



## Codifying IHL before Lieber and Dunant: The 1820 treaty for the regularization of war

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Jacob Coffelt  
University of Padova



Before the Lieber Code and Geneva Conventions came a treaty between the Spanish Empire and Simon Bolivar's revolutionary forces in Colombia and Venezuela. The 1820 Treaty for the Regularization of War aimed at reducing the unnecessary suffering of both soldiers and civilians affected by armed conflict and occupation across a broader spectrum than any previous international agreements. However, despite the significance of such a development in international law, the treaty fell into relative obscurity after the Colombian War of Independence until being slowly reintroduced throughout the 20th century.

In this post, graduate student Jacob Coffelt from the University of Padua explores what can be considered the birth of international humanitarian law in Latin America as well as the effects colonialism has had on its legacy. Using both historical and contemporary sources, he argues that the codification of modern principles of international humanitarian law had occurred decades prior to what is traditionally suggested.

In the midst of the Colombian War of Independence (1810–1826), a *treaty for the regularization of war* was ratified in 1820 that would set new groundbreaking standards of conduct in armed conflict. Representing one of the most important *unrecognized* milestones in the development of international humanitarian law, it remains often overlooked by scholars and historians alike. The history of the treaty contains stories of colonialism and revolution involving famous figures such as Simon Bolivar and King Ferdinand VII, which begs the question as to why it was so quickly forgotten.

## Born of war and politics

The Colombian war of independence was part of a broader series of conflicts throughout Latin America during the 19<sup>th</sup> century between European colonialists and local revolutionary forces. This particular conflict occurred in the Spanish territory known as New Grenada, which included the modern states of Colombia, Ecuador, Panama, Venezuela and portions of Brazil and Peru. The famous revolutionary Simon Bolivar served as the head of the rebel army and, by 1819, had managed to formally declare independence and form a civilian government in the territories which had been liberated. This would mark the official founding of the Republic of Colombia, which also became known as Gran Colombia. However, fighting continued as the Spanish refused to relinquish control of the remaining land they still occupied.

By 1820, the war had reached a critical turning point. Spain had just entered a period of domestic instability known as the *Trienio Liberal* after a successful uprising against King Ferdinand VII by Spanish soldiers led by Lt. Colonel Rafael De Riego. This new government drastically limited material support and lacked the *willingness* to maintain a costly war in its colonies.

The brutality of the conflict had left a lasting impression upon both the soldiers and political leadership at the time and, with the recent political upheaval, room for *negotiation* began to emerge. However, both sides remained set on their initial terms for peace. Bolivar wanted the complete expulsion of Spanish forces from Latin America, and Spain wanted to retain at least some form of *political ownership* over the region.

While neither side was willing to compromise as a means to put an end to the conflict, they did agree to the establishment of a *temporary armistice, and treaty for the regularization of war*, which also resulted in *de facto* recognition of Simon Bolivar's revolutionary forces in Gran Colombia as a *belligerent* on November 26<sup>th</sup>, 1820. The armistice lasted six months, after which the fighting resumed and continued until 1826 following the surrender of Spanish forces in Chiloé and Callao, Northern Peru.

Due to a lack of extensive records and primary accounts from senior figures, it is hard to determine the exact extent of the immediate influence the treaty actually had on the ground. However, it does appear that the policy of “war to the death” had been abandoned and more *mercy* was shown to surrendering and defeated enemy soldiers as well as civilians.

## Preamble of the treaty

Previous treaties did exist which established specific laws of war before 1820, such as the *1785 treaty of amity and commerce between the United States and Prussia* and *1813 Cartel between the United States and Great Britain*. However, they contained no specific language suggesting a desire to limit the negative impact of war on the basis of morality. A divergence from this tradition is immediately noticeable in the preamble of the 1820 treaty:

*“The Governments of Spain and Colombia wish to express to the world the horror with which they view the war of extermination that has devastated these territories until now, turning them into a theatre of blood; and wishing to take advantage of the first moment of calm that has arisen to regularize the war that exists between both Governments, in accordance with the laws of cultured nations, and the most liberal and philanthropic principles, they have agreed to appoint Commissioners to stipulate and establish a treaty for the regularization of war.”*<sup>[1]</sup>

The significance of this excerpt should not be understated, for the language with which it is written suggests an appeal to emotion previously unseen in this context and bearing significant resemblance to the writings of Henry Dunant and Francis Lieber.

