be avoided, is criminal; all turning the public war to private ends [...] as, for instance, the satisfaction of lust; the unnecessary destruction of private property is criminal [...] for I do not do it as public enemy, because it is not serviceable to the general object of war, it is not use, but abuse

<sup>36</sup> F. Lieber, *Twenty Seven Definitions and Elementary Positions Concerning the Law and Usages of War* (1861), manuscript in Milton S. Eisenhower Library, Johns Hopkins University, Baltimore, MD. Box 2, Folder 15, § 14 [Lieber, Definitions]. I wish to thank the staff of the Eisenhower Library for help in obtaining Lieber’s papers. Art. 15, elaborating on what military necessity admits, concludes with a similar – yet explicitly “public” – formula: “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.”

<sup>37</sup> F. Lieber, *Manual of Political Ethics: Designed Chiefly for the Use of Colleges and Students at Law*, Vol. II (1839), 663 [Lieber, Political Ethics II].

of arms, which, nevertheless, I only carry in consequence of that public war.”<sup>38</sup>

## 2. Private Ends in War

In the Code, the denunciation of private ends in war was therefore a logical corollary. If war practices were permissible because of their service to public ends, that which served private ends was impermissible. Permissible injury to the enemy flowed from “that which serves the public good, and what is not allowed is that which serves private ends”.<sup>39</sup> The Code consistently ruled out private ends. Under Article 11, the “law of war [...] disclaims all extortions and other transactions for individual gain; all acts of private revenge, or connivance at such acts”. Such acts should be “severely punished, and especially so if committed by officers”. Article 46 also prohibited “private gain”:

“Neither officers nor soldiers are allowed to make use of their position or power in the hostile country for private gain, not even for commercial transactions otherwise legitimate. Offenses to the contrary committed by commissioned officers will be punished with cashiering or such other punishment as the nature of the offense may require; if by soldiers, they shall be punished according to the nature of the offense.”<sup>40</sup>

And a number of provisions made “unnecessary”, “wanton”, or unauthorized violence, devastation, destruction or injury impermissible: these do not serve public ends.<sup>41</sup>

Lieber’s other works reveal, however, that the denunciation of private ends in war — and private war itself — was more than a logical corollary of public justification. It was also an ideological assertion informed by historical interpretation, and standing in its own right. In the *Manual of Political Ethics*, he exposed the modern, explicitly republican, reasoning for

<sup>38</sup> *Id.*, 659; see also Childress, *supra* note 27, 57.

<sup>39</sup> J. T. Johnson, ‘Lieber and the Theory of War’, in C. Mack & H. H. Lesesne (eds), *Francis Lieber and the Culture of the Mind* (2005), 61, 63.

<sup>40</sup> See also Art. 36, stipulating that no “works of art, libraries, collections, or instruments belonging to a hostile nation or government [...]. In no case they ever be privately appropriated [...]”.

<sup>41</sup> Consider, e.g., Arts 16, 36, 44.

rejecting private war: private causes concerned “lust”,<sup>42</sup> *i.e.* emotion and not reason:

“Formerly, when there were so many wars [...] frequently were undertaken for trifling or unjust causes, it was natural that many niceties should be considered as laws of war. Wars were somewhat like duels, or tournaments, and the [laws] which regulated them were carried over to the wars. Certain arms, advantages, and means of destruction were declared to be unlawful, or not considered honorable. The “Chevalier” lost his battle against king George, because he thought it unfair to take advantage of the battle ground! When nations are aggressed in their good rights, and threatened with the moral and physical calamities of conquest, they are bound to resort to all means of destruction, for they only want to repel.”<sup>43</sup>

Yet, trifling nature of the former (causes of) wars aside, this passage indicates that Lieber’s legitimating of public war and the denunciation of private war had another reason. Modern wars, Lieber constantly advocated, were scarcer, shorter, and less destructive than pre-modern wars: the “gigantic wars of modern times” he advocated, unaware of what the future would bring, “are less destructive than were the protracted former ones, or the unceasing feudal turbulence”.<sup>44</sup> Hence his derision of past wars by private and “petty sovereigns”, nobility and men of cloth.<sup>45</sup> The same sentiment rings in the entry “War, Private, or Club-Law” in the *Encyclopedia Americana*. This was the first of his New World great projects

<sup>42</sup> *Supra* note 38.

<sup>43</sup> Lieber, *Political Ethics II*, *supra* note 37, 660-661. Similarly in *id.*, *Definitions*, *supra* note 36, § 12, Lieber defines combatants by the public power they exercise, noting that “Wars and battles are not duels, nor appeals to the deity to decide by the award of victory who is right”.

<sup>44</sup> *Id.*, *Political Ethics II*, *supra* note 37, 660; see also *id.*, *Definitions*, *supra* note 36, § 19. Why he translated this observation to a humanitarian imperative of “vigorous” pursuit of modern wars in Art. 29 exceeds the scope of this article: “I am not only allowed [...] but it is my duty to injure my enemy, as enemy, the most seriously I can, in order to obtain my end [...]. The more actively this rule is followed out the better for humanity, because intense wars are of short duration. If destruction of my enemy is my object, it is not only right, but my duty, to resort to the most destructive means”: *id.*, *Political Ethics II*, *supra* note 37, 660.

