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**“YOU FIGHT YOUR WAY, WE FIGHT
OUR WAY”: THE CULTURAL CONFLICT
BETWEEN CHINA AND THE LAW OF WAR**

A Thesis Presented to The Judge Advocate General's School
United States Army in partial satisfaction of the requirements
for the Degree of Master of Laws (LL.M.) in Military Law

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, the United States Army, the Department of Defense, or any other governmental agency.

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49TH JUDGE ADVOCATE OFFICER GRADUATE COURSE
APRIL 2001

“You Fight Your Way, We Fight Our Way”^{*}:

The Cultural Conflict Between China and the Law of War

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^{*} Saying by Mao Zedon

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**“You Fight Your Way, We Fight Our Way”:
The Cultural Conflict Between China and the Law of War**

By Major Shannon Morningstar

U.S. Army

ABSTRACT: In his survey of warfare, military historian John Keegan noted, “culture is . . . a prime determinate of the nature of warfare.” The law of war is an effort by the world community to unify the culture of warfare. This thesis proposes that there is an inherent cultural conflict between China and the law of war that cannot be resolved in the near future. This conflict is based on four different factors: (1) China’s distrust of the West; (2) China’s unique perspective on law; (3) China’s unique perspective on war; (4) China’s military doctrine. My thesis will show that the cultural conflict between China and the law of war is so extensive that China will not adhere to the principles of *jus ad bellum* and *jus in bello* if engaged in an armed conflict with the United States. The last portion of this thesis will examine scenarios of China breaching the law of war by reverting to its traditional method of waging war and possible response by the United States.

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"The first law of war is to preserve ourselves and destroy the enemy."

Mao Zedong¹

"What is permissible in war is viewed either absolutely or in relations to a previous promise. It is viewed absolutely, first from the viewpoint of the law of nature, and then from that of the law of nations."

Hugo Grotius²

"East is East, West is West, and never the twain shall meet."

Rudyard Kipling³

I. Introduction

In the darkness of evening on May 7, 1999, the citizens of Belgrade illuminated their city with torches, candles and gas lamps. For the previous forty-five days warplanes from the North Atlantic Treaty Organizations (NATO), spearheaded by the United States, rained down an estimated 15,000 bombs during five thousand missions against the beleaguered city. On this evening Belgrade was subjected to the heaviest bombing yet. Then, approximately fifteen minutes before midnight, a technologically sophisticated B-2 stealth bomber dropped a trio of smart bombs intended for the Federal Directorate for Supply and Procurement, a Yugoslav arms agency. Instead, the two thousand pound bombs struck the Chinese Embassy injuring at least twenty people and killing three Chinese journalists.

The United States moved swiftly to explain the misfortune. On 8 May 1999, President Bill Clinton delivered a televised speech stating that the bombing of the

¹ MAO ZEDONG, ON GUERRILLA WARFARE, 20 (Samuel B. Griffith trans.) (1961).

² THE LAW OF WAR-A DOCUMENTARY HISTORY 16 (Leon Friedman ed. 1972).

³ THE OXFORD DICTIONARY OF QUOTATIONS 438 (Elizabeth Knowles ed. 1999).

Chinese embassy was an unintentional and “tragic mistake.”⁴ The next day Pentagon spokesman Kenneth Bacon added, “the building was hit in error. We did not target the Chinese embassy.”⁵ Mr. Bacon explained that outdated intelligence on Belgrade building locations caused the American bomber to strike the Chinese embassy when it was actually targeting the Federal Directorate for Supply and Procurement.⁶

The Chinese Government summarily rejected the American explanations. Officials repeatedly characterized the incident as a “barbaric attack,”⁷ a “gross violation of Chinese sovereignty seldom seen in diplomatic history,”⁸ and a clear violation of international law. At the same time anti-American demonstrations broke out in cities across China including Shanghai, Guangzhou, and Hong Kong. In Cheng-du, the General Counsel’s house was firebombed. In Beijing, the United States Ambassador was trapped inside the embassy by one angry mob while another surrounded his wife in their official residence.⁹

The reaction to the bombing of the Chinese Embassy in Belgrade is revealing of a troubling cultural divide on issues relating to warfare. The official rhetoric of the Chinese Government and the anger of the Chinese people expressed a deep-seated belief that the American action was a *deliberate* attack. It is even more disturbing to understand that the Chinese cannot possess this view without possessing a corresponding belief that

⁴ Melinda Liu, *Wounded Pride, The Clinton Agenda*, NEWSWEEK, May 24, 1999, at 30.

⁵ *Id.*

⁶ Mia Turner, *China’s Kosovo Problem* TIME, May 17, 1999, at 22.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

the United States willingly violates the law of war. For the community of nations, this begs a most important question: In light of China's expressed view of America, will China follow the law of war in future conflicts?

In his survey of the history of warfare, military historian John Keegan¹⁰ noted, "culture is . . . a prime determinate of the nature of warfare."¹¹ Through the law of war nations attempt to establish limits on the nature of warfare through customary international law and treaties. European nations have long attempted to restrain war by law. There are two primary aspects to the law of war. Laws, which define when warfare is or is not permissible, *jus ad bellum*¹², and laws that regulate conduct during warfare, *jus in bello*.¹³

The principle of *jus ad bellum* was first systemized by Christian theologians who limited warfare to situations where the cause is just, the military action is undertaken with proper intentions, and authorized by the proper constitutional authority. During the eighteenth and nineteenth centuries, nations overlooked the Christian legal boundaries and held that national sovereignty supplied a state with the required justification for resorting for war. The development of the weapons of mass destruction finally caused

¹⁰ John Keegan was a senior lecturer in military history at the Royal Military Academy, Sandhurst. He is presently the defense editor of the *Daily Telegraph* in London. He is the author and co-author of nine books, including *The Face of Battle*, *The Nature of War* (with Joseph Darracott), *World Armies*, *The First World War*, *Who's Who in Military History* (with Andrew Wheatcroft), *Six Armies in Normandy*, *Soldiers* (with Richard Holmes), *The Mask of Command*, *The Price of Admiralty*, *The Second World War*.

¹¹ JOHN KEEGAN, *A HISTORY OF WARFARE*, 387 (1993).

¹² Telford Taylor, in *THE LAW OF WAR-A DOCUMENTARY HISTORY* (Leon Friedman ed.) (1972).

¹³ CHARLES S. RHYNE, *INTERNATIONAL LAW*, 417-28 (1971).

the European nations to enter into various treaties and international agreements to limit onset of armed conflict¹⁴.

The principle of *jus in bello* that is now in force is largely a creature of treaties and international agreement inspired by Henry Dunant's book on the bloody Battle of Solferino. The most important treaties are the Hague Conventions of 1907, the four Geneva Conventions of 1949, and the 1977 Protocols in addition to the Geneva Convention.¹⁵

The success of the law of war in actual application, as opposed to verbal concurrence, depends in large measure on the cultural receptiveness of the nations waging war. In other words, the law of war is most successfully applied by nations that, through tradition and custom, wage war in the manner proscribed by the law of war. China, her land and people, have become seemingly familiar to Americans through the avenues of mass media and global communications. This familiarity, however, is superficial and has spawned a false sense of homogeneity between China and the West. While there is a growing body of published work on China's military potential and strategic interests¹⁶, for example, there remains a dearth of in-depth discussion concerning China and the law of war. This growing familiarity of China's visible strength and ignorance of her inner motivations and intentions is based on an unwarranted assumption that China would "act like us." When considering potential

¹⁴ Taylor, *supra* note 12, at 5-13.

¹⁵ MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 5 (1959).

¹⁶ See BILL GERTZ, THE CHINA THREAT – HOW THE PEOPLE'S REPUBLIC OF CHINA TARGETS AMERICA (2000) & STEVEN W. MOSHER, HEGEMON: CHINA'S PLAN TO DOMINATE ASIA AND THE WORLD (2000).

future conflicts, “mirror imaging” that assumes China would abide by the law of war dangerously ignores the vast cultural difference between China and the West in the area of warfare.

Keegan observations led him to believe, “Oriental warmaking, if . . . identified and denominated as something different and apart from European warfare, is characterized by traits particular to itself.”¹⁷ China’s ‘particular traits’¹⁸ translate into a dangerous disparity between traditional Chinese warfare and the international law of war. Herein lies the cultural conflict between China and the law of war.

This thesis argues that, in potential future conflicts with the West, the dangerous disparity between China’s culture and the law of war will lead China to disregard of the law of war and fight asymmetrically using unconventional means, methods and targets. Specifically, the areas of China’s relationship with the West, its perspective on law and war, and its traditional military doctrine will be examined closely to demonstrate their tendencies to sway China away from strict adherence to the law of war. Establishing this thesis, this paper then explores the more difficult issues concerning the possible responses by the United States in situations where China chooses to disregard the law of war.

¹⁷ KEEGAN, *supra* note 11, at 387.

¹⁸ *Id.*

II. The Causes of Chinese Xenophobia

A. A History in Blood and Tears

Assessing modern Chinese history, Deng Xiaoping commented, "Since the Opium War, China has fallen to the position of 'others are meat cleavers and we are the carcass.' In the international community, China occupies only a subordinate position and others despise us."¹⁹ Such remarks typify the corrosive bitterness and distrust that sits with Chinese leaders like an invisible guest at international negotiation tables. Most non-Chinese cannot begin to comprehend the perspectives and feelings developed during a century of humiliation at the hands of Western Powers. China fears and distrusts the West; a distrust that includes the Western tradition of laws governing armed conflict.

*1. The Reign of Qianlong*²⁰

The reign of Emperor Qianlong (1736-1795) was one of the high points of Chinese history. Enlightened, liberal, and energetic, the fourth ruler of the Qing dynasty presided over a China that stood among the most wealthy and populous nations in the world.²¹ In 1793, a fateful meeting took place between Qianlong and the ambassador from Great Britain, Viscount George Macartney²². In an effort to stem the unfavorable

¹⁹ DAE-CHIEN WU, CHONG GUO WIE XIE LUIAN [Theory Concerning the Chinese Threat: The Expansion of the People's Liberation Army after the Cold War] 83 (1996).

²⁰ Fourth emperor in the Qing Dynasty (1644-1911).

²¹ ANN PALUDAN, CHRONICLE OF THE CHINESE EMPEROR: THE REIGN-BY-REIGN RECORD OF THE RULERS OF IMPERIAL CHINA, 196-203 (1998).

²² *Id.* at 203.

trade deficit created by British demand for Chinese tea, silk, and porcelain, the veteran diplomat Macartney met with Qianlong to negotiate expanded trade access and tariff reduction. Macartney brought with him an entourage of nearly one hundred men and 600 gifts carefully selected to display the latest European technology and hint at the benefit of bilateral trade and diplomatic relations between the two nations.²³

Had Qianlong accepted Britain's offer, he would have gained a powerful ally and moved China towards integration into the community of nations. He could have moved China a step closer towards a claim for treatment as an equal sovereign state in the eyes of European nations. Moreover, Britain's willingness to provide an allied Chinese government with scientific and industrial technology may have prevented China's continuing military decline in relation to industrial nations like Japan and Germany. All such benefits could have been obtained at the relatively minimal cost of authorizing Britain the privilege of greater latitude to sell their goods within China; a privilege the Europeans would win by coercion on their own.

Unfortunately, Britain's attempt to deal with China as equal sovereign state was inherently incompatible with China self image as the unparalleled "Celestial Empire"²⁴ and China's historical use of trade access to reinforce this image. For centuries, countries wishing to trade with China were required to send delegations and tributes to the Chinese

²³ DOROTHY PERKINS, *ENCYCLOPEDIA OF CHINA* 303-04 (1999).

²⁴ This is the common translation for the name of China. In earlier times, the Chinese referred to their civilized world as "tian shia" or "all under heaven." Later, the Chinese refer to themselves as the "the middle kingdom" denoting their belief that China occupies a central position in the cosmos.

capital under the nominal sovereignty of the Emperor.²⁵ In exchange, these countries would receive gifts and permission to trade within China. The tribute system existed mainly as a means to promote China's power and stature while the income from such commercial contacts remained relatively inconsequential and accounted for a minute portion of China's annual state revenue.²⁶ Qianlong, as an emperor who personally expanded the tribute system to countries such as Korea, Nepal, Burma, Thailand, Vietnam, and the Philippines, found Lord Macartney's request impertinent and offensive. Qianlong wrote a scathing letter to George III rejecting Britain's request:

We have never valued ingenious articles, nor do we have the slightest need of your country's manufacturers. Therefore, O King, as regards to your request to send someone to remain at the capital, while it is not in harmony with the regulations of the Celestial Empire, we also feel very much that it is of no advantage to your country²⁷

Faced with a growing trade deficit, British merchants began aggressively marketing and selling an item that was guaranteed to earn Chinese hard currency: opium grown in the British colony of India²⁸. Forty-five years after Lord Macartney's failed diplomatic mission, the importation and sale of opium would cause the first conflict between China and Western powers.

2. *The First Opium War*

²⁵ PERKINS, *supra* note 23, at 533-34.

²⁶ During Qianlong's lifetime trade revenue never exceeded 5.4% of the annual state revenue.

²⁷ GEORGE MACARTNEY, AN EMBASSY TO CHINA, LORD MACARTNEY'S JOURNAL 340 (J.L. Cranmer-Byng, ed. 1962).

²⁸ Aside from Indian cotton, pre-industrial China had little demand for foreign products. By 1800, the British East India Company bought over twenty-three million pounds of Chinese tea for 3.6 million pounds of silver

The deleterious effect of opium addiction threatened the stability of Chinese society. In 1838, Emperor Daoguang outlawed the use and sale of opium and appointed the highly regarded imperial minister Lin Zexu to end its importation by foreign traders.²⁹ In a remarkable letter to Queen Victoria, Lin explained the need to control opium addiction:

Suppose there were people from another country who carried opium for sale to England and seduced your people into buying and smoking it; certainly your honorable ruler would deeply hate it and be bitterly aroused . . . I have heard that the smoking of opium is very strictly forbidden by your country; that is because the harm caused by opium is clearly understood. Since it is not permitted to do harm to your own country, then even less should you let it be passed on to the harm of other countries -- how much less to China! Of all that China exports to foreign countries, there is not a single thing which is not beneficial to people . . . How can you bear to go further, selling products injurious to others in order to fulfill your insatiable desire?³⁰

In compliance with the imperial edict Lin Zexu seized and destroyed two and half million pounds of processed opium after his initial attempts at negotiation failed. In response British naval squadrons landed in China and seized several port cities, including Shanghai and Canton, and threatened the secondary Chinese capital city of Nanjing, strategically located on the southern bank of the Yangzi River. Unable to resist British armed force, China was forced to capitulate and sign the Treaty of Nanjing in 1842. The terms of this treaty were harsh on China. Hong Kong was ceded to the British. Canton, Amoy, Foochow, Ningpo and Shang-hai were opened to the British opium trade. China was forced to pay an indemnity of twenty-one million dollars for the military conflict and an additional six million dollars for the destruction of the opium seized by Lin.³¹

²⁹ JOHNATHAN D. SPENCE, IN SEARCH OF MODERN CHINA 150-64 (1990).

³⁰ SSUYU TENG & JOHN FAIRBANK, CHINA'S RESPONSE TO THE WEST 266-69 (1995).

³¹ SPENCE, *supra* note 29, at 150-64.

3. *The Taiping Rebellion*

Britain had hit China like an earthquake. The aftershocks of the Opium Wars, foreign indemnities and the expanding malaise of drug addiction, shattered the Chinese imperial authority. A series of floods, famines, and localized rebellions overwhelmed what remained of the ineffectual administrative apparatus of the Qing Dynasty. Many Chinese citizens, miserable and desperate for relief, turned to a new religion preached by Hong Xiuguian.³²

A failed Confucian scholar who briefly studied Christianity with Western missionary workers in Canton, Hong woke from a lengthy illness in 1843 and proclaimed himself the younger brother of Jesus Christ and the new savior of China. An assortment of ethnic minorities, displaced peasants and laborers, and anti-Qing organizations rapidly converted to Hong's new Western influenced religion. Within three years, Hong commanded over 30,000 followers who revered him as a living god. By 1850 Hong's adherents openly clashed with Qing military forces and managed to capture the fertile and central and lower valley of the Yangtze River. Hong proclaimed himself the "Heavenly King" and styled the territory under his control as the "Great and Peaceful Heavenly Kingdom" (*Taiping Tian Guo*).³³ For the next fourteen years the Qing government struggled to quell this immense rebellion. By the time the last Taping stronghold fell in 1864, a hundred smaller uprisings were spawned by the Taiping

³² See JONATHAN D. SPENCE, *GOD'S CHINESE SON: THE TAIPIING HEAVENLY KINGDOM OF HONG XIUQUAN*, (1996).

³³ *Id.*

rebellion³⁴, 600 cities changed hands during military conflicts³⁵, and more than 30 million people³⁶ had died in China, more than the combined military and civilian casualties of all countries from of World War I.³⁷

4. *The Second Opium War*

The preoccupied Qing had little inclination toward further military conflict during the Taiping Rebellion, but failure to stem opium importation inevitably led to a second war. From the Chinese point of view, the Second Opium War was yet another invasive effort to expand the opium trade and impose western commerce and religion in China.³⁸ After Western powers blasted various Chinese port cities, the exhausted Qing administration was compelled to sign the Treaty of Tianjin in June 1858. By this treaty England, France, the United States, and Russia forced China to open more ports, receive European delegations in Beijing, grant access for Western missionaries into the interior of China, and most importantly, legalize the importation of opium into all of China.³⁹ In the minds of most Chinese, the Treaty of Tianjin solidified a belief that aggressive and immoral Western powers were allied with each other against China.

A brief lull in hostilities ended in 1860 when the Chinese Emperor refused to receive Western diplomatic missions in Beijing. An Anglo-French expedition crushed

³⁴ PERKINS, *supra* note 23, at 501-02.

³⁵ JOHN KING FAIRBANK, CHINA-A NEW HISTORY 209 (1994).

³⁶ PERKINS, *supra* note 23, at 501-02.

³⁷ R. ERNEST DUPUY & TREVOR N. DUPUY, THE HARPER ENCYCLOPEDIA OF MILITARY HISTORY: FROM 3500 B.C. TO THE PRESENT 1083 (4th Ed. 1993).

³⁸ SPENCE, *supra* note 29, at 180-81.

³⁹ The Mexican Silver dollar was accepted currency for the payment of the indemnities from China to the various European nations.

Chinese forces and arrived outside the walls of Beijing. The old Summer Palace was looted and burned by Sir James Hope Grant in reprisal for mistreatment of an earlier delegation sent to discuss armistice. Before the year was out, China was forced to sign the Beijing Convention, surrender the city of Kowloon, and agree to pay an indemnity of \$8,000,000 to Britain⁴⁰.

5. *Unequal Treaties*

The two Opium Wars and the massive Taiping Rebellion (1850-64) severely weakened China and encouraged the colonial aspirations of other nations. In 1884-1885, France engaged in a lopsided naval battle with China and won total control over Indo-China. Ten years later, Japanese machinations in Korea resulted in a their route of Chinese army and naval forces and the subsequent Japanese seizure of Seoul. The Treaty of Shimoniseki that concluded this conflict in 1895 required China to cede the island of Taiwan, the Pescadore Islands, and the Liaodong Peninsula, along with heavy indemnities, to Japan.⁴¹

By 1898, foreign nations were freely extracting concession from the feeble Qing administration. France claimed special trading rights in the border province of Yunnan, Guanxi, Gruangdong, and the island of Hainan. In 1898 Britain forced China to give a ninety-nine year lease on a large tract of land North of Hong Kong. Russia seized

⁴⁰ SPENCE, *supra*, note 29, at 180-81.

⁴¹ PERKINS, *supra* note 23, at 539-40.