## Prisoners of war

The majority of the treaty focuses on defining who falls under the categorization of prisoners of war and how they are to be treated/processed following their capture, for the most part formalizing *existing customary practices*. However, some deviations from traditional customs are included, such as in Article 7, which completely bans the use of capital punishment against those guilty of desertion or who have committed treason by defecting into the enemy's army.

While most states at the time did not strictly adhere to their own policies of capital punishment for *deserting soldiers*, execution remained the *standard* form of punishment for those guilty of high treason in times of war. Even the Lieber code (1863) listed the punishment of treason as death in *Article 91*:

*“The war-traitor is always severely punished. If his offense consists in betraying to the enemy anything concerning the condition, safety, operations, or plans of the troops holding or occupying the place or district, his punishment is death.”*

Simon Bolivar also attempted to negotiate even more *lenient treatment* of spies, conspirators and those accused of treason, but was forced to compromise when the Spanish refused his initial proposal. This is surprising, as it lies in stark contrast to his own previous policy of executing every Spanish person who did not assist his revolutionary movement, which famously became known as the *Decreto de Guerra a Muerte*.

## Non-combatants

Perhaps the most innovative portion of the treaty is contained within Article 11 regarding codification of the treatment of what we would now call civilians and non-combatants:

*“The inhabitants of the towns that were alternately occupied by the arms of both Governments, will be highly respected, and will enjoy absolute freedom and security, whatever their opinions, fates, services and conduct regarding the belligerent parties.”*

The 1785 treaty of amity and commerce as well as the 1813 *Cartel* included some basic protections for non-combatants, but they also contained much more restrictions regarding who is granted these protections. Non-combatant status is applied much more broadly in the 1820 treaty by using the general term ‘inhabitants’, suggesting a guarantee of absolute freedom without any stipulations.

## Impact on Colombian domestic law

Defining the legacy of the treaty comes with many challenges, and limited historical and academic references make it difficult to provide a deeper analysis of the judicial and constitutional developments in the years following the independence of Gran Colombia. The visible international ramifications of the treaty remain limited if not non-existent altogether in terms of its impact on the general development of IHL. There exists no documented connection between the 1820 treaty and the 1863 *Lieber Code* or 1864 *Geneva Conventions*, despite containing much of the same language.

However, the influence on the development of constitutional standards in Colombia must be taken into consideration. An example of this lies within the 1863 Rionegro Constitution, where the ‘*law of nations*’ was officially codified into domestic law also applicable in cases of civil war. While this was in direct response to the previous 1860–1862 *Civil War*, it was the Colombian War of Independence – during which the Spanish government made a *de facto* recognition of Simon Bolivar’s rebel forces as a *legitimate belligerent* and a mutual agreement to abide by the law of nations – which set the initial precedent.<sup>[2]</sup> This also represented the *first instance* of primary belligerents recognizing the ‘law of nations’ as applicable in what would now be labeled as an non-international armed conflict, or NIAC. Despite a lack of explicit reference to the 1820 treaty, it is presumed that the *subsequent tradition* of integrating early IHL into domestic law was inherently influenced by it.

