

A LITTLE-KNOWN CONVENTION ON THE LAW OF WAR

In its January 1973 issue, International Review published a short article on a humanitarian venture launched in Latin America over 150 years ago, when a treaty on rules of war was signed on 26 November 1820 by representatives of the Governments of Colombia and Spain, and led to the historic accolade between Simón Bolívar and Pablo Morillo at Santa Ana the following day.

Our attention was recently drawn to an article published on this same topic some sixty years ago in the Revue générale de droit international public.¹ In that paper, the late Jules Basdevant, an eminent jurist, examined two relatively little-known conventions on the law of war : one was signed in 1813 by the United States of America and Great Britain, with a view to exchanging prisoners as soon as possible ; the other was concluded seven years later at Trujillo. With the kind permission of the Revue générale de droit international public in which it was originally published, we give below a translation of that part of Basdevant's article dealing with the latter (Red.).

I

The convention between Colombia and Spain, signed at Trujillo on 26 November 1820, was concluded during a civil war, in order to put an end to outrages and, mainly, to ensure the safety of prisoners. The aim was not an exchange of prisoners, but rather the "regularization" of war, in other words, the application to civil strife of the ordinary rules of international warfare. This aim, which dominates throughout the convention must be borne in mind in order to fully understand its scope. It is self-explanatory in the circumstances in which it was concluded.

¹ Paris, Tome XXI, 1914.

The convention constitutes one of the episodes of the war of independence waged by the Spanish Colonies in America against the mother country. Since 1810, the war had been waged by the combatants with varying degrees of fortune. In 1820, swayed perhaps by the events of the liberal revolution in Spain, the Spanish General Morillo and Bolívar started negotiations which, after certain delays, culminated in the signature of the Trujillo armistice of 25 November 1820. In the course of the negotiations, Bolívar first proposed that a treaty be signed in order to "regularize" war in a spirit of liberalism and philanthropy; his initial approaches in this regard are contained in a letter he wrote to General Morillo on 3 November 1820; on 23 November, he delegated powers to his Commissioners to act accordingly; on 26 November, the convention was signed and the following day ratified by General Bolívar in his capacity as President of the Republic of Colombia, and by General Morillo in the name of the Spanish Government. Thus, it was concluded swiftly, and apparently without much difficulty.

When Bolívar proposed such a convention, he was perhaps acting under the influence of the philosophical ideas that had burgeoned in the eighteenth century. He had stayed more than once in Europe and was an admirer of Rousseau's. The spirit of this convention is in harmony both with Montesquieu's thesis which, restated by Blackstone, Abbé Grégoire, Lord Stanhope and Talleyrand and currently accepted at the time, asserted that, in war, nations should inflict as little harm as possible on each other, and with Rousseau's principle, adopted by Portalis, that war was a matter that affected relations between one State and another. To apply these principles and the customs of international war to the South American War, which was a civil war, was to follow the view of Vattel, in whom, as Mallarmé rightly pointed out, the philosophical bent was predominant. If the South Americans wished to make this extension, it was because they considered that their emancipation would depend on their acquiring national sovereignty and on the exercise of their right to establish independent States; here, too, one can trace the link of the convention of 26 November 1820 to the philosophical ideas of the XVIIIth century.

But, besides that, there were a number of precise facts giving strength in some way to those theoretical concepts, and dictating

Bolívar's conduct. He felt the need to put an end to the excesses of a war most ferociously conducted, with many prisoners massacred and opponents put on trial; a war to the death, fought without quarter being given, and the atrocities of which weighed heavily upon those populations whom Bolívar wished to liberate.

In order to bring some mitigation to the harsh conduct of this civil war, the rules of international war were extended to it: it was this that constituted the "regularization" of the war referred to in the convention. In short, what was done here was similar to the action taken later by the Northerners in the American War of Secession, but it was effected in different fashion; in 1820, that result was obtained by means of a treaty, but the originality of this particular case lies in the fact that it was a convention between the Sovereign's representative and his rebel subjects whose status as belligerents was thereby recognized.

