

# Culture, Ideology and Politics: The Shaping of China's Conception of International Humanitarian Law

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## 1. Theoretical Foundations of China's Conception

The publication of *Comparative International Law* by Oxford University Press in 2018<sup>1</sup> marked the recent intensification of the debate between universalism and relativism which has haunted international law scholarship. While, at first glance, international law should have steered clear of the relativist and comparatist challenges thanks to the avowed a priori universality of its rules,<sup>2</sup> Martti Koskenniemi has warned incisively that “[t]he view that there is a single, universal international law [...] emerges from a profoundly Eurocentric view of the world”.<sup>3</sup>

Indeed, the universalist claim of international law is probably too idealistic to be true. It grapples with the everyday reality that States – the principal subjects and creators of international law – vary considerably in economic regime, cultural tradition, religious belief and legal system. As Judge XUE Hanqin has observed: “[n]otwithstanding its universal character, international law in practice is nonetheless not identically interpreted and applied among States”.<sup>4</sup> As a branch of international law, international humanitarian law (‘IHL’) – also known as ‘the law of war’, ‘the law of armed conflict’ or ‘*jus in bello*’ – cannot remain intact before the relativist challenge, in light of the understandings of this concept among countries with diverse attributes: “whilst a broad historical brush may depict all societies as having had some sort of notion of restraint in warfare, it is also clear that not all have emphasized the same ideas or adopted the same institutions”.<sup>5</sup>

As a unique Eastern civilization vastly different from the West – the cradle of modern international law – China, under the influence of culture, ideology and politics, has developed its

distinctive conception of international law and IHL. Subsequent to the splendid period of the Hundred Schools of Thought, Chinese traditional culture centred on Confucianism for over two millennia, which has shaped almost every aspect of social life and national ethos. On the other hand, Marxism, first introduced into China in the early twentieth century, has become its official ideology since 1949, when the People's Republic of China was established. Nowadays, under the banner of ‘socialism with Chinese characteristics’, China is seeking an ideological amalgamation of and harmony between Confucianism and Marxism.<sup>6</sup> Besides culture and ideology, politics – in which State sovereignty and human rights, national interests and reputation, often clash – plays an irreplaceable role in shaping China's conception of international law and IHL, as it does in the evolution of international law as a whole.

Based on this preliminary observation, I will, in the following sections, analyse how culture, ideology and politics shape China's conception of IHL.

## 2. Cultural Legacy: ‘An Army of Benevolence and Justice’

In traditional Chinese culture, the moral regulation of warfare was developed under the theory of just war (义战). According to Chinese classics, the ultimate goal of a just war is to serve the well-being of citizens rather than self-interest.<sup>7</sup> As a consequence, one criterion of just war is that such a war should intrinsically be conducted in a just way.<sup>8</sup> Upon a primitive form of the principle of distinction, Chinese classics offer rules and principles to be followed by professed just belligerents. For example, as *The Methods of the Ssu-ma* provides:

When you enter the offender's territory, do not do violence to his gods; do not hunt his wild animals; do not destroy earthworks; do not set fire to buildings; do not cut down forests; do not take the six domesticated animals, grains, or implements. When you see their elderly or very young, return them without harming them. Even if you encounter adults, unless they en-

<sup>1</sup> Anthea Roberts *et al.* (eds.), *Comparative International Law*, Oxford University Press, New York, 2018.

<sup>2</sup> Harold C. Gutteridge, “Comparative Law and the Law of Nations”, in William E. Butler (ed.), *International Law in Comparative Perspective*, Sijthoff and Noordhoff, Alphen aan den Rijn, 1980, p. 13.

<sup>3</sup> Martti Koskenniemi, “The Case for Comparative International Law”, in *Finnish Yearbook of International Law*, 2009, vol. 20, p. 4.

<sup>4</sup> XUE Hanqin, “Chinese Contemporary Perspectives on International Law: History, Culture and International Law”, in *Recueil des Cours*, 2012, vol. 355, p. 53.

<sup>5</sup> Frédéric Mégret, “The Universality of the Geneva Conventions”, in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds.), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, p. 683.

<sup>6</sup> Sung Bin Ko, “Confucian Leninist State: The People's Republic of China”, in *Asian Perspective*, 1999, vol. 23, no. 2, p. 239.

<sup>7</sup> WANG Ying, “Why Are Chinese Peacekeepers So Disciplined? Towards a Research Agenda”, FICHL Policy Brief Series No. 24 (2014), Torkel Opsahl Academic EPublisher, Brussels, 2016 (<https://www.toaep.org/pbs-pdf/24-wang>).

