

Commentary

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I am pleased to comment upon Professor Zhu Li-Sun's paper on "Traditional Approaches to the Protection of War Victims in Ancient China". I found it particularly interesting that when describing these laws he relies upon sources well over 3,000 years old. Certainly, the beauty of simplicity of the language used by the ancient Chinese commentators upon the law was a pleasure to read.

In discussing Professor Zhu's paper I propose to consider three issues: first, the similarities between Ancient Chinese laws of war concerning the protection of war victims and provisions of the Geneva Convention of 1949 and the Protocols of 1979; secondly, China's approach to modern international law and to negotiation of the Protocols; and thirdly, Article 75 of the First Protocol and the extension of rights to humane treatment to all persons including a Parties' nationals.

The Geneva Conventions and ancient Chinese laws

Professor Zhu demonstrates that the same humanitarian ideals and values which were fundamental to Ancient Chinese attitudes to the protection of war victims are mirrored to a significant degree in the Geneva Conventions and Protocols. The Geneva Conventions give expression to the principle that belligerents must not inflict harm on their adversaries out of all proportion to the object of warfare, which is to destroy or weaken the military strength of the enemy. The aim is not the total destruction of the enemy but rather the achievement of certain limited goals. This object is described in the "Si Ma Code", which codified the laws of war in Ancient China around 50 BC. Its author, the Minister of War, Si Ma Rung Ju, says:¹

"When attacking the country it is necessary to love the people",

or,

"kill those who misrule the people, do not kill the common peoples".

It seems that warring Princes were imbued with an understanding of the differences between the tyrant and the oppressed, for in 596 BC, when the Prince of Chu had the opportunity to destroy his trapped adversary, he asks:²

"We two princes are at enmity with each other, what guilts do the people have?"

Professor Zhu shows that similar objectives in the Ancient Chinese laws of war and the Geneva Conventions are to be found in laws concerning the sick and the wounded, prisoners of war and civilians. In the 23rd year the *Zuo Commentary* reports the custom of not harming wounded soldiers, and the "Si

1. Quoted above p 144.

2. Above p 146.

Ma Code” confirms the basic principle of humane treatment with a stricture that “if the enemy is wounded, treat him with medical care”.³

You will all be aware of analogous provisions in the 1949 Geneva Conventions. For example, the First Geneva Convention Concerning the Wounded and Sick in the Field provides in Article 12 that the sick and wounded must be “respected and protected in all circumstances” and that they are not to be tortured or wilfully left without medical assistance.

Professor Zhu describes the Ancient Chinese laws relating to prisoners of war which prohibit the killing of prisoners, exchanging them, and releasing them on the cessation of hostilities. It seems, for example, that General Hua Yuan was valued at 100 chariots and 400 strong horses in a ransom paid to his captors.⁴ Such practical and dramatic exchanges do not seem to take place today. However, the Third Geneva Convention Relating to Prisoners of War requires that prisoners be protected against violence and reprisals, and establishes detailed conditions for their captivity.⁵

Professor Zhu emphasises that China has customarily attached great importance to the protection of civilians during war. He cites the *Book of Songs* which reports a punitive war in 1136 BC when the Zhou Dynasty issued orders that the people were not to be harmed and that cattle and horses were not to be destroyed. Again, the “Si Ma Code” provided that the old and under-aged were not to be injured, and that grain, farm implements and forests were not to be plundered, nor were religious creeds to be interfered with.⁶ These words are echoed in the Fourth Geneva Convention Relating to Civilians,⁷ and in the First Protocol which, among other things, prohibits attacks on places of worship, homes, dwellings or schools, and protects historic monuments and all objects indispensable to the civilian population such as food-stuffs, crops, livestock and irrigation works.⁸

Similarities between the customs of Ancient China and the modern laws of war are many, manifest and hardly surprising. Respect for, and humane treatment of, the individual are not post-World War II phenomena, peculiar to enlightened and educated peoples. They are deep-seated values common to all civilisations, and, as Professor Zhu demonstrates, these values are traditionally associated with the idea of being civilised. The humanitarian ideal is at least 2,000 years old in China and is part of a tradition which has been handed down from generation to generation.

The detailed articulation of this ideal in international law and the creation of international mechanisms to give it effect are, however, modern objectives and achievements. They are the consequence of increased contact between States in international organisations and of the negotiation of treaties to resolve problems which transcend national boundaries.