Manchuria and Lushun.⁴² Finally, Germany unilaterally occupied the port city of Qingdao in the Shangdo Province and claimed mining and railroad rights to nearby areas.⁴³

6. *The Boxer Rebellion*

With the opening of the ports, Western missionaries began to arrive in China in significant numbers. Chinese historian Pai Yang noted that;

Although the enthusiasm and sincerity of the great number of the Western missionaries were admirable, their numbers also included some hooligan and ruffians. They were arrogant and conceited, treating other . . . with contempt, some even acting as spies for their countries. Some Chinese converts then [in obedience to Christian doctrine] cease to honor their ancestors and allowed their graves to crumble, enraging their neighbors and relatives. Some of the Chinese converts also took advantage of the power of the Western missionaries and became criminals and bullies. The missionaries had a tendency to protect their converts, and the local magistrates protected the missionaries [because the Qing Govnerment was at the mercy of the Western Powers]. Thus the missionaries often became local tyrants. The peasant fear and hatred of the missionaries then increased daily.⁴⁴

Between 1896 and 1897, six Chinese provinces saw peasant rebellions against the presence of foreign interests sections and missionaries.⁴⁵ By 1899, a fanatical secret group of Chinese calling themselves the "Fists of Universal Harmony" (the "Boxers")

⁴² *Id.*

⁴³ *Id.*

⁴⁴ PAI YANG, ZOUNG GWO REN SHI GANG [An Outline of Chinese People and History] 984 (1979).

⁴⁵ PERKINS, *supra* note 23, at 41.

united a grass roots movement against the foreign influences in China and began attacking Christian missionaries and their Chinese converts.⁴⁶

In 1900 the Boxer Rebellion looked to achieve what conventional Chinese arms could not: the eradication of Western influences from China. While diplomatically denouncing the Boxer atrocities, the Chinese government under the Dowager Empress Tzu Hsi lent the rebels clandestine support. The Boxer movement gained momentum and advanced to kill western diplomats in the capitol of Peking. By early June the western interest section was in manifest danger. The Boxer movement peaked on 20 June 1900 with the murder of the German Minister, Baron Klemens von Kettler. A few hundred foreigners and some 3,000 Chinese Christians fled to the foreign legation compound and were besieged by thousands of Chinese. In mid-August, a composite European, Japanese, and American soldiers lifted the siege.⁴⁷

On 17 September 1901, the Qing Government signed the Boxer Protocol. Shortly thereafter, most of the Qing imperial officials who supported the Boxers were forced to commit suicide. By the terms of the treaty, twenty-three Chinese fortifications were destroyed, Foreign legations were allowed to station troops in Beijing, examination for the imperial bureaucracy was suspended in the forty-five cities where the Boxers attacked foreigners, special envoys were sent to Japan and Germany to apologize for the murder of their diplomats, Western powers full authority to pursue trade and missionary work in

⁴⁶ *Id.*

⁴⁷ FAIRBANK, *supra* note 35, at 230-32.

China, and Qing was forced to pay an indemnity that equal five year of China's national income.⁴⁸

7. The Fall of the Qing Dynasty and the War Lord Era

The erosion of territorial sovereignty and the general ineptitude of the Qing authorities spurred an anti-dynastic movement. After thousands of years the only form of government the Chinese had known ended when the last Qing emperor abdicated in 1912.⁴⁹ Control of China fell to dispute between various warlords and political factions and the resulting destabilization of China invited further foreign incursions. Japan quickly seized control of Shangdong province from Germany after World War I. This territory was returned to Chinese control only after competing interests among Western powers forced the Japanese hand at the Washington Naval Conference of 1921-1922.⁵⁰

8. The Japanese Invasion

Eight years later, Japan exhibited its growing willingness to aggressively pursue its interests by invading Manchuria in northeastern China. China urgently requested assistance from the League of Nations and from the United States to repel the Japanese invasion. In 1931 the League of Nations dispatched British diplomat, Lord Edward

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ PERKINS, *supra* note 23, at 273-74.

Lytton, to pursue an inquiry regarding Chinese concerns.⁵¹ Japan responded in February the next year by declaring Manchurian independence, establishing a Manchurian puppet government under Pu-yi, and moving to seize the port of Shanghai. In November 1932, the Lytton Commission renounced the Japanese invasion of Manchuria as a violation of international treaties but simultaneously revealed the impotence of the League of Nations by determining that the invasion could not be undone. The Commission weakly recommended the formation of an autonomous administration under the sovereignty of China with special provision for Japan's economic interest in Manchuria.⁵²

Japan rejected the proposals of the Lytton Commission and withdrew from the League of Nations. Free of Western concerns, Japan expanded its invasion of China by occupying the Chinese province of Jehol and adding it to its created puppet state of Manchukuo. Japan also took Hebei Province and established a demilitarized zone of more than 30 miles width between the Beijing and the port of Tianjin. Japan's ceaseless aggression finally triggered the Second Sino-Japanese War.⁵³

The two most powerful political factions in China, the Chinese Nationalist Party (KMT) and the Chinese Communist Party (CCP), formed a temporary alliance under the command of KMT's Generalissimo Chiang Kai-Shek⁵⁴ to repulse the Japanese invaders. Starting around 1937, the Second Sino-Japanese War was soon absorbed into the greater

⁵¹ SPENCER, *supra* note 29, at 392-93.

⁵² *Id.*

⁵³ PERKINS, *supra* note 23, at 553-56.

⁵⁴ *Id.* at Born 1887, Chiang was sent to Japan for his military training. In 1906, he cut off his queue and joined Dr. Sun Yat-sen's Revolutionary Alliance. He quickly rose through took control of the KMT after the death of Dr. Sun in 1926. In 1936, he allied himself with the CCP and fought the Japanese until their surrender after World War II. He subsequently lost China to Mao and fled to Taiwan in 1949. He died in Taiwan in 1975.

conflict of World War II. Aligning with the Allied powers, Generalissimo Chaing held the attention of 1,280,000 Japanese troops that could have otherwise been available for fighting elsewhere in the Pacific theater.⁵⁵

9. Yalta

In February 1945, the United States' President Franklin Roosevelt and Great Britain's Prime Minister Churchill met with Soviet Premier Joseph Stalin at Yalta. In an effort to entice Stalin into entering the war in Asia after defeating Germany, United States and Great Britain unilaterally granted Russia extensive rights in historically Chinese territories.⁵⁶ The Soviet Union was to receive ports and railways in Manchuria and an "autonomous status for outer Mongolia, subject to a plebiscite which would be conducted with a pro-Soviet regime in political control."⁵⁷

Generalissimo Chiang Kai-shek, China's head of state was excluded from the talks, not surprising when one considers Churchill's belief that it was "an absolute farce"⁵⁸ to consider China one of the big four nations after World War II. The accords however included the statement, "It is understood that the agreement concerning Outer Mongolia and the ports and railroads referred to above will require concurrence of Generalissimo Chiang Kai-shek. The President [Roosevelt] will take measures in order

⁵⁵ PERKINS, *supra* note 23, at 553-56.

⁵⁶ SPENCE, *supra* note 29, at 482.

⁵⁷ HOLLINGTON K. TONG, CHAING KAI-SHEK 356 (1953).

⁵⁸ SPENCE, *supra* note 29, at 482.

to maintain this concurrence on advice from Marshal Stalin.”⁵⁹ In his biography of Generalissimo Chiang, author Hollington K. Tong asserted Chiang was not shown the full text of the Yalta agreement until one year later.⁶⁰

Heavily dependent on military and financial aid from the United States for the ongoing war with Japan and the coming conflict with the CCP, Chiang was in no position to protest.⁶¹ Stalin used his gains in China as a base to support the Mao’s effort to overthrow the Nationalist Government. Ironically, when Generalissimo Chiang and the KMT were forced off the mainland in 1949, the victorious CCP and the new People’s Republic of China were dependent on Soviet aid and were thus also forced to acquiesce to the Soviet Union’s control of outer-Mongolia. Thus, despite its part in defeating Japan, China was the only major allied power forced to lose territory *after* the winning the war: China ceded control of over one million square miles⁶² after Yalta.

10. Taiwan

After Mao and the CCP won control over mainland China, Chiang established a his government in exile under martial law on Taiwan in 1949. An uneasy standoff between the KMT and the CCP existed for the next 50 years during which time both sides claimed sole legitimacy as the true government of China. Despite conflicting ideologies

⁵⁹ *Id.*

⁶⁰ TONG, *supra* note 57, at 357.

⁶¹ *Id.* at 353-60.

⁶² Central Intelligence Agency, *The World Factbook-Mongolia*, at <http://www.cia.gov/cia/publications/factbook/geos/mg.html>.

and claims, neither the KMT nor the CCP ever disputed that Taiwan is an indivisible part of China.⁶³

After 1949, the United States continued to recognize the KMT as the only legitimate government of China. The United States also exerted considerable pressure to ensure that the United Nations did likewise. This situation continued until 1971 when the United States sought a strategic partner with mainland China in order to contain the perceived threat from the Soviet Union.⁶⁴ At that time, United States Secretary of State, Henry Kissinger visited China and told Chinese Premier, Zhou EnLai that United States does not advocate “two Chinas, one China one Taiwan, or an independent Taiwan.”⁶⁵ In October of 1971, with the quiet acquiescence of the United States, Taiwan was ejected from the United Nations and China was admitted as the sole representative of China.⁶⁶

⁶³ June Teufel Dreyer, *A History of Cross-Strait Interchange*, in *CRISIS IN THE TAIWAN STRAIT* 331 (James R. Lilley & Chuck Downs eds., 1997).

⁶⁴ JAMES MANN, *ABOUT FACE: A HISTORY OF AMERICA'S CURIOUS RELATIONSHIP WITH CHINA, FROM NIXON TO CLINTON*, 23-25 (1998).

⁶⁵ Arthur Waldron, *Back to Basics: The U.S. Perspective on Taiwan-PRC Relations*, in *CRISIS IN THE TAIWAN STRAIT* 331 (James R. Lilley & Chuck Downs eds., 1997).

⁶⁶ ROSEMARY FOOT, *THE PRACTICE OF POWER: U.S. RELATIONS WITH CHINA SINCE 1949* 223-57 (1995). Immediately prior to China's admittance, United States made several attempts to ensure that Taiwan would retain a presence in the United Nations. The United States co-sponsored a resolution that attempted to ensure “dual representation” resolution whereby China would hold the Security Council seat but China and Taiwan would both remain within the United Nations General Assembly. Despite intense lobbying efforts by the United States, the “dual representation” resolution failed. Then United States ambassador to the United Nations, George Bush, also sought to have the Taiwan expulsion clause deleted from the resolution admitting China to the United Nation, but his efforts were also blocked. These actions clearly demonstrated the United Nations' intention to recognize only one China, with Taiwan as part of it. Since its expulsion, Taiwan has made eight consecutive attempts to apply for admittance into the United Nations. Its last attempt was made after the election of the DPP party in Taiwan. Despite Taiwan pleas that it no longer considered itself a part of China but wish to rejoin the United Nations as an independent nation, there has been no progress on its re-admittance into the United Nations.

After China rapprochement with the United States, three communiqués (1972, 1979, and 1982) defined the relationship between United States, China, and Taiwan.

These communiqués have four basic components:

First, the United States acknowledged the position held by Chinese on both side of the Taiwan Strait, that there is but one China and that Taiwan was part of it. The United States recognized the Government of the People's Republic as the sole legitimate government of China. The United States also pledged that it would not encourage Japan to replace it as Taiwan's protector. The American position signals that the United States did not intend to permanently detach Taiwan from the mainland.

Second, the United States continues to have a full range of unofficial economic and cultural relations with the people of Taiwan. The Government of the United States and Taiwan establishes private agencies, staffed by personnel on temporary leave from their government, to carry on business between the two government.

Third, the special legislation-The Taiwan Relations Act of 1979 – that enabled the unofficial relationship with Taiwan also mandated that the executive branch provides Taiwan with the capabilities to provide for its self-defense and consult with Congress in the event that Taiwan's security was endangered. This portion of the act specified an American intent that had been conveyed to the Beijing government during prior negotiations, namely, that the United States would continue to sell weapons to Taiwan that were defensive in nature. In 1982, the United States pledged to reduce the quantity and quality of the weapons it would sell to Taiwan as tension in the area diminished, a policy which Beijing reluctantly but explicitly acquiesced in a joint declaration with the United States.

Fourth, the United States would accept any solution that the People's Republic and Taiwan could negotiate without duress on the issue that divided them. The U.S. interest was in a peaceful process of mainland-Taiwan interaction, nit in the outcome. Implicit in this posture was an American expectation that neither Beijing nor Taipei would unilaterally seek to alter the situation or pursue its objective through the use of force.⁶⁷

⁶⁷ Michel Oksenberg, *Taiwan, Tibet, and Hong Kong in Sino-American Relations*, in *Living with China, U.S.-CHINA RELATIONS IN THE TWENTY-FIRST CENTURY* 67-68 (Ezra F. Vogel ed., 1997).

In 2000, Taiwan's position on peaceful unification with mainland China abruptly changed when the KMT fell out of power for the first time since 1949 and the general election brought the Democratic Progressive Party (DDP) and its presidential candidate Chein Shui-bian to power.⁶⁸ The DDP has long advocated the position that Taiwan is not a part of China but an independent nation. The election of President Chein touched off a firestorm of criticism in China. China absolutely opposes the idea of an independent Taiwan and has repeatedly promised military efforts to reunify Taiwan should such an idea near reality. In its 2000 Defense White Paper, China reasserted that the "[s]ettlement of the Taiwan issue and realization of the complete reunification with China embodies the fundamental interests of the Chinese nation."⁶⁹ Faced with such threats from China on the one hand, and n-going political attacks by the Chinese Nationalist Party on the other, President Chein quietly scaled back his own rhetoric regarding Taiwan independence.

B. Lessons Learned

1. *Fear of Foreign Incursion*

During the reign of Qianlong, the Chinese considered themselves among the most powerful and cultured nations in the world. Western influences precipitated a drastic

⁶⁸ Federation of American Scientist, *President-Elect Chein Talks About Cross Strait Relations*, available at <http://www.fas.org/news/taiwan/2000/e-04-09-00-17.htm> (last visited Jan. 17, 2001).

⁶⁹ PEOPLE'S REPUBLIC OF CHINA'S INFORMATION OFFICE OF THE STATE COUNCIL, CHINA'S NATIONAL DEFENSE IN 2000 [hereinafter China White Paper], available at <http://www.fas.org/nuke/guide/china/doctrine/cnd0010/china-001016wp.htm> (last visited Jan. 26, 2001).

decline in Chinese fortunes causing a century of humiliation that scarred the Chinese national psyche. Although Western politicians tend to ignore or dismiss the events of the mid-1800s to mid-1900s as irrelevant, the Opium War and its aftermath remain recent history⁷⁰ to the Chinese and have tinted the prism through which the Chinese view current world events. This painful prologue to present events has created a deep sense of victimization among the Chinese people, a feeling shared by leaders and followers alike.⁷¹

This sense of victimization has resulted in a distinct, but somewhat subterranean, suspicions of all forms of foreign influence. China equates efforts by foreign governments or international agencies to influence Chinese internal matters as evidence of imperialist and colonial intentions. Since its founding in 1949, the People's Republic of China has exhibited acute sensitivity to any interests in the country's affairs. When, for example, in 1958 China's ally the Soviet Union proposed to build a jointly owned ultra-long wave radio station on China's east coast, Mao angrily responded: "You never trust the Chinese . . . Just because you have a few atomic bombs, you think you are in a

⁷⁰ SPENCE, *supra* note 29, at 3. The author dated modern Chinese history as beginning in 1600 AD.

⁷¹ DAVID M. LAMPTON, SAME BED DIFFERENT DREAMS: MANAGING CHINESE RELATIONS 1989-2000 251 (2001). David M. Lampton has been president of the National Committee on United States-China Relations since 1988. Prior to assuming that position, he was associate professor of political science at Ohio State University and director of China Policy Studies at American Enterprise Institute. Dr. Lampton has lived and conducted research in the People's Republic of China, Hong Kong, and Taiwan. His research addresses bureaucratic and elite politics in China, U.S.-China relationship, and Chinese foreign policy. His articles have appeared widely, including *Foreign Affairs*, *Foreign Policy*, *The American Science Review*, and *China Quarterly*. Among his recent books and edited volumes are *Paths to Power: Elite Mobility in Contemporary China*; *Bureaucracy, Politics, and Decision Making in Post-Mao China*; *United States and China Relations at a Cross Road*; and *Same Bed, Different Dream: Managing U.S. China Relations 1989-2000*.

position to control us by seeking a few leases. How else can you justify your behavior?

...[But] you have extended Russian nationalism right up the Chinese coast.”⁷²

2. *Hegemony*

Chinese officials have adopted a new code word, *hegemony*, to describe unacceptable efforts by foreign governments to interfere in the internal matters of other nations.⁷³ The word derives from the Greek word for “leader” and is defined as “a leading or paramount power.”⁷⁴ Hegemony is the common translation for the Chinese word *ba* and carries a special historical connotation in Chinese statecraft. The concept of hegemony was developed during China’s Warring State Era’s multi-state competition to become the dominant power. A country achieved hegemony by amassing such military power as to make it virtually unstoppable in any undertaking with an ability to obliterate other nations at will.⁷⁵

Chinese leaders previously feared Soviet intentions of achieving hegemony at China’s expense. With the collapse of the Soviet Union, China sees as the United States as the nation that is most relentlessly driving to achieve hegemony:

“The United States is stepping up its efforts to seek world hegemony in all fields. . . Believing that it will be the sole global power without rival before 2015, the United States is speeding up hegemonic acts in all fields. . . . The United States also dreams of dominating international organizations such as the United Nations and the World Trade

⁷² PHILLIP SHORT, *MAO-A LIFE*, 490 (1999).

⁷³ LAMPTON, *supra* note 71, at 253.

⁷⁴ STEVEN W. MOSHER, *HEGEMON: CHINA’S PLAN TO DOMINATE ASIA AND THE WORLD* 1-5 (2000).

⁷⁵ *Id.*

Organization, so that it can establish control on the world's economy, politics and social ideology. When its hegemonic acts are thwarted, the United States will resort to its 'hardware' taking military measures to force its way ahead. The Gulf War and the Kosovo crisis are two demonstrations of such tricks.⁷⁶

Mao Zedong and Zhou Enlai established a Chinese stance to never seek hegemony and to firmly oppose "any country seeking hegemony in any part of the war."⁷⁷ Today China continually expresses the concern that all nations, regardless of size, wealth, or relative military power are equal and must have the freedom to choose their own paths for development.⁷⁸ Such is China's preoccupation with the issue of hegemony that it views even economic sanctions as a violation of another nation's sovereignty. Since 1990, China has agreed to participate in United Nations peacekeeping operations but only when the host nations consent to the presence of the U.N. troops.⁷⁹

3. The Center May Not Hold

There is obvious self-interest in China's high-minded arguments and actions in support of national self-determination. At present, even the most pro-Western analysts would have difficulty denying that the United States has steadily maintained a policy of exerting its influence in Asia to prevent any one country from dominating the region.⁸⁰ But China's efforts to ensure national self determination blend with its efforts to counter what China perceives to be United States ultimate goal: to achieve and retain American

⁷⁶ *China; What They Are Saying*, CHINA DAILY, Feb. 3, 2000, available at LEXIS, Nexis Library, Asia & Pacific Rim File.

⁷⁷ *Vice-Premier Teng Hsiao-Ping Says: China Opposes Hegemony-Seeking In Any Part of the World*, XINHUA GENERAL OVERSEAS NEWS AGENCY, Nov. 13, 1978, available at LEXIS, Nexis Library, Asia & Pacific Rim File.

⁷⁸ *Id.*

⁷⁹ LAMPTON, *supra* note 71, at 167.

⁸⁰ RICHARD BERNSTEIN & RICHARD H. MUNRO, *THE COMING CONFLICT WITH CHINA* 5 (1997).

hegemony in Asia even if it requires re-inciting historically Western inspired chaos within China.⁸¹

Today's leaders in China bear an inherited lack of confidence in their country's internal stability. This uncertainty is manifest in the government's severe reaction against any activities that have the potential to upset the fragile domestic equilibrium. Thus, the Chinese Government has ruthlessly quelled both the student protesters in Tiananman Square in 1989⁸² and the Fu Long Gong Sect demonstrations in 2000 and 2001⁸³.