<sup>8</sup> LO Ping-cheung, “The Art of War Corpus and Chinese Just War Ethics Past and Present”, in *Journal of Religious Ethics*, 2012, vol. 40, no. 3, p. 419.

gauge you in combat, do not treat them as enemies. If an enemy has been wounded, provide medical attention and return him.<sup>9</sup>

Another Chinese military classic, *Wei Liao-tzu*, warns: “do not [...] slay men who have not committed offences. Whoever kills people’s fathers and elder brothers [...]; whoever makes slaves of the sons and daughters of other men is in all cases a brigand”.<sup>10</sup> Regulated under norms like these, the army of a just belligerent, in the Chinese tradition, was specially denominated as ‘an Army of Benevolence and Justice (仁义之师)’, trained with propriety and benevolence, and expected to adhere to kind-heartedness and humanity in the course of warfare. As Xunzi envisaged: “[w]herever the army of a humane man is, it has an effect like that of a spirit; wherever it travels, it produces transformation. Like seasonable rains, it pleases and gives joy to all”.<sup>11</sup>

Traditional Chinese culture facilitates modern China to sit in harmony with the principles and spirit of IHL. Concerning this linkage, XUE Ru submitted that in relation to “the benevolent treatment of the non-participants and the victim of the wars or armed conflicts [...], Chinese traditional military ethics in ancient military science [...] are more close and analogous to modern IHL”.<sup>12</sup> The Red Cross Society of China perceived China’s accession to the first two Additional Protocols to the 1949 Geneva Convention as a result of its persistent peace policy and humanitarian ideals.<sup>13</sup> Tellingly, IHL encounters little difficulty in gaining cultural legitimacy in China.

Traditional Chinese culture shapes China’s conception of IHL in various detailed aspects. First, with regards to the traditional reverence for the protection and humane treatment of war victims, modern China takes IHL largely as the materialization of the universal value of humanitarianism. In 1952, China stated positively that it took the 1925 Geneva Protocol and the 1949 Geneva Conventions to be “basically conducive to a lasting peace amongst all nations” and “in conformity with humanitarian principles”.<sup>14</sup> Second, just as ancient China rejected that war is uncontrollable violence, so modern China holds that war is a human activity subject to restrictions. The Chinese People’s Liberation Army (‘PLA’) explicitly recognizes the principle of limitation, that is: “any means and method of warfare adopted by belligerent States or belligerents should be limited by the protective requirements of humanitarianism”, as “one of the funda-

mental principles of the law of war”.<sup>15</sup> Third, the PLA uses the term ‘an Army of Benevolence and Justice’ to label itself with pride, building a public image that abides by the law and circumvents even the slightest offence against people.<sup>16</sup> The behaviour of the PLA is subject to the strict discipline set forth in Chinese legislation.

### 3. Ideological Factors: ‘An Army of the People’

In Marxist military thought, the respect for *jus in bello* is a corollary of the doctrine of proletarian internationalism. Proletarian internationalism is built upon conceiving capitalism as a global economic and social system which created one working class whose members invariably sell their labour to the bourgeoisie, irrespective of particular local conditions or cultures.<sup>17</sup> Proletarians of different countries and locations have immanently common interests.<sup>18</sup> They should, therefore, unite together to pursue their common political agenda, which is to combat the bourgeois supremacy and seize political power.<sup>19</sup> However, war may become a crushing blow for this goal, for it involves confrontations between the peoples and the organized troops of hostile parties, which are predominantly composed of proletarians. Given such an underlying contradiction between the desire for proletariat’s internal solidarity and the unavoidability of war, it becomes imperative for Marxists to work out their battleground policies with a view to reducing bloodshed and destruction among proletarians to a minimum extent, and reuniting them under the banner of proletarian internationalism. For instance, during the Chinese Civil War, the Communist Party of China (‘CPC’) reasoned the necessity of the protection of captives as follows:

Most of [the captured enemy officers and men] are workers and peasants [...] [A]s long as they lay down arms, they become our friends, mates and compatriots [...] Once the battle is over, we offer them lenient treatment, looking after their life and pain just as treating our own brothers.<sup>20</sup>

The CPC adopted a multiplicity of rules and regulations to protect civilians and captives. In October 1947, the CPC issued the standard version of “The Three Main Rules of Discipline and the Eight Points for Attention”, a code of conduct mainly concerned with the treatment of local populace and captives. It contains rules such as “do not hit or swear at people”, “do not take liberties with women”, and “do not maltreat captives”.<sup>21</sup> In June 1948, the CPC issued a disciplinary code requiring the PLA, when entering cities, to “protect the lives and property of people in the city”, “protect schools, hospitals, scientific and

<sup>9</sup> Ralph D. Sawyer (trans.), *The Seven Military Classics of Ancient China*, Basic Books, New York, 1993, p. 128.

