

ARTICLE

## Ancient China and the Responsibility to Protect: An Under-Studied Topic of Legal History

Yuxi FENG

Faculty of Law, The Chinese University of Hong Kong, Hong Kong  
Email: [yuxifeng@link.cuhk.edu.hk](mailto:yuxifeng@link.cuhk.edu.hk)

(First published online 2 March 2022)

### Abstract

While the Responsibility to Protect (“R2P”) doctrine synergizes modern international law against atrocities, its legal underpinnings formed in Europe much earlier. Scholarship thus attributes R2P’s origin to the Just War traditions as early as the fourth century, which particularly endorsed external interventions against tyranny. The Ancient Chinese had championed similar ideas of Just War, encompassing *jus ad bellum* recognition of war against unworthy sovereigns and *jus in bello*. Nevertheless, the Chinese traditions charted a different course. While in Europe, Just War rationalized the interventionist protection of co-religionists during the Reformation and later of oppressed Christians ruled by the Ottomans; the Chinese humanitarian expedition was discontinued by the advent of the Qin Empire. As R2P literature largely ignores ancient Chinese doctrines and practice, this paper investigates how they veered away from the pre-Qin traditions. It particularly illustrates how “tyranny” was perceived differently, and why “atrociousness” and “minority protection” appeared alien concepts.

“If one must attack a state out of love for their people, then attacking it is permissible. If one must stop war with war, although it is war it is permissible...”

*The Methods of the Sima: Benevolence the Foundation* (ca. 400 BCE)<sup>1</sup>

The Responsibility to Protect (“R2P”) is a twenty-first century doctrine that confirms the sovereign state’s primary responsibility to protect its population from atrocities.<sup>2</sup> When a

<sup>1</sup> *The Methods of the Sima* is among the earliest existing Chinese military classics. It is deemed to date from around the fourth century BCE, and it may partly include thoughts of Taigong who helped the Zhou dynasty take over the Shang dynasty and was later enfeoffed as the first king of Qi. During the Zhou dynasty, “sima” was the official title for the Minister of War. The text is quoted from Ralph Sawyer’s translation, see Ralph D. SAWYER and Mei-chun SAWYER trans., *The Seven Military Classics of Ancient China* (Boulder, San Francisco, Oxford: Westview Press, 1993), at 126.

<sup>2</sup> Although R2P has been widely accepted, its normative nature remains ambiguous. In the literature, for example, it has been understood as “soft law” by Jennifer Welsh, a “legal doctrine” by Peter Hilpold, and a “nascent legal principle” by Anne Peters. In comparison, the United Nations (UN) has been more cautious, characterizing it simply as a “norm” that rests on existing international legal obligations. See Jennifer WELSH and Maria BANDA, “International Law and the Responsibility to Protect: Clarifying or Expanding States’ Responsibilities?” (2010) 2 *Global Responsibility to Protect* 213 at 230; Peter HILPOLD, “R2P and Humanitarian Intervention in a Historical Perspective” in Peter HILPOLD, ed., *The Responsibility to Protect (R2P) A New*

state manifestly fails to discharge this duty, R2P further requests the international community to protect the victimized populations. To do so, this community needs to employ various intervention measures, including diplomatic, humanitarian, economic, and military, as a last resort.<sup>3</sup>

Since its formulation in 2001, R2P has remained contentious partly due to its perception as a “liberal western construct”.<sup>4</sup> The literature on R2P has done little to help contest this presumption, especially because the study of R2P’s conceptual components rarely spotlights their counterparts in non-Western societies.<sup>5</sup> International law scholars, including Simon Chesterman and Peter Hilpold, have thoroughly examined R2P’s genealogy from humanitarian intervention and the latter’s origin from Just War, both having their roots in Europe.<sup>6</sup> In contrast, ancient Chinese heritage reflective of R2P has hardly been mentioned.

This article seeks to address this gap through a comparative historical lens. After reviewing R2P’s genealogy, originating from the Christian Just War tradition (Part I), I will first demonstrate how the pre-Qin Chinese articulation of Just War closely resembles its Western counterpart, and where it differs (Part II). Like Just War proponents in Europe, the ancient Chinese before the Qin Empire (221–207 BCE) believed that wars in general should be avoided, but those for upholding righteousness would be justifiable under certain circumstances. In particular, deposing “unworthy kings”, a Chinese rendering of “tyrants”, was a distinct cause of righteous war. Yet, humanitarian expeditions rationalized by Just War stopped around the time the Qin state established the first Empire. Why did Qin’s unification mark the watershed for humanitarian expeditions? After noting the lack of practice within post-Qin China and in her encounter with other countries, I will lay out five normative reasons (Part III).

## I. R2P’S Genealogy: A Narrative Framework for Comparative Analysis

### A. R2P’s Precursors Rooted in European History

Just War emerged as the earliest doctrinal framework in Europe for legitimizing wars against tyranny. A set of criteria, including just cause, right intention, right authority, and using force as a last resort, were posited to determine when forcible intervention might be justifiable. For example, writing in the thirteenth century, Saint Thomas Aquinas regarded tyranny as the worst crime, which could be legitimately opposed by other princes, even by military action.<sup>7</sup> During the Reformation that divided Christendom over the sixteenth and seventeenth centuries, the Just War doctrine was invoked to support the interventions of rulers on behalf of their foreign co-religionists who were persecuted on confessional grounds.

---

*Paradigm of International Law?* (Brill Nijhoff, 2015) at 1; Anne PETERS, “The Security Council’s Responsibility to Protect” (2011) 8 (1) *International Organisations Law Review* 15; Beatriz ESCRIBANA CREMADES, “R2P and the UN”, online: UN Chronicle <<https://www.un.org/en/chronicle/article/r2p-and-un>>.

<sup>3</sup> *World Summit Outcome Document*, GA. Res 60/1 (24 October 2005) at 30, para 138, 139.

<sup>4</sup> See e.g., Faith MABERA and Yolanda SPIES, “How Well Does R2P Travel Beyond the West?” in Alex BELLAMY and Tim DUNNE, eds., *The Oxford Handbook of The Responsibility to Protect* (Oxford: Oxford University Press, 2016), at 208.

<sup>5</sup> A major exception is the emphasis on R2P’s African roots. For example, Paul Williams identified Africa as being “one of the most important crucibles in which R2P was forged”. See Paul Williams, “The Responsibility to Protect, Norm Localization and African International Society” (2009) 1 *Global Responsibility to Protect* 392 at 413.

<sup>6</sup> See e.g., Simon CHESTERMAN, *Just War or Just Peace?: Humanitarian Intervention and International Law* (Oxford University Press, 2002); Hilpold, *supra* note 2 at 60.

<sup>7</sup> David TRIM, “If a prince use tyrannie towards his people’: interventions on behalf of foreign populations in early modern Europe” in Brendan SIMMS and David TRIM, eds., *Humanitarian Intervention: A History* (Cambridge University Press, 2011), at 31–2.