Similar concerns impel China's intense preoccupation with issues of national sovereignty. The Chinese leadership believes that failure to maintain national sovereignty over any portion of its territory may encourage succession by various provinces and eventually lead to the complete dissolution of national unity. Noted Chinese scholar Michael Oksenberg,⁸⁴ summarized this attitude as follows:

China's rulers believe the unity of their country is tenuous; fissiparous tendencies, they think threaten to pull the country apart and must be countered. To yield on Taiwan, Hong Kong or Tibet might encourage a separatist inclination amount other locales with large ethnic minorities . . .
85

⁸¹ *Id.* at 23.

⁸² See THE TIANANMEN PAPERS: THE CHINESE LEADERSHIP'S DECISION TO USE FORCE AGAINST ITS OWN PEOPLE-IN THEIR OWN WORDS (Andrew J. Nathan & Perry Link eds. 2001).

⁸³ LAMPTON, *supra* note 71, at 56-57.

⁸⁴ Michael Oksenberg is the senior fellow at Asia/Pacific Research Center and Professor of political science at Stanford University. He is the co-author of *An Emerging China in a World Interdependence* (1994), *China's Participation in the IMF; the World Bank, and GATT* (1990), and *Policy Making in China* (1988), as well as numerous other books and articles concerning Chinese domestic affairs, Chinese foreign policy and Sino-American relations. He is a member of the Trilateral Commission, the National Committee on U.S. Sino Relations, and the Forum for International Policy. He was a National Security Counsel staff member (1977-80) and president of the East-West Center.

⁸⁵ Michel Oksenberg, *Taiwan, Tibet, and Hong Kong in Sino-American Relations*, in *Living with China, U.S.-CHINA RELATIONS IN THE TWENTY-FIRST CENTURY*, 53, 56 (Ezra F. Vogel ed., 1997).

Such separatist inclinations, in turn, may evoke historical propensities and cause the downfall of the ruling administration and even lead China into the chaos of civil war.

In the geographic litany recited by Michael Oskenberg, the most likely flashpoint between the United States and China undoubtedly is Taiwan. As the long time ally to Taiwan, the United States is inexorably drawn into China's argument over national sovereignty. To China, securing the return of this "renegade province," is the essence of sovereignty. They cannot help but view United States' ongoing support for Taiwan as an overt effort to subvert Chinese sovereignty and unity⁸⁶.

China continuously pursues a diplomatic divorce between the United States and the defense of Taiwan while paradoxically continuing efforts to militarily intimidate the island into resubmission. When they succeeded in 1982 in getting the United States to pledge to reduce the quantity and quality of the defensive weapons it sells to Taiwan, dependent on easing tensions, Beijing reluctantly announced their acceptance of the American position in a joint declaration with the United States.⁸⁷ The United States has extended its position as far as to accept any solution that the People's Republic and Taiwan could negotiate without duress on the issue that divided them.⁸⁸ While the Americans express interest in a peaceful resolution of the Chinese-Taiwan issue with the implicit desire that neither Beijing nor Taipei unilaterally uses force to pursue a solution, the Chinese leaders, with little reason to expect military aggression from Taiwan, see the

⁸⁶ BERNSTEIN & MUNRO, *supra* note 80, at 150-65.

⁸⁷ *Id.*

⁸⁸ ANDREW J. NATHAN & ROBERT S. ROSS, *THE GREAT WALL AND THE EMPTY FORTRESS: CHINA'S SEARCH FOR SECURITY* 66-67 (1997).

American position as a thinly veiled stance against China's fundamental sovereign right to maintain its territorial integrity.⁸⁹

4. Political Power Comes from the Barrel of Gun⁹⁰

Relentlessly pragmatic, the Chinese leaders passionately believe that only credible military strength will end its historical cycle of dependence on the mercy of other nations. These leaders well remember China's harsh experience during the latter part of the Qing dynasty and they find the taste unpalatable. To inoculate China from the virus of America's hegemonic intentions and its resultant internal upheaval, the Chinese leaders must maintain the loyalty and fighting capabilities of the People's Liberation Army (PLA).⁹¹

It is popularly understood in China that the PLA rescued the Chinese Communist Party from total annihilation during the Long March and later saved the nation from absolute anarchy during the Great Proletariat Cultural Revolution. Despite the faith in the PLA to handle such domestic catastrophes, few in China believe it currently has the military hardware and know-how to prevail in a modern conventional warfare against the United States.⁹² Even General Mi Zhenyu, the Vice President of the Academy of Military Science who chaired a commission that produced one of the China's most influential studies on future warfare, concluded that China's conventional weapons technology is

⁸⁹ BERNSTEIN & MUNRO, *supra* note 80, at 150-65.

⁹⁰ THE OXFORD DICTIONARY OF QUOTATIONS 494 (Elizabeth Knowles ed.) (1999). Statement from Mao Zedong.

⁹¹ JOHN BRYAN STARR, UNDERSTANDING CHINA 90-107 (1997).

⁹² *Id.*

twenty to twenty-five years behind the United States, with the gap likely to widen in the future.⁹³ The PLA must replace an obsolete four-fifths of its present warfighting equipment to close the technological gap by 2010.⁹⁴

Harkening back to their roots, some Chinese military theorists have begun debating the potential of supplementing China's limited conventional warfare capabilities with the more ruthless unconventional tactics frequently recorded in their long history. In this debate, these theorists tend to view the law of war as yet another tact employed by Western powers to ensure China's defeat by restricting warfare to the limited, conventional operations mastered by the Western militaries. Colonel Wang Xiangsui, the author of *Unrestricted Warfare*⁹⁵, says of this situation, "[w]e are a weak country, so do we need to fight according to your rules? No. . . . If you use those rules, weak countries have no chances."⁹⁶

C. Conclusion

The history of China has incubated a culture suspicious of the West and resistant to Western influence. A century or more of real and perceived hardships and exploitation by Western powers has left the Chinese and their leaders with the belief that Western interests seek to keep China restricted and deny her a rightful place as a world power.

⁹³ MICHAEL PILLSBURY, CHINA—DEBATES THE FUTURE SECURITY ENVIRONMENT 290 (2000).

⁹⁴ JASPER BECKER, THE CHINESE 290 (2000).

⁹⁵ LIANG QIAO & XIANGSUI WANG, UNRESTRICTED WARFARE -- THEORY ON WAR AND METHODS OF WAR IN THE ERA OF GLOBALIZATION (Foreign Broadcast Information Service, trans., People's Liberation Army Literature and Arts Publishing House 1999) (1999).

⁹⁶ John Pomfret, *China Ponders New Rules of Unrestricted Warfare*, Wash. Post, Aug. 8, 1999, available at <http://taiwansecurity.org/WP/WP-ChinaPondersNewRulesOfUnrestrictedWar>.

This belief colors Chinese perception of Western actions and intents. It bears a direct impact on how China perceives approaches the law of war.

III. Law

Few in the West understand the differences between the concept of law as developed in China and that developed in Europe. The Greek and Christian philosophers who laid the foundation for Western law held that there was “an essential (conceptual, logical, necessary) connection between law and morality.”⁹⁷ Morality grew out of religious belief⁹⁸ or ideas promulgated to enhance civic well-being⁹⁹. The Chinese, on the other hand, have never embraced a belief in the divine origin of law, the correlation between law and justice, or even the need for law to regulate all aspects of human affairs. In China law originated from the clash between Legalism and Confucianism and was later codified under the strictures of Confucian theology. This unique cultural perspective on law prevents China from accepting the legitimacy of the West’s concept of the law of war.

A. Legalism and Confucianism

During the Warring States Period (402-221 BC) seven states, mostly located in the North China plain, competed in a ceaseless struggle for dominance.¹⁰⁰ In this warfare, the competing rulers implemented various methods to gain an edge over their rivals. Conceptually, two different philosophies, Legalism and Confucianism, arose to guide their efforts.

⁹⁷ JULES L. COLEMAN & JEFFRIE G. MURRAY, *PHILOSOPHY OF LAW: INTRODUCTION TO JURISPRUDENCE* 11 (1990).

⁹⁸ 20 *Exodus* 20:1-20:17.

⁹⁹ COLEMAN & MURRAY *supra* note 97, at 14.

¹⁰⁰ FAIRBANK, *supra* note 35, at 4.

Beginning in 338 BC, a trio of philosopher-bureaucrats, Shang Yang, Shen Pu-hai and Han Fei-Tsu, began to advocate and implement the concepts of Legalism.¹⁰¹ Their composite school of thought advocated the universal application of laws and consequential rewards and punishments as the primary method for gaining power and governing. The law, in Legalist thought, was not concerned with justice or morality but rather served as a tool to change people's behavior and fulfill the goal of the ruler.¹⁰² Thus, they wrote, there are "three factors in governing, one is profit, the second is enforcement, and the third is law. The Great Man uses profit to win the hearts of men, exerts force to carry out governmental edicts, and uses law to unify the followers behavior."¹⁰³ Han Fei-Tsu further summarized the legalist concept: "[i]n ruling the world, one must follow the bent of Man's true nature. Man's nature is based on his likes and dislikes. Thus reward and penalties can be effectively used, prohibitions and commands can be implemented, and thus good order can be actualized. The ruler holds the handles in order to establish his authority."¹⁰⁴

In theory and application, Confucianism was almost the exact opposite Legalism. Confucius saw the world as a place with natural social and moral order. All men were born to a certain status and that status conferred moral obligations. The greatest duty of an individual was to behave properly and fulfill their required moral obligation. For example, the duty of a son (status) was to obey (moral obligation) the father.¹⁰⁵ If an individual behaved properly and fulfilled his moral obligations, that individual would be

¹⁰¹ BENJAMIN I. SCHWARTZ, *THE WORLD OF THOUGHTS IN ANCIENT CHINA* 333 (1985).

¹⁰² FAIRBANK, *supra* note 35, at 55.

¹⁰³ YUAN CHUAN, *HAN FEI TZU DE REN SHEN JEA SHUI* [Life Philosophies of Han Fe Tze] 39 (1994).

¹⁰⁴ *Id.* at 216.

¹⁰⁵ SCHWARTZ *supra* note 101, at 56-134.

a good example to others and, in turn, influence them toward proper behavior. Confucius believed that this type of influence was effective because:

If you govern the people by laws and keep them in order by penalties, they will avoid the penalties; yet lose their sense of shame. If, on the other hand, you govern by depending upon the moral sentiments, and maintain order by encouraging education and good manners, the people will have a sense of shame for wrong-doing and, moreover, will emulate what is good.¹⁰⁶

Confucius firmly believed that if “a prince’s personal conduct is correct, his government is effective without orders.”¹⁰⁷ In essence, Confucian philosophy advocated that it was inefficient to use laws as a means to manage people’s actions. Instead, he believed it was more effective to influence people’s behavior by affecting their thinking through instruction and example.

B. The Rise and Fall of Legalism

Of the seven Warring States, the Kingdom of Qin was particularly successful in applying the Legalist methods. Qin began as a small, independent kingdom in western China in the 9th Century B.C. In 325 B.C., the Legalist philosopher Shang Yang was installed as Chancellor of Qin. Shang Yang’s legalist methods encouraged the efficient use of agricultural resources and eliminated aristocratic corruption. Within nineteen years, Qin was able to marshal sufficient economic resources and military forces to begin outward expansion.¹⁰⁸

¹⁰⁶ CONFUCIUS, THE ANALECTS 215 (1996).

¹⁰⁷ FAIRBANK, *supra* note 101, at 52.

¹⁰⁸ *Id.* at 55.

By 221 B.C., King Zheng of Qin amassed sufficient power to eliminate rival states and unify China under his rule. He then discarded the title of king and style himself *Shi Huangdi*, the First Emperor.¹⁰⁹ Many of his policies as Emperor were actually formulated and implemented by his Chancellor, the Legalist scholar, Li-Si. To consolidate and solidify Qin rule over its new territories, Li-Si promulgated a series of laws that standardized weights, measures and written script. He eliminated hereditary fiefdoms and divided China into provinces with appointed governors. Using conscripted labor, Li-Si erected the first version of the Great Wall of China and built standardized roads reaching out into the four corners of the empire.¹¹⁰ The historical evidence indicates that such projects, while sorely needed to ensure unity, placed an intolerable burden on an agrarian population that had barely recovered from years of warfare required to unify China.¹¹¹

Eight years after the initial unification of China, Confucian scholars attempted to gain power by criticizing the measures implemented by the Legalists.¹¹² Striking back, Li-Si accused the Confucians of criticizing the imperial edicts and inciting sedition. The First Emperor sided with the Legalists and ordered the burning of Confucian texts -- and the burying alive of 460 scholars and intellectuals -- as punishment. This draconian censorship thereafter became infamous as the *Confucian Holocaust* when "the books were burned and the scholars were buried alive."¹¹³

¹⁰⁹ PALUDAN, *supra* note 17, at 16-26.

¹¹⁰ CHEN-TU HU, CHINA 15 (1960).

¹¹¹ *Id.* at 16.

¹¹² SU MA CHIEN, THE HISTORIES 76-101 (Tou Wen Ming ed., 1983)(97 BC).

¹¹³ THE CAMBRIDGE ENCYCLOPEDIA OF CHINA 150 (Brian Hook & Denis Twitchett eds., 2d ed., 1991).

The First Emperor's death in 210 B.C. sparked widespread rebellion against the repressive regime. Contrary to First Emperor's belief that his heirs would rule for ten thousand years, his son was deposed after only eight years. By 202 B.C., the rebel Liu Bang successfully captured the former Qin stronghold and adopted the title of Emperor of the Han Dynasty.¹¹⁴ The Legalists never recovered from this downfall of the Qin Empire. Legalist philosophies were so entwined with the ruthlessness of the Qin regime, that they was considered to be inherently associated with an undercurrent of evil. Thereafter, some emperors might employ, without specifically staying so, some Legalist theories and principles, but Legalism would never reclaim an ability to shape Chinese history.¹¹⁵

C. The Dominance of Confucianism

1. The Influence Of Confucian Theology On The Development Of Chinese Law

After the fall of Legalism, Confucianism became the official theology of the Han and subsequent dynasties. Confucian scholars became indispensable advisors to the emperors and their insistence on natural social order bolstered and legitimized imperial power.¹¹⁶

¹¹⁴ JACQUES GARNET, A HISTORY OF CHINESE CIVILIZATION 109 (1999).

¹¹⁵ SCHWARTZ, *supra* note 101, at 349.

¹¹⁶ FAIRBANK, *supra* note 35, at 67.

Confucian scholars retained a permanent suspicion of Legalism specifically and law in general. Thus, they advocated the theory that “law is subordinate to morality”¹¹⁷ and stressed a sense that it was more important to be properly trained in morality than to be trained in the law. In the eyes of the Confucian scholars, law was “neither primary nor persuasive”¹¹⁸ and they expressed a belief that to appeal to “the letter of the law is to disregard true morality and admit the moral weakness of one’s case.”¹¹⁹ In such a manner the Confucian theorists saw the legal system not in terms of dispensing justice but as a means to preserve harmony within the social order. Due to the influence of imperial Confucianism, the Chinese imperial code¹²⁰ was largely limited to matters of public law relevant to government administration. There arose a dearth of written civil law¹²¹ and the criminal code was, although more complete, often contradictory and uncertain. As a result, Confucian theology left an extensive legacy in the development of Chinese Law.

2. Application of Law by County Magistrate

Chinese law, though somewhat feeble and incomplete, formed a tool found mainly in the hands of country magistrates, the lowest level of the Chinese bureaucracy, who, on average, were responsible for governing between 25,000 to 50,000 people.¹²² The legal functions of these magistrates were extensive and, in the view of Western legal

¹¹⁷ *Id.* at 183.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ STARR, *supra* note 91, at 106.

¹²² *Id.* at 45.

scholars, fraught with inherent conflicts of interest. Magistrates¹²³ were required to investigate crimes and prosecute criminals. They adjudicated both the criminal cases whose investigations they supervised and the civil disputes that could not be resolved within families.¹²⁴

In carrying out these tasks, any county magistrate would find himself hampered by two problems. First, he had received no training in the reading or application of the law but instead, was trained only in Confucian philosophy. Since the Han Dynasty, emperors selected candidate for magistrates and other imperial appointments based solely on written examination in Confucian philosophy. Thus the entire imperial bureaucratic regime, from the powerful ministers and counselors to the lowly county magistrates, was uniformly inculcated in the Confucian philosophy. Imbibed on the Confucian disdain for law, the county magistrate would decide cases on his taste of moral sensibilities. In short, the Chinese legal system functioned like courts of equity and consistently offered uncertain outcomes.¹²⁵

The second problem a county magistrate faced was the hefty language barrier. Although all Chinese writing is uniform, there exist thirteen major dialects and numerous sub-dialects within the country. Dialects differ so substantially that different speakers cannot understand each other. Because a careful system was constructed to ensure that the county magistrates were never sent to their home province so as to prevent the

¹²³ Traditional China was a strictly patriarchal society and no woman was allowed to take the bureaucratic examination that lead to the appointment as an imperial official.

¹²⁴ STARR, *supra* note 91, at 106.

¹²⁵ FAIRBANK, *supra* note 35, at 183-86. .

erosion of imperial power through local alliances, many magistrates found local dialects comprehensible. Newly appointed magistrates arrived at their posts without the ability to communicate with the local citizens without relying on the permanent staff and the local gentry.¹²⁶

To the Chinese masses, this then was the public face of the law: A punitive system consisting of minimal written guidance applied by individuals who insisted on morality over law, with whom they could not directly communicate and whose decisions were never predictable.

3. The Result of Confucian Law

In the long term, Confucian control over the Chinese legal system bore three unintended consequences. First, by allowing and even encouraging departure from written guidance, individuals in positions of power were able to manipulate the law. This ability originated with the emperor who exercised an inherent power to enact or negate any law, increase or lessen any punishment, and exert unbridled power over life and death.¹²⁷ Those who worked for the emperor, depending on their degree of influence, could acquire a portion of that power.

The lack of checks and balances combined with the requirements of the Confucian social order led to the second consequence: rampant corruption. Imperial

¹²⁶ STARR, *supra* note 91, at 106.

¹²⁷ FAIRBANK, *supra* note 30, at 68-69.

officials were required to fund public events within their jurisdiction but were not given discretion over all public funds.¹²⁸ Beyond the taxes and revenue they collected on behalf of the emperor, officials were required to provide costly monetary gifts to superiors and colleagues to maintain their own political status. The Confucian social order itself required the performance of duty in supporting and advancing relatives, friends, and the indigent members of one's clan.¹²⁹ Most officials found governmental pay inadequate for meeting these requirements.¹³⁰ Many fell back on their one avenue of indiscretion, wielding power with minimal supervision over their magisterial duties, as a means of income. Most officials completely abandon their Confucian morality and engaged in systematic corruption, extorting money from their constituents and taking bribes to decide cases.¹³¹ The few officials who managed to remain uncorrupt were

¹²⁸ *Id.* at 180-83.

¹²⁹ CAMBRIDGE ENCYCLOPEDIA, *supra* note 131, at 495.

¹³⁰ See also WU JINGZI, RU LIN WAI SHI [The Scholars], (Liao Tiansheng ed., 1989) (1740) and LEE BU YUAN [Exposing the True Face of the Bureaucrats] (Liao Tiansheng ed., 1989) (1877). Both famous Chinese novels lampoon the desperate efforts that the imperial officials undertake to extract money from each other and from wealthy gentry members.

¹³¹ CAO XUEQIN, HONG LOU MENG [The Dream of the Red Chamber] (1763). An episode in this famous Qing Dynasty (1644-1912 AD) novel about an aristocratic family, illuminated the pervasive corruption in the Chinese judicial systems. The only son of a wealthy family killed a bartender in a drunken brawl. His family immediately attempted to save him from prosecution through bribery. The letter his younger brother wrote home detailed their efforts:

I have accordingly brought money for everyone in the magistrate's office. Mother should not worry since brother is relatively well in the jail. The people here are difficult and neither the witnesses nor the relatives of the deceased would take our money. Even our brother's friends are siding with the family. Lee and myself are both strangers here, but we finally found an influential man who was able to help us for a price. He said we should post bail for the man who was drinking with our brother when the incident occurred. We will give this friend money and tell him to alter his testimony. If he refuses, we will then spread a rumor that he was the actual killer and attempted frame our brother. We have gotten this man out of jail and [his new testimony], along with the testimony of some other witnesses who have accepted our money, have been submitted as another affidavit to the magistrate.