3. Above p 145.

4. Above p 145.

5. Above p 146.

6. Above p 144.

7. Articles 27, 32 and 33.

8. Articles 52–56.

China and modern international law

My second point concerns China's role in modern international law. International law ultimately depends upon consensus and shared values. The 1949 Geneva Conventions on the Law of War reflected the consensus of a relatively homogenous international society, which included the Chinese. With the emergence into international affairs, since that time, of socialist and developing States this international community of shared values and interests has largely disappeared. The consensus has become strained and there sometimes appears to be no common denominator upon which agreements may be based. Indeed, when the People's Republic of China assumed control of China in 1950, it was feared that China would renounce traditional international law in favour of the Marxist-Leninist-Maoist ideology of struggle against imperialism, and that it would conduct its foreign policy purely in terms of political expediency.⁹

In fact, and stated at a minimum, the People's Republic of China has not rejected the entire fabric of international law and, on many occasions, has viewed, described and evaluated international events in terms of accepted international legal principles. China has required that States adhere to these principles, including the 1949 Geneva Convention on Prisoners of War, and has frequently asserted that its own conduct conforms with these principles.¹⁰

When it is remembered that international law depends upon reciprocity between States and is a dynamic and flexible system that is not a startling conclusion. Revolutionary governments, like all governments, strive for power and influence in the world community and depend upon co-operation with other States for trade and cultural exchanges. The People's Republic of China can expect its legal claims to be honoured if it demonstrates a corresponding willingness to honour similar claims by other States.¹¹

It is on the basis of this reciprocal nature of international law that we can understand China's attitude to the humanitarian laws of war. Its attitude is, however, conditioned by two philosophical approaches to international law which, in the degree to which they are espoused by China, distinguish it from other socialist States.

The first of these philosophical approaches to international law distinguishes between just and unjust wars. China believes that all "unjust" wars of aggression are those of the imperialist States determined to impose their domination over other States and to ensure continued exploitation of them.¹² Just wars are fought by those opposed to imperialist interests. For the Chinese, the laws of war must fulfil the twin functions of alleviating the suffering caused by such conflicts and favouring those who oppose aggression. This ideological approach to the laws of war has had practical consequences.

9. See, eg, Steiner, HA, "Mainsprings of Chinese Communist Foreign Policy" (1950) 44 AJIL 69 who argued that the CPR was "the first State which has defied all rules of international law and international behaviour after the Second World War".

10. Draper, GIAD, "The People's Republic of China and the Red Cross" in Cohen, JS, (ed), *China's Practice in International Law: Some Case Studies* (1972), 13; Cohen, JA, "Introduction" *ibid*, 13; Hsiung, JC, *Law and Policy in China's Foreign Relations: A Study of Attitudes and Practice*, 315-26.

11. Cohen, *op cit*, 13.

12. Farina, N, "The Attitudes of the People's Republic of China" in Cassese, A, *The New Humanitarian Law of Armed Conflict* (1979), 445.

The second philosophical approach to international law which has been stressed to a significant degree by China has been its emphasis upon the principles of sovereignty and non-intervention in the internal affairs of a State.¹³ Certainly, there is nothing novel about States insisting upon respect for these principles, indeed, they are central to the United Nations Charter. However, China has been less ready to concede limitations upon its sovereignty and more fearful of foreign intervention than most States. Accordingly, the Chinese delegation to the first Geneva Diplomatic Conference in 1974 placed great weight upon the concepts of just and unjust wars and inviolable State sovereignty when participating in negotiations upon the First and Second Protocols.¹⁴

It may be useful to examine briefly the effect China's commitment to these concepts has had upon those provisions of the Protocols which concern wars of national liberation, the nomination of a Protecting Power or substitute, the protection of civilians and non-international armed conflicts.

1. *Wars of national liberation*

Article 1 of the First Protocol was particularly successful in extending the Geneva Conventions to wars of national liberation. It provides that the Protocol extends to:

“armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of the rights of self determination”.

From China's point of view this extension of the Geneva Conventions conforms with the legitimacy of applying humanitarian laws to just wars fought in opposition to imperialist wars of aggression. As the Head of the Chinese Delegation to the Geneva Conference argued:¹⁵

“wars of national liberation are progressive wars, revolutionary and just”.