<sup>10</sup> *Ibid.*, p. 254.

<sup>11</sup> John Knoblock (trans.), *Xunzi: A Translation and Study of the Complete Works*, vol. 2, Stanford University Press, Stanford, 1990, p. 228, para. 15.2.

<sup>12</sup> XUE Ru, “Humanitarianism in Chinese Traditional Military Ethics and International Humanitarian Law Training in the People’s Liberation Army”, in Suzannah Linton, Tim McCormack and Sandesh Sivakumaran (eds.), *Asia-Pacific Perspectives on International Humanitarian Law*, Cambridge University Press, Cambridge, 2019, p. 94.

<sup>13</sup> SU Wei, “Red Cross Society of China: The 1977 Geneva Protocols and the Development of International Humanitarian Law”, in *International Review of the Red Cross (1961-1997)*, 1987, vol. 27, no. 258, p. 286.

<sup>14</sup> “Foreign Minister Chou En-lai’s Statement on China’s Recognition of the 1949 Geneva Conventions”, 13 July 1952, reproduced in Jerome Alan Cohen and Hungdah Chiu, *People’s China and International Law: A Documentary Study*, vol. 2, Princeton University Press, Princeton, 1974, p. 1123.

<sup>15</sup> 中国人民解放军军语 [Military Terminology of the Chinese PLA], Military Science Press, Beijing, 2011, p. 580.

<sup>16</sup> See, for example, HU Junhua *et al.*, “瓦砾间, 仁义之师真本色 [Among the Rocks and Debris, the True Colours of an Army of Benevolence and Justice]”, in *PLA Daily*, 12 August 2014, p. 1.

<sup>17</sup> John Schwarzmantel, “Nationalism and Socialist Internationalism”, in John Breuilly (ed.), *The Oxford Handbook of the History of Nationalism*, Oxford University Press, Oxford, 2013, p. 637.

<sup>18</sup> Karl Marx and Friedrich Engels, “Manifesto of the Communist Party”, in *Marx and Engels Collected Works*, vol. 6, Lawrence and Wishart, London, 2010, p. 497.

<sup>19</sup> *Ibid.*, p. 519.

<sup>20</sup> 中共中央文件选集 [Selected Documents of the CPC Central Committee], vol. 16, CPC Central Party School Press, Beijing, 1992, pp. 698–699.

<sup>21</sup> “A Collection of Codes of Conduct Issued by Armed Groups”, in *International Review of the Red Cross*, 2011, vol. 93, no. 882, p. 487.

cultural institutions, public facilities of the city, scenic spots and historical sites and buildings”, and “abide by the public order”.<sup>22</sup>

Nowadays, China has acknowledged and enshrined in its legislation and official documents the past practice of the CPC army. MAO Zedong’s assertion of the purpose of the CPC army as “to stand firmly with the Chinese people and to serve them whole-heartedly” is reiterated verbatim in Interior Service Regulations of the PLA as part of the Chinese legislation.<sup>23</sup> Also, “The Three Main Rules of Discipline and the Eight Points for Attention” is reproduced and implemented in Discipline Regulations of the PLA.<sup>24</sup> In addition, pursuant to the PLA’s first-hand experience in the battlefield, China has constantly stressed the need for a strict protection of civilians and prisoners of war in its comments on IHL.<sup>25</sup> In Chinese criminal law, the protection of civilians and captives is specifically recognized as a duty of servicemen, violations of which would incur criminal responsibility.<sup>26</sup> In the absence of a special implementation law of the 1949 Geneva Conventions, these rules are the only two in Chinese law that are analogous to war crimes under IHL.

Coincidentally, both China’s culture and prevailing ideology seem to give the Chinese the impression that IHL is exclusively about the protection of victims of war. This conception, while serving well the humanitarian spirit, sometimes causes ignorance about the other side of the IHL coin, namely, the regulation of the conduct of hostilities. There is an overall lack of Chinese theory and legislation in this aspect, including on the choice of methods of warfare and the use of weapons. IHL norms are not uniformly designed to serve humanitarian purposes; military considerations and pragmatic arrangements are also embedded in a substantial part of the norms. To benefit from a more complete picture, Chinese actors should take a more balanced approach to the two facets of this body of law.

