

Reflections on Spain's Contribution to the Application of Humanitarian Law in War

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Like all other European countries with a historic and cultural tradition, Spain contributed to the birth and evolution of humanitarian law as applied to war. Its contribution, like that of every country, had certain special aspects striking a characteristic note in the composition as a whole and anticipating what were later to become generally applicable provisions.

This article will endeavour to outline some of these particular aspects.

Any consideration of the Spanish influence on international law, involves reference to that extraordinary group of theologians and jurists of the 16th century who comprised the Spanish classical school. Although this school's influence on modern international law was not acknowledged until the first decade of this century, due in part to political and religious prejudice, it is now widely recognized. Such names as Francisco de Vitoria, Domingo de Soto, Francisco Suarez, Vezquez de Menchaca ("the glory of Spain" as Grotius called him) are known the world over. The same applies to jurists like Molina, Ibanez and Covarrubias and to court martial prosecutors such as Baltasar de Ayala.

The Spanish classical school represented the culmination of the theory of a just war as an instrument of justice and not of power politics. That is why the doctrine of this school continues to influence the law of war—*jus in bello*—whilst at the same time it is

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important in other fields of international law, particularly in those connected with *jus ad bellum* and international relations.

Indeed, if war is licit only to ensure justice, if the sovereign or prince waging war acts as a judge to redress an injustice and punish the offender, in the absence of some other high authority, then his action should a priori be limited to achieving that objective.

Respect for the innocent is one of the first limiting factors; not all inhabitants of an enemy country may be subject to attack, for many of them are foreigners who, unless they become implicated by their own actions, cannot in principle be considered guilty of aiding and abetting the State or prince in a violation of justice. Again, a large section of the population cannot, or rarely does take up arms, such as women, children, the clergy; all are to be presumed non-combatant in the absence of evidence to the contrary.

As Vitoria said: "Nunquam licet per se et ex intentione interficere innocentem." Deliberate killing of innocent people cannot be justified and their deaths as a result of war should not occur except as accidental casualties.

An ever topical question derives from this proposition, i.e.: is it permissible to attack a town or village where there are combatants and non-combatants, if such an operation would harm both? If there is an alternative way of achieving the objective, or the taking of the town—even if it contains an enemy garrison—is not an important step towards victory, the answer is a categorical "no". Only extreme need could justify such an attack, for indiscriminate killing of the population cannot be vindicated. Clearly all forms of indiscriminate warfare, all weapons of mass destruction, attacks on civilians and laying waste by bombing are to be condemned. The concept of a military objective becomes clearly discernible, approaching the idea underlying the "Draft regulations for the protection of civilian populations against indiscriminate warfare".

Another consequence of the respect due to non-combatants is evident in the treatment of hostages. If the prince or State which surrenders hostages fails to discharge an undertaking, the detaining power may not, for that reason, presume to execute the hostages if they are innocent. Such a course would be possible only if they were guilty of an offence deserving the death penalty.

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Needless to say, respect for human life is a principle which extends also to prisoners.

According to Vitoria, and expressed even more clearly by Suarez, the only persons to whom guilt may be attached are voluntary active combatants—to use a modern term—who are aware of the injustice of the cause for which they fight.

The ideas of the times were much more elastic on questions of liberty and material goods. True, Vitoria concluded that “ damage to a guilty nation during war should be limited as much as possible ”, but the Spanish classical school distinguishes between life, goods and liberty. As Suarez said, God alone has the power of life and death, whereas goods are subject to human control and can therefore be lost due to the fault of the State. This, it was admitted, justified servitude and loss of goods, even for the innocent in certain circumstances.

But, in his hour of triumph, the victor should remember that he is acting as a judge; he in turn must avoid perpetrating injustice. Penalties should never exceed the measure necessary to restore peace. Thus in his last, and what have been called his golden rules, Vitoria tells us that war declared with justification should not be waged with the intention of ruining the enemy, but to ensure that right shall prevail and to obtain peace and stability. Once victory is achieved, the victor should act as judge, not as prosecutor, inflicting as little damage as possible on the vanquished. It is sufficient to punish the guilty to the extent they deserve. Vitoria adds: “ More often than not the guilt lies with the princes, for their subjects fight on their behalf in good faith .”

All these norms undoubtedly constituted a step forward at the time. It has been said that the distinction between a nation with a just cause in war and a nation without one, hinders rather than promotes the law of war. But, from the humanitarian point of view, it was a greater limiting factor than the ideas which succeeded it. It distinguished between action necessary to restore peace and that which suited State policy and ambition for power. It has also been said that at that time there was a considerable gulf between theory and practice. Unfortunately, it must be admitted that this still applies today.

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Mention must also be made of the views of a legal expert and disciple of the same school: Baltasar de Ayula. Not only was he versed in law, but he experienced war, so to say, as a court martial judge. He held that the law of war, irrespective of whether war was justified or not, applied to all enemies who could be considered as belligerents, provided the state of war had been declared. This thinking is in line with Vitoria's. The prince's subjects fight in good faith, obeying orders and ignorant of the factors which would enable them to see the rights and wrongs of the cause; theirs is but to obey the authority which declared war.