In order to carry out this regularization of the war, article 1 of the Trujillo convention laid down the principle that the war between Spain and Colombia was to be conducted as between civilized nations. Moreover, the convention stated certain rules which were to take priority, where necessary, over customary principles.

The convention concerned itself mainly with the plight of soldiers belonging to one of the parties who fell into the hands of the other. It stated that they were to be taken care of and treated as prisoners of war until they were exchanged: this implied—and that was the essential part of the convention that was to put an end to the previous excesses—that their lives were to be spared and that they were not to be punished for the mere fact of having taken part in the war. By it the right to prisoner-of-war treatment in case of capture was extended to all military personnel or other persons attached to an army (art. 2), wherever they might have been when captured, even when storming a position or boarding a vessel (art. 3), as well as to "military personnel and peasants, who, either singly or in groups, carry out reconnaissance surveys, make observations or obtain information about one army with the intention of transmitting them to the chief of another army" (art. 6).

To treat the troops of an adverse party as prisoners of war was but a confirmation of customary law and the application of this

principle to soldiers captured in a position taken by storm was, notwithstanding some last-minute hesitation, a solution that found acceptance towards the end of the XVIIIth century. That had not been the case as regards peasants who sought to obtain information for a belligerent: such men were spies and were punishable in law as such. To allow them to benefit from the rules applied to prisoners was a provision which had no equivalent in the cartel of 1813, or in the United States Instructions of 1863, or in the Hague Regulations: the precedent created by the Trujillo convention on this point has not been repeated, as far as I am aware. It seems to me that it can be explained by a very special kind of consideration. The men who drafted the 1820 convention did not have in mind that a good rule of the laws of war could be one that would give a spy penal immunity; they adopted rather a viewpoint based on some contingency: they considered, no doubt, the possible abuses, and that if an inhabitant could be sought and punished for having transmitted to one of the armies information on another army, the prosecutions on that account could well be so frequent as to place the aims of the convention, that is the "regularization" of the war and the cessation of repressive measures, in jeopardy. Therefore, prisoner-of-war treatment and the exchange of prisoners were ensured not for all spies but only for peasants trying to obtain information.¹

The decision not to condemn deserters, military or civilian defectors, conspirators and malcontents to death was based on similar considerations (art. 7). The convention, in laying down this rule, did not afford them, as it did certain spies, prisoner-of-war treatment; it did not say that they would completely escape repres-

¹ The Colombian Commissioners had envisaged the application of prisoner-of-war treatment to all spies and conspirators, and had proposed an article worded as follows: "Spies, conspirators and dissidents shall be included in the exchange (of prisoners), considering that it is in civil war that the application of the law of nations should have greatest scope and that humanity claims most imperatively the application of its precepts. Consequently, spies, conspirators and dissidents shall not be condemned to death or to any other punishment involving personal restraint or penal servitude; any action against them shall be restricted to detention under decent conditions, until the time comes for them to be exchanged as prisoners, for political errors and offences must never be considered as crimes". The Spanish negotiators refused to agree to the exchange of all spies and conspirators, with the result that prisoner-of-war treatment in respect of this category of prisoner was applied only to peasants seeking to obtain information.

sion or that they would be exchanged, it merely required that their lives be spared.¹