Throughout the Enlightenment, individual identification with the sufferings of fellow human beings continued to trigger a surge in humanitarian thinking and action, which brought the language of atrocity into public discourse.<sup>8</sup> Meanwhile, the long-established Just War tradition fed into the Humanitarian Intervention doctrine (HI) emerging in the nineteenth century, which operated as a legal principle in justifying European interventions in Greece, Lebanon, and many Balkan areas on behalf of the Christian minorities oppressed by their Ottoman rulers. In these contexts, common understanding defined HI as threats or the use of force against a state to stop widespread and grave persecution of its citizens.<sup>9</sup> Thus, HI could be understood as applying the Just War framework to one specific cause: preventing sovereigns from persecuting their subjects. But compared with Just War, HI became controversial because of the increasing recognition of non-intervention as a competing principle.<sup>10</sup>

Since the Second World War, states have signed treaties aimed at preventing, prohibiting, and punishing atrocity crimes.<sup>11</sup> Meanwhile, specific legal regimes have been set up to address the root causes of atrocities targeting minorities and other vulnerable groups.<sup>12</sup> However, protective intervention was challenged by the overarching values assigned to the principle of non-intervention<sup>13</sup> and the general limit on the inter-state use of force in the United Nations (UN) Charter.<sup>14</sup> Thus, when atrocities did transpire and the UN Security Council (Council) did not authorize forcible measures, international law was mired in bitter debates about whether external actors could respond militarily. In 1999, the North Atlantic Treaty Organization (NATO) bombed the Federal Republic of Yugoslavia allegedly to stem the latter's ethnic cleansing against Kosovar Albanians. Without first acquiring the Council's approval, this operation quickly divided the international society, as the right to humanitarian intervention invoked to justify the action was criticized by many former colonized countries

<sup>8</sup> Noora KOTILAINEN, "Atrocity" in Antonio De Lauri, ed., *Humanitarianism: Keywords* (Brill, 2020) at 7–9.

<sup>9</sup> See J. L. HOLZGREFFE, "The Humanitarian Intervention Debate" in J. L. HOLZGREFFE and Robert O. KEOHANE, eds., *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (Cambridge University Press, 2004), at 18.

<sup>10</sup> See e.g., Henry WHEATON, *Elements of International Law with a Sketch of the History of the Science* (Philadelphia: Carey, Lea & Blanchard, 1836), at 51; Cf. Lassa OPPENHEIM, *International Law: A Treatise, vol. I: Peace* (Longmans, Green, and Co., 1905), at 183–4.

<sup>11</sup> See e.g., *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277 (entered into force 12 January 1951) [*Genocide Convention*]; *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 U.N.T.S. 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 U.N.T.S. 85 (entered into force 21 October 1950); *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 135 (entered into force 21 October 1950); *Geneva Convention Relative to the Protection of Civilian Persons in Times of War*, 12 August 1949, 75 U.N.T.S. 287 (entered into force 21 October 1950); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 U.N.T.S. 3 (entered into force 7 December 1978), *Statute of the International Criminal Tribunal for Rwanda* (as last amended on 13 October 2006), UN Security Council (1994); *Statute of the International Criminal Tribunal for the Former Yugoslavia* (as amended on 17 May 2002), UN Security Council (1993); *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 90 (entered into force 1 July 2002).

<sup>12</sup> See e.g., *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 U.N.T.S. 195 (entered into force 4 January 1969); *Convention Relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 150 (entered into force 22 April 1954) [*Refugee Convention*].

<sup>13</sup> The Charter of the United Nations, 26 June 1945, 1 U.N.T.S. XVI (entered into force 24 October 1945) [*The Charter*], art. 2 (7).

<sup>14</sup> The Charter, art. 2 (4), Chapter VII, and esp. article 51. Prominent interventions in the 1970s, such as those by Vietnam in Cambodia, Tanzania in Uganda, and India in East Pakistan, all had humanitarian motives and significant humanitarian effects. None of them were based on humanitarian grounds.

as violating the UN law,<sup>15</sup> but interpreted by some states as reconcilable with international law in general.

In 2001, a blue-ribbon panel, the International Commission on Intervention and State Sovereignty (ICISS) presented the R2P doctrine as a new discursive framework for curbing humanitarian catastrophes, and R2P's scope was later narrowed down to four types of atrocities, *viz.* genocide, crimes against humanity, war crimes, and ethnic cleansing. After R2P's endorsement by world leaders at the 2005 World Summit, this new doctrine has seen wide acceptance within the international society, and it thus has gradually replaced the old HI framework.

While R2P has inherited HI's rationale of external intervention in the case of atrocities,<sup>16</sup> these two doctrines are remarkably different. First, R2P is premised on the concept of "sovereignty as responsibility", which confers the primary protection responsibility on sovereign states themselves. This important conceptual starting point is missing in HI. Second, R2P prioritizes peaceful measures to persuade a state to accept its own responsibility, and it has an extended focus on atrocity prevention and post-atrocity rebuilding in addition to responding to atrocities. These two aspects altogether identify R2P's purpose as allocating and enforcing the *responsibility* towards vulnerable populations instead of justifying a *right* to intervene, as is the case for HI.

### B. The Unexplored Links to R2P in Ancient China

Modern China has maintained an uneasy relationship with R2P and rejected HI due to its distaste for intervention through the use of force. When drafting the 2001 report, the ICISS commissioners received feedback from the Chinese analysts who said that "[h]umanitarianism is an admirable virtue, but interventionism is a red herring and widely condemned by the world".<sup>17</sup> Given the centrality of interventionism to its formulation, any proposals of HI would be non-starters for the Chinese government. On the other hand, the idea of R2P received China's principled acceptance, specifically because military intervention has been brought within the UN Collective Security framework, where China can veto related proposals.<sup>18</sup>

Despite extensive research on the Chinese government's attitudes towards R2P or HI, there has been little inquiry on ancient China's rendering of the norms.<sup>19</sup> Exceptionally, Luke Glanville, a leading R2P expert, identified the ancient Chinese concept of the "Mandate of Heaven" as equivalent to R2P's constituent notion, "sovereignty as responsibility".<sup>20</sup> In his 2010 article, Glanville illustrated how the Confucian concept on the responsibilities of legitimate rule justified benevolent rulers' punitive war against

<sup>15</sup> Declaration of the South Summit, Group 77 South Summit, A/55/589 (2000), online: <[http://www.g77.org/summit/Declaration\\_G77Summit.htm](http://www.g77.org/summit/Declaration_G77Summit.htm)>.

<sup>16</sup> *The Responsibility to Protect*, The International Commission on Intervention and State Sovereignty (Ottawa: International Development Research Centre, 2001), at 12–13 [ICISS Report].

<sup>17</sup> Thomas G. Weiss and Don Hubert, *Responsibility to Protect: Research, Bibliography, Background* (International Development Research Centre 2001), at 392.

<sup>18</sup> After R2P's endorsement at the UN in 2005, Liu Zhenmin, the Chinese vice representative to the UN, remarked that the World Summit Outcome "has made a prudent definition on the 'Responsibility to Protect'". However, he cautioned, "the determination to follow the principle of sovereign and non-intervention should never be shaken". "Chinese Diplomat: Implementing 'Responsibility to Protect' Must not Contravene State Sovereignty" *Xinhua* (25 July 2009), online: [Xinhua <news.xinhuanet.com/english/2009-07/25/content\\_11769124.htm>](http://news.xinhuanet.com/english/2009-07/25/content_11769124.htm).

<sup>19</sup> For example, in the research output of the ICISS Report, ancient China is only referenced as one of the "territorial entities" with "a concept of sovereignty". See also Weiss and Hubert, *supra* note 17 at 6.