There is no denying this trend of thought in the history of humanitarian law as applied to war; although evolved in the course of centuries, it reached its culminating point in the Spanish classical school and influenced Grotius and his successors.

Another important date in the history of humanitarian law as applied to war was January 5, 1882, when a law was passed to introduce the Spanish Army Regulations for Service in the Field. These regulations conferred official sanction on many ideas contained in the 1877 Brussels declaration and in the Oxford Manual of 1880, thereby making their observance compulsory for the Spanish armed forces. At the time, these regulations were a legislative instrument which represented considerable progress and deserved the praise they received. In Dukacinski's opinion, these regulations would not have been disavowed by the Peace Conference.¹

These regulations contain 128 articles dealing with the law of war. Also to be found in them are such statements as the one contained in article 866 on the subject of hostages, namely: "It is a useless abuse of power to hold hostages responsible for faults committed by others, and any punishment inflicted on them for such faults is unjust and arbitrary." Another article forbade the locking up of prisoners in confined cells and stipulated that they be held in custody, under guard, preferably in the interior of the country, in a healthy climate and protected from the animosity of soldiers and population.

¹ Les règlements militaires des grandes puissances considérés du point de vue du droit international, Bordeaux, 1912.

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These regulations, of course, reflect the precepts of the 1864 Geneva Conventions on the treatment of the wounded of armies in the field and on the red cross sign.

At this stage we may examine Spain's participation in the promotion of the International Red Cross and the circumstances in which the early activities of the Spanish Relief Committee were carried out. These, as we shall see, were original and characteristic.

Spain was one of the countries which were associated in the movement to set up the Red Cross. Two names are outstanding, those of: Don Joaquin Agullo, Count Ripalda and representative of the " Lengua de Castilla " to the Military and Hospitable Order of St John of Jerusalem, and Don Nicasio Landa y Alvarez de Carballo, of the army medical staff, who played a leading rôle in the constitution and development of the movement. Both attended the preliminary conference in Geneva from October 26-29, 1863, taking part in the proceedings and agreements.

Upon his return to Spain, Count Ripalda devoted himself to the constitution of the Spanish committee, and a preparatory meeting was organized to set up a Central Committee. This preparatory meeting was attended inter alia by Don Nicasio Landa, Count Ripalda, another member of the Order of St John, General Osset, who was elected Chairman, and by the Director General of the Army Medical Branch, Don Nicolas Garcia Briz—an undoubted asset. He it was who conveyed to the Government the conclusions reached by the Geneva Conference. The idea was approved by a royal decree issued by the Ministry for War, authorizing the founding of a Committee whose services would be acceptable to the government and commending it, with such sections as were deemed necessary, to the Order of St John of Jerusalem. The same decree gave official approval to the idea of neutrality of enemy wounded on the battle-field and of relief services. The date of the first meeting of the Committee was March 2, 1864¹ and official recognition may be said to date from July 6, 1864.

As can be seen, Spain was one of the first countries to set up a relief committee; it was the fifth, following Württemberg, Olden-

¹ This was the date of foundation mentioned in the *International Review of the Red Cross*, September 1965.

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burg, Belgium and Prussia. It played an active rôle in the framing of the Convention of August 22, 1864, for the protection of the wounded of armies in the field, which it ratified on December 5 of the same year, thus becoming the sixth signatory State.

A characteristic of the Spanish relief committee distinguished it from others. The primary mission of relief committees was to act as an auxiliary of the army medical service in the event of international conflict, in order to care for the wounded. From the outset the Spanish committee was entitled "Spanish Assembly of the International Association to assist the wounded on land and at sea, in international or civil war".¹ The widening of scope implied in this title is worthy of mention. The words "military wounded" are replaced by "wounded", giving wider application to include civilians; the expression "on land and at sea" includes war at sea; while the words "or civil war" confer a special character on the Spanish committee.

The fundamental idea here is that the relief committee and its sections should function during civil war. The statutes of the Spanish Red Cross—approved by royal decree on July 30, 1868—stipulate that in the event of civil war the Society may issue arm-bands bearing the distinctive emblem of the red cross.

In 1870 a charitable organization was incorporated into the Red Cross and authorized to display the emblem. It had been set up during the struggle against Napoleon in Madrid, in 1808, with the mission of collecting the dead and caring for the wounded in the Maravillas district of Madrid. In *Anales de la Cruz Roja*, published in Barcelona by Don Saturnino Gimenez Enrich towards the end of 1874, can be found the sentence: "It matters little to the Spanish Red Cross whether a war be civil or international."

Spanish Red Cross action was, in fact, in its early years, carried out during the constant civil disturbances and riots which occurred in Spain during the late decades of the 19th century. That is why it was faced with the problems which always arise in such cases, perhaps before and more urgently than other National Societies.

¹ "Asamblea española de la Asociación Internacional para socorro a heridos en campaña de tierra y mar y en luchas civiles."