Id.

extolled as secular saints.¹³²

Confucian social order and corruption combined to make law a means for the powerful to exploit the weak. The final consequence, unsurprisingly, was the common man's fear and distrust of the law and its practitioners. Legal outcomes were never predictable and were often unjust. There was no due process, as the concept is understood in the West.¹³³ "An accused person might be arrested arbitrarily and detained indefinitely, was presumed guilty, might be forced to incriminate himself through confession and had not advise of counsel nor much chance to make a defense. The individual was unprotected against the state."¹³⁴ Most people avoided litigation at all cost and used informal methods, such as consulting with a respected clan leader or the village elder for arbitration and mediation to resolve their differences.¹³⁵ In the end, the Chinese grew to view law not as an instrument of justice, but as a tool for the benefit of the rich and powerful.¹³⁶

D. Law Under the Chinese Communist Party

Mao Zedong used both the Confucian and the Legalist concept of law when he laid the groundwork for the legal regime of the Chinese Communist Party and the modern

¹³² SHI YUKWIN, *CHI XIA WU YI* [The Seven Heros and the Five Righteous Men] (Liao Tiang Hwa ed., 1989) (1879). The main character of this novel is based on Bao Zhun, the Song Dynasty (960-1279 AD) magistrate who was the most famous of the incorruptible judges. His exploits were greatly exaggerated in this popular Chinese novel to the point that he was written as a semi-deity who was placed on earth to judge the living during the day and the souls of the dead during the night.

¹³³ FAIRBANK, *supra* note 35, at 85.

¹³⁴ *Id.* 185.

¹³⁵ BECKER, *supra* note 137, at 321.

¹³⁶ FAIRBANK, *supra* note 35, at 185.

Chinese state. Combining Legalist and Marxist theories, Mao dismissed all laws predating the People's Republic of China as tools to exploit the poor and the powerless.¹³⁷ Mao then paraphrased Confucian concepts in Marxist terms and asserted that it was more important to possess correct revolutionary spirit than to follow the letter of the law. He decreed that it was better to "rely on the rule of Man and not the rule of law."¹³⁸ Accordingly, the legal regime established by Mao was susceptible to the same infirmities that plagued Confucian systems.¹³⁹

An especially pernicious condition under the Communist legal regime was to be accused as a "counter-revolutionary." Until its cancellation in 1997, this ambiguous, catchall offense served as the basis for countless prosecutions. The definition of being a "counter-revolutionary" was flexibly defined by the Chinese Communist Party and could be modified *ex post facto*.¹⁴⁰ In the early days of the People's Republic of China, any activity construed as disloyalty to Mao, such as inadvertently stepping on a newspaper bearing Mao's name or picture, was punishable by physical torture, sentences to labor reform camps, or even execution.¹⁴¹ Corrupt cadres threatened people as *counter-revolutionaries* as a means to line their pockets or to prosecute personal animosities.¹⁴² The accused were presumed guilty when brought for trial only received the help of a defense attorney who could not establish innocence but only offer evidence in mitigation.

¹³⁷ STARR, *supra* note 91, at 207.

¹³⁸ BECKER, *supra* note 137, at 326.

¹³⁹ See ZHANG YI, HONG SUA GI NIAN BAI [Red Memorial] (1993). This book chronicles the excess of the corrupt communist cadres who used the communist legal system for their own benefit. A photo copy of this book was given by the author to an Australian couple who smuggled it out of China and published abroad.

¹⁴⁰ STARR, *supra* note 91, at 208.

¹⁴¹ *Id.*

¹⁴² *Id.*

Mao's legal regime proved disastrous. Traditional Chinese society coupled a rejection of rigidly legal standards with an emphasis on order and moral conduct. Under Mao, the Chinese Communist Party rejected rigid legal standards while promoting continual political struggle and revolution. The Great Preliterate Cultural Revolution saw a complete break down of all legal apparatus. The courtroom was condemned as the "bastion of bourgeois justice."¹⁴³ Individuals suspected of being counter-revolutionary were tortured in private or subjected to public purges where the zealous mobs sometimes ripped the accused limb from limb.¹⁴⁴ Mao encouraged the Red Guards to destroyed priceless cultural relics, including the Imperial Summer Palace.¹⁴⁵ The resulting anarchy grew so rampant it finally had to be suppressed by the PLA. By the time of Mao's death in 1976, China had become a largely unruly society placed under martial law. In 1980, when Deng Xiaoping attempt to reform the legal system, he found that:

In 1980, only 3,000 people in China could claim to have any legal qualification and most of these were old men who had been persecuted under Mao. Almost no books on law could be found and the Party complained of the difficulty of introducing even basic notions of legality. A 1984 report delivered to the National People's Congress admitted that 'to many people the notion of acting according to law is new, unfamiliar, not something they are used to.'¹⁴⁶

The advent of communism did little to bolster the Chinese confidence in the rule of law. Recently, legal reforms have been slowly implemented but often with unsatisfactory results. Like the corrupt magistrates of old, corrupt party officials sap the

¹⁴³ BECKER, *supra* note 137, at 326.

¹⁴⁴ ZHANG YI, *supra* note 139.

¹⁴⁵ SPENCER, *supra* note 29. In his book, Spence described how thousands of intellectuals and other suspected to be intellectuals were beaten to death or died of their injuries. Countless others committed suicide to escape "public humiliation" sessions that functioned as arenas for torture. Millions were relocated to purify themselves through labor in the countryside.

¹⁴⁶ STARR, *supra* note 91, at 209.

people's confidence in the legal process. In 1998 a new round of legal reform was initiated to make the Chinese legal system more "credible and accountable"¹⁴⁷ in an effort to curb political corruption and the results to date have not been overly encouraging. In his March 9, 2001, speech to China's National People's Congress, Chinese Premier Li Peng stated ominously, "We face destruction of our party and the destruction of our nation if we fail to fight corruption and promote clean government."¹⁴⁸

E. The Two Paradigms

China's history has produced two paradigms for viewing the concept law in the abstract. The Legalist paradigm held that law was tool used by those in power ruler to elicit desired behavior from the subjects with no correlation to justice.¹⁴⁹ The applied-Confucian paradigm put forth law that may have been based on moral or noble ideals but was corrupted by a system in which the powerful applied the law only to their own benefit.¹⁵⁰ Communist application of the law has yet to break these past paradigms. With the past as context, the Chinese cannot help but to see international law in the same light with which they have seen these internal law paradigms.

Under the Legalism paradigm, it is China's tendency to view the law of war as a tool by which those who formulated the law, that is the West, seek to manage China's

¹⁴⁷ BECKER, *supra* note 137, at 331.

¹⁴⁸ Christopher Bodeen, *Top Chinese Legislature Wars Colleagues About Corruption*, WASH. POST, Mar. 10, 2001.

¹⁴⁹ SCHWARTZ, *supra* note 101, at 329.

¹⁵⁰ SPENCE, *supra* note 29, at 75-77.

behavior. Thus a Shanghai commentator summarized the popular Chinese sentiment toward international law:

The crux of the problem is, why should we follow the 'rules of the game' as established by the West? Does the West truly wish for China to accept their established regulations and then willing change our relationship to that of bosom friends? The history of the establishment and proliferation of international law is, after the West had become the most advanced nations by means of bloody robbery, they forced the less developed nations to follow the regime they established (since the less powerful nations will certainly be eliminated otherwise). Finally, when these less powerful nations understand the exploitive and discriminatory nature of these rules, they will inevitably seek to change the legal regime. The history of national revolution is a history of these types of efforts. This was the same reason that the United States initially fought for independence.¹⁵¹

Under the applied-Confucian paradigm, the Chinese concede humanitarian intentions as the basis for the law of war, but believe that those who use the law (particularly the United States) do so in a predatory manner to achieve hegemony in Asia:

Hegemonism and power politics still exists and are developing further in the international political, economic, and security spheres. Certain big powers are pursuing . . . neo-colonialism . . . Under the pretext of 'humanitarianism' and 'human rights,' some countries have frequently resorted to the use or threat of force, in flagrant violation of the UN charter and other universally recognized principles governing international relations . . . In particular, a *certain country* is still continuing its effort to develop and introduce the National Missile Defense (NMD) and the Theatre Missile Defense (TMD) system which have undermined the international community's¹⁵² [emphasis added].

F. Reinforcing the Skeptic

¹⁵¹ Mou Shou Tze, *The Predator's Rules*, in CHINA CAN STILL SAY NO 225 (Guo Xingsheng, Tang Zhangyu, Gaio Gian, Zhang Tsantsan, Song Chang eds., 1996).

¹⁵² PEOPLE'S REPUBLIC OF CHINA'S INFORMATION OFFICE OF THE STATE COUNCIL, *supra* note 69.

From China's point of view, this intense cynicism regarding international law is fully justified by the behavior of the United States. In light of its historical concern with sovereignty and national unity, China has placed great emphasis on Article 2(7) of the United Nations Charter which guarantees non-interference in "matters which are essentially within the domestic jurisdiction of any state"¹⁵³ unless enforcement measures are authorized by the United Nation's Security Council. Thus, China has been scrupulous in avoiding any action that could be interpreted as a threat to the sovereign interests of another nation.

The seemingly cavalier attitude that the United States occasionally takes on issues of sovereignty is extremely alarming to China. As a case in point, China (along with the United Nation's General Assembly) condemned the United States invasion of Panama as a gross violation of Panamanian sovereignty.¹⁵⁴ President Jiang Zemin, used a Legalism paradigm to openly derided American assertions that the invasion was legally conducted in self-defense as required by Article 51 of the United Nation's charter. "The United States repeatedly talks about democracy, freedom, and human rights," he said, "but China finds it very difficult to understand why the U.S. sent troops to Panama and took its President back to the United States. In the eyes of the Chinese people, the Panama Invasion was a manifestation of power politics."¹⁵⁵

¹⁵³ U.N.CHARTER art. 2, para. 7.

¹⁵⁴ BARRY E. CARTER & PHILLIP R. TIMBLE, INTERNATIONAL LAW 1345-54 (1995).

¹⁵⁵ *Our Democracy is the Best*, 108 WORLD REPORT 10, 50 (1990) available at LEXIS, Nexis Library, Asia & Pacific Rim File.

Until recently, what China believes international law is unable to do, it believed its authority in the United Nations could achieve. Until 1999, China looked to its status as one of the permanent members of the United Nation's Security Council as a measure of security in matters of sovereignty. Article 39 of the United Nations Charters gave the United Nations Security Council the responsibility of determining when a threat to peace, breach of peace, or an act of aggression occurred and to sanction collective action.¹⁵⁶ The Security Council is composed of five permanent members and six non-permanent members. All nonprocedural Security Council action requires seven affirmative votes and can be effectively vetoed by any of the permanent members. As the permanent members on the Security Council, China felt secure in its ability to veto collective action that could threaten its interests.¹⁵⁷

The air bombing campaign in Kosovo conducted by North Atlantic Treaty Organization (NATO) shattered this sense of security. In 1998, the autonomous province of Kosovo under the sovereignty of Yugoslavia began to destabilize. Yugoslavia insisted the situation in Kosovo, pursuant to Article 2(7), was an internal matter within its jurisdiction. After China publicly announced that it would veto any Security Council resolution calling for international intervention on Kosovo, NATO initiated bombing in Kosovo in 1999 without even seeking permission from the United Nation's Security Council. The United States was widely viewed as the primary instigator and supporter of

¹⁵⁶ U.N. CHARTER art. 39.

¹⁵⁷ See UNITED NATIONS OFFICE OF PUBLIC INFORMATION, EVERYMAN'S UNITED NATIONS.

the NATO air campaign, with the media going to far as to dub the bombing "Madeleine's War"¹⁵⁸ in reference to Madeleine Albright, the United States Secretary of State.¹⁵⁹

International Law Professor Ved P. Nanda assessed that, "The [United Nations] Security Council was bypassed, as the United States and NATO decided to take military action for the obvious reason that two permanent members, Russian and China, would use their veto power in the Council to block the action."¹⁶⁰

Predictably, China was incensed at the end-run around the United Nations Security Council. After the beginning of the NATO air campaign, China's representative at the United Nations called NATO's action a blatant violation of the United Nations Charter which gave the United Nation's Security Council the sole responsibility for initiating the use of use force in a non self-defense mode.¹⁶¹ China's attitude remained unchanged throughout the NATO bombing campaign. In June 1999, Finnish President and European Union's Peace Envoy, Martti Ahtisaaari visited Beijing in hopes of persuading China to support the Kosovo peace plan in the upcoming United Nation's Security Council meeting. Chinese Leader Jiang Zemin remained resolute in calling for NATO to first cease its bombing in Yugoslavia before the United Nation's Security Council could consider any peace plan.¹⁶²

11-14 (1963).

¹⁵⁸ *Madeleine's War*, TIME, May 17, 1999, at 26.

¹⁵⁹ *Id.*

¹⁶⁰ Ved P. Nanda, *NATO's Armed Intervention in Kosovo*, 10 U.S. AIR FORCE ACAD. J. LEG. STUD. 1, 1-10 (1999/2000).

¹⁶¹ See *supra* note 72, at 8.

¹⁶² *How China Views the Kosovo Peace Plan Drawn up by Russia and Seven Leading Industrialized Nations is still Unclear* (Voice of America broadcast, June 8, 1999), available at <http://www.fas.org/man/dod-101/ops/docs/981006-kosovo11.htm> (last visited Feb 23, 2000).

After the NATO air campaign, the Chinese leaders have publicly voiced their disappointment with the enforceability of international law. Using an applied-Confucian paradigm, China speculated that the Kosovo incident was a sign of the destruction of the current international law by those using humanitarian interventions an excuse for enforcing a new world (social) order dominated by Western powers¹⁶³:

Facts indicate that NATO air raids against Yugoslavia are an extremely brutal war launched by a strong military bloc against a weak nation, exposing the true face of hegemony. The aggressive war waged by the US-led NATO is groundless in terms of either morality or law. . . . NATO's military intervention against Yugoslavia under the pretext of ethnic conflict is a sheer violation of the United Nation's Charter The US-led NATO alleged that, as the new millennium approaches, the international community should change the traditional norms governing international relations, 'Some important aspects of the principles of non-interference in internal affairs should be limited,' they said, adding that 'a country's sovereignty is not as important as human rights' The so-called theory of 'state sovereignty is not as important as human rights' is extremely absurd and tampers with the basic principles of international law."¹⁶⁴

Despite the United States' intentions and actual legal basis for intervention abroad, its recent overseas adventures play into China's two legal paradigms and deepen their skepticism of international law.

G. Conclusion

¹⁶³ LAMPTON, *supra* note 71, at 69.

¹⁶⁴ *Hegemony Doomed To Fail*, CHINA DAILY, MAY 18, 1999, available at LEXIS, Nexis Library, Asia & Pacific Rim File.

In application, laws limiting the use of force in international affairs remain works in progress plagued by an assortment of shortcomings and insufficiencies. Participation and compliance requires self-restraint and a leap of faith in the underlying benefit and the ultimate moral authority of the law of war. China's traditional suspicion of law undermines the requisite faith needed to take such a step. The United States aggressive pursuit of intervention in foreign affairs feeds China's suspicions and causes China to question the legitimacy of all international law. Ironically, the American example has reinforced historic Chinese suspicion of law and diminished the possibility that China will ultimately comply with the law of war.

IV. War

Any discussion of Chinese attitude on warfare begins with differentiating between the two traditional types of the Chinese military action. The first type of military action consists of border disputes and minor rebellions such as the expeditions that the Tang Emperor Lee Shiming undertook against the Korean Kingdom of Koguryo.¹⁶⁵ Such punitive expeditions and insurgencies suppressions are limited in duration, size, and scope and thus had minimal impact on the social stability within China proper. The second type of military action consists of the protracted, bloody civil wars periodically occurred in the interim between dissolution following the collapse of an old dynasty and eventual reunification under a new dynasty.¹⁶⁶ Of these two types of military action, the latter is what the Chinese people refer to when they reflect on the notion of warfare.

There are both philosophical and practical rationales for the lack of systematic regulation of Chinese warfare. The philosophical reason originates in the concept of the "mandate of heaven"¹⁶⁷ first seen in China over three thousand years ago. The practical basis is a by-product of the China's cultural extensiveness and its legacy as a centralized state.

A. The Mandate of Heaven

¹⁶⁵ PALUDAN, *supra* note 17, at 92.

¹⁶⁶ There were two major periods of disunion in Chinese history, the first occurred between 220-581 AD and the second occurred between 907-959.

¹⁶⁷ SU MA CHIEN, *supra* note 112, at 22-31.

1. *The Divine Will*

In 1122 B.C., Zhou, a dependent state of the Shang Kingdom, overthrew its feudal overlord. The Duke of Zhou justified the rebellion by stating the Shang King could no longer legitimately rule because he had lost “the mandate of heaven and Zhou has receive it.”¹⁶⁸ The Duke of Zhou was referring to a theory, already wide spread in his time, that the right to rule was not based on blood or inheritance, but conferred by Heaven on any on any family or individual that was morally worthy of the responsibility. China Scholar Benjamin Schwartz summarized the concept: “In the long run, the will of Heaven is not bound by any dynasty. Heavenly attitudes toward kings are based on objective universalistic criteria of behavior.”¹⁶⁹ When a ruler became immoral or abusive, the mandate would depart from him and rest on a more worthy candidate.

After the Duke of Zhou, successive Chinese rulers have sought to legitimize their right to rule by claiming the “mandate of heaven.” The “mandate of heaven” theory was incorporated into the Confucian theology and formed one of the central tenants of Confucian teaching. Chinese historian and scholar John King Fairbank declared that the “central myth of the Confucian state was that the ruler’s exemplary and benevolent conduct manifest his personal virtue (*de*) drew people to him and gave him the Mandate.”¹⁷⁰

¹⁶⁸ SCHWARTZ, *supra* note 101, at 47.

¹⁶⁹ *Id.* at 46.

¹⁷⁰ FAIRBANK, *supra* note 35, at 62.

By using this theory to legitimize their claims to power, the Chinese rulers have grasped a two-edged sword. On one hand, this theory conferred instant legitimacy, ex post facto, to any individual able grasp power from a corrupt or feeble ruler. On the other hand, any ruler thought to have lost mandate of heaven found his subjects had no obligation to obey him and even had the right to rebel.¹⁷¹

There were no established criteria marking the passing of the “mandate of heaven.” However, in the cosmic, inclusive view of Chinese Confucian culture, disasters such as famines, earthquakes and rebellions were all warnings that a ruler’s claim on the mandate of heaven had become diluted. In the example of the Sui Emperor Yangdi (604-618), three disastrous campaigns against Korea that exhausted the national treasury was evidence enough that Heaven had withdrawn its mandate. The loss of imperial prestige and perceived moral claim on the throne sped the demise of the Sui Dynasty.¹⁷²

2. *Warfare And the Mandate of Heaven*

In the view of old Chinese historians (Confucian scholars by training) the history of China is an ongoing cycle in which each dynasty first obtains the “mandate of heaven” and then loses it through immoral conduct.¹⁷³ Thus when the Chinese philosopher Mencius was queried by a student on whether it was proper for a subject to use military power to dispose of a despotic ruler, Mencius replied that the individual who was

¹⁷¹ SCHWARTZ, *supra* note 101, at 47.

¹⁷² PALUDAN, *supra* note 17, at 87.

¹⁷³ FAIRBANK, *supra* note 35, at 48.

disposed cannot be considered as a true ruler, but only as a tyrant.¹⁷⁴ Warfare itself was an integral part of the evolutionary process by which Heaven displaced an evil ruler with a virtuous ruler. Military success by a new ruler was a true manifestation of his possession of the mandate of heaven.