<sup>20</sup> Luke GLANVILLE, "Retaining the Mandate of Heaven: Sovereign Accountability in Ancient China" (2010) 39 *Millennium: Journal of International Studies* 323.

tyrants. However, as he argued, the idea of sovereign accountability declined due to its theoretical incoherence and the victory of legalism during the third and fourth centuries. Similarly, Chinese international criminal law scholar Zhu Wenqi linked the concept of “sovereignty as responsibility” with the “Mandate of Heaven”, and therefore deemed R2P as “not new to Chinese culture and the Chinese society”.<sup>21</sup>

As to the practice of intervention, Daniel A. Bell, a professor of political philosophy, pointed out the similarity between Mencius’ punitive expedition and Just War.<sup>22</sup> The Chinese political scientist Wang Qingxin also argued that the ethical principles underlying HI have much in common with the Confucian world order. His analysis, however, stopped before the Qin Empire.<sup>23</sup>

In brief, although a few pieces have identified the common grounds between the Chinese intellectual traditions and R2P, together with its normative precursors, this literature is fragmented and truncated. The above highlighted scholarship often focuses on some particular aspects: either the concept of responsible sovereignty as R2P’s innovative component, or forcible intervention as a critical means of implementing R2P or HI. Moreover, since most authors limit their inquiries to the pre-Qin era,<sup>24</sup> a fundamental question is left unanswered: why did humanitarian expeditions disappear by the end of the Warring States period? What happened over these two millennia remains a blind spot in research, but is critical for understanding how modern China can be related to its ancient traditions.

Thus, apart from unpacking the similarities between the ancient Chinese ideas and R2P, this paper will trace the decline of “humanitarian expedition” in China, which corresponds to R2P’s interventionist aspect. Based on this descriptive survey, I will further consider possible reasons for the change in practice. These include that sovereign responsibilities required by the Mandate doctrine fall short of that in R2P. As a result, the Chinese perception of “tyranny” is different from its European counterpart, and “atrocities prevention” and “minority protection” thus did not independently constitute a cause for just war. In addition, since the Han dynasty, the pre-Qin understanding of Mandate was turned into a justifier instead of qualifier, of authority. Meanwhile, when institutionalized inequality was normalized through ethics and law, small-scale persecution became acceptable, which then precluded mutual intervention between rival regimes during periods of division. Last but not least, the solidarity that motivated humanitarian expeditions in the pre-Qin era can essentially be reduced to family bonds among “family states”. The absence of these affective ties explains the non-intervention against unworthy rulers abroad.

Because the historical review stretches approximately over two millennia, the post-Qin narrative is subject to a remarkable degree of generalization and may lack precision and comprehensiveness. That said, by outlining a general picture and analysing some critical materials, this paper seeks to invite a more in-depth examination of the topic from interested researchers.

<sup>21</sup> ZHU Wenqi, “Responsibility to Protect: A Challenge to Chinese Traditional Diplomacy” (2013) 1 Chinese Legal Science 97, citing Sarah TEITZ, “Asia Pacific and South Asia” in *The Oxford Handbook of The Responsibility to Protect*, Bellamy and Dunne, eds., *supra* note 4 at 376.

<sup>22</sup> DANIEL A. BELL, “Just war and Confucianism: Implications for the contemporary world” in Daniel A. Bell, ed., *Confucian Political Ethics* (Princeton University Press, 2008).

<sup>23</sup> WANG Qingxin [王庆新], “Rujia wangdao lixiang, tianxia zhuyi yu xiandai guoji zhuxu de weilai 儒家王道理想、天下主义与现代国际秩序的未来 [The Confucian Ideal of the Kingly Way, the Doctrine of “All under Heaven” and the Future of Contemporary International Order]” (2016) *Waijiao xueyuan xuebao [Foreign Affairs Review]*.

<sup>24</sup> As an exception, Glanville’s 2010 article detailed how the Confucian theory of Mandate was eclipsed by the rising Legalist thinking before Qin’s unification. As will be discussed in Part III together with other normative reasons, the interaction between these two schools of thought contributed to the absence of humanitarian expeditions in the dynasties following Qin. See Glanville, *supra* note 20.

The original sources for historical survey include three types of references: military strategists' writings, philosophers' essays, and documents intended as historical records. Specifically, philosophical writings feature topics on righteous war and legitimate rule, primarily from Confucius and his disciples, Mencius and Xunzi. Cases of humanitarian expeditions come from historical records. In this regard, the primary literature that was consulted includes the earliest existing documentary records in *The Book of History*, which contained speeches of rulers and ministers during the archaic dynasties of Xia, Shang, and Zhou, and *The Spring and Autumn Annals*, which was the court chronicle of Confucius' home state regarding events during 722–481 BCE.<sup>25</sup> To clarify the records in the *Annals*, I will frequently refer to its commentary, *Zuo Tradition*, as well as the collection of speeches in *The Discourses of the States*, which was compiled in the fourth century BCE.

## II. Humanitarian Expeditions in Pre-Qin China: Just Wars in Restoring the Mandate of Heaven

This part will first present an overview of the pre-Qin order to contextualize the intellectual traditions introduced later. It then will demonstrate how Just War served as a general discursive framework for deposing unworthy kings. Importantly, the political tradition of deriving sovereign legitimacy from the Mandate of Heaven supported the Just War rationale that sovereigns ruled “with conditions” and were therefore removable. This political idea parallels the notion of responsible sovereignty as part of R2P's theoretical foundation.

The arguments will proceed in three steps. It first introduces the reasoning in support of the exceptional use of force against another state. In particular, wars were deemed necessary to stop carnage and tyranny for the purpose of “loving others”. The second section focuses on deposing unworthy kings as one particular cause under the Just War framework. Here, punitive expeditions are examined in detail. The last section discusses other Just War criteria in the case of humanitarian expeditions, including the right intention, the right authority, and humane conduct during war.

### A. Historical Contexts: A Poly-Centric System before the Qin Empire

The advent of the Qin Empire in 221 BCE marked a watershed in ancient China. Since it inaugurated the first centralized government, rulers in the following two millennia followed in each other's footsteps. The situation was different for the pre-Qin polities. The Shang dynasty (1600–1046 BCE) and its successor, Zhou (1046–256 BCE),<sup>26</sup> ruled through their enfeoffed states, which from time to time enjoyed quasi-independence from the reigning house.<sup>27</sup> In such circumstances, vassal states themselves at times interacted on an equal footing. Hence, as said, before the Qin unification, there had been “inter but no nations”, and afterwards, there was only “a ‘nation’ but no ‘inter’”.<sup>28</sup>

<sup>25</sup> Given its representation of the only period of equal inter-state relations in China's history, the *Annals* has been studied since Qing dynasty as China's book of “international law”.

<sup>26</sup> The endpoint of Zhou, which consisted the Western and the Eastern Zhou, is disputed. Here, this article adopts the mainstream view that Zhou was ended in 256 BCE by Qin's conquest.

<sup>27</sup> William A. P. MARTIN, “Traces of International Law in Ancient China” (1883) 14 *International Review* at 65. “The states, twelve in number, were created by the voluntary subdivision of the national domain by the founder of the Chou [Zhou] Dynasty. The throne of each state being hereditary, decentralization and a feeling of independence naturally sprang up.”

<sup>28</sup> CHEN Guyuan in the Preface to Hong, in Denis TWITCHETT and John K. FAIRBANK, eds., *The Cambridge History of China, Vol. 11, Part 2* (Cambridge University Press, 1980), at 1, citing WANG Tieya [王铁崖], *International Law in China: Historical and Contemporary Perspectives*, Recueil des cours vol. 221, at 214, n. 33.

While rulers of Shang claimed to be the everlasting recipient of the Heavenly Mandate, founders of Zhou opposed its corrupt rule and argued that the Mandate was in fact delegated to the ruler simply for the benefit of his subjects. Emerging from this successful revolution, the Western Zhou (1046–771 BCE) was organized as a feudalistic system consisting of loosely connected clans.<sup>29</sup> Under the new feudal structure, vassal states took on the duty to defend the Zhou Court against defiant feudal lords and aggressive barbarians.<sup>30</sup> As a common code of conduct, the royals and vassals shared a set of rituals (*li*). These rituals, as recorded in the canon *Rites of Zhou* composed around the second century BCE,<sup>31</sup> governed numerous aspects of an individual's living, ranging from the daily routines to the offering of sacrifices. Through formalistic rituals, it was deemed, individuals would then internalize norms of propriety, namely, appropriate behaviour taught by fathers, clan elders, and state officials. Eventually, virtues such as filial piety, brotherliness, and loyalty would be inculcated within the patriarchal hierarchical order.