<sup>45</sup> *Id.*

and, most likely, he had written that entry himself: it speaks of “this pernicious custom” and “these bloody feuds”.<sup>46</sup>

## II. Public War and the Inter-National Order

This brings us to the second matter of note in the Code’s language on the public character of war. It is also what marks Lieber’s war definition from previous elaborations of the distinction between private and public war. For Lieber, public ends served to license and limit conduct of war. But this controlling principle of the Code was more than an extreme version of *Kriegsraison*.<sup>47</sup> Lieber’s construction of war as an interstate affair went beyond an observation on the changing nature of war in human history. For Lieber, it was more than just the conceptual stepping-stone for a systematic intellectual effort to limit the frequency or inhumanity of war. Rejecting private reason for public reason was also a writ of republican ideology that viewed the modern nation State as “the glory of man”.<sup>48</sup> Lieber’s war definition offered an ideological justification for the formation and existence of the modern nation State. It sought, in addition, to construct and justify, along ideological lines, the formation, existence, and preservation of an international society comprised by nation States. The ultimate *telos* of Lieber’s war definition, and the ideology driving it, was the modern, international order.

This concern for what Lieber came to call, with the crucial dash, the “inter-national”,<sup>49</sup> is manifest in the Code itself. It gives meaning to what otherwise appears arcane language that has no place in a modern code of law, or in a modern legal definition of war. Consider again the language of Articles 20, 29 and 30:

<sup>46</sup> *Id.* (ed.), *Encyclopedia Americana: A Popular Dictionary of Arts, Sciences, Literature, Politics and Biography, Brought Down to the Present Time etc.*, Vol. XIII (1840), 64. For Lieber’s involvement in this project, see F. B. Freidel, *Francis Lieber: A Nineteenth Century Liberal* (1947), 63-81 [Freidel, Lieber].

<sup>47</sup> P. Bordwell, *The Law War Between Belligerents* (1908), 74; for a Confederate critique of the Code’s excesses, see J. A. Seddon to R. Ould, 24 January 1863, in R. S. Hartigan, *Lieber’s Code and the Law of War* (1983), 120. On *Kriegsraison* see C. Jochnick & R. Normand, ‘The Legitimation of Violence: A Critical History of the Laws of War’, 35 *Harvard International Law Journal* (1994) 1, 49.

<sup>48</sup> Lieber, *Political Ethics I*, *supra* note 32, 183. For an account of the role of republican ideology in the formation of the laws of war, see Nabulsi, *supra* note 17.

<sup>49</sup> F. Lieber, *Fragments of Political Science on Nationalism and Inter-Nationalism* (1868) [Lieber, Fragments].

“Article 20

Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilized existence that men live in political, continuous societies, forming organized units, called states or nations, whose constituents bear, enjoy, suffer, advance and retrograde together, in peace and in war.

Article 29

Modern times are distinguished from earlier ages by the existence, at one and the same time, of many nations and great governments related to one another in close intercourse. Peace is their normal condition; war is the exception. The ultimate object of all modern war is a renewed state of peace. The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief.

Article 30

Ever since the formation and coexistence of modern nations, and ever since wars have become great national wars, war has come to be acknowledged not to be its own end, but the means to obtain great ends of state, or to consist in defense against wrong; and no conventional restriction of the modes adopted to injure the enemy is any longer admitted; but the law of war imposes many limitations and restrictions on principles of justice, faith, and honor.”

For Lieber, the inter-national order — the “formation and coexistence of modern nations”, “of many nations and great governments related to one another in close intercourse” — was both a historical observation and legal, political, and moral imperative whose creed was progress: the advancement of human civilization. If the nation was the only form “adequate” to meet “the high demands of modern civilization” within,<sup>50</sup> the inter-national order was the only form of political organization adequate to meet the challenge of modern times without.

<sup>50</sup> Lieber, *Political Ethics I*, *supra* note 32, 179; *id.*, *Fragments*, *supra* note 49, 5 & 8.

Lieber saw no tension between nationalism and inter-nationalism; on the contrary, he considered the existence of national States a necessary condition for inter-national order in which civilization can advance. Thus, addressing “Nationalism and Inter-Nationalism” a few short years after the Code, he noted “The Political Characteristic of Our Age”. Thus, he wrote, “the political development which mark[s] the modern epoch” included “The national polity” and

“[t]he decree that has gone forth that many leading nations flourish at one and the same time, plainly distinguished from one another, yet striving together, with one public opinion, under the protection of one law of nations, and in the bonds of one common moving civilization.”<sup>51</sup>