Given that warfare was an instrument of divine retribution and machination, regulation of warfare by man was neither possible nor desirable from the Chinese viewpoint. There was no logical reason to establish laws that controlled the initiation or conduct of warfare whose course was determined by Heaven. It would be no different from legislating the conduct of an earthquake or a typhoon.

B. The Lack Of Enforcement Capabilities

Historically speaking, there was little possibility that China could have implemented laws to control armed conflict even without the ideological barrier placed by the mandate of heaven. The lack of external and internal enforcement, or check-and-balance mechanisms, alone makes such concepts impossible.

From an external point of view, China's size and cultural profundity overwhelmed its neighbors. Japan, Korea, Burma, Thailand, Vietnam, and the Ryukyu Islands all borrow aspects of their culture from China, including the "Chinese-style calendar, some form of [written] script adapted from the Chinese models, similar types of food and dress,

¹⁷⁴ SCHWARTZ, *supra* note 101, at 110-11.

the practice of Confucianism and Buddhism, and the outlines of Chinese bureaucratic organization.”¹⁷⁵

The two times when China was conquered by outside forces, the Mongols during the Yuan Dynasty (1276-1368 AD) and Manchus during the Qing Dynasty (1644-1912), the conquerors were absorbed into China¹⁷⁶ and their indigenous practices left no lasting imprint on Chinese culture. This record strengthens China’s perception that it was the “central kingdom and all other countries were, by definition peripheral, that is removed from the cultural center of the universe.”¹⁷⁷ Consequently, when China dissolved into civil wars during dynastic changes, no outside force was capable of enforcing aspects of societal integrity like the law of war. Unlike Europe, China had neither a Pope nor a community of other nations to provide a check on its nature of warfare.

From an internal point of view, China has retained an impetus to remain a monolithic nation since its first unification in 221 B.C. despite extensive periods of disunion.¹⁷⁸ A collateral cost of a monolithic nation is the simultaneous failure of political, economical, cultural, and legal frameworks when the central government

¹⁷⁵ SPENCE, *supra* note 29, at 118.

¹⁷⁶ See CAMBRIDGE ENCYCLOPEDIA; *supra* note 4. The Mongol rulers of the Yuan Dynasty were illiterate and overwhelmed by the administrative requirements of the Chinese empire, thus leading to a quick collapse of the Mongol rule. The Manchu, in contrast, quickly adopted Chinese philosophy and culture. The Qing emperors were all educated as Confucian scholars.

¹⁷⁷ SPENCE, *supra* note 29, at 119.

¹⁷⁸ See CAMBRIDGE ENCYCLOPEDIA; *supra* note 41, at 141-286. From China’s initial unification by the Qin Dynasty in 221BC to the present day government of the People’s Republic of China, there have been nine different central governments. These are the Qin Dynasty (221-207BC); Han Dynasty (206BC – 220AD); Sui (581-618AD); Tang (618-907AD); Song (960-1279AD); Yuan (1279-1368AD); Ming (1368-1644AD); Qing (1644-1911AD); People’s Republic of China (1949-).

collapses or is rendered ineffective. The breakdown of the Tang Dynasty (618-907 AD) provided a microcosm of this process:

The military districts defied the central government and the local military commanders openly rebelled against the high command authority [of the central government]. Due to their rebellion, the local military commanders lost their legitimacy to retain power and were in continuous fear of being deposed by their subordinate commanders. In fact, that was what occurred. Each military district had a series of coups where the subordinated commanders would band together and deposed the local commander and set another one up in his place. The old commander would then be exiled or killed. To prevent such rebellions, the local military commander would undertake efforts to make the people in his district as ignorant as possible. Within his jurisdiction, the local commander would prohibit gathering for weddings, funerals, and religious festivals. Even relatives were discouraged from speaking together. Since intellectuals had thoughts of improving and unifying the government, they became specific targets of persecution. All schools were closed. Travel was severely limited, cutting off commerce. The idea was to isolate each military district and every person with military district, thus preventing the fermenting of rebellion. Thus the entire social, economical, cultural, and educational fabric of society were completely destroyed.¹⁷⁹

The last vestiges of local governmental control following the fall of the central government were erased by the length and extent of the civil wars that plagued China during the dynastic change. The longest such period occurred between the fall of the Han Dynasty in 220 A.D. and reunification under the Sui/Tang regime approximately 361 years later. During that time, China had one central government for approximately only 30 years and for 200 of those 361 years China was divided into two distinct countries, north and south. One of these two countries, the Northern Wei fractured into 19 different regimes between 316 and 439 AD.¹⁸⁰

¹⁷⁹ YANG PAI, ZONG GUO ZEN SHI GONG [A Historical Summary of Chinese History and People] 562 (1979).

¹⁸⁰ CAMBRIDGE ENCYCLOPEDIA, *supra* note 131, at 152.

These long periods of civil strife battered the rural stability essential for food production by a primarily agrarian society and in the people's minds warfare and famine became inextricably linked. During the period of civil wars, starvation became so commonplace that human flesh was openly bought and sold as food and children were exchanged and eaten.¹⁸¹ Those who refused to starve were forced to band together and starting grass root rebellions,¹⁸² contributing another source of warfare.

In this caldron of human suffering, there was no means nor inclination to regulate warfare. Instead, the various warlords sought to consolidate their power through brutal tactics. The history of China is littered with gruesome examples of what we now call war crimes during the dynastic changes. In 260 B.C., the Qin General Bai Chi defeated the

¹⁸¹ PAI YANG, *supra* note 44, at 404.

¹⁸² *Id.* Prior to the peasant rebellion that toppled the Ming Dynasty (1368-1644 AD), an imperial official tried to appeal to the emperor for help by describing the famine in his province:

Even though the local magistrates say, "the fathers abandon their children, and husband sell their wives, some are eating grass roots, and others are trying to eat mud." But this description is still far from the truth. I lived in Yanan province. From last year to this, there was no rainfall and all the vegetation has withered away. By August and September, the people go to the mountain and find wild grass to eat. The grass is like pig fodder and is exceedingly bitter. Its only virtue is that it staved off death. By October, people were stripping barks off the tree to eat . . . thus prolonging their life a while longer. By the end of the year, there were no more tree bark, so people began eating rocks and stones. The rocks were cold and hard with a wretched by the smell. But you only need to consume a little, and then you are full. Of course, you could not digest the rocks. Several days later, your abdomen will swell and you die from eating the rocks. Those who do not want to eat rocks become bandits. They rob others who have hidden provisions for the famine. Once robbed, these people also become the rank of the starving. These people know that it is against the law to become robbers, but they are willing to be executed by the Government rather than starve to death. Thus even if they become ghosts, they will die with a full stomach. Most pitiful is a section west of the city. Every day, one of two young child will be left there, crying for their parents. They are so hungry; they eat the offal and waste off the ground and were dead by the next day. More frightening, if a young child or a single traveler wanders outside the city, they immediately disappear. Later, others see human bones being used as firewood and realize that the hungry people outside of the city have resorted to cannibalism. But even cannibalism does not save them. Many of these cannibals' head swell up and die in a hot fever.

Id.

Zhang State and captured over 400,000 prisoners of war in his drive to consolidate China. Two hundred and forty prisoners were selected to serve as messengers, and the rest were taken to a valley and buried alive.¹⁸³ When the Han warlord Dong Zhou evacuated the imperial capital Louyang in 191 B.C. to prevent it from falling into the hands of his enemy, he razed the thousand-year-old city and forced the inhabitants to march westward to the city of Xian, five hundred miles away, without either provisions or shelter. Historians recorded the entire route between the two cities was littered with human remains.¹⁸⁴ In 1645, the Qing Emperor Dorgon ordered all Han men to shave their heads stating, "keep your hair and lose your head, or lose your hair and keep your head." In the city of Jiangying, the Qing Army took the city, then commenced a three day massacre of the civilian population, killing an estimated 130,000 civilians and prisoners of war. In the city of Giading, the process was repeated for ten days and over 200,000 civilians and prisoners of war were killed.¹⁸⁵

C. Fine Weapons of War Augur Evil¹⁸⁶

The unmitigated brutality of Chinese warfare, unsurprisingly, resulted in an extremely negative view of military conflicts. The Chinese people equate war with civilian anarchy and suffering. As far back as 6th century B.C., the Daoist philosopher Laozi commented that, "To rejoice over victory is to rejoice over the slaughter of men . .

¹⁸³ SU MA CHIEN, *supra* note 112, at 537.

¹⁸⁴ PAI YANG, *supra* note 44, at 357.

¹⁸⁵ *Id.* at 33.

¹⁸⁶ Saying accorded to Lao Tzu, semi-mythical Daoist philosopher

. hence even a victory is a funeral.”¹⁸⁷ Poetry from the Tang (618-907 A.D.) and Song (960-1279 A.D.) dynasties are full of laments of the bitter consequence of warfare.¹⁸⁸

The most venerated Chinese heroes are not great conquerors but men such as General Yue Fei¹⁸⁹ and General Yuan Chonghuan¹⁹⁰ who defended China against imminent invasion. Even Chinese military tactical manuals are replete with warnings against evil of warfare:

The Army is an inauspicious instrument, warfare a contrary virtue. Only when it is absolutely unavoidable should they be employed. You cannot, because the state is large and the populace numerous, exhaust all your

¹⁸⁷ LAO TZU, TAO THE CHING [The Way] (John C. H. Wu, trans., 1964) (6 BC).

¹⁸⁸ The great Tang Poet Du Fu wrote a representative poem, The Song of Soldiers and Chariots, that read in part:

Like this Winter, without resting the soldiers [at home to work the farm], the magistrates are again forcing us to give more taxes, and where shall the money come from. I now believe it is better to have daughters instead of sons. Daughters you can marry to your neighbors, sons will be taken away and buried in the weeds. Don't you see the bones of our soldiers in the moors where there are none to bury them.

HANG TANG TWA SHI [the Hermit of Hang Tang], TANG SHI SAN BAI SHOU [Three Hundred Tang Poems], 202 (1978) (1793).

¹⁸⁹ PERKINS, *supra* note 23, at 609. Yue Fai (1103-1141) was a general from the Song Dynasty who held back the Jurchen invasion. Legend held that his mother tattooed the words, “loyal to the last” on his back to encourage his patriotism. Yue Fai came close to recapturing the lost Song territory from the Jurchens when a jealous prime minister, Chi Gui, had him and his eldest son executed on false charges. Yue Fai was thirty-nine when he died.

¹⁹⁰ SPENCE, *supra* note 29, at 24. Yuan Chonghuan was a brilliant and dogged Ming general who Chinese defended the tottering Ming Dynasty against the Manchu invasion.

A classically educated scholar from South China, Yuan entered Peking bureaucracy as a young man. In 1622, he went on an inspection tour of southern Manchuria and grew convinced that he could defend the crucial passes that led to Peking. As a staff member of the ministry of war, with a good knowledge of European firearms . . . Yuan was able to hold the Liao River against Nurhaci. In 1628 he was named field marshal of all northeastern forces When in 1630, Manchu raiding parties appeared near Peking, Yuan was falsely accused of colluding with them and was tried on trumpeted up charges of reason. . . . Yuan had no chance of clearing himself. Instead he was condemned to death by way of the most publicly humiliating and painful punishment that the Chinese penal code allowed for: being cut to pieces in the marketplace of Peking. Later scholars mourned him as one of China's greatest generals.

Yuan Chonghuan's military success and his unjust death so paralleled the fate of Yue Fai that Chinese legend popularized him as Yue Fai's reincarnation.

Id.

sharpness and expeditions and attack and exterminating without end until finally being defeated and perishing when regret is useless, Yet, the Army is like fire: if you do not eventually extinguish it, you will suffer misfortune and burn yourself. If you constantly pursue the martial and exhaust the army, disaster will come in constant. A principle from *Ssu-Ma Fa* states: "Even though the state may be vast, those who love warfare will inevitably perish."¹⁹¹

In his survey of Chinese military thoughts, historian Martin Van Creveld¹⁹²

analyzed "...the underlying way in which Chinese culture approaches war. War was neither a means in the hand of policy nor, and much less, an end in itself. Instead it was regarded as evil, albeit one that was sometimes rendered necessary by the imperfection of the world."¹⁹³

D. The Western Contrast

The Chinese view of warfare is clearly and substantially different from the Western view of warfare. This difference can be highlighted in the development of the Western doctrine of *Jus ad Bellum*, the rules governing the requirements for initiating warfare. Drawn from various sources throughout the European history and culture, *Jus ad Bellum* can be divided into three phases, the just war period, the de facto war period, and the treaty period. The "just war" concept held that resorting to warfare was legal if one nation properly sought to redress the wrong inflicted by another nation. After the European states normalized their relations through the treaties that constituted the Peace of Westphalia in 1648, the various sovereign European nations viewed their international

¹⁹¹ LIU PO-WEN, ONE HUNDRED UNORTHODOX STRATEGIES (1996).

¹⁹² Martin Van Creveld was born in the Netherlands in 1964, and has lived in Israel since 1950. He received a Ph.D. in international history at the London School of Economics. Since 1971, Professor van Creveld has been on the faculty of the History Department at Hebrew University. A specialist on military history and strategy, he is the author of thirteen books, including *Technology and War*, *Nuclear Proliferation and the Future of Conflict*, and *The Rise and Fall of the State*.

¹⁹³ MARTIN VAN CREVALD, THE ART OF WAR: WAR AND MILITARY THOUGHTS 24 (2000).

relations in terms of balances of power between states and warfare as a legal, de facto method to advance the agenda of a nation-state. Post-World War I efforts were made to prevent the devastation of warfare through international treaties and agreements¹⁹⁴ and warfare was eliminated except in limited circumstances.

Three conclusions can be drawn from the development of *jus ad bellum* doctrine. First, warfare was viewed as an activity subject to human control. Therefore, steps were taken to implement legal parameters. This is contrary to China's belief that the course of war was dictated by Heaven to remove the wrongful ruler and insert a ruler possessing a divine mandate.

Second, as a legacy of the "just war" period, the West appears to accept the dual nature of warfare. While on one hand war was bloody and cruel, on other hand warfare had a certain patina of glamour and glory because it was fought with the "intention of advancement of good, or the avoidance of evil."¹⁹⁵ Therefore, in the Western mind, warfare can function as the perfect stage for displaying heroism, gallantry, and honor. This romantic view of warfare grew so intense before World War I that the announcement of war was "greeted with enormous popular enthusiasm in the capital of all combatant countries. Crowds thronged the streets, shouting, cheering, and singing patriotic songs."¹⁹⁶ China, through its lengthy civil wars, entertains no such illusions about the nature of warfare and sees it only as an ugly necessity.

¹⁹⁴ CARTER & TIMBLE, *supra* note 154, at 1269.

¹⁹⁵ THE LAW OF WAR-A DOCUMENTARY HISTORY (Leon Friedman ed. 1972).

¹⁹⁶ JOHN KEEGAN, THE FIRST WORLD WAR 71 (1998).

Finally, there is a Western notion that warfare could be compartmentalized and contained means to an end. A nation, for example, could engage in warfare for a limited amount of time or for a limited objective. This is at variance with the Chinese belief that warfare was a limitless engagement that could consume the existing structure of civilization. Therefore one cannot be surprised by the diametrically opposed ideas expressed by the greatest military philosophers of the East and West. When the Western military thinker Clausewitz said, "War is the continuation of politics by other means" ¹⁹⁷ the Chinese military thinker Sun Tzu responds "War is the greatest affair of state, the basis of life and death, and the way to survival if extinction."¹⁹⁸

E. Taiwan

There is no better method of elucidating the difference between the Chinese and Western viewpoint on warfare than to use the example of Taiwan. To the United States, there are a variety of reasons to support Taiwan, including, strategic imperative, support for democracy, or humanitarian intervention. There is little understanding of why China, the third largest country in the world with a territory of 3,719,275 square miles¹⁹⁹ is so vehemently insistent on reunification with Taiwan, an off-shore island that is approximately 250 miles long and 90 miles wide.²⁰⁰ To China, there is only one reason to ensure reunification with Taiwan: survival.

¹⁹⁷ KARL VON CLAUSEWITZ, ON WAR 8 (1834).

¹⁹⁸ SUN-TZU, THE ART OF WAR 167 (1994).

¹⁹⁹ CAMBRIDGE ENCYCLOPEDIA, *supra* note 131, at 180.

²⁰⁰ PERKINS, *supra* note 23, at 503.

Philosophically, just as the fall of Qing Dynasty stemmed from its inability to address the inequities resulting from the Opium Wars, a definitive failure to regain Taiwan will be construed by the Chinese masses as an indication of the current regimes' loss of the mandate of heaven and would seriously undermine the legitimacy of the Chinese Communist Party. At the same time, the loss of Taiwan could encourage other territories or ethnic minorities, like those in Tibet or inner-Mongolia, to demand their independence.²⁰¹ Since China's entire history from 221 B.C. onward has been an ongoing drive toward unifying and maintaining historic China, there is little likelihood the Chinese Communist Party would accept permanent dissolution of this territory. Regimes only survive when they regain or appear able to regain Chinese territory. They fall when they no longer demonstrate such ability. The ensuing civil war would be, as always, devastating. If the Chinese Communist Party fails to regain the breakaway territories and China dissolves further, its legitimacy would be ended. The collapse of the Chinese Communist Party would result in anarchy for 1.3 billion people. At the present time, there is "no church, no labor union, no political party in China that could do what these organizations did in Eastern Europe and the former Soviet Union when the Communist Party control unraveled."²⁰² Thus it is unsurprising that in its most recent Defense White Paper, China asserted that the "[s]ettlement of the Taiwan issue and realization of the complete reunification with China embodies the fundamental interests of the Chinese nation."²⁰³

F. Conclusion

²⁰¹ OKSENBERG, *supra* note 85, at 53.

²⁰² STARR, *supra* note 91, at 97.

²⁰³ PEOPLE'S REPUBLIC OF CHINA'S INFORMATION OFFICE OF THE STATE COUNCIL, *supra* note 69.

China's view on war differs radically from that held in the West and will contribute to a fundamentally different view of the law of war. Consider three factors. First, the Chinese believe a nation must pay a price for limiting warfare through the law of war. Such limitation would not only prohibit certain effective military maneuver, like General Tecumseh Sherman's march through the South or guerilla warfare tactics of the North Vietnamese Army, but also impede the natural evolution of the mandate of Heaven. Second, in China has no experience either internally or from outside influence in the successful application of law as a means by which to limit the conduct of war. In light of its limited conventional weapons capabilities, many Chinese believe that any such adherence is a sure road to defeat. Third, history and culture have conditioned China to view defeat in warfare as annihilation and not a temporary setback.

In light of these three factors, China will conclude that obedience to the law of war may be a possibility for more technologically advanced nations, but it serves only as a suicide pact for China. Winston Churchill once said, "No great nation can allow an issue involving its very survival to be decided by other nations."²⁰⁴ There is no indication that China is ready to disregard Churchill's advice and fulfill the requirements of the law of war. Instead, all evidence points to the fact that China is moving toward survival through use of unrestricted warfare doctrine.

²⁰⁴ RICHARD NIXON, LEADERS 74 (1982).

V. Doctrine

A. The Roots of Chinese Doctrine

In February 1999, two Chinese air force colonels, Qiao Liang and Wang Xiangsui, caused considerable consternation and controversy among advocates for legal restrictions on warfare when they argued that “modern warfare dissolves boundaries between the military and civilian spheres” in their book, *Unrestricted Warfare*.²⁰⁵ Colonels Qiao and Wang examined how technology is changing the three traditional components of warfare: battlefield space, soldiers, and weapons. In the future, they argue, battlefield space will consist of conventional space (land, sea, air, space) and cyber space (space which is created and sustained by man-made technology). Beyond defending against professional soldiers, countries will also have to contend with hackers, terrorist groups, or financial raiders. Science will present new fields of weapons and expand the “state of war into every field of human endeavor, far beyond what can be embraced by the term military operation.”²⁰⁶

Mutations of these three components of warfare redefine warfare. War will no longer consist of “using armed forces to compel the enemy to submit to one’s will” but rather, “using all means . . . to compel the enemy to accept one’s interest.”²⁰⁷ More

²⁰⁵ QIAO & WANG, *supra* note 95, at 103.

²⁰⁶ *Id.* at 30.