After two centuries of peaceful rule, the western Zhou was weakened by feudal lords and in 771 BCE, after King You was assassinated, his successor moved the capital to Luo Yi, thus marking the start of the Eastern Zhou period. Departing from the Western Zhou tradition that All under Heaven follow one true king (*tianxia gongzhu*), the Eastern Zhou matured into a multi-state system, spanning from the Spring and Autumn period to the greater part of the Warring States period.

These five hundred-odd years, from the eighth century to the third century BCE, constituted an intermezzo in ancient China's history, with virtually independent and equal states living side-by-side. Their peoples had the same blood, a common civilization, and one shared language.<sup>32</sup> When the East Zhou king increasingly lost control over his vassals, the Mandate doctrine served to support inter-state interventions among feudal lords. These demographic and political conditions provided the necessary context for the opening quote from the *Methods of Sima (Simafa)*, which captures a stunningly detailed rendering of R2P's interventionist aspect.

Still, the transit from the Spring and Autumn (770–476 BCE) to the Warring States period (475–221 BCE) featured a gradual degeneration. Throughout the first part, while Zhou's rituals (*li*) still held sway and a sense of kinship remained, warfare between lords mostly respected the norms of propriety as a common reference.<sup>33</sup> Meanwhile, since the enduring conflicts loosened state control, private education became prevalent and intellectuals travelled across borders for preaching.<sup>34</sup> “The Hundred Schools of Thought” thus flourished, including Confucianism, Mohism, Daoism, and later Legalism. Identified more as a “cosmopolitan” than belonging to a specific state,<sup>35</sup> philosophers and military specialists converged on the doctrine of Just War (*yizhan*), which contained both a *jus ad bellum*

<sup>29</sup> When the Zhou dynasty seized power, it is said that there were more than 800–1000 tribes under the rule of the previous Yin and Shang, citing ZHAO Tingyang [赵汀阳], “*Tianxia tixi de yige jianyao biao* 天下体系的一个简要表述 [A Brief Exposition of “All under Heaven”] (2008) 10 *Shijie jingji yu zhengzhi* 世界经济与政治 [World Economics and Politics] at 61.

<sup>30</sup> WANG Tieya, *International Law in China: Historical and Contemporary Perspectives* (Collected Courses of the Hague Academy of International Law, 1990) at 208–9.

<sup>31</sup> Ulrich THEOBALD, “Zhouli 周礼 [Rites of Zhou]” *ChinaKnowledge* (24 July 2010), online: [ChinaKnowledge <http://www.chinaknowledge.de/Literature/Classics/zhouli.html>](http://www.chinaknowledge.de/Literature/Classics/zhouli.html).

<sup>32</sup> Martin, *supra* note 27.

<sup>33</sup> ZHENG Langong 郑岚公, “*Xianqin yizhan shuping* 先秦义战述评 [Review of Pre-Qin Righteous War] (2019) 35 (3) *Tangdu Journal* 唐都学刊.

<sup>34</sup> Chen-Ya TIEN, *Chinese Military Theory: Ancient and Modern* (Mosaic Press, 1992), at 2, n. 13.

<sup>35</sup> A prime example is Mozi's advocating for “universal love” among all peoples and non-aggression among states. See Cyrus LEE, “Universal Love II” in LI Shaokun, ed., *The Complete Works of Motzu in English* (The Commercial Press, 2009).

standard of righteous war-waging and a *jus in bello* standard of appropriate behaviour of war.

After three centuries of struggle for hegemony, warfare became a matter of elimination. Consequently, military strategists expounded less on war ethics but more on the technical aspects of efficient defeat.<sup>36</sup> At times of survival, the Confucian ideal of benevolent rule also became less palatable for states than the Legalist claim of strong and effective rule.

### B. The Ethical Foundation for Just Wars

How war can ever be justified precedes the question of when a war appears just. Hence, in ancient China, a shift in attitudes from valuing the war-free utopia to taking war as the necessary evil laid the foundation for the Just War theory. According to *Simafa*, the earliest extant Chinese military classics composed in the fourth century BCE, former Sage Kings ruled by the law of nature. Under the reign of Sage Virtue, namely, taking benevolence as the foundation (*ren*) and employing righteousness to govern (*yi*), punishments had no reason to exist, neither did the causes of war.<sup>37</sup> The second-best type of ruler was the Worthy Kings, who “ordered the rites, music, laws, and regulations and established the five punishments, raising armoured troops to attack the unrighteous”.<sup>38</sup> In particular, *Simafa* spelled out nine prohibitions whose violation demanded collective punitive expeditions led by the Kings or rulers. Among the nine injunctions, those who “murder the Worthy or harm the people” would be attacked and deposed, those who are “brutal within their state” would be purged, and those who “act like animals” would be extinguished.<sup>39</sup> In this archaic Chinese vision, war became a punishment tool following the loss of the “Golden Age” under the rule of Sage Kings.

Idolising the Sage Kings, Confucius (551–479 BCE) recognized that the nature of wars differed according to their purposes and motives. A Duke once asked: “using force, it seems to be a terrible thing?” Confucius replied: “why is it so? Sages used force to stop carnage and tyranny. It was simply that later on, the greedy used it to slay the people and jeopardize the country.”<sup>40</sup>

Influenced by the Confucian ethics, military essayists also recognized righteous war. Wuzi (440–381 BCE),<sup>41</sup> a learned Confucian scholar and military strategist whose eponymous book is studied together with Sunzi’s *Art of War*, categorized wars by their nature into the righteous, aggressive, enraged, wanton, and insurgent. As he claimed, wars are righteous when used to suppress violence and quell disorder.<sup>42</sup> Similarly, Mozi (ca. 476–390 BCE), the founder of Mohism, while condemning aggressive wars, also gave cautious support for punitive wars aimed at deposing tyrants and restoring peace.<sup>43</sup>

<sup>36</sup> See generally Sunzi and Victor MAIR, Trans., *The Art of War: Sun Zi’s Military Methods* (Columbia University Press, 2009).

<sup>37</sup> “The Methods of the *Ssu-ma*: Benevolence the Foundation” in Sawyer and Sawyer trans., *The Seven Military Classics of Ancient China*, *supra* note 1, 126, at 127.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*, at 128.

<sup>40</sup> *Da dai liji: Yong bing* 大戴礼记·用兵 [*The Book of Rites by Dai Senior*].

<sup>41</sup> Wuzi was one of the Seven Military Classics of ancient China, which was compiled in the Song dynasty as the official text for learning.

<sup>42</sup> “Wu-tzu: Planning for the State” in Sawyer and Sawyer trans., *The Seven Military Classics of Ancient China*, *supra* note 1, 206, at 208.

<sup>43</sup> LI Nexiong, “The Implications of Ancient Chinese Military Culture for World Peace” in Daniel A. BELL, ed., *Confucian Political Ethics* (Princeton: Princeton University Press, 2008), at 216; Arthur WALEY, *Three Ways of Thought in Ancient China* (London: George Allen & Unwin, 1939), at 175, citing Glanville, *supra* note 20 at 337.