#### 4. Political Considerations: Sovereignty and Reputation

Sovereignty serves as a prominent political factor shaping China’s conception of IHL. The page of modern Chinese history is replete with Western invasion and dominance. China’s interaction with international law during the nineteenth and the first half of the twentieth centuries was therefore “nothing less than a traumatic encounter that created lasting memories of humiliation, domination, and oppression by foreign powers under the unequal treaty regime”.<sup>27</sup> Such past experience of bitterness is the key to comprehend Chinese approaches to international law, in particular China’s rigidity on sovereignty, non-interference and equality.<sup>28</sup> Among the major powers in the contemporary world,

China is probably the most outspoken and staunch defender of the traditional concept of State sovereignty. One commentator even described China as “the last bastion of Westphalia”.<sup>29</sup>

The law of non-international armed conflict (‘NIAC’) – typically regulating the fight between a government and an armed group – innately touches upon State sovereignty.<sup>30</sup> While upholding the international legal regulation of NIAC, China has been vigilant about the expanding ambit of NIAC law beyond its well-established borders, which has an obvious impact on State sovereignty. On the question of the protection of the environment in relation to armed conflicts, China expressed, in a generalized tone, that “[w]ithout the support of international practice, it would be inappropriate simply to transpose rules applicable in international armed conflicts to [NIACs]”.<sup>31</sup> On the war crimes provisions in the Rome Statute of the International Criminal Court (‘ICC’), China stated that “[t]he definition of war crimes committed during domestic armed conflicts in the Statute had far exceeded not only customary international law but also but also the provisions of Additional Protocol II”.<sup>32</sup> Admittedly, “sovereignty related political concerns still heavily outweigh all legal arguments for China’s accession to the ICC at this stage”.<sup>33</sup>

China’s reluctance to accept some, if not all, NIAC war crimes as customary – with the motive to protect sovereignty – could easily be criticized as a signal of tolerance of impunity for such atrocities. If this conceptual equation is established, there is high risk for China as international law has already evolved to the stage where “the rule of some aspects of international law [prevails] over traditional State sovereignty”.<sup>34</sup> Indeed, sovereignty is no longer a pretext for a State to do whatever it wishes at home. China will have to find a way to reconcile its stubbornness on sovereignty with the global efforts to suppress flagrant violations of NIAC law. China’s attitude towards NIAC war crimes under the jurisdiction of the ICC may be understandable in light of “valid and tragic historical reasons”, inviting further mutual exchanges on the relationship between sovereignty and international crimes among Chinese and other actors.<sup>35</sup>

Fortunately, China’s desire to gain and retain international reputation compensates, to some extent, for the country’s conservative position on State sovereignty. As Anthea Roberts observed, China is truly concerned with the need to project an

<sup>29</sup> ZHANG Yongjin, “Ambivalent Sovereignty: China and Re-Imagining the Westphalian Ideal”, in Trudy Jacobsen *et al.* (eds.), *Re-envisioning Sovereignty: The End of Westphalia?*, Ashgate, Aldershot, 2008, pp. 101–102.

<sup>30</sup> See Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, Cambridge University Press, Cambridge, 2010, pp. 93–96, 166.

<sup>31</sup> Summary Record of the Twenty-Second Meeting, UN Doc. A/C.6/70/SR.22, 23 November 2015, para. 74.

<sup>32</sup> Statement by QU Wensheng (China), UN Doc. A/C.6/53/SR.9, 4 November 1998, para. 36.

<sup>33</sup> GUAN Jing, “The ICC’s Jurisdiction over War Crimes in Internal Armed Conflicts: An Insurmountable Obstacle for China’s Accession?”, in *Penn State International Law Review*, 2010, vol. 28, no. 4, p. 749.

<sup>34</sup> Morten Bergsmo and LING Yan, “On State Sovereignty and Individual Criminal Responsibility for Core International Crimes in International Law”, in Morten Bergsmo and LING Yan (eds.), *State Sovereignty and International Criminal Law*, Torkel Opsahl Academic EPublisher, Beijing, 2012, p. 1 (<http://www.toaep.org/ps-pdf/15-bergsmo-ling>).

<sup>35</sup> *Ibid.*, p. 4.

<sup>22</sup> 中共中央文件选集 [Selected Documents of the CPC Central Committee], vol. 17, CPC Central Party School Press, Beijing, 1992, pp. 200–201.

<sup>23</sup> China, Interior Service Regulations of the Chinese PLA (trial implementation), 22 March 2018, Article 4.