²⁰⁷ *Id.* at 33. The rather confusing language at the conclusion of section one actually serves as the introduction to section two of *Unrestricted Warfare*. This second section, *A Discussion of New Methods of Operation*, was written for serious military tacticians and included specific details for waging “non-military war operations.” In actuality, “non-war military operations” is an adjunct of the overall concept of unrestricted warfare.

specifically, in future warfare, "all means will be in readiness, information will be omnipresent and the battlefield will be everywhere. It means that all weapons and technology can be superimposed at will, it means that all boundaries between the two world of war and nonwar, military and nonmilitary, will be totally destroyed."²⁰⁸

Speaking with some apparent official sanction, Colonels Qiao and Wang reason that unlimited means and asymmetrical strategies will inevitably result in "continual enlargement on the range of selection and the methods of use" of means and of warfare.²⁰⁹ They suggest that military planners employ: atomic war; diplomatic war; financial war; trade war; media war; space warfare; biochemical war; intelligence war; ecological war; electronic war; guerrilla warfare; drug war; virtual war; ideological war; and terrorist war.²¹⁰ Military analysts unfamiliar with Chinese history fail to grasp the persuasive nature of Colonels Qiao and Wang's argument to the Chinese military establishment. In actuality, the authors are advocating the kind of multi-tiered unconventional methods of fighting traditionally favored in China.

The development of classical Chinese war fighting doctrine was not systematic. It was strained by the Confucian scholars who "regarded the practitioners of wu (violence) as their mortal enemies, incarnating the very evil of brute force that it was the Confucian moral duty to extirpate in the cause of civilized behavior."²¹¹ Consequently, the few serious homegrown studies of Chinese military doctrine and tactics have been

²⁰⁸ *Id.* at 33.

²⁰⁹ *Id.* at 121.

²¹⁰ See CREVALD, *supra* note 193, at 34.

²¹¹ FAIRBANK, *supra* note 25, at 109.

relegated to the sidelines and the possession of military manuals was construed as evidence of seditious intent²¹². The seminal collection of classical Chinese military writing, *The Seven Military Classics*, was formally published and circulated only in 1078 during the Sung dynasty²¹³. This analytical reticence combined with the scarcity of writing on Chinese military tactics leaves the student of classical Chinese war fighting to glean doctrine from the details of the numerous battles dutifully recorded by Chinese historians.

Two broad unifying principles can be established from these battle records. First, Chinese doctrine valued a bloodless military victory. The ability to gain the desired objective without resorting to violence was held in the highest regard. Thus, Wei Liao-Tzu, the fourth century Chinese military theorist, distinguished between a greater and lesser victory by saying, “when one is victorious without exposing one’s armor, it is the ruler’s victory; when victory comes after the deployment, it is the general’s victory.”²¹⁴ Sun Tzu famously claimed that “to subdue the enemy without fighting is the acme of skill”²¹⁵ and “in war, the best policy is to take a state intact.”²¹⁶ Even on a tactical level, Chinese military doctrine valued the bloodless victory. The Chinese historical epic, *The Three Kingdoms*, which recorded the struggle of three rulers attempting to unify China, exaltation of this principle:

“In a world where the power was evanescent, the book glorified the use of stratagem (*ji*) deception designed to win battles against greater forces, if possible without using any of one’s own forces. In the ‘borrowed arrows

²¹² THE SEVEN MILITARY CLASSICS OF ANCIENT CHINA 17 (Ralph D. Sawyer trans.) (1993).

²¹³ *Id.*

²¹⁴ *Id.* at 243.

²¹⁵ *Id.* at 161.

²¹⁶ *Id.* at 160.

stratagem,' the military advisor Zhuge Liang is ordered to prepare a hundred thousand arrows within three days for a military action, an apparently impossible mission. He does nothing until the evening of the third day, then sends twenty boats filled with straws across the river in a fog. The enemy camp shoots the straws full of arrows, which Zhuge brings back to his own camp. In the 'defecting with a secret stratagem,' also called the 'personal injury stratagem' a loyal general accepts a cruel beating at the hand of his commander so that he can defect to the enemy's side to serve as a spy. The stories praise mirror-within-mirrors deceit. People with steel nerves and quick wits disarm others' suspicion only to betray them. Leaders lose their power because they give trust. Intended treacheries are secretly perceived and turned against their perpetrators."²¹⁷

The second principle follows: if bloody conflict cannot be avoided the participants must then act with ruthless determination. This ruthlessness applies both to the willingness to inflict unmitigated brutality on the enemy and an equal willingness to accept whatever losses are demanded as the price of victory. After surveying classical Chinese military philosophies, Professor Martin Van Creveld concluded that, when waging war, the Chinese display a marked tendency to "ignore personal considerations concerning love and hate, take the most drastic measures (including such as we would consider underhanded or immoral) and inflict the harshest punishment; all as may be dictated by a necessity which knows no bounds. Above all, no clear line is drawn between military affairs and the rest of life."²¹⁸

There are numerous historical examples to support Creveld's observation. The Tang Emperor Daizong (726-779 AD) forged an alliance with the nomadic Tibetans and Uighurs to evict the rebel General An Lu-shan from the Tang capital of Xian. In repayment for their military aid, the Emperor gave his allies permission to loot the

²¹⁷ NATHAN & ROSS, *supra* note 88, at 22.

²¹⁸ CREVALD, *supra* note 193, at 34.

ancient city of Louyang. Historians later recorded that the fire from raged through the cities continued for months; civilian deaths were tallied by the tens of thousands; and the wretched few left alive were forced to dress in garments of paper because everything else had been looted.²¹⁹

The great siege of Huaiyang, which occurred at the same time, proved another stark example of military commanders taking what Creveld called "drastic measures." A strategic stronghold, Huaiyang was located in the Henan Province and held by the Tang military commander, Zhang Xuan. When Zhang Xuan first assumed command, he had over 10,000 soldiers under his command and the city was home to a many times greater number of civilian inhabitants. Rebels under the control of the General An Lu-Shan twice besieged Huaiyang. By great ingenuity Zhang Xuan broke the first siege but in the process greatly weakened the city's ability to defend itself.²²⁰ The second siege began in July of 757. By October, the city of Huaiyang was completely without food or provisions:

"The Tang army offices then considered abandoning Huaiyang and retreating northward. The military commanders, Zhang Xuan, and his subordinate, Xue Yan disagreed. 'Huaiyang protects the entire Jiang Huwai region. If we abandon Huaiyang, the rebels will surely follow and take the entire area . . .'

[Zhang Xuan stayed and was determined to hold Huaiyang.] When all the tea and paper had been consumed as food, the warhorses were killed.

²¹⁹ YANG, *supra* note 44, at 220.

²²⁰ SIMA GUANG, TSU SHIH TUNG CHIEN: HUAIYANG ZE WAI [Comprehensive Mirror for Aid in Government-The Siege of Huaiyang] 40-67, (Pai Yang ed., (1989) (1085). Zhang Xuan wanted capture the rebel general, Yin Zechi, but could not recognize him. Knowing that Yin Zechi was on the front lines supervising the siege, Zhang Xuan ordered his men to begin shooting arrows that had no tips. The rebel soldiers immediately presented these tipless arrows to Yin Zechi to report that the city had run out of arrows. Zhang Xuan observed carefully and was able to deduced who was Yin Zechi. Zhang Xuan's archers then shot Yin Zechi in the left eye and charged out to capture him. Severely wounded, Yin Zechi retreated with his army.

Once the warhorses were consumed, people climbed trees to catch birds and overturned walls to eat the rats. When even birds and rats were gone, Zhang Xuan's most favored concubine was slain and the soldiers ate her as food. Xue Yan also had his slaves killed as food. They then consumed all the women in the city, and then the men who were old and unable to fight. Everyone in the city knew they would perish, but all believed in Zhang Xuan's cause and none would betray him. Finally, there were only four hundred people left in the city.

On the 9th of October, the rebel forces entered the city walls. The Tang soldiers could not fight because they were so weakened. Zhang Xuan then kneeled toward the west [where the Tang Emperor was] and said, 'My strength is gone. I could not save the city. Since I cannot be of no further service to you in life, I will become a demon and slay the rebels after my death.' Huaiyang was then taken by the rebels . . . The rebel general, Yin Zichi, then beheaded Zhang Xuan and thirty-six of his followers. Zhang Xuan maintained his composure throughout, his expression and attitude never altering even at the end. . . ."²²¹

B. Mao Zedong - The Modern Practitioner of China

Undoubtedly, the most skilled practitioner of traditional Chinese warfare in modern times was Mao. An avid reader of Chinese history and military tactics²²², Mao absorbed the various aspects of classical Chinese military doctrine and applied them during his struggle against the Chinese Nationalist Party. Time and again he showed willingness to accept extreme losses, use deceptions and stratagems, and inflict limitless brutality on his enemies.

In 1934 Mao was nearly annihilated by Chiang's encirclement campaign. He escaped with approximately 100,000 troops and party members and began the "Long March." A quarter of his personnel died in the first three weeks. Mao's

²²¹ *Id.* 65-67 \.

²²² LI ZHISUI, *THE PRIVATE LIFE OF CHAIRMAN MAO* 83 (1994).

third wife, He Zijen, gave birth to their daughter during the march. In order to proceed with the army, they gave the child peasant farmers along the road and never saw her again.²²³ After one year, 6,000 miles, and countless skirmishes with KMT, Mao finally led his ragged survivors to the city of Yunnan. He had suffered more than 90% casualties and only arrived in Yunnan with between four and eight thousand followers.²²⁴

Mao then used a combination of deception and stratagem to buy sufficient time to nurture his army back to fighting form. Mao lobbied for a false alliance with Chiang's army. He mounted an array of public and private appeals to Chiang to declare a truce and form an alliance against the Japanese invaders. To facilitate this alliance, Mao "even agreed to change the designation of the Red Army, so as to make it formally part of the national armed forces under nominal Nationalist Command. So long as the reality of the Party's control over communist troops and territories was preserved, almost any concession was possible."²²⁵

Chiang saw through Mao's ruse and refused to accept an alliance or cease his attack on Mao's strongholds. Mao then used another unexpected approach. Through intermediaries, he began cultivating a relationship with Chiang's subordinate, Zhang Xueliang. Knowing that Zhang had a special animus toward the Japanese for killing his father, Mao convinced Zhang that the Japanese would

²²³ *Id.* at 72.

²²⁴ FAIRBANK, *supra* note 25, at 305.

²²⁵ SHORT, *supra* note 72, at 345.

overrun China if the alliance were not formed. Persuaded by Mao's arguments, Zhang eventually kidnapped Chiang and forced him to form an alliance with the Mao.²²⁶ The public nature of the kidnapping and the resulting agreement made it impossible for Chiang to renege on his agreement. An alliance was duly formed. During the subsequent War of Resistance against the Japanese, Mao retrenched his forces and allowed the Nationalist Army to take the brunt of Japanese military attacks. While Chiang exhausted himself defeating the Japanese, Mao ceaselessly recruited followers to re-establish his army. After the Japanese was defeated, Chiang's exhausted army lost the battle for control of China to Mao.²²⁷

Mao incorporated aspects of classical Chinese strategy and tactics into the PLA's war fighting doctrine. The "people's war" doctrine emphasized various elements including guerilla warfare tactics, extensive use of stratagem and deceptions, and above all attrition warfare.²²⁸ The application attrition, in Mao's view, could be without limits. In 1963 Nikita Khrushchev sought to issue a subtle threat to Mao by reminding him of the catastrophic loss of life that could result from a nuclear attack by the Soviet Union. Mao was unmoved. "Let four hundred million Chinese die," he told the startled Khrushchev, "three hundred million will be left."²²⁹ To this day, the basic tenets of the "people's war" doctrine have never been repudiated and remains, at least nominally, the cornerstone of China's military thinking.²³⁰

²²⁶ *Id.* at 345-56.

²²⁷ *Id.* at 353-438.

²²⁸ PILLSBURY, *supra* note 93, at 262.

²²⁹ NIXON, *supra* note 204, at 210.

²³⁰ PILLSBURY, *supra* note 93, at 269.

C. The Advent of Unrestricted Warfare

Colonel Qiao's and Wang's call for a return to traditional Chinese war-fighting doctrine, albeit with a high tech twist, was inevitable in light of recent Sino-American relations. In the 1970s and 1980s, China and the United States quietly moved closer to counter-balance the Soviet threat. The relationship between the two countries cooled in the Soviet Union's twilight years and iced over after 1989 Tienanman Incident.²³¹ China regarded the student demonstrations as an unacceptable threat to national security and an internal matter. The United States' ongoing criticism on this and other human rights matters, in China's view, was both "ill-informed and insincere, and . . . masks the intention of blocking China's rise to power by undermining China's social stability and political order."²³²

During this period of mounting tensions, China watched in awe as the United States demonstrated its military prowess during Desert Storm in 1991. Iraq, using the same Soviet tactics and equipment used by China, was quickly routed by the United States in less than 100 hours of ground combat.²³³ The high tech weaponry and precise command and control of the coalition forces dazzled the Chinese military establishment. The bright light of American military operations of Desert Storm only served to highlight

²³¹ MANN, *supra* note 64.

²³² Harry Harding, *Breaking the Impasse Over Human Rights*, in *LIVING WITH CHINA, US-CHINA RELATIONS IN THE TWENTY-FIRST CENTURY*, 173 (Ezra F. Vogel ed., 1997).

²³³ See RICK ATKINSON, *CRUSADE-THE UNTOLD STORY OF THE PERSIAN GULF WAR* (1993).

the PLA's inadequacies.²³⁴ Jasper Becker, the Beijing Bureau Chief for the *South China Morning Post* summarized the weakness of the People's Liberation Army conventional warfare capabilities in his recent book:

The Chinese air force is hobbled by its lack of range and speed. Chinese pilots cannot even fly in bad weather because their radar screens are unreliable. Since the Gulf War, China has largely abandoned efforts to modernize its existing planes and bought Russian Sukhoi-27 supersonic aircraft and S-300 air defense missiles and Israeli electronic reconnaissance technology. It has also acquired French Mirage jets as well as helicopters and missile defense systems from the United States. The importance of strengthening the PLAAF²³⁵ became all the more apparent during the Kosovo conflict. While Belgrade – with defense systems comparable to those possessed by China – managed to hide some of its weapons from NATO air forces, its air defense was unable to inflict a single casualty.

The PLA Navy is similarly at a disadvantage. Although larger in terms of ships and manpower than the U.S. Navy, its tied to its coastal waters and seems entirely inadequate even for mounting of an invasion across the 100-mile-wide Taiwan Strait. American commentators have talked mockingly of China having to launch a 'million-man swim.' In the 1990s, the Navy bought few domestic warships and, despite talks of building aircraft carrier, turned instead to the Russians for attack submarines and destroyers.

The infantry too is handicapped by what are termed its 'short arms and slow legs.' In other words, or so it is said, it can only move as fast as it can walk. Its low level of mechanization is one problem but poor communications and training mean that the PLA also has difficulty in coordinating different units and large body of troops. The PLA exercises directed against Taiwan in 1996 showed only 10 percent of the troops deployed could maneuver at any one time because of poor communication

In the absence of an up to date conventional arsenal, China's claim to great-power status rests largely on its nuclear weapons and missile force. The technology was acquired at the end of the 1950s either from the Soviet Union or from the United States through the defection of a handful of scientist such as Qian Xuesen.²³⁶

²³⁴ Ming Zhang, *War Without Rules*, 55 THE BULL. OF THE ATOMIC SCI. 16, 16-18 (1999).

²³⁵ People's Liberation Army Air Force

²³⁶ BECKER, *supra* note 137, at 288-89.

China is well aware of the dismal state of its conventional capabilities and seeks to modernize its military capabilities but is limited by scarce resources to upgrade its defense capabilities. Its immense population (1.3 billion people in 1999)²³⁷ exerts pressure for other domestic spending.²³⁸ Still, China officially spent 146 billion dollars on its national defense in 2000²³⁹ although experts agree that the real figure is probably four to six times higher. Even if one adjusts Chinese defense spending by six times the reported amount, however, the result is a fraction of the monies spent by the United States for defense.²⁴⁰

By 1996, China's military modernization reached a fork in the road. Some strategic planners advocated a wholesale adoption of conventional Western style warfare as the goal of Chinese military modernization. Others, alarmed by the huge expense of this process, argued that China needed a completely different approach to future warfare.²⁴¹

It was in the in the midst of this debate that the two Chinese Air Force Colonels, Qiao and Wang, met by chance while traveling to Fujian in China to observe a military exercise taking place in the Taiwan Strait. The subsequent disruption of this military exercise by two United States aircraft carrier groups started a discussion between Qiao and Wang. Despite five years of modernization effort, they realized that China's

²³⁷ World Bank, *Country Brief: China*, at <http://www.worldbank.org/html/exdr/offrep/eap/china.htm> (last visited Jan 6, 2001).

²³⁸ BECKER, *supra* note 37, at 78. Becker stated that an estimated 70 million people live in abject poverty and threatens to destabilize the social order.

²³⁹ PEOPLE'S REPUBLIC OF CHINA'S INFORMATION OFFICE OF THE STATE COUNCIL, *supra* note 69.

²⁴⁰ BERNSTEIN & MUNRO, *supra* note 80, at 73.

²⁴¹ John Pomfret, *China Ponders New Rules of Unrestricted Warfare*, WASH. POST, 8 Aug. 1999, available at <http://taiwansecurity.org/WP/WP-ChinaPondersNewRulesOfUnrestrictedWar>.

conventional military capabilities still lagged far behind those of the United States. Moreover, fiscal constraints precluded China from winning, or even running even, in an arms race against the United States in the foreseeable future.

To Colonels Qiao and Wang, China was in a familiar impasse, a weak opponent facing a larger and more powerful adversary. They came to the conclusion that China needed a "new strategy to right the balance of power."²⁴² This strategy they set forth in their book, *Unrestricted Warfare*. Aspects of *Unrestricted Warfare*, such as reference to media war and diplomatic war, pay homage to the ancient concept of bloodless victory through strategies designed to sap the adversary's will to fight. The greatest portion of Colonel Qiao and Wang's book, however, constitute a blue print for the ruthless struggles that must occur when passive means are exhausted. Like ancient practitioners of Chinese warfare, the authors coolly discuss using every available measure, without regard for laws of war, to gain military victory.

Since China does not promote transparency in defense matters, there is no clear agreement as to the degree that *Unrestricted Warfare* is being integrated into the PLA's fighting doctrine. The publication of this book by the People's Liberation Army Literature and Arts Publishing House and its subsequent favorable reviews in party controlled newspapers implies high-level support for this book and suggests some official approval of its concepts.²⁴³ Some Chinese analysts believe that the concept of

²⁴² *Id.*

²⁴³ Foreign Broadcast Information Service Editor Note to LIANG QIAO & XIANGSUI WANG, UNRESTRICTED WARFARE -- THEORY ON WAR AND METHODS OF WAR IN THE ERA OF GLOBALIZATION (Foreign Broadcast Information Service, trans., People's Liberation Army Literature and Arts Publishing House 1999) (1999).

unrestricted war is authoritatively part of the PLA plans. Al Santoli, editor of the Chinese Reform Monitor Bulletin, contends the PLA has accepted the concept of unrestricted warfare and moreover is openly encouraging its officers to think about different methods of application.²⁴⁴

There is a growing likelihood at least some of the theories espoused in *Unrestricted Warfare* have expanded into one of the competing schools of military thoughts vying for dominance inside the PLA. Mr. Charles Hawkins²⁴⁵, the defense and operations analyst and Director of the Historical Evolution & Research Organization (HERO) Library, has authored a paper called *The Four Futures*. He lists several trends of military thinking in the PLA and argues, "Unrestricted Warfare advocates constitute a recently emerged fourth group."²⁴⁶

It is likely that aspects of *Unrestricted Warfare* will be incorporated into an existing Chinese school of thought on military doctrine called "revolution in military affairs" or RMA. The term RMA is familiar to all students of modern American military operations but was first used by Soviet military thinkers and refers to a situation where "one of the participants in a conflict incorporates new technology, organization, and

²⁴⁴ J. Michael Waller, *PLA Revises the Art of War*, at <http://www.insightmag.com/archive/200002063> (last visited Aug 8, 2000).

