

Books and Reviews

Zhu Wen-Qi, *Outline of international humanitarian law*, Peter Chan Publishers/International Committee of the Red Cross, Hong Kong/Shanghai, 1997, 182 pages — in Chinese, with an English résumé

Humanitarian concerns have traditionally occupied an important place in Chinese culture. The teachings of Confucius are displayed prominently, along with teachings from other cultures, in the International Red Cross Museum in Geneva. Mao Zedong's orders were quoted in the majority opinion of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the Tadic jurisdiction appeal as evidence of State practice in extending certain general principles of warfare to internal armed conflict.¹ And yet, for whatever reason, there is little academic literature in Chinese that systematically discusses international humanitarian law. The publication of Dr Wenqi Zhu's "Outline of International Humanitarian Law" (the *Outline*) at the invitation of the ICRC will no doubt help to fill that gap.

The first monograph ever published on this subject in China, the *Outline* aims to help disseminate the basic rules and principles of international humanitarian law in China and the Chinese-speaking world at large. Dr Zhu is well qualified for this task. He received his doctorate in international law from the University of Paris II, and had a stint doing research in the ICRC's Legal Division. Subsequently he served at the Department of Treaties and Law of the Chinese Ministry of Foreign Affairs and became a deputy division director. Currently he is a Legal Adviser in the Office of the Prosecutor at the ICTY in The Hague. Previously, he was the author of the chapter on the laws of war for the standard Chinese college textbook "International Law", under the editorship of Professor Wang Tieya. That chapter contains a section entitled

¹ Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction. Prosecutor v. Tadic, Case No. IT-94-I-AR72 (ICTY, App. Ch., 2 October 1995), para. 102.

“International Humanitarian Law”, the first time such a section has ever appeared in any Chinese college textbook on international law.

As outlines go, Dr Zhu’s *Outline* is a rich one. It contains an introduction and five chapters, namely, “Historical Development of Humanitarian Law; China and Humanitarian Law”; “Basic Rules and Principles of International Humanitarian Law”; “Major Current Legal Issues related to International Humanitarian Law”; “Distinct Features of International Humanitarian Law”; and “International Humanitarian Law and International Human Rights Law.” In addition, the *Outline* is privileged to contain a foreword by H.E. Judge Shi Jiuyong of the International Court of Justice. Moreover, annexed to the *Outline* are “General Introduction to the Red Cross Society of China”² and “The International Red Cross and Red Crescent Movement: Its Origins, Structure and Mandate”,³ together with the relevant legal texts.

Conceived as an introduction to the basic principles of international humanitarian law and related issues, the *Outline* does not simply translate them into Chinese. In the course of addressing these principles and the philosophy behind them, Dr Zhu pays particular attention to the history of China and its present circumstances, and touches upon various questions with particular significance to China, such as the right of the ICRC to visit persons detained for political or security reasons, and the differences between international humanitarian law and international human rights law. This effort is admirable and will help clear up some misunderstandings regarding the basic concepts of international humanitarian law.

In his introduction, Dr Zhu first briefly outlines various concepts relating to international humanitarian law, such as international law, international humanitarian law, laws of war, Hague law and Geneva law, *jus cogens*, customary international law, as well as the notion of war and armed conflict. He also discusses the place of international humanitarian law in international law as a whole and its current significance, and then moves on to the key issues of his *Outline*. The author argues that the current standard Chinese rendition of the term “international humanitarian law” as “*Guoji Rendao Zhuyi Fa*” is incorrect. He does not find any fault

² By Li Changming and Yuan Tianyi, respectively Secretary-General and Director of the Policy Research Bureau, Red Cross Society of China.

³ By Christophe Swinarski and Alfred Michael Boll, respectively head of delegation and delegate, ICRC Regional Delegation for East Asia.

with “*Guoji*”, meaning “international”, “*Rendo*”, meaning “humanitarian”, or “*Fa*”, meaning “law”. What troubles him is “*Zhuyi*”, which in standard Chinese refers to a political, philosophical or social doctrine or theory, such as Marxism, Leninism, socialism or communism. As such, “*Zhuyi*” can hardly be placed together with “*Fa*”, which stands for law with binding force. Accordingly, Dr Zhu advocates deleting “*Zhuyi*” from the standard Chinese rendition, leaving only “*Guoji Rendao Fa*”, which corresponds better with “international humanitarian law” in English and “*droit international humanitaire*” in French. If Dr Zhu’s wording becomes generally accepted, it will contribute to clarifying the concept to the general Chinese-speaking public, although to the educated elite steeped in humanitarian issues such an issue of phraseology might not matter so much.