The convention was intended to ensure decent treatment for such prisoners not by a complete set of regulations or a single general principle, but by laying down two provisions judged to be particularly important; anything not covered by the convention was implicitly referred back to customary law. It provided that prisoners should always be held within the territory of Colombia, that they should under no pretext be removed therefrom (art. 8), and that they should be kept in accordance with the wishes of their own governments, which would settle the costs therefor between themselves (art. 9). This stipulation, dictated by a policy for the welfare of the prisoners themselves, who would thus be spared the ill-will and meanness of their captors, appeared rather peculiar in some respects. The cartel of 1813 understandably laid down the treatment of prisoners, and the 1785 and 1799 treaties between the United States and Prussia, and the Hague Regulations, linked such treatment to that of the captors' own troops, but it is difficult to comprehend a solution whereby the prisoners' own government decided their treatment; it was laying the way open to a host of practical difficulties, disputes and conflicts. Furthermore, the provision that the prisoners' own State was to pay for their maintenance and keep led to a settlement of accounts between the belligerents. But the convention did not mention when such a settlement was to be made. The 1785 and 1799 treaties between the United States and Prussia postponed it till after peace was restored. But this was not to be adopted in the Trujillo convention: here was a civil war which could only end either in the independence of Colombia or in its subjection to Spanish domination. Each party refused to envisage one or the other of these two conclusions, while the alternative would have eliminated any possibility of a settlement of

¹ In his letter of 23 November 1820, Bolívar demanded prisoner-of-war treatment for these men, and his Commissioners proposed that they should be entitled to be exchanged, under an article VI worded as follows: "Whereas the source of this war lies in differences of opinion and the men who have fiercely fought for each of their respective causes are united to each other by the closest family ties and whereas the shedding of blood must be avoided at all costs, soldiers or employees who, having served either of the two governments, are captured while serving under the flag of the other, shall also be respected and exchanged." The Spanish negotiators did not agree to include these men in the exchange.

accounts, which meant that they could not have intended postponing settlement until the war was over. Therefore, it had to be effected during the course of hostilities. If the text were to be interpreted according to a contemporary state of mind, one would be inclined to say that this was not what was intended, so unlikely does the notion of a belligerent's making money payments to an adversary appear to be. But it is probable that in 1820 people judged otherwise, and the fact that a French decree of 25 May 1793 stipulated that a cash settlement to provide for advances of prisoners' pay was to be effected during the war at each exchange of prisoners tends to lend credence to that view. The policy of exchanges, influenced by the previous practice of ransom, had led people to agree, while a war was still in progress, to an operation which today no one would think of undertaking before the termination of hostilities.

In order to improve the prisoners' conditions of detention, the Trujillo convention authorized army commanders to designate Commissioners who were to go to the places where prisoners were held, examine their situation and seek to have improvements carried out. The Commissioners more or less corresponded to the Agents for prisoners of war provided for in the cartel of 1813. It will be observed, however, that here they were to be the envoys of army commanders and not of governments, a procedure explained by the fact that Spain recognized the insurgents' status, but not the independence of the Republic of Colombia. Moreover, following the example of the treaties of 1785 and 1799, the Trujillo convention mentioned them as being instructed to improve prisoners' conditions without any reference to their taking part in exchanges of prisoners.

This convention confined itself to stipulating the exchange of prisoners, without going into the details which a cartel would have laid down. It stated that the exchange of prisoners was to be compulsory and carried out as soon as possible (art. 8), that each prisoner of a particular class or rank was to be exchanged for a prisoner of the other side of the same class or rank and that the number of men of inferior rank to be exchanged for one of superior rank was to be in accordance with custom as between civilized nations (art. 5).

While the Trujillo convention is less comprehensive than the 1813 cartel as regards captivity during wartime and the manner

in which it is terminated, it does make special reference to the wounded and sick. Military personnel or persons attached to the army, taken while lying wounded or sick in hospitals or elsewhere, were not to be held as prisoners; they were free to rejoin their own forces after having been restored to health, and they were to be given "at least the same relief and treatment as that given to the wounded and sick belonging to the army which holds them in its power" (art. 4). This obligation to treat the wounded of the adverse party had already been endorsed in numerous earlier instruments and was apparently considered by G. F. de Martens as a rule of positive international law. As regards the immunity from capture granted the wounded and sick, it is met with in only very few agreements, and in ordinary law the custom is to treat them as prisoners of war: on this point, therefore, this convention was most uncommonly lenient.