Why are punitive wars serving particular purposes considered justifiable? Xunzi's teaching pointed to some fundamental moral responsibilities as a potential reason. One of the three great early Confucian philosophers, Xunzi (ca. 300–230 BCE) once faced a question: “when debating military affairs, you, sir, always take *ren* and *yi* as what is fundamental. One who is *ren* cares for the others, and one who is *yi* follows good order. If this is so, then what use does one have for military forces?” *Ren* (benevolence) and *yi* (righteousness) are at the core of Confucius' teaching, and they were revered as the Sage Virtues in the previous quote from *Simafa*. The meaning of *ren*, Confucius remarked, consists of loving others.<sup>44</sup> *Yi* captures a categorical imperative to do what one ought to do.<sup>45</sup> So, Xunzi explained:<sup>46</sup>

[t]he person of *ren* indeed cares for others, *but it is because he cares for others that he hates for people to harm them*. The person of *yi* indeed follows good order, *but it is because he follows good order that he hates for people to throw it into chaos*. Indeed, military forces are that by which one prohibits violence and does away with what is harmful. (*Emphasis added*)

In essence, a war may be justified because it is fought for the love of others. Since appeals to meritorious rulers crossed borders and became universal, the perceived duty to shield other people from tyranny then made humanitarian expeditions a viable option.<sup>47</sup>

Xunzi's explanation highlighted the foundation of the Chinese Just War as partly emanating from a sense of moral responsibility towards the mistreated people. This understanding can be confirmed by the semantic analysis of the Chinese concept of Just (*yi*) War (*zhan*). Following its modern usage, *yi* is now commonly understood as “just”. But as Japanese sinologist Tomiya Itaru argued, at least dating back to the Qin and Han periods, *yi* was often used as a suffix to words expressing virtues such as loyalty (*zhongyi*) and familial piety (*xiaoyi*). Here, *yi* captures an obligation to fulfil the said virtues.<sup>48</sup> Accordingly, righteous wars are those including a duty to fulfil certain virtues. This reading is quite close to the idea of R2P, which bases protective intervention on the international community's collective responsibility.

### C. Restoring the Lost Mandate as a Just Cause for War

#### 1. Just cause: saving the Mandate of Heaven

Wars can be just (*yi*) depending on different causes for waging it, including for the removal of tyrants. Writing in the fourth century, *Weiliaozi*, one of the Seven Military Classics, declared that wars should be used only to “punish those guilty of committing violence, cruelty, and tyranny, and to stop unrighteous actions”.<sup>49</sup> Near the end of the

<sup>44</sup> “Yan Yuan” in *The Analects*, Book XII at para 22. For other translations, see e.g., Annping CHIN trans., *The Analects* (Penguin Group, 2014), 184 at 196.

<sup>45</sup> NAN Huijin 南怀瑾, *Zhongguo zhexue xiaoshi* 中国哲学小史[A Short History of Chinese Philosophy] (The Macmillan Company, 1960), at 42.

<sup>46</sup> Eric L. HUTTON, ed., *Xunzi: The Complete Text* (Princeton University Press, 2014), at 155.

<sup>47</sup> CHEN Qi 陈琪 and HUANG Yuxing 黄宇兴, “Chunqiu shiqi de guojia jian ganshe—Jiyu 《Zuozhuan》 de yanjiu 春秋时期的国家间干涉—基于《左传》的研究 [Inter-state Intervention during the Spring and Autumn Period: Studies on Zuo Tradion] (2008) 1 Chinese Journal of International Politics.

<sup>48</sup> Tomiya Itaru 富谷至, “Zhongguo gudai de Zhengyi guan 中国古代的正义观 [Ancient China's Ethics on Justness] *The Paper* (6 October 2017), online: *The Paper* <[https://www.thepaper.cn/newsDetail\\_forward\\_1812451](https://www.thepaper.cn/newsDetail_forward_1812451)>.

<sup>49</sup> “Wei Liao-tzu: Martial Plans” in Sawyer and Sawyer trans., *The Seven Military Classics of Ancient China*, *supra* note 1, 254, at 254. citing Tien, *supra* note 34. The author was identified as someone contemporary with King Hui

Warring States period, Lü Buwei (291(?)–235 BCE), prime minister to the ruler of Qin, who was to unify China within two decades, invited scholars from different schools of thought to a debate on good governance. When summarizing the pre-Qin military studies, these scholars divided wars into the righteous and the barbarian. A righteous war must meet three conditions: it is directed against a ruler without *Dao* (Way) or a people without righteousness;<sup>50</sup> the purpose is to save the people;<sup>51</sup> and the battle follows principles of humanity.<sup>52</sup> Again, the righteousness of a war lies first and foremost in its cause.

Within various accounts of Just War, punishing tyranny, or by the Chinese concept, deposing “a sovereign without *Dao*” was particularly legitimized by a long-standing Chinese belief in “the Mandate of Heaven” (*tianming*). Similar to the medieval Divine Right of Kings, the Mandate was to explain where the monarchical power came from. For the ancient Chinese, “[l]aws are derived from political power and political power is derived from the Way (*Dao*)”.<sup>53</sup> The recipient of this ultimate Way was the sovereign who was selected as the “Son of Heaven” to maintain on earth “a cosmic status” reflecting the order of the celestial universe.<sup>54</sup>

To begin with, the Shang and Zhou dynasties believed in the Mandate of Heaven as “an eternally determined and imposed order or relationship between the superior and inferior and between the ruler and the ruled”.<sup>55</sup> The people of Shang particularly believed in “God” (*di*) as a supreme being reigning over the cosmos. Later, the decedents of Zhou transformed this worship of God into a belief in Heaven (*tian*), which favoured virtuous deeds (*de*).<sup>56</sup>

Linking the Mandate with moral excellence was initially a strategy used by the founders of Shang and Zhou to justify rebellions against their tyrannical kings. As recorded in *The Book of History*, Shang’s first king, Tang, assembled his alliance with a public indictment against the tyrannical Jie: “[i]t is not that I, the humble man, have the audacity to declare war. It is because the prince of Xia has committed monstrous crimes that Heaven has given me the Mandate to exterminate his kingdom”.<sup>57</sup> More than that, Tang justified his rebellion as a “punitive mission” for “not daring to disobey the orders from Heaven”.<sup>58</sup> Likewise, when the first King Wu of the Zhou dynasty challenged Shang’s corrupted rule, he reiterated that it was for the heavenly goal of protecting the people that the king was

---

of Liang (r. 369–20 BCE). *Weiliaozi* (or “Wei Liao-tzu” in Wade-Giles) stands out from pre-Qin books in that it contains various arguments of different schools on warfare.

<sup>50</sup> *The Annals of Lü Buwei: Zhen Luan* [吕氏春秋·振乱].

<sup>51</sup> *The Annals of Lü Buwei: Huai Chong* [吕氏春秋·怀宠].

<sup>52</sup> *Ibid.*

<sup>53</sup> *Guanzi: Xin Shu I* 管子·心术上. See Geoffrey MACCORMACK, “Mythology and the Origin of Law in Early Chinese Thought” (2001) 1 *Journal of Asian Legal History*. This early expression forecast the perceived relations between law, men and heaven. For example, at the time of the Tang dynasty, chancellor Lu Zhi [陆贽] of Emperor De of Tang stated: “[w]hen laws [of men] are to be proclaimed, they should always be verified according to the rules of Heaven” [悬法皆考于天则]. *Luxuangong ji* [陆宣公集—普王荆襄江西道兵马都元帅制]. See Derk BODDE, “Evidence for ‘Laws of Nature’ in Chinese Thought” (1957) 20 *Harvard Journal of Asiatic Studies* 709, at 714.

<sup>54</sup> Daniel J. HOFFHEIMER, “China and the International Legal Order: An Historical Introduction” (1979) 11 *Case Western Reserve Journal of International Law* at 252.