²⁴⁵ Charles F. Hawkins, *The four Futures,; Competing school of thoughts inside the PLA*, Mach 2000, available at <http://taiwansecurity.org/IS/IS-0300-Hawkings.htm> (last visited Oct. 3, 2000). Mr. Hawkins is a graduate of the United States Military Academy at West Point in 1968, taking a commission as an infantry officer. He served with distinction in Vietnam with the 101st Airborne Division, and has 24 years military service in the United States Army. Mr. Hawkins retired from the Army reserve in 1992. He has worked in the defense analytical community since 1987.

²⁴⁶ *Id.*

doctrine to the extent that victory is attained in the immediate instance.”²⁴⁷ In general, there are three basic permutation of RMA. The first consisted reconfiguring the existing military force and organization to effectively deal with the future conflicts. The second focused on evolution of weapons, weapons technology, and military forces and organization. The third examined the continuing evolution in equipment, organization, and tactics to adjust to changes in technology.²⁴⁸

Since its introduction in China, the concept of RMA has gained a small but powerful group of adherents. In 1996 China announced the creation of a strategic research center that would combine research on “traditional Chinese statecraft with studies and experiments designed to generate innovative military operations concepts.”²⁴⁹ One of the primary aspect of the research is focused on how “a dominate power . . . can be neutralized or even defeated if a weaker contender knows how to exploit key vulnerabilities.”²⁵⁰ In subsequent PLA writings, the concepts of RMA and asymmetrical warfare have become intertwined. There have been troubling hints that the Chinese military establishment embraces *Unrestricted Warfare*’s stance on willingly disregarding barriers between military and civilian targets and will prosecute asymmetrical strategies using unrestricted means. In one example of this willingness, in an article on information

²⁴⁷ THEODOR W. GALDI, *REVOLUTION IN MILITARY AFFAIRS: COMPETING CONCEPTS, ORGANIZATIONAL RESPONSES, AND OUTSTANDING ISSUES* (1995) (CRS Report 95-1107F) available at <http://www.fas.org/man/crs/95-1170.htm>.

²⁴⁸ *Id.*

²⁴⁹ PILLSBURY, *supra* note 93, at 288.

²⁵⁰ Federation of American Scientist, *China Doctrine Overview*, available at <http://www.fas.org/nuke/guide/cjoma/doctrine/overview.htm> (last modified Apr. 1, 2000).

warfare, Chinese General Pan Junfeng states that one method for implementing warfare is to “dominate the enemy’s banking system and even its entire social order.”²⁵¹

D. The Impact of Unrestricted Warfare on China’s Compliance With the Law of War

For the West, especially its military legalists, even the remote possibility of China’s implementation of *Unrestricted Warfare* methods warrants discussion and raises serious questions on China’s commitment to the restrictions of *jus in bello*. Even the most cursory review of these methods reveals them to be incompatible with the law of war. When, for instance, Colonels Qiao and Wang and their disciples contend that technology expands the battlefield to include civilian targets, they noticeably violate the *jus in bello* principles of *discrimination* and *humanity*. Discrimination alone requires differentiation between military and civilian objectives and personnel²⁵². In essence, without clear comprehension of the implication of their argument on the law of war, Colonels Qiao and Wang envision an all-encompassing future battle environment:

“The two types of battlespaces—the conventional space and the technological space—will overlap and intersect with each other, and will mutually complementary as each developed in its own way. . . . With the progressive breaking down of the distinction between professional soldier and non-professional warriors, the battlefield space will overlap more and more with non-battlefield space, serving also to make the line between these two entities less and less clear Thus, the battlefield is omnipresent. Just think, if it’s even possible to start a war in a computer room or a stock exchange that will send the enemy country to its doom, then is there non-battlefield space anywhere?”²⁵³

²⁵¹ PILLSBURY, *supra* note 93, at 69.

²⁵² A.P.V. ROGERS, LAW ON THE BATTLE FIELD 7-10 (1996).

²⁵³ QIAO & WANG, *supra* note 95, at 26.

The Colonels blithely disregard the principle of *humanity* that “forbids the employment of all such kinds and degrees of violence as are not necessary for the purpose of war,”²⁵⁴ when they advocate the “rendezvous of terrorists with various types of high technology that possibly will evolve into super weapons”²⁵⁵ and using “modern technology to . . . cause earthquakes and alter precipitation patterns.”²⁵⁶

More troubling than their advocacy for using means and methods in violation of law of war, is the apparent lack of comprehension on the part of the Chinese military thinkers that the methods they call for violate the laws in the first place. Colonels Qiao and Wang conclude the first section of *Unrestricted Warfare* with a critical examination of the United States’ military capabilities to function in a scenario. They note “a lag that exists between U.S. military thinking and military technology”²⁵⁷ and marvel that the United States is “unable to discover that, part from war as a military operation, there still exists the possibility for far vaster non-military war operations.”²⁵⁸ These authors fail to grasp is that “non-war military operations” cross the threshold of acceptability and violate laws that limit the means and methods of warfare. In compliance with international law, United States cannot use such measures and thus have not adopted tactics like those advocated by *Unrestricted Warfare*. Colonels Qiao and Wang were not alone with this criticism. Military analyst and author Michael Pillsbury has noted that Chinese military writers have uniformly criticized United States military for failure to implement or

²⁵⁴ MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 315 (1959).

²⁵⁵ QIAO & WANG, *supra* note 95, at 32.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 58.

²⁵⁸ *Id.* at ch. 4.

expand on the doctrine of RMA.²⁵⁹ Assuming that China's definition of RMA incorporates *Unrestricted Warfare* measures, the collective disregard of Chinese military thinkers for the international law of war is simply staggering.

E. Conclusion

Whereas the West traditionally attempts limit violence in warfare by limiting the means and methods of application, China traditionally attempts to limit violence in warfare by avoiding the need to actually resort to war. However, if efforts at passive resolution are deemed fruitless, the Chinese historically resort to the ruthless application of any means necessary to gain their objective. *Unrestricted Warfare* is merely a new name for this old doctrine. Regardless of its title, traditional and modern Chinese war fighting doctrine is inherently incompatible with the law of war.

²⁵⁹ *Id.* at 65-70.

VI. Future Warfare With China Scenario

Given that China would disregard the law of war and seek to engage the more conventionally technologically superior Western nations by unconventional means and asymmetrical strategies, how should the West respond? If China chooses to engage in warfare against the West, against the United States in particular, likely scenarios would involve complex dilemmas for American military diplomats and military operational law attorneys. In the following scenario, we can examine possible Chinese actions designed to shape the battlefield in a crisis over Taiwan. The field of military law in such an engagement may be unequal as a result of the variance in attitudes held by the opponents, but Western lawyers can still find arguments supporting their case.

Utilizing the various factors describe in previous pages, this multi-part scenario builds on China's historic and cultural world views and its interests in the modern world. It assumes China's leadership fully supports the propositions set forth in *Unrestricted Warfare* and will adopt them to achieve its goals. The challenge in creating such a scenario is not in keeping the imagination in check with real world events but rather keeping real world events from surpassing the imagination.

A. Scenario One – Threat of Nuclear Attack

1. Facts:

In December 10, 2005, President Chein Shui-bian of Taiwan faces a tough reelection. The global energy crisis caused Taiwan's once booming economy to shrink by more than 3%. Battered by public opinion, he seeks a political victory abroad. In the

last twelve years, Taiwan has unsuccessfully applied for membership in the United Nations. President Chien and his closest advisor decided to utilize Taiwan's 2005 application for United Nation membership as a platform for seeking international recognition of Taiwan's independence. In a live telecast, President Chien announced that he would declare Taiwan an independent state even if the Taiwan's membership again fails to make the agenda for UN General Assembly plenary session. Despite emergency diplomatic intervention by the United States, President Chien refuses to retract his statement.

President Chien's announcement came during a time of internal instability for the People's Republic of China. Former President Jiang Zemin is 79 years old and in frail health. He has nominally given up his power in 2002 but retains final authority over important issues. Although Jiang has named Hu Jintao his successor, several inner party members still maneuver to replace Hu after Jiang's death. Prior to his official retirement, Jiang has sought to create a lasting legacy by making substantive progress toward peaceful unification with Taiwan. He is now furious with President Chien's actions and vows that he will not be seen by future generations as the "fool who lost Taiwan."

At this critical juncture, none of the potential candidates, including Hu, can afford to appear conciliatory toward Taiwan. Instead, each candidate strives to set the most aggressive tone possible in order to obtain support from the leadership of the People's Liberation Army. Their vitriolic public statements increased the political tension and escalate the potential for military confrontation. The United States' Ambassador to China, Joseph W. Prueher, obtained a private meeting with Jiang and pleaded with him to contain the escalating rhetoric. Jiang was sympathetic but warned that his influence has limits. "Mao, when he died, was a like a God and could do anything he wished. Deng, when he died, was like an emperor, and could do almost anything he wished. As I come to end of my days, I am like your lame duck president. Some will listen to me and some will not." He then told the Ambassador Prueher that if President Chien continues on this path, a civil war is inevitable. Jiang reiterated, "there is only one China and Taiwan is an inseparable part of Chinese territory. This fact has been accepted by both the United States and the United Nations. We will use military action, if necessary, to reintegrate the renegade province of Taiwan with China. United States cannot and should not interfere in this internal Chinese matter."

After hearing Ambassador Prueher's report, the President of the United States orders the U.S.S. Truman carrier battle group with embarked Carrier Air Wing Five, the U.S.S. Lincoln carrier battle group, and the U.S.S. Essex amphibious ready group with the embarked 11th Marine Expedition Unit, to the Taiwan Strait. The naval forces are ordered to keep the military forces of China and Taiwan apart, by force if necessary, to buy time for a diplomatic resolution to the crisis.

In response to the United States deployment, China's Central Military Commission convenes for a special session in Nanjing Military District. Commanded by General Chen Bingde, Nanjing Military District is responsible for implementing military plans for retaking Taiwan. General Chen distinguished himself for leading the 1996

exercise near Taiwan and is considered the PLA expert in amphibious warfare and joint forces operations. After the meeting, and at his government's direction, General Chen granted an interview to CNN's China correspondent. Through interpreters General Chen relays to American audiences his warning that Taiwan should not to rely on military aid from the United States, "The United States has no stamina for foreign intervention. It will lose its patience and leave Taiwan, just as it left Vietnam and Somalia. If the United States intervenes in Taiwan, it should remember that San Francisco or Los Angeles is more important than Taiwan." When pressed by the reporter to clarify his comment, General Chen demurred. However, later in the interview, he indicated, "theoretically, military power includes hardware and software. As to hardware, China's new ICBM, the DF-100 can carry a nuclear warhead and has the range to reach the Western United States."

2. Chinese Legal Argument

In the 20th century, the evolution of the doctrine of *Jus ad Bellum* has resulted in principle that the use of force by a nation to resolve international disputes is illegal except in individual or collective self-defense, under authorization of an international organization, or under residual aspects of customary international law.²⁶⁰ Specifically, Article 2(4) of the United Nations Charter requires its members to "refrain in their international relations from the threat or use of force inconsistent with the Purpose of the United Nations."²⁶¹

In the above scenario, General Chen's statement does not constitute a "threat of the use of force" under Article 2(4). A threat of the use of force consists of "an express or implied promise by a Government of a resort to force conditional on non-acceptance of certain demands of that government. If the promise is to resort to force in conditions

²⁶⁰ CARTER & TIMBLE, *supra* note 154, at 1282.

²⁶¹ U.N. CHARTER, art. 2, para. 4.

which no justification for the use of force exists, the threat itself is illegal.”²⁶² General Chen’s promise to resort to force is justified on the basis of self-defense and is therefore not an illegal act.

China’s present position on Taiwan is that reunification is not an international matter but an internal matter. This position is based on Article 2(7) of the United Nations Charter:

Nothing contained in the present Charter shall authorize the United Nations to Intervene in matters which are essentially within the domestic jurisdiction of any state or shall require Members to submit matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.²⁶³

Therefore, unless the United Nations Security Council authorizes formal action under Chapter VII of the United Nations charter, neither United States nor any other nation has the legal authority to interfere with a matter within the China sovereignty. China will construe any interference with the reunification of Taiwan as a blatant disregard Article 2(7) of the United Nations Charter and an armed attack that seeks to undermine the territorial integrity and political independence of China. Accordingly, China will act swiftly in self-defense as authorized by Article 51 of the United Nations Charter. Under Article 51, China has the “inherent right of individual or collective self-defense”²⁶⁴ if an armed attack occurs. China will not hesitate to defend itself against the unlawful use of force.

²⁶² IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 364 (1963).

²⁶³ U.N. CHARTER, art. 2, para. 7.

²⁶⁴ U.N. CHARTER, art. 51.

3. *United States Legal Analysis*

The action of the United States military forces in the above scenario does not rise to the level of “armed attack.” Article 51 of the UN charter indeed recognizes that every nation has the inherent right of self-defense. However, this right is triggered only if an “armed attack” occurs. Although the term “armed attack” was not defined in the United Nations Charter. International Law scholars have provide some widely accepted parameters which include invasion, bombardment and cross border shooting, blockade, attack on the land, sea, or air force or on the civilian marine and air fleets, breach of stationing agreement, placing territory at another state’s disposal, participation in the use of force by military organized unofficial groups.²⁶⁵ The action of United States naval forces, with orders to separate the Chinese and Taiwan forces, does not fall into the parameters of “armed attack.”

Even if US naval action can be considered a “armed attack,” the scope of the self-defense must follow the requirements of international law. Actions taken in self-defense must be proportionate to the amount of force used by the aggressor.²⁶⁶ Under the present scenario, the United States naval forces are still en route and thus China does not know the actual scope of its action. As such, it is disproportionate for China to threaten nuclear confrontation.

²⁶⁵ WALTER GARY SHARP, SR., *CYBERSPACE AND THE USE OF FORCE* 114-15 (1999).

²⁶⁶ ROGERS, *supra* note 252, at 19.

China's threat of nuclear attack against civilian objectives, San Francisco and Los Angeles, also violates the principles of discrimination and humanity. Discrimination requires that parties to armed conflicts differentiate between military and civilian targets. In general, civilian centers cannot lawfully made targets of armed aggression. Acts or threat of violence the primary purpose of which is to spread terror among the civilian population is prohibited. China's threat, against two cities populated with non-combatants, clearly triggers the prohibition set forth in the principles of discrimination and proportionality.

4. Possible Response by the United States

General Chen's statement resulted in violation of various aspects of international law, specifically Article 2(4) of the United Nations Charter. However, China's present action consisted of an isolated, albeit serious, verbal threat which does not rise to the scope, duration, and intensity of an "armed attack." The United States must now determine the necessary and proportional response to China's threat to the use of force. Proportionality requires the United States to seek options that fall short of actual use of force.

In general, unilateral action short of force consists of actions such as: severance of diplomatic relations; withdrawal from a treaty; cancellation of membership in an international organization; embargo; boycott; non-intercourse; or pacific blockade.²⁶⁷ Theoretically, all the actions above are legal. However, various measures would be

²⁶⁷ RHYNE, *supra* note 13, at 429-32.

ineffectual if applied. For example, during a time of extreme animosity, severance of diplomatic relationship may not dismay China but may actually serve to hinder future attempts at negotiation. Also, blockades or embargo would be costly, time-consuming, and difficult to enforce in light of China's size and shared borders with Russia. In the final analysis, the United States should take appropriate, legal unilateral action in response to China's threats. The specific parameters of the action will be driven by political and military concerns.

B. Scenario Two – The Korean Interference

1. Facts

General Chen's statement draws condemnation from various European nations. However, other nations, especially Russia and North Korea, openly support China's action. Russian President, Vladimir Putin, released a statement indicating that, "China should be free to resolve the internal matter concerning the renegade province of Taiwan." Kim Jong Il of North Korea also supported China with fulsome praises, "The United States is shameless in its pursuit of hegemony. China is justified in taking all measures necessary to ensure its territorial integrity."

Kim has grown ever closer to China in recent years. North Korea has been in the grip of a devastating famine since 1988. In desperate need of food and fuel for its frigid winters, North Korea entered into a framework agreement with the United States in October 1994. The United States agreed to lead a consortium that would build two light water nuclear generators in North Korea at the cost of 4.6 billion. The projected completion date was 2003. The United States promised to send an annual supply of fuel oil to North Korea until the light water generators are operational. In return, North Korea agreed to cease development in its military nuclear program. This agreement has steadily unraveled since its inception as North Korea steadfastly avoided meeting its obligations. When the new administration in Washington began to hold a hard line on the agreement, North Korea's state media equated the actions as "a declaration of war." Completion of the nuclear reactors fell hopelessly behind schedule and then was suspended as the disagreement between the United States and North Korea accelerated. Finally, the price of fuel oil skyrocketed and the United States Congress cancelled the

shipment to North Korea in 2003, citing non-compliance with the terms of the 1994 agreement.

Between 2003-2005, North Korea's fragile hold on stability depended largely on the fuel and food aid from China. Kim, who felt he wasted considerable personal capital to obtain the 1994 agreement, was humiliated by its subsequent failure. He has since amplified his anti-West rhetoric and accused the United States of deliberately exacerbating the famine in North Korea and causing the death of over 10,000 North Korean citizens. During this time, Kim Jong-Il continued to cultivate an extremely close relationship with China. By 2005, Kim had traveled to China on six separate occasions, meeting with both Chinese President Jiang Zemin and Chinese Premier, Zhu Ronggi. Some Japanese analysts speculate that China has reasserted its historical feudal control over the ruler of North Korea. While vehemently denying these charges, China nevertheless supplied North Korea with advanced weaponry, military supplies, and over 6000 "technical advisors."

Twenty-four hours after General Chen's speech, North Korea launched a shocking, destructive missile attack against United States forces in South Korea and Japan. Subsequent cross border attacks and chaos in South Korea caught US bases off guard. Military intelligence sources within the United States indicated that North Korea was only able to field such an attack after augmentation of their military arsenal with the latest Chinese medium range ICBM missiles.

In the subsequent United Nations assembly, North Korea's delegation stated that it was acting in self-defense in the face of brutal economic coercion, tantamount of the use of force, in violation of Article 2(4) of the United Nations Charter. China's delegate then stated China fully supported the action of North Korea, but denied encouraging or controlling North Korea's attack, saying, "China will never seek hegemony. North Korea has a proud tradition of self-determination in their own sovereign affairs and China applauds their courage." United States military intelligence determined, through satellite and aerial photos, China has continued to provide North Korea arms and supplies after the initial attack. However, hampered by the secretive inner workings of North Korea, the United States was unable to confirm the activities of the 6,000 Chinese "technical advisors."

Suddenly faced with a two front conflict, the United States diverts the majority of its military capabilities to the Korean peninsula to rescue the remnants of the US 8th Army and 7th Air Force.. Thus the Sino-US confrontation over the Taiwan Strait has been delayed.

2. *China's Legal Analysis*

North Korea has been stricken by a terrible famine. Over ten percent of the North Korean population has died from this lamentable plight.²⁶⁸ Taking advantage of this tragedy, the United States has extended a false promise to build two light water nuclear reactor plants in North Korea. In reliance on the promise from the United States, North Korea has froze the development of its domestic nuclear program, which would have provided needed power to aid its starving economy. Now, the United States reneged on both its promise to finish the two power plants and to send fuel oil to North Korea. Countless men, women and children have already frozen or starved to death in North Korea due to lack of heat and power.

Article 2(4) of the United Charter requires all members to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purpose of the United Nations.”²⁶⁹ The United States willfully limits its interpretation of “use of force” to military force alone and stubbornly refuses to recognize either political or economical coercion as a “use of force” under Article 2(4). This position is inconsistent with the interpretation of Eastern Europe and developing countries. These countries, often victims themselves of economic coercion by the United States, have long claimed, “Article 2(4)

²⁶⁸ Barbara Slavin, *North Korea's Famine Could Be Among The Century's Worst*, USA TODAY, Jul. 23, 1999.