The dead were to be given a decent burial or, if that were to prove impossible because of their number or of special circumstances, their bodies were to be burnt: it was the duty of the victorious party to carry out this task and, if prevented from doing so through exceptional and very serious circumstances, it had to notify the local authorities in order that they should do so in its stead. Bodies claimed by the enemy government or by private individuals were to be handed over to them (art. 13). This duty of burial had been postulated by G. F. de Martens, while before him Grotius had recognized it in the course of a lengthy examination of the subject. Today, it is held to be beyond question and writers mentioning it do not think it necessary to dwell upon it; it is considered to be so indisputable that modern conventions on the law of war have not deemed it necessary to state it.

To that extent, the Trujillo convention settled the treatment of the members of the two belligerent armies, thus remaining within the framework of ideas in which the 1813 cartel found its natural place. What is new is its article 11 defining the conditions applicable to inhabitants of a territory occupied by one or the other of the belligerents: this article provided that those inhabitants "shall be respected, shall enjoy entire liberty and shall not be molested, whatever may be or may have been their opinions, sentiments, services and conduct for or against the belligerent parties." In confirming

the liberty of non-combatants, the Trujillo convention appeared at first sight to favour a particular viewpoint on a question that had been subject to uncertainty in the 18th century. G. F. de Martens recognized that liberty, whereas Vattel would have authorized a belligerent to treat non-combatants as prisoners of war. It might be thought that the convention, in this respect, anticipated modern law, but such an appreciation would be based upon an error, for modern law recognizes the principle of the liberty of non-combatants only as long as they do not commit any punishable act: an inhabitant in occupied territory who fired a shot without having fulfilled the conditions laid down in articles 1 and 2 of the Hague Regulations, or, in the case of a national of the invading country, who committed an act of treason, may be arrested and punished. In contrast, the Trujillo convention offered complete immunity to the inhabitants of occupied territory "whatever may be or may have been their opinions, sentiments, services and conduct for or against the belligerent parties." In doing so, it was not, as modern law was, inspired by the idea that it was desirable for peaceable persons to be placed, as far as that might be possible, beyond the reach of the evil effects of war: that idea would not explain the wide scope of article 11. It was based on the belief that in the struggle actually being waged, which was a civil war, a belligerent should not exercise any repression against the partisans of its adversary: what was most apparent in article 11 was the desire to "regularize" the war, precisely by prohibiting radically any repressive measures; this motive, as I indicated earlier, already determined the immunity laid down for traitors and spies discovered among the prisoners taken; here the immunity was extended to traitors and spies discovered among the inhabitants: that was the essential aim, and to ensure the liberty of the inhabitants was one of the means of achieving it. It thus may be said that the convention is extraneous to the development of the law relating to the condition of non-combatants.

The execution of these various provisions is the subject of a special stipulation (art. 13). Military commanders and all authorities were obliged to observe them faithfully and were "liable to the most drastic penalties in case of their breach"; the two governments declared themselves "responsible for the punctilious observance of

the convention, under the surety of good faith and national honour ". Two classes of sanctions were provided for: on the one hand, offending military commanders were to be punished by the government to which they belonged; on the other hand, the State's responsibility for breaches committed by its troops was asserted, but the actual provisions were couched in vague terms which left the impression that it was a responsibility of a purely political or moral rather than a juridical character. The question of sanctions in respect of the laws of war was finally only touched upon rather than resolved.

Such is the content of the Trujillo convention. Its predominant character is that of a convention for the "regularization" of war; an attempt to subject civil war to the rules of international war. That was the general object, which explains its unusual provisions with regard to spies, deserters, traitors and inhabitants of occupied territories. Concerning the law of war, the convention often merely refers to the established principles of the conduct of civilized nations; many of its provisions simply confirm ordinary law or state clauses equivalent to others in previous cartels (exchange and upkeep of prisoners, Commissioners). However, sometimes there are new stipulations which bear the mark of a spirit of progress (regarding the wounded, burial of the dead). It should be observed, moreover, that this expression of the law of war is here very scanty and at times, as I see it, not very well worded. The treaty was drafted hastily and the effects of such haste are visible; it greatly lacks the precision and professional class of the 1813 cartel.