In Chapter I, Dr Zhu traces the origins and the development of international humanitarian law and describes how humanitarian issues and international humanitarian law figure in China. In so doing, he not only retells the familiar story of Henry Dunant, the establishment of the ICRC and its unflagging hard work, but also stresses the universality of humanitarian precepts. The concern for human dignity is shared by all nations. No one culture should claim to have a monopoly on it.⁴ Section I of this chapter summarizes the development of Geneva law and Hague law. The historical background is familiar and is related concisely in limited space.

Section II of Chapter I briefly describes the ancient Chinese theories relating to humanitarian concerns during times of war. The laws of war are as old as war itself. The roots of humanitarian law can be found in the teachings of the Chinese thinkers, rulers and military strategists who have had a profound influence throughout Chinese history. As an example, Dr Zhu cites the teachings of Sun Wu (Sun Tzu), whose famed book *The Art of War* first appeared around 500 B.C., but still commands a huge readership throughout the world today. Not interested in devising strategies for a short-lived victory, Sun Tzu advocated “trying to defeat the enemy by morality,” and asserted that a skilful strategist should be able to subdue an enemy army without engaging it, to take an enemy city without laying siege to it, and to overthrow an enemy State without

⁴ Dr Zhu draws support for this position from Jean Pictet, *Development and principles of international humanitarian law*, Geneva, 1985, p. 6; Mohammed Bedjaoui, “Humanitarian law at a time of failing national and international consensus», *Modern wars — The humanitarian challenge, A Report for the Independent Commission on International Humanitarian Issues*, London, 1986, p. 6.

bloodying swords. In other words, unnecessary suffering should be avoided. Sun Tzu also believed that a general should train his troops in reasoning and run the army with strong discipline. One of the important rules was that a soldier shall not attack civilians or damage their property. Such ideas can be said to be the forerunners of certain rules of international humanitarian law. These teachings — distinguishing between combatants and civilians, avoiding unnecessary suffering — were repeated and practised by many rulers and generals who battled with each other during the Warring States period (*Chunqiu Zhanguo*, 453-221 B.C.) in Chinese history. To these were added several more principles such as not to pursue defeated enemies; not to employ ruses in battle; not to kill those who have already surrendered. Some of these principles subsequently became prominent in Western thought, although there may not have been any causal relationship between their influence in China and their crystallization in the West. For example, it was only in 1868 that the Declaration of St. Petersburg formally recognized that the only legitimate object of war is to weaken the military forces of the enemy and this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable. Finally, the author sketches the relationship between China and international humanitarian law. The history of modern China's participation in international humanitarian law has been exemplary, with China having ratified most of the basic instruments thereof since 1904. In 1983 it became the first permanent member of the Security Council to ratify both the 1977 Protocols (I and II) to the Geneva Conventions, and is still one of the only two permanent members that have ratified both Protocols. In short, Dr Zhu provides a very good description of how humanitarian principles took root in China.

In Chapter II, Dr Zhu summarizes the basic rules and principles of international humanitarian law, concisely reiterating the basic content of international humanitarian law. In so doing, he focuses on the essential aspects of the four Geneva Conventions, the two Protocols and the seven Fundamental rules as drafted in 1978 by a group of experts convened by the ICRC. This summary of law provides an excellent starting point for further study.

In Chapter III, Dr Zhu discusses several current major issues in international humanitarian law. These include the distinction between international and internal armed conflicts, the relationship between the Martens clause and nuclear weapons, the relationship between humanitarian principles and military necessity, the right of the ICRC to visit prisoners and detainees, and sanctions for violations of international

humanitarian law. He first takes up the issue of the distinction between international and internal armed conflicts. He notes that while all the rules and principles have been inspired by humane considerations and the desire to minimize the evils of armed conflicts, the scope of application of the norms of humanitarian law depends very much on the nature of the armed conflicts. To illustrate this point, Dr Zhu analysed the *Tadic* jurisdiction appeal decision by the Appeals Chamber of the ICTY.⁵ In that decision, the distinction between international and internal armed conflicts plays an important role, but its impact is reduced by the Appeals Chamber's reading of Article 3 of its Statute as encompassing serious violations of international humanitarian law not covered under other articles of the Statute. One might venture to add that the distinction between international and internal armed conflicts, in itself, does not really adversely affect the underlying philosophy — humane consideration of suffering — of humanitarian law, as violations of humanitarian rules may still be punished under different names in the domestic legal regime. So viewed, the distinction between international and internal armed conflicts serves to distribute jurisdiction between international and domestic legal regimes. Categorizing an armed conflict as internal does not necessarily afford impunity to the perpetrators of inhuman acts. The weak point in the process is that enforcement under the domestic regime may be ineffective, although the international enforcement mechanism is itself not much stronger. The ICTY is the first such tribunal established since World War Two.