The inter-national order was no accident of history: the “multiplicity of civilized nations [with] their distinct independence” — was one of “the great safeguards of our civilization”. The virtue of the inter-national order was its ability to create the conditions necessary to meet the demands of the age, the quest “the Spreading Progress of our Kind” — and preserve these conditions. The modern inter-national order — the existence of many nation States — was a guarantee against a total war that would encompass and consume European civilization entirely, or the threat of hegemony and an “enslaving Universal Monarchy”.<sup>52</sup> “Modern nations of our family”, members of “one common moving civilization”, were bonded by “their increasing resemblance and agreement” which produce legal, cultural, scientific, and political unities among them.<sup>53</sup> Inter-nationalization was not a fixed condition but an ongoing, self-preserving process whose end result was not the “obliteration of nationalities”; these were requisite for a “moving civilization”, for if that happened, “civilization would be seriously injured. Hegemonies of ‘ancient times’ were short lived. Once declining,

<sup>51</sup> *Id.*, 19-20 (other forms of international order dismissed as “obsolete”: “universal monarchy [...]”; a “single leading nation; an agglomeration of States without a fundamental law, with the mere leadership or hegemony of one State or another, which always leads to Peloponnesian wars; regular confederacies of petty sovereigns; [...] all these are obsolete ideas, wholly insufficient for the demands of advanced civilization, and attempts at their renewal have led and must lead to ruinous results [...].”).

<sup>52</sup> *Id.*, 21 (multiplicity), 20 (safeguard), 5 (progress), 20 (monarchy) clearly a reference to Napoleonic empire.

<sup>53</sup> *Id.*, 19-21. See also *id.*, *Definitions*, *supra* note 36, § 8.

they never recovered [...]. Modern nations by contrast are long-lived, and possess recuperative energy [...].”<sup>54</sup>

Lieber’s man was a rational being who “consciously work[s] out his own perfection; that is, the development of his own humanity.” Such development could only take place in society organized, in modern times, in a nation State. Only the State could achieve the “great ends of humanity”.<sup>55</sup> For Lieber, the modern nation State, and the modern inter-national order, were as expressive of man’s humanity as his faculty of reason.<sup>56</sup> Humanity, as an observed condition, gave rise to humanity as a calling. The existence of an inter-national society of modern nation States was innate in *and expressive of* human nature, just as the existence of the nation State was. The national and inter-national societies were, on different scales, two manifestation of the same attribute, two applications of the same principle of self-government, and both were geared towards the same vocation of the progress of civilization.<sup>57</sup>

And if, within a State, it was the role of government to preserve order by supplying protection against undue interference with liberty, protection against interference within the inter-national society was the role of inter-national law.<sup>58</sup> Inter-national law, really, was equivalent to government: protecting and restraining nation States, it was an empire overseeing their relations.<sup>59</sup> Rather than a product of sovereign States, law was the source of

<sup>54</sup> *Id.*, *Fragments*, *supra* note 49, 21. See analysis by M. Curti, ‘Francis Lieber and Nationalism’, 4 *Huntington Library Quarterly* (1941) 3, 263, 270-271.

<sup>55</sup> Lieber, *Political Ethics I*, *supra* note 32, 3 (rationality), 63 (development of humanity).

<sup>56</sup> Giladi, *A Different Sense*, *supra* note 4.

<sup>57</sup> One of the fundamental principles of Lieber’s inter-national law is the “all-pervading law of interdependence, without which men would never have felt compelled to form society [...] inter-dependence which like all original characteristics of humanity, increases in intensity and spreads in action as men advance, — this divine law of inter-dependence applies to nations quite as much as to individuals”: Lieber, *Fragments*, *supra* note 49, 22.

<sup>58</sup> *Id.*, 22 (“Without the law of nations [...] which [...] is at once the manly idea of self-government applied to a number of independent nations in close relation with one another, and the application of the fundamental law of Good Neighborhood, and the comprehensive law of Nuisance, flowing from it, to vast national societies, wholly independent, sovereign, yet bound together by a thousand ties”).

<sup>59</sup> “The civilized nations have come to constitute a community of nations, and are daily forming more and more, a commonwealth of nations, under the restraint and protection of the law of nations, which rules, *vigore divino*. They draw the chariot of

their sovereignty, their protection and restraints on their conduct. Rules of modern of inter-national law, innate in human nature, drew directly from the fact of modern inter-national order and aimed at preserving it.<sup>60</sup> Expressing the condition of humanity, their role was to promote its progressive vocation.<sup>61</sup>

This progressive ideology was, as noted, explicit in the Code. The advancement of modern civilization was contingent on preserving a stable, regenerative order of nation States; the inter-national order was necessary to preclude the emergence of short-lived hegemonies and total war. Such order guaranteed a healthy constant, competition catalyzing human progress to counter the challenges of modern conditions.

And so, war — a “human contest”<sup>62</sup> — was a requisite of such a healthy competition among nations. Though he preferred peace to war, Lieber rejected pacifism and did not consider war as necessarily evil; he recognized the suffering it brings, but often expressed admiration for war’s virtues.<sup>63</sup> His war theory saw war as a force that on occasion has served, and may again serve, virtue. Though it causes suffering, war may have a moralizing, and civilizing, effects on individuals and nations.<sup>64</sup> War can

civilization abreast, as the ancient steeds drew the car of victory”: L. R. Harley, *Francis Lieber: His Life and Political Philosophy* (1899), 142. See also Art. 30.