<sup>55</sup> Sharron GU, *The Boundaries of Meaning and the Formation of Law: Legal Concepts and Reasoning in the English, Arabic, and Chinese Traditions* (McGill-Queen’s University Press, 2006), at 78; Chan Kei THONG and Charlene L. FU, *Finding God in Ancient China* (Zondervan, 2009), at 158–74.

<sup>56</sup> WEI Chunyan [魏春艳] and LI Erkang [李尔康], “*Tianming yishi yu yidepeitian shuo*” “天命”意识与“以德配天”说 [All under Heaven and the Idea of Serving Heaven with Virtue] (2016) 32 *Journal of Chengdu Normal University [成都师范学院学报]*, at 49.

<sup>57</sup> “The Speech of Tang” in WANG Shishun and Du Ruiqing trans., *The Book of History* (Shandong Friendship Press, 1993), at 103.

<sup>58</sup> *Ibid.*

appointed as the sovereign and the educator. Given Heaven's command to expel the tyrant due to his countless crimes, "my offence will be as grave as his if I disobey the order".<sup>59</sup> In short, dethroning immoral kings like Jie and Zhou<sup>60</sup> was not only justified, but demanded by Heaven.

In history, this shift from spiritual to moral fulfilment of the Mandate took some time to sink in, and was best illustrated in times of war. Initially, fortune telling and sacrifice were the key to receiving instructions from Heaven when preparing for war, a belief that continued to influence King Wu of Zhou during his revolution.<sup>61</sup> Three centuries later, in 706 BCE, when the small state of Sui was tricked into pursuing the large state of Chu on the battlefield, Lord Sui felt confident because of his faithfully prepared sacrifices. His Chancellor Ji disagreed: "[t]he Way of Heaven relies on being loyal towards one's own people and faithful towards gods, who listen to the people. Therefore, the Sage Kings in antiquity served the people first, and gods later."<sup>62</sup>

Thus, through the literati's pedagogical reading of the Mandate, three ideas were established: the Mandate is changing (*tianming wuchang*), it only rests on moral excellence (*tianming weide*), and it lives in the people (*tianyi zaimin*).<sup>63</sup> Accordingly, a ruler's ability to uphold the Mandate depends on "[h]is personal virtues and wisdom in governing."<sup>64</sup> By logical extension, the ruling class became the focal point of the Empire's moral strength.<sup>65</sup>

Given that Heaven grants its Mandate by virtue of merits, revolution seems the natural response to substandard performance. After all, *geming*, which is the Chinese concept of revolution, literally means the removal of the Mandate. In this sense, Confucius even compared revolution against the tyrants Jie and Zhou to the evolution of Heaven and Earth in his elaboration of the *Book of Changes*.<sup>66</sup>

Apart from Confucius himself, the idea of revolutionizing the Mandate was enthusiastically developed by other Confucian scholars. For example, Mencius was recorded as having justified tyrannicide by characterizing offenders of humaneness as outlaws, in which case a ruler is equally subject to punishment as other fellows.<sup>67</sup> Similarly, Xunzi

<sup>59</sup> Taishi 泰誓上 [The Monumental Speech I] in *The Book of History*.

<sup>60</sup> Zhou [纣] is the name of the last king of the Shang Dynasty, not the Zhou [周] Dynasty.

<sup>61</sup> Allegedly, when a storm suddenly dwelled on the allied troop, all lords joining forces with Wu were terror-stricken. Only Taigong insisted and persuaded Wu. "Qitaigong shijia 齐太公世家 [The Reigning House of Qi]" in SIMA Qian [司马迁], *Shi Ji* [史记 Records of the Grand Historian]. *Shi Ji* covered around 2,500 years of history from the time of the legendary Emperor Huang to the early years of Emperor Wu of Han.

<sup>62</sup> "Lord Huan VI" in Andrew PLAKS and Michael NYLAN, eds., Stephen DURRANT, Wai-yee LI and David SCHABERG, trans., *Zuo Tradition: Commentary on the Spring and Autumn Annals* (University of Washington Press, 2016).

<sup>63</sup> CHEN Lai [陈来], "Yinshang de jisi zongjiao yu xizhou de tianming Xinyang 殷商的祭祀宗教与西周的天命信仰 [The Religion of Sacrifice in Yin and Shang and Early Zhou's Belief in the Mandate of Heaven]" (2013) 2 *Zhongyuan wenhua yanjiu* [中原文化研究].

<sup>64</sup> Thong and Fu, *supra* note 55, at 226, citing Caleb WAN, "Confucianism and Higher Law Thinking in Ancient China" (2013) 10 *Regent Journal of International Law* at 83.

<sup>65</sup> The belief that authority originates from moral excellence forms a basis of Confucianism. This idea was foregrounded in "The Great Learning", a piece from *The Book of Rites* that was later amended by revered Song literati. "In ancient times, one who intended to carry forward all the inherent virtues in the world and to rid them of material desires had to first rule his state well. To rule his state well, he had to first educate his family. To educate his family, he had first to cultivate himself. To cultivate himself, he had first to set his heart right..." See HE Zuokang [何祚康], *The Great Learning & The Doctrine of the Mean* (Sinolingua, 1996), at 6.

<sup>66</sup> See Zhou Yi: *tuan zhuan, ge* [周易·彖传·革] Book of Changes]: "[t]he evolution of Heaven and Earth brought about four seasons; the revolution of Tang and Wu against Jie and Zhou observed the law of Heaven and met people's wants. How great is the effect of 'change!'" This translation is mine.

<sup>67</sup> Irene BLOOM, trans., and Philip IVANHOE ed., *Mencius* (Columbia University Press, 2009), at 21.

prioritized the Way (*Dao*) over the Sovereign (*Jun*): “To follow the Way but not one’s ruler, and to obey rightness but not one’s father...were behaviours of great significance.”<sup>68</sup>

In practice, not only was righteous revolution accepted, but external intervention to assist the expelled rulers was also rebuked. Such was the case when the king of Jin planned to restore the king of Wei, banished in 559 BCE, but was later dissuaded from doing so by his aides. In particular, the music master Kuang cautioned him:

If he ruins the livelihood of the people and deprives the spirits of sacrifices, so that all the clans lose hope and the altars of the domain have no master, of what use is he? What is to be done but have him expelled? Heaven gives birth to the people and establishes rulers to oversee them and take care of them, not let them lose their livelihood...<sup>69</sup>

## 2. Collective campaign against irresponsible rulers

Apart from by revolution, the removal of tyrants could also take place through external intervention including collective campaigns. As previously discussed, *Simafo* enumerated nine categories of misdeeds triggering collective interventions for offending common perceptions of the ritually and morally acceptable. Once the violation was noticed, Worthy Kings would first “publicize it among all the feudal lords, making it clear that [the wrongdoer] had committed a crime”. After that, the Prime Minister would order the feudal lords to assemble troops, announcing, “a certain state has acted against *Dao*. You will take part in the rectification campaign on such and such a year, month, and day.” The coalition army would then convene accordingly to apply “the punishment of rectification”.<sup>70</sup>

While parts of the accounts cited appear to be anecdotal, including the references to the legendary Sage Kings of Yao, Shun, and Yu, the description of the “rectification campaign” arguably reflected contemporaneous practice. This is substantiated by the records in the *Annals* and its commentaries, *Zuo Tradition*. In 576 BCE, several princes met on the occasion of the arrest of the Liege of Cao, who was presented at the Zhou capital.<sup>71</sup> As Zuo’s note explained, the *Annals* “implies that a ruler who failed his people should be arrested by leaders of other domains”.<sup>72</sup>

In the fifteenth year, in spring, the princes met at Qi: this was to confer about chastising Lord Cheng of Cao ... The text says, ‘The Prince of Jin arrested the Liege of Cao’: it was because the punishment did not extend to his people. In all cases when a ruler violated the proper way with his people, and the princes chastised and arrested him, the text would say, ‘A leader of such and such a domain seized the prince of such and such a domain.’ If it were not so, no such formulation is used.