The second current issue discussed by the author is the relationship between the Martens clause and nuclear weapons. He is of the view that since nuclear weapons are capable of mass destruction, mass injury or mass poisoning, it is questionable whether they can be used in conformity with the basic principles of international humanitarian law, which prohibits parties to an armed conflict from employing any means and methods that cause unnecessary suffering or that do not distinguish between civilians and combatants. Dr Zhu is of the view that there may be room for applying in this area the Martens Clause, as a principle of international customary law providing for the application of international customs and the dictates of public conscience in the absence of a positive rule.⁶ To him, however, the Martens Clause leaves the precise content of the applicable standard to be ascertained in the light of the particular changing circum-

⁵ See note 1.

⁶ Dr Zhu cites *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, ICJ Reports, 1996, para. 84 (not yet published).

stances, thereby leading to enormous complexity, as demonstrated by the Advisory Opinion of the ICJ.⁷

The next issue that Dr Zhu tackles is the relationship between humanitarian law and military necessity. He notes that the basic rules of international humanitarian law have been adopted by sovereign States which are willing to accept the wording of the provisions as far as their military requirements permit. As a result, there exists the doctrine of military necessity, under which the existence of the latter could constitute an exception to the general rules of humanitarian law. Dr Zhu argues that this doctrine should not be interpreted broadly with the result that, whenever military necessity exists, laws of war would cease to apply. He argues that laws of war are designed specifically for all phases of war and that military necessity cannot justify the violation of a positive rule. To him, military necessity, even of the most urgent nature, cannot constitute an exception to the rules of international humanitarian law unless those rules themselves so provide.

Next Dr Zhu comes to the issue of the ICRC's right to visit political and security detainees. He recognizes that the Geneva Conventions and the Protocols do not provide a legal basis for visits to such persons when no armed conflict exists. He notes, however, that the ICRC has a broad mandate to conduct humane activities "at all times and in all circumstances" and has been universally recognized to have the right to take certain initiatives in the humanitarian sphere. He argues that visits by the ICRC to political and security detainees are within such a broad mandate and should not be questioned.

The last current issue is sanctions for violations of international humanitarian law. Dr Zhu discusses the current state of existing regimes for such sanctions and analyses various issues relating to the two international criminal tribunals currently in operation. He believes that these tribunals will boost the enforcement of international humanitarian law. As we can tell, these are hotly disputed issues and Dr Zhu poses various thoughtful questions, attempting to put forward his point of view succinctly. Controversial as they are, these issues have received fair treatment from Dr Zhu. Of course, definitive answers are not to be expected from him or anybody else. The value of such a discussion is more in raising thoughtful questions than in providing clear answers to them.

⁷ ICJ Reports, *ibid.* (note 6).

In Chapter IV, Dr Zhu analyses various special characteristics of international humanitarian law as a distinct branch of public international law. In order to help disseminate international humanitarian law in China, he describes and analyses various basic rules and principles, focusing on various aspects of those rules that are designed to maximize the protection of victims of armed conflicts. For example, common Article 2 of the Geneva Conventions provides that the Geneva Conventions shall apply to all cases of declared war or of any other armed conflict, even if one of the parties does not recognize the state of war. It also provides that if one of the parties to the conflict is not a party to the Conventions, the rules of the Conventions would still apply between those who remain parties, thus departing from the so-called “general participation clause” in traditional international law. Another such rule is that the Geneva Conventions do not permit protected persons to renounce their rights thereunder, in order to prevent their precarious, powerless status from being abused by the occupying power. Dr Zhu traces the theoretical and historical basis for these rules and emphasizes their sole purpose of providing effective protection to the victims of war.

In the final chapter, the author discusses the differences between international humanitarian law and international human rights law in an effort to dispel the prevalent confusion between the two in China. Of course, both international humanitarian law and international human rights law stem from the same concern for the protection of the individual and share many common features. It is perhaps for this reason that many people in China regard international humanitarian law as being the same as international human rights law. Dr Zhu stresses the differences between them, such as in their sources and their scope of application. He notes the political sensitivity of human rights law, compared to the clearer, more concrete and more universally recognized rules of international humanitarian law. Moreover, the monitoring mechanism for human rights is very complex, including intergovernmental organizations such as the United Nations and many non-governmental organizations. This mechanism is not perfect at present and often leads to friction. He notes that while many non-governmental organizations appear to be intent on finding fault with domestic systems, the ICRC always tries to stick to its principles of neutrality and independence, a quality that is not easy to find in a world where there is no shortage of partiality and double standards.

In summary, Dr Zhu's *Outline* is an admirable piece of work, presenting a Chinese scholar's thoughtful views on the basic rules and principles of international humanitarian law. H.E. Judge Shi Jiuyong of the International Court of Justice states in his foreword that the *Outline* represents

an important contribution of practical significance to the development of international humanitarian law, and will spark further research and publications on international humanitarian law in China. I would simply add that I hope there will be an English version of it.

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