<sup>60</sup> Lieber, *Definitions*, *supra* note 36, § 20 (“the civilized nations of our race form a family of nations. If members of this family go to war with one another, they do not thereby divest themselves of the membership — neither toward the other members, nor wholly toward the enemy”). See also Baker, *supra* note 14, 246-247 (note 30).

<sup>61</sup> Thus, the State was “the state is a form and faculty of mankind to lead the species toward perfection”: Lieber, *Political Ethics I*, *supra* note 32, 183; and “International law is the greatest blessing of modern civilization, and every settlement of a principle in the law of nations is a distinct, plain step in the progress of humanity”: ‘Lieber to Sumner, Dec. 27, 1861’, in T. S. Perry, *The Life and Letters of Francis Lieber* (1882), 324.

<sup>62</sup> F. Lieber, ‘The Duty of Provisional Governors’, *New York Evening Post*, 16 June 1862, 1; Art. 15; and often in Lieber’s work; see also Childress, *supra* note 27, 47-48.

<sup>63</sup> He dismissed Peace Societies and the “principle of benevolence” they preached which “was considered to prohibit all violent contest, even wars of defence and resistance, even [...] to acquire liberty”: F. Lieber, *Law and Usages of War*, No. I (1861-62), manuscript in Box 2, Folders 16-18, Eisenhower Library. *Id.*, *Political Ethics II*, *supra* note 37, 632-633, 635. Elsewhere he testified he was “no vilifier of war under all circumstances”: ‘Lieber to Hillard, 18 April 1854’, in Perry, *supra* note 61, 270-271. See also Childress, *supra* note 27, 44; Freidel, *Lieber*, *supra* note 46, 223.

<sup>64</sup> Lieber, *Political Ethics II*, *supra* note 37, 634 *et seq.*; wars historically disseminated civilization and have caused “exchange of thought and produce and enlargement of knowledge [...]”: *id.*, 649; or “Blood has always flowed before great ideas could settle

bring nations “to their senses and makes them recover themselves” and, if just, often catalyse progress.<sup>65</sup> Long peace, by the same token, can have corruptive, stifling effects.<sup>66</sup>

For both war and peace had an inter-national function, and both were to be assessed in reference to that function. Lieber’s imperative for modern times was not perpetual peace, but the dynamic process of mankind’s progress and the advance of civilization.<sup>67</sup> The value of peace and war depended on their effect on the stability of the modern inter-national order as a requisite for constant competition, their contribution to a dynamic interaction producing progress and fulfilling humanity’s vocation. Peace was crucial to this order and its stability; yet at times, peace could cause the inter-national society to wane, degenerate or disintegrate. Some wars could preserve or regenerate the inter-national order. War, for Lieber, was a necessary component of a dynamic process of human progress.

Lieber’s law of war was aimed at enabling and preserving the same dynamic inter-national order as a prescription of human progress. War was not in itself immoral; rather, its morality drew largely on its service to the modern order of the age of nation States.<sup>68</sup> Limiting war to the causes, ends, and hands of nations was, for Lieber, aimed at preserving and stabilizing the inter-national order; this was indispensable for maintaining the conditions necessary for human civilization to progress towards perfection. His war definition expressed an ideological justification for the formation and existence of a modern world order for the age of nation States. Codifying, in inter-national law, State monopoly over the use of legitimate violence was an ideological imperative of progressive civilization.

into actual institutions, or before the yearnings of humanity could become realities. Every marked struggle in the progress of civilization has its period of convulsion”: *id.*, *On Civil Liberty and Self-Government*, Vol. I (1853), 26. See Childress, *supra* note 27, 43-44.

<sup>65</sup> Freidel, *Lieber*, *supra* note 46, 299, 305.

<sup>66</sup> “Prolonged peace and worldly security and well-being” he wrote, “had thrown us into a trifling pursuit of life, a State of un-earnestness, had produced a lack of character, and loosened many a moral bond”: cited in Baxter, *supra* note 1, 178; Lieber, *Political Ethics II*, *supra* note 37, 645-646.

<sup>67</sup> Lieber considered *On Perpetual Peace*, one of Kant’s “weaker productions”: *id.*, 653.

<sup>68</sup> *Id.*, 640-650.

## D. The Sources of Lieber's Public War

Before turning to the implications of Lieber's war theory, it may be useful to take a short pause to ponder the historical, intellectual, and ideological sources that combined to form Lieber's normative claim and ideological assertion about the public character of war.

Lieber's theories on man, society, the State, peace and war drew from a variety of historical sources and intellectual influences.<sup>69</sup> In this respect, his eclecticism (and, perhaps, some lack of originality) was a virtue, not a weakness. It served him well as he "gathered seeds from the rich German harvest of his youth and planted them in America".<sup>70</sup> He was, as his biographer suggested, a "Transmitter of European Ideas to America",<sup>71</sup> partaking in a transatlantic conversation.<sup>72</sup> Many of his ideas traveled back a full circle; they were retransmitted back to Europe during his lifetime and long outlived their author, even the Code in which they were presented. Such was the case, we saw, with his public war doctrine.