Collective campaigns as such were possible because inter-state interventions existed in practice. For example, the *Agreement of Kuiqiu*, concluded in 651 BCE, regulated issues considered to be “domestic affairs” by present-day standards, including restrictions not to “build dykes on a river”, to “store grain for speculation”, or to “let women be involved in state affairs”.<sup>73</sup>

<sup>68</sup> Xunzi: *Zidao* [荀子·子道 Norms on Filial Piety].

<sup>69</sup> Plaks and Nylan, eds., Durrant, Li and Schaberg trans., *supra* note 62 at 1023, 1025 and 1027.

<sup>70</sup> *Ibid.*, at 93, 95.

<sup>71</sup> “Lord Cheng 15 (576 BCE)” in Plaks and Nylan, eds., Durrant, Li and Schaberg trans., *supra* note 62 at 817.

<sup>72</sup> *Ibid.*, 819.

<sup>73</sup> LIU Daqun, “International Law and International Humanitarian Law in Ancient China” in Morten BERGSMO, CHEAH Wui Ling and YI Ping, eds., *Historical Origins of International Criminal Law: Volume 1* (Brussels: Torkel Opsahl Academic EPublisher, 2014), at 91.

## D. Other Criteria of Just War in Deposing Unworthy Kings

Apart from just cause, the Chinese Just War tradition contains other criteria,<sup>74</sup> including the *jus ad bellum* requirements of right intention and right authority, as well as the *jus in bello* standard of humane conduct. While corresponding to the enumerated list in its Western counterpart, the Chinese Just War doctrine has some specifics unique to its historical context.

### 1. Right intention

In assessing the nature of war, the initiator's intention was a decisive factor. In fact, a just (*yi*) war (*zhan*) depends on the fulfilment of being righteous (*yi*). In Confucianism, "righteousness" and "profit" are diametrically opposed terms, and acting for righteousness is applauded as much as fighting for profit is condemned.<sup>75</sup>

As an example, *Zuo Tradition* noted that the state of Chu intervened after Lord of Chen's assassination in 598 BCE. King Zhuang of Chu then assured leaders of Chen, "do not be alarmed! I am going to chastise the lineage of Shaoxi." He entered Chen, executed the murderer, and turned Chen into a Chu dependency. King Zhuang's minister disapproved of the seizure of Chen and stated "that the princes followed you was because you said you were chastising the guilty. Now to turn Chen into a dependency is to covet its riches. To summon the princes in the name of chastisement and then to let it end in covetousness—is this not unacceptable?" The King then relinquished his claim to Chen.<sup>76</sup> Based on the studies of the inter-state practice, modern scholars pointed out that not aiming at profiting from the intervention was an essential element to maintain its righteousness.<sup>77</sup>

The requirement of the right intention also applied when someone within the state expelled a tyrant. At one point, citing Yi Yin's situation as an example, Mencius was asked whether a worthy minister could banish an unworthy ruler. Yin was revered as an early sage who had helped the first King of Shang, Tang, to overthrow the tyrannical King Jie of Xia. After Tang's death, Minister Yin once banished his young master Taijia, saying "I cannot stand by while someone goes against what is right." When Taijia lived up to the expectation of a responsible ruler, Yin brought him back. Referring to this event, Mencius answered: "[i]f he has the intentions of a Yi Yin, then he can. If he lacks the intentions of a Yi Yin, then it would be usurpation."<sup>78</sup> The prerequisite of having the right intention was an important guideline for senior ministers who were one step away from saving the Mandate or staging the usurpation.

### 2. Right authority

Many Confucian philosophers believed that just wars could only be rightfully waged by those with superior moral authority. Thus, the initiators of punitive campaigns against unworthy kings could only be those who governed their states with benevolence and also treated the tyrannized people with kindness.<sup>79</sup> In this regard, Mencius' comments on state Qi's intervention illustrated his interpretation of proper authority. When Qi defeated the badly ruled Yan, King Xuan of Qi justified it as a sign of divine providence because Qi could not otherwise possibly defeat the equally powerful Yan within fifty

<sup>74</sup> See e.g., *De civitate dei*: Book XXII at para 74, citing Hilpold, *supra* note 2 at 9; Alex BELLAMY, *Just Wars: From Cicero to Iraq* (Polity, 2006), at 124.

<sup>75</sup> Nan, *supra* note 45.

<sup>76</sup> Plaks and Nylan, eds., Durrant, Li and Schaberg trans., *supra* note 62 at 637.

<sup>77</sup> Chen and Huang, *supra* note 47.

<sup>78</sup> Bloom, *supra* note 67 at 151.

<sup>79</sup> Glanville, *supra* note 20 at 334–7.

days. Mencius then suggested that if the people of Yan were happy, then Qi might take it over.<sup>80</sup>

But later Mencius was shocked at the way the people of Yan were mistreated. Therefore, when asked if he indeed suggested that Qi should attack Yan, Mencius replied in the negative:

Shen Tong asked whether Yan might be chastised; I replied that it might... Had he asked, 'Who may chastise it?' I would have replied that a minister appointed by Heaven might chastise it ... How would I have advised that one Yan should chastise another Yan?<sup>81</sup>

As “ministers of Heaven”, interveners were sometimes also responsible for assisting a post-war state. As *Simafa* notes, after punishing the offenders, “the King and feudal lords rectified the state, recommended the Worthy, supported the enlightened ruler and restored its original feudal position”.<sup>82</sup> This precedent became an ideal for later generations, expressed through Confucius’ passionate exhortation to “revive the fallen states, restore the imperilled lineage and re-elect the hidden men of merits”.<sup>83</sup>

In addition to “ministers of Heaven”, military commanders in charge of the operations had their share of responsibility. In the pre-Qin era, the functions of the prime minister and the commander-in-chief were not separated. Therefore, someone who served in peacetime as a ruler’s advisor changed to lead the army in wars. Given the growing influence of Confucianism, the prime minister-cum-general was often a learned Confucian who could easily translate their political tasks into military directives. In this way, the ethics of war, epitomized by “virtues”, figured prominently in most military classics.<sup>84</sup> Further through the chain of command, martial virtues extended to all actors involved in the intervention.<sup>85</sup>

### 3. Humane conduct in war: benevolence, precaution, and proportionality

As discussed, a righteous war first needs to be initiated in a proper manner, such as one initiated by a “minister of Heaven” to overthrow a tyrant. In addition, it needs to be conducted in a humane manner, especially by respecting the principles of benevolence, precaution, and proportionality.

Benevolence is the foundation. As *Weiliaozi* aptly summarized, “when a true king attacks the brutal and chaotic, he takes benevolence and righteousness as the foundation for it”.<sup>86</sup> Some requirements were outdated, but illustrate the efforts to limit the impacts of war. For example, there were strict restrictions on the timing of war; namely, it could

<sup>80</sup> Bloom, *supra* note 67 at 22.

<sup>81</sup> *Ibid.*, at 44. In other words, Qi, being much like Yan in terms of the quality of its government, was not a suitable agent to intervene in Yan.

<sup>82</sup> “The Methods of the *Ssu-ma*: Benevolence the Foundation” in Sawyer and Sawyer trans., *The Seven Military Classics of Ancient China*, *supra* note 37, 126, at 128.

<sup>83</sup> “Yao Yue” in *The Analects*, Book XX. The translation is mine, see also, Chin trans., *The Analects*, Book 20. IB, *supra* note 44, at 307.