Article 1 may be criticised as necessarily confined to wars of national liberation when, in fact, many other internal conflicts and wars exist in which combatants and civilians equally require protection. Although this criticism has weight, any increase of civilian and prisoner of war protection is to be welcomed, rather than no improvement upon the 1949 position. Restrictive though the definition of armed conflicts is under Article 1, it reflects the third world, socialist and Chinese views of just and unjust wars.

2. *Nomination and acceptance of a Protecting Power or substitute*

While China favoured extension of the 1949 Geneva Conventions to certain kinds of wars which conformed with its view of just and unjust conflicts, it has been unable to accept the notion of a neutral Protecting Power, the appointment of which is crucial to supervision of the Conventions.¹⁶ China “recognized” the

13. Scott, GL, *Chinese Treaties* (1975) 47 et seq; Chiu, H, “The United Nations” in Leng and Chiu (eds), *Law in Chinese Foreign Policy: Communist China and Selected Problems of International Law* (1972) 197 et seq.

14. China attended only the first session of the Diplomatic Conferences taking place between 1974 and 1979 and emphasised its ideological position in preference to playing a role in negotiation of the draft articles, Farina, op cit.

15. Pi-Ki-Long, Statement, 12th Plenary Session, CDDH/SR.12.

16. First Geneva Convention, Article 8; Second Geneva Convention, Article 8; Third Geneva Convention, Article 8; Fourth Geneva Convention, Article 9.

Geneva Conventions in 1952 during the Korean conflict and ratified them in 1956.¹⁷ It made a reservation to those Articles in the four Conventions which provided for a substitute humanitarian organisation, such as the International Committee of the Red Cross, to assume the functions of the Protecting Power. For example, although the choice of a substitute is a matter for the detaining power under Article 10 of the First Geneva Convention, the Chinese reservation subjects this choice to the consent of the State of which the protected persons are nationals.¹⁸ The Chinese reservation has the effect of requiring that consent be given in each instance. This reservation reflects China's desire to safeguard its sovereignty and its fear of illegal interference.

It is a sobering fact that, while the backbone of the Geneva Convention system rests with the protecting power, not a single Protecting Power has been accepted or permitted to function during an armed conflict since the Geneva Conventions came into force.¹⁹ The First Protocol attempts to overcome the obvious reluctance of States to concede a role to a foreign power or substitute organisation in their internal affairs. Article 5 of this Protocol makes it more likely that a Protecting Power or Organisation will be appointed earlier in a conflict, but there remain no guarantees that a State will permit the Protecting Power or substitute to function within its territory.

3. *Protection of civilians*

In contrast with China's reluctance to give full effect to the mechanism of the Protecting Power or substitute, China played a more positive role in the 1st Session of the Geneva diplomatic conference of 1972. During these negotiations China stressed the need for the broadest protection for civilians in armed conflicts.²⁰ It is clear that recent wars have been fought by guerillas with the aid of civilians. Indeed, it is often impossible to distinguish between them. Civilians are particularly likely to suffer in such conflicts. China's predominant concern has been to protect civilians involved in just wars against imperialist aggression. The humanitarian aim of protecting civilians has, it seems, a strategic value for China. For both political and ideological reasons China has argued for the widest possible definition of civilians to include "freedom fighters". China has argued that:²¹

"When not participating directly in military operations, members of people's militia or guerilla movements should have civilian status and benefit from the protection guaranteed to civilians".

The First Protocol attempts to resolve the problems created by the involvement of civilians in guerilla war in Articles 43 to 47. The aim has been to make the

17. Cohen, JA, Chiu, H, *People's China and International Law* (1974), vol 2, 1123-4, 1522-82.

18. "Regarding Article 10 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, the People's Republic of China will not recognize as valid a request by the Detaining Power of the wounded and sick, or medical personnel and chaplains to a neutral State or of a humanitarian organization to undertake the functions which should be performed by a Protecting Power, unless the consent has been obtained of the Government of the State of which the protected persons are nationals." See generally, Schindler and Toman *ed*, *The Laws of Arms Conflict* (1978), 439-40.