Tracing the intellectual sources of Lieber's war definition is an elusive task.<sup>73</sup> He left a few, if any, clues: in the Code itself, in the writings that surrounded its making, or in his other works. Nor did he compose a general treatise on international law. He was quite fond, with respect of the Code and other reforms he authored, of asserting the want of precedent or earlier guidance, notwithstanding (or perhaps because of) the degree to which he had borrowed from his predecessors.<sup>74</sup> His admiration for Grotius, and his

<sup>69</sup> C. B. Robson, 'Francis Lieber's Theories of Society, Government, and Liberty', 4 *Journal of Politics* (1942) 2, 227, 230 *et seq.* [Robson, Theories].

<sup>70</sup> Freidel, *Lieber*, *supra* note 46, 149 discussing Lieber, *Political Ethics I*, *supra* note 32.

<sup>71</sup> F. B. Freidel, 'Francis Lieber: Transmitter of European Ideas to America', 38 *Bulletin of the John Rylands Library* (1956) 2, 342, 358 [Freidel, Transmitter].

<sup>72</sup> S. A. Samson, 'Francis Lieber: Transatlantic Cultural Missionary', in Mack & Lesesne, *supra* note 39, 129.

<sup>73</sup> Childress, *supra* note 27. Generally see C. B. Robson, 'Papers of Francis Lieber', 3 *The Huntington Library Bulletin* (1933) 1, 135 [Robson, Papers]. Some useful information on his German education can be gleaned from Curti, *supra* note 54, and E. Bruncken, 'Francis Lieber: A Study of a Man and an Ideal', 15 *Deutsch-Amerikanische Geschichtsblätter: Jahrbuch der Deutsch-Amerikanischen Historischen Gesellschaft von Illinois* (1915), 7.

<sup>74</sup> Thus, he wrote to General Halleck on 20 February 1863: "I have earnestly endeavored to treat of these grave topics conscientiously and comprehensively; and you, well read in the literature of this branch of international law, know that nothing of this kind exists in any language. I had no guide, no groundwork, no text-book. I can assure you,

disdain for Vattel and Rousseau, is patent in his writing; these sentiments, however, or the traces of Kant or Burke and others are too general to help trace the sources of his public war theory.<sup>75</sup>

Historical references, on the other hand, are not infrequent in his writing on the definition of war. This was his usual method, his ordinary style of writing. At times, these alluded to general European history.<sup>76</sup> More often, his denunciation of private war referenced German history. He was familiar with the process and legal institutions (*e.g.* the *landfriede*) that gradually limited and prohibited private war in Germany and France;<sup>77</sup> and the Thirty Years War looms large in his works as a warning against religious wars and private armies.<sup>78</sup> Lieber seems to have reserved his strictest censure to those who undermined, throughout history, German unity:

“‘Separatismus,’ as German historians have called the tendency of the German princes to make themselves as independent of the empire as possible, until their treason against the country reached ‘sovereignty’, has made the political history of Germany resemble the river Rhine, whose glorious water runs out in a number of shallow and muddy streamlets, having lost its imperial identity long before reaching the broad ocean.”<sup>79</sup>

as a friend, that no counsellor of Justinian sat down to his task of the Digest with a deeper feeling of the gravity of his labor, than filled my breast in the laying down for the first time such a code, where nearly everything was floating. Usage, history, reason, and conscientiousness, a sincere love of truth, justice, and civilization have been my guides; but of course the whole must be still very imperfect”: Perry, *supra* note 61, 331.

<sup>75</sup> F. Lieber, *History and Political Science: Necessary Studies in Free Countries* (1858), an edited printout of his inaugural address at Columbia College (Grotius “immortal”) [Lieber, *History and Political Science*]; Harley, *supra* note 59, 126 and Freidel, *Lieber*, *supra* note 46, 154, 155 (note 27) (Rousseau); Childress, *supra* note 27, 59 (note 82) (Vattel).

<sup>76</sup> See, *e.g.*, the text quoted in text accompanying *supra* note 43.

<sup>77</sup> *E.g.* the *Encyclopedia Americana* entry, *supra* note 46, 65. B. Arnold, *Princes and Territories in Medieval Germany* (1991).

<sup>78</sup> Lieber, *Definitions*, *supra* note 36, § 19. See R. Bonney, *The Thirty Year’s War: 1618-1648* (2002); A. Wedgwood, *The Thirty Years War* (2005); G. Parker, *The Thirty Years’ War*, 2nd ed. (1997).

<sup>79</sup> Lieber, *History and Political Science*, *supra* note 75, 10.

Lieber's republicanism comes across clearly in these historical references. Political forms such as "petty sovereigns", recall, were "obsolete ideas, wholly insufficient for the demands of advanced civilization, and attempts at their renewal have led and must lead to ruinous results".<sup>80</sup> So do his beliefs in progress and the advantages of the modern world. Indeed, the juxtaposition of modern and earlier ages is a recurrent theme in the Code and his other works.<sup>81</sup> Lieber's use of historical sources confirms that his ideology, to a very large extent, stood at the source of his views on war.