Two days after the convention was signed, one of its negotiators, Pedro Briceño Mendez, wrote to the Vice-President of Colombia: "Never has a people at war shown such liberalism. It was to Colombia that was left the glory of giving the world lessons not only of valour and steadfastness, but also of humanity, in the midst of the hatred and rage which the law of reprisals against its enemies instilled in all hearts." If only the rules of the law of war posited in the convention are considered, it might be thought that this judgement was elicited by the enthusiasm peculiar to the period and to the South American character; but if the essential aim pursued, namely the "regularization" of the war, is borne in mind, as well as the fact that the two parties fighting each other agreed

to limit the horrors of civil war by submitting to the rules of international war, construed, moreover, in a progressive and liberal spirit, it will be recognized that a noble example was indeed given to the world.

II

Each of the two treaties I have here examined is an example of the agreement reached by direct negotiations between belligerents for laying down rules of the law of war. Its advantages over an international understanding laying down such rules in peacetime, such as has been reached at Geneva and The Hague, were that it permitted a closer view of the facts, greater accuracy in appraising the position of each of the belligerents and greater precision in rules on certain questions. These advantages become apparent concerning matters such as where the prisoners are to be collected, and how they are to be treated, the text to be signed by prisoners released on parole, the immunity to be granted in special cases to traitors and spies and the extension of the rules of international war to civil war, all matters concerning which special considerations were essential or important.

On the other hand, direct agreement between belligerents seems less satisfactory on two counts. First it is subject to a rather narrow application. The two conventions examined here deal only with the lot of combatants in a rather wide sense of the term, and in practice they can hardly do more than that. They say nothing of the means of injuring the enemy, for it is hardly imaginable that in the course of the fighting the two belligerents are likely to reach an agreement on the prohibition of any one means or another. A prohibition of this kind would relate to weapons, or methods of waging war, or the actual possibility for a belligerent of utilizing more readily than his adversary such and such a method; problems insuperable in the course of hostilities. Similarly, it is hard to imagine direct negotiation on the effects of military occupation while one of the belligerents is the occupier and the other has to submit to occupation. There is and could be nothing regarding all this in the two conventions. Moreover, direct agreements between belligerents reached in the course of a war and affecting only that

particular conflict are short-lived. They do not lay down any agreed regulations in respect of war events prior to their signature, and after the cessation of hostilities their only value for future use consists in their constituting precedents that are quickly forgotten.

I may add that though the method of direct agreements between belligerents may, in certain respects, have some advantages, the practical consequences are not of any significance. The conclusion of such agreements is today hardly likely. Besides, those made in the past were determined by circumstances which are no longer encountered. The 1813 cartel was linked to the practice of the time of exchanges of prisoners; today, such exchanges have almost ceased, owing to changes of a technical nature, or have at least completely lost their earlier form of being operations planned in advance giving rise to an indefinite set of executory acts. The 1820 convention was brought about by a very special kind of circumstance, the pressing need that was aroused to make an extremely cruel civil war more humane. Moreover, the conclusion of such agreements was in earlier times made possible because wars themselves took place at a more leisurely pace. Campaigns developed slowly, interrupted by periods of inaction caused by a siege or the setting up of troops in winter quarters, combined with fluctuations in the fortunes of war: the belligerents had then ample time in the course of hostilities to conclude agreements. The cartel of 1813 was signed eleven months after the start of the war of 1812 between Great Britain and the United States, while nine years had elapsed before Venezuela declared its independence, when the Trujillo convention was concluded. In modern times, war is too sharp and swift to allow any time for the conclusion of such agreements.

These conventions therefore are not suitable models for the present. Should a lesson be drawn therefrom for any practical ends, it could relate to the institution of Agents for prisoners of war which to my mind would be the one most worthy to be taken up. Apart from that, and from a scientific viewpoint, each of those two conventions has its place in the evolution of the law of war and encourages the study of similar instruments. It is for those reasons that I thought it worth while to bring them back to light from oblivion.