19. Aldrich, G.H., "New Life for the Laws of War (1981) 75 AJIL 764, 766.

20. Farina, *op cit* 453.

21. CCH/111/SR.7; see also Farina, *loc cit*.

exceptions to the definition of combatant, and their entitlement to prisoner of war status, as narrow as possible while, at the same time, to protect as civilians all those not falling within the definition of combatants. Article 44 attempts to distinguish between combatants and civilians by requiring that the combatant should carry his arms openly during military engagement and while he is engaged in military deployments preceding the launching of an attack. These provisions seem ill-defined and fragile but they indicate the concern of a majority of States, including China, to ensure prisoner of war status to as large a group as possible. While not going far enough, the First Protocol achieves one of China's objectives in giving prisoner of war status to guerillas and in protecting civilians.²²

4. *Non-international armed conflicts*

Unlike other socialist States, the People's Republic of China has been reluctant to concede the need to regulate "non-international armed conflicts" such as terrorism and civil wars. A majority of States has been prepared to accept this need, and the Second Protocol applies to all armed conflicts not already covered in the First Protocol. Article 3, however, specifically provides that the Protocol is not to affect the sovereignty of a State, nor to justify intervening in the internal or external affairs of a High Contracting Party within the territory in which the conflict occurs. Despite this savings clause, China's delegate to the negotiations on this Protocol argued that the Protocol is "vague and ambiguous" and open to various interpretations.²³ In particular, China argued that, in dealing with civil wars, the Protocol might constitute a threat to State sovereignty. The fear has been that rebels will assume the status of legitimate combatants and therefore the status of a prisoner of war once they are in the hands of central authorities. China's willingness to accept the wider protections accorded to civilians and guerillas in wars against racism and foreign domination, but not in relation to other kinds of internal conflict, conforms with its view that wars of national liberation are just wars.

China's approach to international law, and to the laws of war in particular, is determined by its national interests and ideology. China has been primarily concerned to preserve its inviolable State sovereignty within its territory and to protect the victims of wars of national liberation. The coincidence of these interests with those of the majority of developing and socialist States has facilitated negotiation of the Protocols which extend the protection of the 1949 Geneva Conventions to civilians in certain internal conflicts and to new categories of combatants. The failures of the Second Protocol to regulate civil strife more generally, and of the First Protocol to establish an effective system of international supervision, reflect the concern of most States, including the People's Republic of China, that the Protocols should not encroach upon their sovereign rights in internal matters.

22. Farina, *op cit.*

23. Chinese Delegate to Third Committee, CDDH/III/SR.1.

Article 75: First Protocol

Article 75 of the First Protocol is a kind of mini-human rights convention²⁴ which in some respects embodies the common humanitarian ideals of which Professor Zhu speaks. Article 75 extends both substantive and procedural human rights to all persons who are within the power of a Party to a conflict. Regardless of the classification of the individual under the Geneva Conventions or under the First Protocol, these individuals will be entitled to enjoy certain minimum protections. Article 75 protects persons who are excluded from the definition of a protected person under Article 4 of the Fourth Geneva Convention thereby applying to a wider class of persons and extending the rights of civilians. Most importantly, the minimum rights included in Article 75 apply to a Party's nationals. As a result, the distinction made at customary international law between the obligations of States to aliens and their obligations to nationals has been eliminated in relation to armed conflicts under the First Protocol.

The rights included under Article 75 include many of the provisions of the International Covenant on Civil and Political Rights 1966, with the important exception that under this Protocol these rights cannot be derogated from in times of emergency, as can certain of these rights under the International Covenant. As such, Article 75 reflects a shift in emphasis in modern humanitarian law from the description of categories of protected persons, to the implementation of certain basic rights available to all persons regardless of their nationality. This shift suggests a progressive development away from overly technical rules of law, with their readily manipulated exceptions, to minimum substantive and procedural rights to all persons in all circumstances.

Conclusion

Professor Zhu concludes his paper by observing that the laws of war in Ancient China depended then, as now, on "public feeling, popular sympathy and support". Indeed, it seems that unless the humanitarian ideal, whether as part of the Chinese tradition of war or as articulated by the Geneva Conventions and Protocols, is accepted or imbued as a primary value by people throughout the world, no formal mechanism or treaty will have practical effect. It is for this reason that Professor Zhu's paper, and other papers describing the traditional laws of Japan, Malaysia and India, provide a contribution to our knowledge of those humanitarian principles which are common to all nations of justice and of fair and civilised behaviour. An understanding of these common values may encourage agreement not only upon the substantive rights of victims of war but also upon procedural mechanisms for the implementation of these rights.

24. See generally, De Stoop, D, "New Guarantees for Human Rights in Armed Conflicts — a major result of the Geneva Conference 1974-1977" (1974-5) 6 *Aust YBIL* 52.