What of, then, of Lieber's ardent nationalism? Did it have any influence on his public war definition? Consider the evidence. He was born in 1798.<sup>82</sup> At eight, he became firsthand witnesses of Prussia's collapse and, with it, the demise of the First Reich when watching French soldiers marching into Berlin in 1806. The Liebers were patriots, and Prussian guerilla leaders were his childhood heroes. He enrolled in a Gymnasium, a breeding ground for German nationalism, but was too young to join the 1813 War of Liberation. Two of his brothers mustered. Age did not stop young Franz from taking a "most solemn oath [...] that I should study French, enter the French army, come near to Napoleon's person, and rid the earth of that son of crime and sin. I was then thirteen".<sup>83</sup> When Bonaparte escaped from Elba, Lieber obtained parental permission to join the Colberg regiment. He was wounded at Ligny and later again at Namur.

Young Lieber was "one of those excited, nationalistic youths in Germany who [...] agitated for German constitutionalism and unification".<sup>84</sup> With Bonaparte removed, the newly formed German Confederation reneged on earlier promises of constitutional reform and popular participation; for Lieber's generation, worse, it was a betrayal of the ideal of German unification by "scheming diplomatists".<sup>85</sup> In the next few years, Lieber can

<sup>80</sup> *Supra* note 51.

<sup>81</sup> *Supra* note 9; Lieber, *History and Political Science*, *supra* note 75, 9-10: "modern civilization stands in need of entire countries"; "moderns stand in need of nations and national longevity".

<sup>82</sup> Freidel, *Lieber*, *supra* note 46, 1, 3 who notes that Lieber himself supplied 1800 as his year of birth. The biographical details in the next few paragraphs appear in most Lieber biographies.

<sup>83</sup> He was likely fifteen: *id.* The quote is from Perry, *supra* note 61, 298.

<sup>84</sup> Freidel, *Transmitter*, *supra* note 71, 344.

<sup>85</sup> 'Lieber to Hammond, 14 February 1859', in C. S. Phinney, *Francis Lieber's Influence on American Thought and Some of His Unpublished Letters* (1918), 74: "Though I was but a lad when the Congress of Vienna mapped out a new Europe, especially a new Germany, I well remember how keenly it was felt that whole populations should

be found at the cradle of *Vormärz* German romantic nationalism: he became a *Turner* and an intimate of *Turnvater* Jahn. What prevented his *Burschenschaften* membership was not lack of sympathy but formal status: not yet a student, he could not be a member. Sympathize he did; he was a friend of Karl Ludwig Sand, a *Burschenschaft* member who in 1819 murdered reactionary writer August von Kotzebue. The Carlsbad Decrees followed, dissolving both the student associations and the *Turnerschaften*; now a student, Lieber became the victim of persistent arrests, police persecution and harassment. These set the stage for his eventual departure from Germany, first to England, then in 1927 to America. And although the young liberal would in time turn republican, the radical become a conservative, he remained a keen supporter of German unification — by force if need be — for the rest of his life.<sup>86</sup>

Lieber's biographers all recognize the cardinal influence which his German youth, and of the ideals and ideas he brought from Germany, had on the theories he would elaborate in the United States and on the Code he wrote during the American Civil War. This was the case, in particular, with his nationalism.<sup>87</sup> The German chapter of his biography makes a far more plausible source for his concept of modern war than the Civil War. It is true that the Code arose out of the needs of the Civil War. Some provisions reflect, clearly, the Civil War settings.<sup>88</sup> Nonetheless, the Code only elaborated a public war theory Lieber had first discussed in the *Manual of Political Ethics* — written two decades before the war. When requested to opine on the status and treatments of irregular Confederate forces, Lieber wrote *Guerilla Parties* where he treated regular, not “public”, war only in

be given and taken like chattel, not by simple conquest, but by scheming diplomatists.”

<sup>86</sup> D. Clinton, *Tocqueville, Lieber, and Bagehot: Liberalism Confronts the World* (2003), 53-54, 116. The Franco-Prussian War and the Unification of Germany were, for Lieber, the realization of a lifelong dream: Francis Lieber, ‘The Value of Plebiscitum in International Law’ (1871), in Gilman, *supra* note 13, 301; Curti, *supra* note 54, 267, 277.