²⁶⁹ U.N. CHARTER, art. 2, para. 4.

also prohibits political and economic coercion.”²⁷⁰ China has also consistently viewed economic sanctions as a potential use of force under Article 2(4). This position is not inconsistent with the conclusion of various American scholars on international law. Ann Van Wynen Thomas and A.J. Thomas, Jr. concluded, “Economic aggressions can be used as a tool to subjugate one nation to the will of another”²⁷¹ and added:

Although a state in international law may chart its own economic course in its relation with other states, still all states are restricted by the rule that a policy cannot be exercised for the sole purpose of causing injury to and forcing the will of another state unless such economic coercion is used in the right of self-defense or reprisal. An illegal intervention of an economic nature becomes aggression if it jeopardizes essential rights of a state, which are requisite to its security.²⁷²

Under such analysis, North Korea is indeed a helpless victim of the United States desire to cause it injury. The United States is determined to force its will on North Korea or cause it injury by toppling the legitimate regime of Kim Song Il. To this end, the United States willfully engaged in false treaties that contributed to the deaths of North Korean civilians. This was done with the intent of destabilizing the regime of Kim Jong Il through the needless suffering of North Korean people. The United States’ malicious failure to keep its agreement is especially reprehensible in light of North Korea’s extreme circumstances. Under these circumstances, North Korea is fully within its right to consider the economic coercion as “use of force” under Article 2(4) of the United Nations charter and accordingly act in self-defense.

3. United States Legal Analysis

²⁷⁰ SHARP, *supra* note 265, at 88.

²⁷¹ *Id.* at 33.

²⁷² *Id.*

The Use of force” as found in Article 2(4) of the United Nations charter applies only to the use of military force.²⁷³ Even if, for the sake of argument, the use of force applies also to economic coercion, United States action in no way amounts to the use of economic coercion. The 1994 agreement was valid only as long as there was verifiable compliance on the part of North Korea. Since North Korea refused to allow inspectors to scrutinize its nuclear freeze, the agreement was unilaterally breached by North Korea. Therefore, the non-completion of the nuclear reactor and the cession of the oil shipment cannot be classed as economic coercion with the intention of causing harm to North Korea and thus cannot be the basis of a self-defense claim. In any case, the real issue is not North Korea’s putative claim to the right of self-defense. Instead, there must be a determination as to whether China’s aid to North Korea is so extensive that it can be classed as indirect aggression, thus justifying military action against China.

Although it seems obvious that China has stepped beyond the bounds of a neutral state, a legal analysis should start with that foundational question. The Hague Convention V, 1907, and the Geneva Conventions for the Protection of War Victims sets forth important provisions concerning the rights and obligations of a neutral state.²⁷⁴ In general, the law of neutrality requires that a state remains strictly impartial and “bound not to participate or show partiality in the conflict” and in consequence, the territory of the neutral state remains inviolable.²⁷⁵ The impartiality extends to providing aid to a belligerent power. Therefore, in the words of international scholar Ian Brownlie,

²⁷³ GREENSPAN, *supra* note 15, at 532-33.

²⁷⁴ *Id.* at 533.

²⁷⁵ *Id.* at 534.

“military, economic, and other forms of aid to an aggressor will naturally constitute a breaches of the law of neutrality.”²⁷⁶ Specifically, Article 6 of Hague Convention XIII, 1907, stipulates that, “[t]he supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of war-ships, ammunition, or war material of any kind whatever is forbidden.”²⁷⁷ A separate prohibition is included for war materials that help air power. Article 44 of the Hague Air warfare rules, 1923, states that, “the supply in any manner, directly or indirectly, by a neutral Government to a belligerent Power of aircraft, parts of aircraft, or material, supplies or munitions required for aircraft is forbidden.”²⁷⁸ Finally, Hague Convention V, 1907, has forbid even loaning war materials to belligerent Powers.²⁷⁹ In the present case, China has clearly violated the laws of neutrality by providing military materials and advanced weaponry to North Korea.

Since China has clearly moved beyond the bounds of neutrality, there must be a further determination on the issue of China exerting indirect aggression against the United States via North Korea. This then turns on the factual analysis of the extent of control that China exerted over North Korea’s military actions. According to Brownlie:

Charges of ‘aggression’ are frequently based on allegations of military aid to and control over, rebels in a civil war. If rebels are effectively, supported *and controlled* by another state that state is responsible for a ‘use of force’ as a consequence of the agency. Thus aid to rebels by foreign states has been held by the General Assembly to be inconsistent with the principles of the United Nations Charter, with reference to Article 2, paragraphs 3 and 4. However, in cases in which aid is given and there is no exercise of control over the rebels by foreign government, it is very

²⁷⁶ BROWNIE, *supra* note 262, at 369.

²⁷⁷ GREENSPAN, *supra* note 15, at 548.

²⁷⁸ *Id.* at 547-48.

²⁷⁹ *Id.*

doubtful it is correct to describe the responsibility of that government in terms of use of force or armed attack.²⁸⁰

In the present case, there is insufficient data to determine the amount of control that China is exerting over North Korea. On one hand, the timing of North Korea's attack is highly suspicious since it split the United States military effort in the Far East area of operations. Also, Kim's close personal relationship with the Chinese leadership and the presence of the Chinese technical advisors in China points to possible Chinese control over North Korean military action. Finally, China and Korea have enjoyed a close relationship over the centuries whereby China has maintained a historic nominal control over North Korea. Counter-balanced against these arguments is the denial from China and the lack of concrete evidence of "exercise of control"²⁸¹ by China.

4. Possible Response by the United States

Without further evidence of Chinese involvement in North Korea, the United States cannot regard its support of North Korea as indirect aggression. This may dovetail with the United States desire not to simultaneously prosecute a two front war in Asia. United States should limit its efforts to diplomatic coordination with China to ensure that no further war supplies will be sent to North Korea, keeping in mind that China will make such concessions only if concrete benefits can be gained in the area of unifying Taiwan.

²⁸⁰ BROWNLIE, *supra* note 262, at 370.

²⁸¹ *Id.*

C. Scenario Three – Panama Canal

1. Facts

A Chinese merchant ship, Old Golden Mountain, catastrophically explodes as it passes through the Panama Canal. The force of the explosion has extensively damaged the aged locks key to the canal's function. The Panama Canal is now impassible for the foreseeable future, although no American life or property was damaged. The shut down of the canal severely impacts the United States' Naval contingency logistical support capabilities. China immediately denies the explosion was a military action. China Daily, the official newspaper of the People's Republic of China insists that the Old Golden Mountain was strictly a civilian vessel and the explosion resulted from mechanical disasters. The parent company that owns the Old Gold Mountain joins the Chinese Government in a promise to pay sufficient claims to the Government of Panama to cover the cost of repairing the canal and also agree to pay indemnities to ensure that the "good relations between the Government of Panama and the Government of the People's Republic of China remains unchanged."

Armed with this public assurance, the Panamanian Government elects to handle the explosion as an industrial accident. The Panamanian Government bars the United States investigators from the accident site. The United States' intelligence agencies subsequently determine a subsidiary corporation under the control of People's Liberation Army was the registered owner of the Old Gold Mountain. Initial data indicates the force of the explosion is beyond the capacity of any shipboard mechanical disaster. No further information can be gathered without cooperation of the Panamanian Government. The United States demands redress by China. China, pointing to the lack of hard evidence, continues to insist that the explosion was an industrial accident.

2. China's legal analysis

The explosion of the *Old Gold Mountain* was not a military action but a civilian accident. China has every confidence that the Government of Panama will coordinate the appropriate civilian response and conduct the necessary inquiry. If found to be responsible, the Government of China will ensure that the Chinese corporation which owned the *Old Gold Mountain* will pay claims and indemnity.

3. United States Legal Analysis

The myriad of legal issues that arise from this scenario demonstrates the difficulties of applying existing international law of war principles to the methods outlined in *Unrestricted Warfare*²⁸². In his treatise on law of war, Morris Greenspan argued that “for the law of war to command respect and obedience they must be adequate for their function. It is essential that these rules should be applicable to the circumstances of modern warfare and clearly and closely defined in their application.”²⁸³ Since the essence of *Unrestricted Warfare*²⁸⁴ lies in utilizing innumerable permutation of daily activities towards achieving military victory, there is no possibility of “clearly and closely” defining the circumstances of modern unconventional warfare.

In this particular scenario, the United States (while enabled by certain aspects of our treaties with Panama) is hampered by the lack of hard evidence and the limited prospect of gathering desired data in the near future. The explosion in the Panama Canal not only impedes United States naval logistics, but also has severe negative impact on international shipping and commerce. It could constitute a warning shot fired at the Global Economy. Theoretically, the United States should be able to rally the world community and bring international pressure to bear on China. However, China itself is a large nation with considerable economic and military leverage. Without hard evidence, other nations will likely maintain their neutrality.

²⁸² QIAO & WANG, *supra* note 95.

²⁸³ GREENSPAN, *supra* note 15, at 20.

²⁸⁴ QIAO & WANG, *supra* note 95.

Even without international coalition support, United States alone can take certain legal actions. First, the United States may unilaterally determine that the explosion in the Panama Canal warrants reprisal. The concept of reprisal in the law of war arena has been summarized as:

Reprisals are acts of self-help by the injured State, acts responding to acts contrary to international law committed by the offending State which have continued after a fruitless demand for amend. Reprisals have the effect of temporarily suspending-between the two States-the observance of this or that rule of international law. They are restricted by consideration of humanity and the rules of good faith generally applicable between States. They are illegal unless they are motivated by previous acts contrary to international law. They seek to impose upon the offending State reparation for the offense or the return to legality with a view to the avoidance of the new offense.²⁸⁵

The United States has traditionally disregards the legal appropriateness of reprisal in favor of more palatable claims of "self-defense." Article 51 of the United Nation's Charter, customary international law, and relevant case laws all allow the United States to unilaterally determine the necessity of resorting to self-defense in response to the illegal and aggressive armed attack by another nation. In a situation that is somewhat analogous is the American bombing of Libya:

Declaring the Libyan government responsible for terrorist acts in Europe, including the bombing of a Berlin nightclub frequented by U.S. servicemen in which one was killed any many wounded, the United States launched a bomb attack on targets in Libyan territory. President Reagan described the attack as 'fully consistent with Article 51 of the UN Charter,' . . .²⁸⁶

²⁸⁵ WERNER LEVI, COTEMPORARY INTERNATIONAL LAW: A CONCISE INTRODUCTION 298 (1985).

²⁸⁶ CARTER & TIMBLE, *supra* note 154, at 1309.

In the present scenario, there is the additional problem of invoking self-defense when there is a patent lack of harm to American lives. In invoking self-defense, the United States must somehow justify its action with the principles of necessity and proportionality. There is, however, no absolute requirement that the justification be palatable to the international community. The United States rationale for bombing Libya was widely rejected and condemned by the international community, yet no concrete punishment was levied against the United States.²⁸⁷

D. Scenario Four –Cyber Attack

1. Facts

In the morning hours of 20 December 2004, five hours before United States Navy detects China invading armada, the United States comes under computer network attack originating in China. Civilian electricity networks, air transportation networks, traffic dispatching networks, financial transaction networks, telephone communication networks, and mass communication networks experienced consecutive paralysis. The denial of television services lasted for approximately three minutes. During that time, a computer virus imbedded within these network systems²⁸⁸ played a pre-positioned image of a young Chinese woman earnestly explaining the need for China to reunify with Taiwan. These reasons she stated were the same ones the United States expressed when it fought the Civil War to keep the South in the Union. However, unlike the Civil war, the reunification measure between China and Taiwan would be swift and peaceful if the United States did not interfere. This and other computer viruses penetrated the Pentagon military computer network systems and disabled portions of them for indeterminate amounts of time. In the civilian sector, there were no human casualties since the denial of service was of short duration.

2. China's Legal Analysis

²⁸⁷ *Id.*

²⁸⁸ *Supra* note 11, at 84.

This is not an armed attack. This is a last ditch plea that the United States respect the sovereignty of China and cease in its attempt to establish hegemony in Asia. China wishes to live in peace with the United States but will not do so at the expense of losing its territory. The wide distribution of the video image demonstrates that China has the capability to wreak havoc with the computer and communication infrastructure of the United States, but it chose not to.

3. United States' Legal Analysis

The video and the computer virus is an armed attack against the United States. There is no absolute definition what constitutes an "armed attack" under all circumstances. Unarmed-non-military physical force against another nation can also constitute a "use of force" under Article 2(4) of the United Nations Charter. International Law professor Walter Gary Sharp, Sr., opined that:

Any destructive state activity intentionally caused within the sovereign territory of another state is an unlawful use of force . . . Accordingly, any state activity in Cyberspace that intentionally caused any destructive effect within the sovereign territory of another state is an unlawful use of force.²⁸⁹

The next legal question to resolve is whether the unlawful use of force under Article 2(4) of the United Nations Charter rises to the level of an "armed attack."²⁹⁰ Under Article 51 a nation has the right of individual or collective self-defense if an "armed attack" occurred. It is generally recognized that the threshold for triggering the right of individual or collective self-defense is higher than that which determines an

²⁸⁹ SHARP, *supra* note 265, at 102.

²⁹⁰ U.N. CHARTER, art. 51.

unlawful use of force. The scope, duration, and intensity of the use of force must be examined to determine whether an “armed attack” occurred.²⁹¹

In the scenario above, it appears that China has in fact conducted a cyberspace operation that constituted a successful attempt to “disrupt, deny, degrade, or destroy information resident in computers and computer networks of the computer and network themselves.”²⁹² According to the United States military, the Chinese cyberspace operation should then be considered “computer network attack”²⁹³ and thus was inherently destructive. Professor Sharp’s equates an “any destructive effect” intentionally caused by any computer network attack with the effects of an armed attack thus “prompting the right of self defense” consistent with the controlling *jus ad bello* principles. Thus the United States will have legal rights to respond within the parameters of *jus in bello*.

²⁹¹ *Id.* at 44.

²⁹² CHAIRMAN OF THE JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-13. JOINT DOCTRINE FOR INFORMATION OPERATIONS, I-9 & I-10 (1998).

²⁹³ *Id.*

VII. Conclusion

In his survey of China and the present global order, China analysts David Lampton²⁹⁴ posed the following question will “China accept the basic legitimacy of the current rules of international organization and norms?”²⁹⁵ China, like any other nation-state, has four basic reasons for complying with the international law of war. These include (1) compliance based on belief in the fundamental legitimacy of the law of war; (2) compliance based on custom, tradition, and habit; (3) compliance based on an expectation of obtaining benefits, such as reciprocal compliance by other nations; and (4) compliance based on fear of enforcement. These four rationales must be assessed individually in light of the unique Chinese cultural viewpoint on xenophobia, law, war, and military doctrine.

Of the four rationale discussed above, China is least likely to conform to the law of war on the basis of custom or traditions. The law of war is a Western institution, developed wholly in European nations without Chinese input. There was no similar development in China because the Chinese view on warfare stymied the growth of the law of war. Specifically, China’s unique belief that war was a tool that Heaven used to deposed a unsatisfactory ruler and instill the proper ruler. China’s monolithic and centralized form of government also prevented the ability for any form of checks and

²⁹⁴ See note 71.

²⁹⁵ David M. Lampton, *A Growing China in a Shrinking World: Beijing and the World Order*, in *LIVING WITH CHINA: U.S. CHINA RELATIONS IN THE TWENTY-FIRST CENTURY* 131-32 (Ezra F. Vogel ed., 1997).

balance during warfare. Thus there was neither philosophical or a practical groundwork for the development of the law of war in China.

China is also unlikely to follow the law of war due to any putative fear of enforcement. Using an implied Confucian paradigm, Chinese military thinkers have realistically discounted the lack of enforcement in the international law arena:

When the rules are not in accordance with the interest of one's own nation, generally speaking, the breaking of the rules by the small nations can be corrected by large nations in the enforcer of the law. However, when large nations break the rules, for example the United States, enforcing supranational laws in Panama, where it grabbed the head of another nation and brought him to be tried in their own nation. . . . the international community time and again only signs in despair, being at a loss what to do.²⁹⁶

As a nation with a quarter of the world's population, extensive international economic business connections, and the ability to field the atomic bomb, China is certain one of the "large nations" that the international community cannot "punish" without invoking grave consequences. As a permanent member of the United Nations Security Council with veto power over United Nation's enforcement actions, China retains protection from international enforcement measures. This protection will remain in place, despite the aberration of the Kosovo bombing, unless the community of nations is ready to abandon the regime established by the United Nations Charter. In the final assessment, there is low likelihood that China will obey the law of war due to fear of enforcement.

²⁹⁶ QIAO & WANG, *supra* note 95, at 75.

At the present time, China has very low regard for the legitimacy of the law of war. This is due to China's historical distrust of the West and its distrust of law. As previously discussed, Confucian culture fostered an intense distrust of law. China's history in the past 105 years also resulted in deep suspicious of foreign influences. Together, these two factors cause China to view the law of war as a tool used by the West to oppress China. This belief has been reinforced by United States intervention abroad in 1999 and 2000.

The final reason for China to comply with the law of war is expectation of benefit. Examining China's compliance with various international agreements, Lampton concluded that China is extremely pragmatic in ascertaining the benefit that can be derived from international agreements and reacts accordingly:

Beijing's behavior vis-à-vis international organization and agreements is an active and constructive participation in those organization that brings a net positive benefit to China; the attempt to preserve advantages where they exist and gain new ones when possible; noncompliance with some bilateral and multilateral agreements to obtain the compliance of other states with other commitment; and marginal or noncompliant behavior when such agreement constrain Chinese economic advantage or are inconsistent with sovereignty, particularly those that might limit the regime's ability to maintain internal political control.²⁹⁷

Applying this pragmatism to the law of war does not yield reassuring results. Prior to the actual military engagement, China can derive some benefit from international control over the actual onset of armed conflict. After the onset of conflict, China derives no foreseeable benefit from complying with the principles of *jus in bello* due to its disadvantages in conventional warfare abilities.

²⁹⁷ Lampton, *supra* note 294, at 131-32.

Since China's adherence to the law of war cannot be based on custom nor tradition, fear of enforcement, basic legitimacy of the law of war, or expectation of benefits, the answer cannot be a simple, one-dimensional solution. Instead there must be recognition that China's cultural conflict with the law of war is merely symptomatic of a more extensive cultural conflict between the China and the West. In other words, there can be no resolution in the more limited area of the law of war without resolution of the underlying cultural differences between the East and the West.

One of the cultural differences that must be resolved to ensure compliance is a resolution on China's position in the world community. China seeks a position in the world commiserate with its size, population, and historical importance. Despite the United States discomfort with the thought of China as a superpower, we should encourage this natural progression. In an ever-shrinking world, it is inevitable that China will gain its proper place in the new world order, in spite of our hindrance.

Another cultural difference that must be resolved is the issue of Taiwan. The United States must avoid direct military confrontation with China on the issue of Taiwan. China considers the issue of sovereignty inviolable. The alternative is a military conflict between China and the United States sometime in the near future. In a conflict that involves Taiwan, China will regard this as a matter of survival and do little to ameliorate the brutality of warfare in hopes that the United States would loose its will to fight. United States should, therefore, extricate itself from the issue of Taiwan unless it is willing to accept and inflict overwhelming casualties.

Finally, China's unique cultural history should be utilized to diminish the opportunity for China to breach the law of war in an armed conflict. The United States should recognizing China's extreme reluctance to become embroiled in ongoing warfare and push for an advantageous diplomatic and political solution. The best method of assuring that China does not breach the law of war in an armed conflict is to avoid the onset of conflict. Christopher Patten, the last British Governor of Hong Kong, provided the following advice about dealing with China:

By quiet rather than strident diplomacy, we can best help dissidents and assist China to build the rudiments of the rule of law, China has never been an expansionist power, and provided we understand some of its sensitive border and maritime problems –Taiwan; exploration rights in the South China Sea – we should be able to smooth the way to China playing a constructive rule in the region and the world.²⁹⁸

²⁹⁸ CHRISTOPHER PATTEN, *EAST AND WEST: CHINA, POWER, AND THE FUTURE OF ASIA* 250-52 (1998).