Colombia has continued this tradition of *implementing IHL into its constitution* up into the present day, with the drafting of the current 1991 *constitution*. This has been particularly important given the *situations of conflict and violence* which have been ongoing within Colombia since the establishment of the modern state. *Constitutional debates* have arisen regarding whether many of these legally reach the threshold of becoming an armed conflict, and whether IHL applied to cases of internal disturbances and sporadic violence. However, according to directives 15 & 16 from the Ministry of Defense, IHL will be applied by the Colombian Public Forces to organized armed groups engaged in hostilities against the government, where a minimum degree of intensity has been reached, thus incorporating the criteria from the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Court (ICC) and the ICRC’s criteria to define a NIAC within the Colombian national framework. As of the time of publication of this post, the ICRC has classified seven simultaneously occurring NIACs, and five non-state armed groups (NSAGs) are currently operating within Colombia.

In 1995, Colombia *officially ratified* Additional Protocols I & II following the *Constitutional Court’s* positive determination of their applicability. In a *statement* released by the Constitutional Court, they approved the constitutionality of the Additional Protocols and that all principles of IHL were to be applied at all times during armed conflict and by all people within Colombia. The court’s justification lies primarily in Article 214 (2) of the constitution; *“the rules of international humanitarian law shall be respected in all cases”*. In an effort to provide historical legitimacy to this decision, the 1820 Treaty for the Regularization of War is directly referenced in *paragraph 9*. This decision was supplemented by *Law 599 of 2000*, issued by the Congress of Colombia, which officially integrated violations of IHL into criminal law.

## Fading into obscurity

So why did such a significant treaty go relatively unnoticed by 19th century legal scholars outside of Colombia and wasn’t further built upon in the immediate aftermath of the war? There are a few factors which may have led to its general abandonment.

First, it must be taken into consideration that the treaty was birthed out of the context of violent colonialism. Europe, and to a lesser extent the United States, were supposedly the *epicenters* of philosophical development regarding the ‘laws of nations’. A treaty brought about by a colonial conflict was not to be taken as seriously as one between two ‘civilized’ states.

A question remains as to why Latin American states did not try to build upon the treaty internationally, since much of the continent was still experiencing regular conflicts with European powers. Given the relative weakness of most Latin American states in comparison to the European powers, there was still the possibility that their newfound independence was in jeopardy.<sup>[3]</sup>

Dr. Alonso Gurmendi of King’s College in London *contends* that these former colonies essentially didn’t have the privilege of focusing on *jus in bello*, so instead they turned to *jus ad bellum*, the reason being that it made more sense to challenge the overall legality of European military intervention in order to prevent the possibility of recolonization.

Therefore, it wasn’t until the threat of recolonization had disappeared that Latin American states could again focus on participating in the development of *jus in bello*, hence why we see the 1820 treaty being increasingly *referenced* in legal decisions throughout the 20th century.

## Conclusion

As we approach the 75th anniversary of the 1949 Geneva Conventions later this year, it is important to remember that the development of modern international humanitarian law did not follow a direct, linear path. Determining where it theoretically began, or at which point it became most effective, may end up discounting the contributions which don't receive the same recognition as others. This is particularly true in the case of the western-centric domination in the creation and interpretation of international law up until the mid-20th century.

While the 'Treaty for the Regularization of War' may not have had the same effect as later contributions to IHL, what it does show is that at least the ideas which ultimately culminated in the 1863 Lieber Code and 1864 Geneva Convention were not produced in a vacuum. This treaty is a key indicator that by the early 19th century, people were already searching for a way to codify protections for all people affected by armed conflict on the basis of a moral obligation to prevent unnecessary death and destruction.

[1] All of the articles listed in this paper are translated from the original Spanish copy of the treaty located in the *collection* of General O'Leary, Chapter XVII.

[2] One thing that must be taken into consideration is that the preamble to the 1820 treaty specifically translates into English as 'law of cultured nations' (*leyes de las naciones cultas*) as opposed to just 'law of nations'. In this instance, there appears to be an *academic* consensus that given the context, both of these have the same meaning.

[3] Spain had already retaken Venezuela following its *first attempt at independence* in 1812 and Great Britain as well as Portugal were still *regularly intervening* in South America until the late 19th century.

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