<sup>87</sup> *Id.*

<sup>88</sup> Like the provisions concerning slavery, or the status of consuls. The ‘American’ thesis of the Code's influence is synthesized by his chief biographer: “Like so much of Lieber's earlier work it grew out of American experience, in this instance in the conduct of the war, which led Lieber to lay down precepts and generalizations. These he buttressed with learned reference to the European authorities on international law”: Freidel, *Transmitter*, *supra* note 71, 358. Freidel, however, also recognized the extent of his German and European experience: *supra* note 70.

passing. His analysis in that pamphlet was, moreover, grounded in European precedent, not American experience.<sup>89</sup>

None of this shows direct, positive influence of Lieber's biography on his elaboration of modern war as public war. Still, the evidence demonstrates a very high degree of resonance between the German sensibilities of his youth and his mature war definition. Put differently, it is hard not to see the connection between the limitation of the war entitlement to nation States pursuing national ends and Lieber's concerns for German unification. It is equally hard not to identify his nationalism, or republicanism as explanations for his rejection of the private in war. It is hard, finally, to separate his early concerns with German nation- and state-building with the significance he would assign to the "formation and coexistence of modern nations" (Art. 30). If we disregard his romanticism, we cannot hope to understand his determination that only nations, and only a dynamic competition between nation States, can meet requirements of the modern age. In the final analysis, whatever the precise historical or intellectual sources of Lieber's public war definition, it was an ideological assertion driven by ideological convictions.

## E. Rethinking Public and Private War

This reflection on Lieber's public war theory raises a myriad of new questions, directing attention to new horizons of inquiry. If it offers a somewhat richer historical understanding of the interstate paradigm now dominating the law governing restraint in war, it also compels its historical, normative, and policy reconsideration. Lieber's ideology has little resonance, perhaps, with present-day international law. The construction of war to which it gave rise, however, lives on in extant norms. Whatever ideology underscores present-day norms affecting the *jus in bello* entitlement to wage war, there is something disconcerting in the realization that norms are so permeable to ideology. If the interstate paradigm can

<sup>89</sup> F. Lieber, *Guerrilla Parties Considered with Reference to the Laws and Usages of War* (1862), in Hartigan, *supra* note 47, 30, 33. I found no reference in Lieber's writing to early American manifestations of a republican public war doctrine, e.g. the Neutrality Act: *An Act in Addition to the Act for the Punishment of Certain Crimes Against the United States*, 5 June 1794, 1 United States Statutes at Large 381, 383. See J. Lobel, 'The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy', 24 *Harvard International Law Journal* (1983) 1, 1.

today be defended by contemporary notions of humanitarianism or human dignity; and, with equal force, by early 19<sup>th</sup> Century romantic nationalism or republicanism, then we ought to examine, in the very least, the role of ideology in shaping, or justifying, present day international law.

Today, Lieber's public war ideology serves as a reminder that international legal humanitarianism remains limited, with notable but few exceptions, to restraining political violence by one class of participants. This reminder somewhat dampens IHL's "quest for universal application",<sup>90</sup> or bolder assertions that IHL's material scope of application has in fact become universal. IHL's universality, if achieved to whatever degree, seems to have been made possible by fiddling with definitions of what constitutes "war". This reminder also suggests that appraising IHL's record of achievement in restraining war to-date must also account for political violence left out of such definition. What forms of large-scale organized political violence applied for *private* ends, or non-state public ends, escape regulation and restraint?<sup>91</sup> Is private war dead, or does it persist, under other names or, at times, with some "public" justification?

Lieber's public war ideology informs, likewise, a broader historical appraisal of modern legal restraints on war. Today, we saw, Lieber's public war theory is embedded in the assumption that restraint starts with, and is possible by, limiting legitimate violence to States. This may be true insofar as divesting the State of its war monopoly would, in all likelihood, guarantee a return to *bellum omnium contra omne*. States may be equipped with such characteristics that enable them to monitor and ensure compliance with restraints: hierarchy, bureaucracy, discipline, resources, *etc.* These are the characteristics that made the modern State such a successful form of political organization. Yet, as Charles Tilly observed, these very characteristics, alas, also gave the modern State the propensity to wage war: "War made the state, and the state made war".<sup>92</sup> The record of the 20<sup>th</sup> Century undermines Lieber's confidence that codifying the war monopoly of the nation State would guarantee against wars for "trifling or unjust

<sup>90</sup> G. Abi-Saab, 'The Specificities of Humanitarian Law', in C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (1984), 265, 267.

<sup>91</sup> Even if such violence *may* be regulated by other international law regimes: S. R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', 111 *Yale Law Journal* (2001) 3, 443.

<sup>92</sup> C. Tilly, 'Reflections on the History of European State-Making', in *id.*, (ed.), *The Formation of National States in Western Europe* (1975), 3, 42.

causes”, or that wars would be waged only for the common good. His optimism that modern national wars would be less frequent, protracted, and destructive today seems, at best, irredeemably naïve. The prevalence of intrastate violence in our times only adds concerns of centralized, legitimized means of violence. Limiting legitimate violence to States alone, clearly, comes at a cost. Lieber’s war theory also serves as a reminder that that cost requires constant reappraisal.