<sup>24</sup> China, Discipline Regulations of the Chinese PLA (trial implementation), 22 March 2018, Article 5 and Appendix 1.

<sup>25</sup> General Assembly Official Records, 28th Session: 1450th Meeting, UN Doc. A/C.6/SR.1450, 29 November 1973, para. 33; Summary Record of the Fifth Meeting, UN Doc. A/C.6/59/SR.5, 4 November 2004, para. 22.

<sup>26</sup> China, Criminal Law of the People’s Republic of China, 4 November 2017, Articles 446 and 448 (<http://www.legal-tools.org/doc/80fc95/>).

<sup>27</sup> LI Zhaojie, “The Impact of International Law on the Transformation of China’s Perception of the World: A Lesson from History”, in *Maryland Journal of International Law*, 2012, vol. 27, no. 1, p. 152.

<sup>28</sup> *Ibid.*, p. 129.

image of being a good international citizen.<sup>36</sup> This political consideration has pushed China to embrace IHL norms which have been well-accepted by the international community. In China's mind, those norms, backed up by humanitarianism, appear to be less rules of the jungle and more an embodiment of the universal value of civilization. The Hague Conventions of 1899 and 1907, for example, were shielded from China's repeated censure of unequal treaties.<sup>37</sup> In 1952, although refusing to recognise the vast majority of the treaties entered into by the former government, China decided to recognize the 1949 Geneva Conventions,<sup>38</sup> which then made up the most important multilateral treaties recognized by the pre-reform China. Until 1989, China was the only Permanent Member of the Security Council to ratify both Protocols of the 1949 Geneva Conventions.<sup>39</sup> On diplomatic occasions, China has often referred to the universality of IHL instruments.<sup>40</sup> China's behaviour does not come as a surprise, as the universal appearance of IHL legal instruments is attractive for every State eager to be treated as a civilized and respected member of the international community, more so when such treaties are widely ratified by States. China, dubbing itself as 'a responsible major power', is no exception.

## 5. Concluding Remarks

International actors and practitioners have taken IHL as a bridge to seek more dialogue and co-operation with China on diverse issues of global governance. For instance, during his visit to China in 2018, Peter Maurer, President of the International Committee of the Red Cross, remarked that "[w]e wish to have a regular and substantive strategic dialogue with China on global governance, global affairs and [IHL], the best tool at our disposal for reducing the impact of armed conflicts on the lives of ordinary people".<sup>41</sup> China's engagement with IHL would be particularly meaningful to tackle the daily threat to the effectiveness of law in protecting the dignity and well-being of victims in the cauldron of war, given China's growing role in maintaining international peace and security, as a Permanent Member of the UN Security Council, the country with the largest standing army, and the second-larg-

est financial contributor to the UN peace-keeping budget.

This policy brief depicts the principal features of China's conception of IHL and their cultural, ideological and political roots. While the notion of sovereignty renders China's conception conservative in the context of NIAC law, I believe that China's traditional culture and the desire for international reputation make China a competent supporter and generous sponsor of the development of IHL. Furthermore, an understanding of the fundamentals of China's conception of, or even further, approaches to IHL serves as a departure point to boost co-operation with China in tackling the challenges that beset victims of armed conflicts and atrocities. Admittedly, academic research on China and IHL is still insufficient, especially with regards to concrete legal issues and norms. As a modest spur, the aim of this policy brief is to induce more contributions to further the study of this topic.

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<sup>36</sup> Anthea Roberts, *Is International Law International?*, Oxford University Press, New York, 2017, p. 287.

<sup>37</sup> WANG Tieya, "International Law in China: Historical and Contemporary Perspectives", in *Recueil des Cours*, 1990, vol. 221, pp. 250–251.

<sup>38</sup> See Cohen and Chiu, 1974, pp. 1123–1124, see *supra* note 14.

<sup>39</sup> Cornelio Sommaruga, "Les Protocoles Additionnels aux Conventions de Genève en Quête d'Universalité", in *International Review of the Red Cross*, 1987, vol. 69, no. 765, p. 252.

<sup>40</sup> See, for example, Report of the 30th International Conference of the Red Cross and Red Crescent, Geneva, 23–30 November 2007, p. 238; Summary Record of the Twenty-Third Meeting, UN Doc. A/C.6/66/SR.23, 14 November 2011, para. 40.

<sup>41</sup> "China: ICRC President Urges Humanitarian Focus for China's Global Governance Endeavour", 1 June 2018 (available on the International Committee of the Red Cross's web site).