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As early as April 1870, during the insurrection of the township of Gracia, near Barcelona, the red cross banner was raised and as a forerunner of "refugee reception centres" the Barcelona province charitable institute sheltered some 5,000 refugees, under the sign of the red cross.

The first conflict in which the Spanish Red Cross went into action on the battle-field was a civil war. This was at the Battle of Oroquieta at Navarra, on May 4, 1872, during the Carlist war, when an ambulance from Pampelona helped in collecting and evacuating the wounded; 150 men were engaged on this mission. The prime mover in this enterprise, Dr. Landa, wrote to Geneva: "My main objective was to establish the neutrality of the wounded, and I had the good fortune to succeed."¹

Dr. Landa's and the Society's idea was *neutral status* for the wounded. They not only desired respect for the Red Cross ambulances and volunteers, which had been obtained both from the government and Carlist forces; they also wished the wounded to be exempt from captivity and punishment, an objective difficult to achieve in civil war. Nevertheless, on February 26, 1873, General Pavía, the head of the army operating in the north, gave orders that all Carlist prisoners should be inviolable and that the lives of all wounded taken on the battle-field should be spared. However, a month later, the new Commanding General Nouvilas, who replaced General Pavía, limited this regulation to the effect that no enemy wounded might be reprieved without first asking for the benefit of such clemency, but that no wounded should be left without care. The General expressly recommended "unit commanders, local authorities and the philanthropic Red Cross Association" to help the wounded.

Dr. Landa, who was an army physician during the campaign, understood the difficulties and wrote to Geneva: "My greatest difficulty is to find a solution to these conflicts. I thought of asking the government to apply the Geneva Convention provisions relating to civil war, but the article prohibiting wounded from taking up arms again would be accepted neither by the army nor the Carlist forces."

¹ See *Bulletin international des Sociétés de secours aux militaires blessés*, Geneva, July 1872.

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The question of secrecy on assistance soon arose. The Navarra Committee said in a circular to local committees on December 31, 1872: "It may happen that some wounded or sick desire the assistance they receive to be kept secret . . . if so, the secret must be kept. In such cases, medical attention may be given provided the local doctor confirms the need, in all conscientiousness, without going into details."

Another difficulty is apparent in the General Assembly's note of May 5, 1873, to the Minister of War. According to this note, the Association would not object to informing the authorities, on request, of the number and condition of the wounded in its care, but would not do so automatically on its own initiative, for the reason that "even if charity in war must be adapted to the abnormal circumstances in which it is administered, it is quite incompatible with police investigation, which by no means accords with the noble character of our people".

The action of the local Red Cross at the important Mediterranean naval base at Cartagena was also distinctive, when the city joined the rising against the central government in 1873.

Already in 1866 the Cartagena Red Cross Committee had requested the application to the wounded in naval action of the same benefits as were granted to the wounded of the army.

After this well defended and armed city and naval base rose in rebellion, it resisted military operations and siege for many months. The rebel forces were as well armed as those of the government, if not better. After the first engagement, the rebel navy put to sea on October 13, 1873, to do battle with the government fleet. The rebels asked the local Red Cross to accompany their fleet. This the Red Cross agreed to do on condition that the vessel on which its medical staff sailed would be unarmed and would fly the Red Cross flag. Thus it was that on that day a small paddle driven tug of 110 tons, the "Buenaventura", sallied forth from Cartagena in the wake of the warships, with 14 members of the Red Cross aboard and flying the red cross flag. Fortunately it did not have to go into action, as the government fleet fled without any battle taking place. However, this was, we believe, the first time, well before the 1899 Convention and during civil war to boot, that a ship sailed on a humanitarian mission flying the red cross flag.

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Another forerunner worth mentioning and nearer our own times, was the office set up during the first world war under the direct personal supervision of H.M. Alfonso XIII. Within the royal secretariat a humanitarian organization was formed. In view of the complexity and scope of its tasks it was subdivided into several sections, namely: 1) Missing persons; 2) information and mail in occupied territory; 3) prisoners of war; 4) repatriation of seriously wounded or sick prisoners; 5) civilian repatriation; 6) Swiss internment; 7) reprieves; 8) commutation of penalties; 9) cash remittances to persons residing in occupied territory and unable to communicate with their families; and 10) reports on inspection carried out by Spanish delegates accredited to embassies in Berlin, Vienna and Rome.

Mention should also be made of intercession for reprieve in some fifty cases where the death penalty had been pronounced. Most were successful. In addition, more than five thousand applications for repatriation of wounded and sick, twenty-five thousand messages from families in occupied territory and over 250,000 enquiries about wounded, prisoners and missing persons were handled.

Intervention for repatriation of twenty-five thousand French citizens held as hostages was successful. Furthermore, Spanish delegates sailed with hospital ships to ensure their neutrality. Other Spanish delegates visited prison camps and intervened to arrange repatriation of many of the inmates. Many other details could be given to illustrate Spain's continuous contribution.

Like all old countries, Spain has experienced the benefits of charity and human fellowship throughout its history. She has also contributed to the birth and development of humanitarian law, a work in which nationalism has no place but to which each country adds a special contribution of its own.

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