Tilly’s interpretation of the rise of the modern State points to another salient inquiry. The Lieber Code, his public war definition, and republican ideology all stress the *formation* of modern States and nations. On this basis, Lieber proceeded to recognize in the modern nation State a legitimate monopoly of force. This resonates with Weber’s definition of the State in *Politics As a Vocation*, a lecture he gave in 1918 or 1919:

“Today the relation between the state and violence is an especially intimate one [...] Today [...] we have to say that a state is a human community that (successfully) claims the *monopoly of the legitimate use of force* within a given territory [...] Specifically, at the present time, the right to use physical force is ascribed to other institutions or to individuals only to the extent to which the state permits it. The state is considered the sole source of the ‘right’ to use violence.”<sup>93</sup>

Weber prescribed the monopoly of the *legitimate* use of force *within* a given territory; Lieber’s public war theory, by contrast, legitimized State monopoly of the use of *external* force. Weber described a conceptual definition of the State;<sup>94</sup> Lieber advanced it as a normative, and ideological, assertion. But the intimate relation of state-making and war-making is also historically grounded:<sup>95</sup>

<sup>93</sup> M. Weber, ‘Politics as a Vocation’, in B. S. Turner (ed.), *From Max Weber: Essays in Sociology* (1991), 77-78.

<sup>94</sup> Though he was aware of its historical manifestations: *id.* Notably, he was influenced by Georg Jellinek’s theory of the state: see D. Kelly, *The State of the Political: Conceptions of Politics and the State in the Thought of Max Weber, Carl Schmitt, and Franz Neumann* (2003); J. Seitzer, *Comparative History and Legal Theory: Carl Schmitt in the First German Democracy* (2001), 29-30; M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2002), 198 *et seq.*

<sup>95</sup> C. Tilly, ‘War Making and State Making as Organized Crime’, in P. Evans, D. Rueschemeyer & T. Skocpol (eds), *Bringing the State Back In* (1985), 169.

“Over most of European history, ordinary men [...] have commonly had lethal weapons at their disposal [...] local and regional powerholders have ordinarily had control of concentrated means of force that could, if combined, match or even overwhelm those of the State. For a long time, nobles [...] had a legal right to wage private war. Since the seventeenth century, nevertheless, rulers have managed to shift the balance decisively against both individual citizens and rival powerholders within their own states. They made it criminal, unpopular, and impractical for most of their citizens to bear arms, have outlawed private armies, and have made it seem normal for armed agents of the state to confront unarmed civilians.”<sup>96</sup>

In Tilly’s and Weber’s accounts, law had a cardinal role in state-formation: to legitimize State monopoly of the means of violence. Lieber’s public war theory implies that international law, too, may have had some role, conceptual and historical, in the formation of modern States (and of modern world order). If war-making and state-making are closely related, what role did international law play in state-making through war? What role did it play in war-making by the State? Did it only move, as the Code’s language and timing implies, to legitimize States’ war monopoly of violence once their monopoly of violence was firmly established internally? Or did international law affect the process, long before the 19<sup>th</sup> Century, of force concentration that produced the modern State? Both Weber and Tilly suggest that exploring, and perhaps collapsing, the private/public war distinction is a useful starting point in the search for these questions.

Contemporary international legal scholarship hardly addresses these questions. Private war is not a topic familiar to students of international law. It rarely is given an index entry in international law textbooks, even tomes dedicated to international legal history. The latter, at best, allude to it cryptically *en passant*.<sup>97</sup> Rethinking public and private war promises, however, a deeper understanding of the formation, driving forces, and the

<sup>96</sup> C. Tilly, *Coercion, Capital, and European States: AD 990-1992* (1992), 69.

<sup>97</sup> In addition to Neff, *supra* note 10, the following offer little help on private war: A. Nussbaum, *A Concise History of the Law of Nations*, rev. ed. (1954); W. G. Grewe, *The Epochs of International Law*, transl. & rev. by M. Byres (2000); J. H. W. Verzijl, *International Law in Historical Perspective*, Vol. II: International Persons (1969).

significance of modern international law. It may lead some to revisit the history of international law, perhaps even its theory of sources and subjects. Rethinking public and private war can likewise add much to contemporary debates on the pros and cons of regulating violence by non-state actors, or on the merit and pitfalls of applying IHL rules to privatized warfare, or on the adequacy of IHL.

## F. Conclusion

Lieber's public war definition was a conceptual base and controlling principle of the systematic positive regulation of restraints in war he elaborated in the 1863 Code. It was the source for restraining the conduct of belligerents, but at the same time for license. As such, it became a foundational concept of the 19<sup>th</sup> Century project to modernize the laws of war. Today, it remains embedded, albeit implicit, in contemporary international humanitarian law which views war, paradigmatically, as interstate war.

Yet for Lieber, State monopoly of the external use of force was far more than a normative claim. It was driven by the ideological sensibilities of Lieber's youth in *Vormärz* Germany: romantic nationalism, ardent republicanism, and profound faith in modernity and progress. The public character of war and its normative consequences were, for Lieber, ideological assertions. These sought to justify the modern nation State, its formation and existence. Lieber's public war definition, however, also sought to construct and justify, in ideological terms, the formation, existence, and preservation of an international order comprised of nation States. The inter-national order was "the great safeguards of our civilization". The inter-national order guaranteed a healthy constant, competition catalyzing human progress to counter the challenges of modern conditions. It was indispensable for maintaining the conditions necessary for human civilization to progress towards perfection. Lieber tasked international law with preserving that inter-national order. Codifying State monopoly over the use of legitimate violence was an ideological imperative of progressive civilization in the modern age.