<sup>84</sup> See e.g., Liu tao: *long tao: lun jiang/xuan jiang, Taigong’s Six Secret Teachings: Dragon Secret Teaching: A Discussion of Generals & Selecting Generals* [六韬·龙韬·论将/选将]; Wuzi *bingfa: lun jiang, Wuzi: The Tao of the General* [吴子兵法·论将]; Sunzi *bingfa: jiu bian, Sunzi’s Art of War: Nine Changes* [孙子兵法·九变]; *Weiliaozi: shi’er ling/wu yi/jiang li, Weiliaozi: Twelve Insults, Martial Plans, The General as a Law Official* [尉缭子·十二陵//武议/将理]; Xunzi: *yi bing, Xunzi: A Discussion of War Strategies* [荀子·议兵]; Sunbin *bingfa: jiang yi, Sun Bin’s Art of War: Virtues of the General* [孙臧兵法·将义].

<sup>85</sup> Zheng, *supra* note 33.

<sup>86</sup> “Wei Liao-tzu: Army Orders I” in Sawyer and Sawyer trans., *The Seven Military Classics of Ancient China*, *supra* note 1, 273, at 273.

not be done during the farming seasons to take care of one's own people, it should not be initiated against a state during its national mourning or during natural disasters to take care of its people, and the army should not be raised in winter or summer to take care of people on both sides.<sup>87</sup>

Moreover, as the *Annals* declared, warfare was one of the things that the Master was most cautious about.<sup>88</sup> Confucius considered wars to be a matter of life and death for states and their peoples. Therefore, a just war must have general support from the people and their voluntary participation. In other words, a just war needs to be perceived as “just” by citizens of the war-waging state.<sup>89</sup>

The principle of proportionality required that harm be minimized. In the words of *Weiliaozi*, farmers should be allowed to work in their fields, merchants to stay in their stores, and officials to remain at their posts when the army reaches the target. The scale of the operation should be controlled, with the aim of not unduly harming the other side.<sup>90</sup>

### III. The Discontinued Practice of Humanitarian Expeditions in Post-Qin China and Tentative Explanations through Comparative Studies

#### A. The Advent of the First Empire

Humanitarian expeditions disappeared from historical records after the advent of the Qin Empire. The Qin dynasty reigned for merely fourteen years, but it offered a vision of Empire, which, after times of division, always made a comeback until the beginning of the twentieth century. During the periods of division from 220 to 589 and from 907 to 960, rival regimes engaged in constant turf wars, while no humanitarian expeditions occurred. This section briefly documents the climactic change at the end of the Warring State period, where the Qin state took steps to eliminate all its rivals and inaugurated the first centralized government in China. In particular, I will highlight the changing intellectual traditions that contributed to Qin's unification, its rapid downfall, and its lasting legacy.

During the Warring States period, human suffering and social chaos became the shared vision of dystopia due to centuries-long warfare. Against this background, Legalism developed, whose adherents understood good governance differently from earlier Confucianism. Regarding rival political units as the source of bloodshed and breakdown of order, some pioneering Legalists launched reforms in various states to create a stronger government.

In the wave of these Legalist reforms, Shang Yang (390–338 BCE) helped Duke Xiao of Qin to implement radical measures, of which the central theme was to weaken the people and strengthen the government. To weaken the people, for example, Shang dismissed eight things as nurturing “the rapacity of the wicked”, including cleverness, rites, benevolence,

<sup>87</sup> “The Methods of the Ssu-ma: Benevolence the Foundation” in Sawyer and Sawyer trans., *The Seven Military Classics of Ancient China*, *supra* note 1, 126, at 126.

<sup>88</sup> *Analects*, Book VII. Shu R., Chap. 12, in James LEGGE trans., *The Project Gutenberg EBook of The Chinese Classics--Volume 1: Confucian Analects* (The Project Gutenberg 2001) online: The Project Gutenberg <<https://www.gutenberg.org/files/4094/4094-h/4094-h.htm>>.

<sup>89</sup> Zheng Langong [郑岚公], “*Cong renyi zhi bian kan xianqin rujia yizhan sixiang* 从仁义之辩看先秦儒家义战思想 [On Pre-Qin Confucian Thought of Righteous War from the Debate of Benevolence]” (2016) 11 Weishi [唯实].

<sup>90</sup> The historical rendering of this point comes from an archaic source. It is said in the *Zuo Tradition* that prince Qi's challenge of the states Cai and Chu ended once the latter conceded to their wrongs. The war stopped once the reason was restored. Lord Xi 4, in Plaks and Nylan, eds., Durrant, Li and Schaberg trans., *supra* note 62, at 265, 267.

and employment.<sup>91</sup> To strengthen the state, he fixed models and measures, valued farming and weaving, and prepared for defence and attack.<sup>92</sup> After only five years, Qin arose from a backward country on the far western borders to such a commanding position that the Zhou court sent sacrificial meat.<sup>93</sup>

After six generations, King Zheng annexed all the warring states by 221 BCE and announced himself as the “first emperor”. Abandoning Zhou’s feudal system, the first emperor established a centralized bureaucracy: local prefectures and counties were directly administered by the court; measures and written characters were standardized; laws were unified, clarified, and publicized nationwide;<sup>94</sup> statistics on demography and taxes were collected and reported to the court annually.<sup>95</sup> These policies remained the cornerstone of imperial rule for the next two thousand years.

Qin’s military and political unification was due in large part to the influence of the Legalist doctrines. Generally, the first emperor’s pursuit of a centralized system, specifically through the use of laws, was inspired by Legalist thinkers. After reading Han Feizi who had argued that Confucian methods of rule were obsolete, the first emperor once cried out “if I could meet this man and talk to him, I would embrace death without complaint”.<sup>96</sup> Han Feizi (ca. 280–233 BCE) followed his master Xunzi’s assumption that without proper guidance, human beings could easily degenerate.<sup>97</sup> In particular, an individual’s instinctual egoism would destroy a public-minded society, which would not be readily tempered by moral teachings. In contrast, clearly written law accessible to all subjects was the most effective way to counteract individuals’ selfish and anarchic tendencies. Correspondingly, Han Feizi and fellow student of Xunzi, Li Si (ca. 280–08 BCE) advocated the elimination of other schools of thought. Han Feizi particularly said that “in a state of an intelligent ruler, there is no literature of books and bamboo tablets, but the law is the only doctrine; there are no sayings of former Kings, but the officials are the only models”.<sup>98</sup> As a dramatic event, in 213 BCE, the first emperor approved Li’s proposal to suppress private learning by burning privately-owned books including the Confucian classics of which some had been cited to support the revival of Zhou’s practice.

The first emperor left behind him a united Empire with an exhausted population. His successor, Huhai, further doomed the dynasty through a series of arbitrary acts. Hu Hai ordered massive building projects, including the extravagant E-Pang Palace. To sponsor these extensive works, people were heavily taxed. Meanwhile, officials at court opposing his wilful exploitation and licentious living were purged, and Li Si himself was put to death. The first popular revolt soon occurred in 209 BCE,<sup>99</sup> and this was the precursor of a wave of revolutions; among them the commoner Liu Bang won over all competing powers and established the Han dynasty in 202 BCE.

Trying to distance itself from the tyrannical Qin, the Han court accused Qin of flouting benevolent rule, and identified itself with Confucianism. Since Emperor Wu, Confucianism

<sup>91</sup> Shang jun shu, II. Discussion About the People, para 5. See J. J. L. DUYVENDAK, trans., *The Book of Lord Shang: A Classic of the Chinese School of Law* (Clark, New Jersey: The Lawbook Exchange, Ltd., 2002), at 206.

<sup>92</sup> Jia Yi [贾谊], “Guo qin lun 过秦论 [To Surpass the Qin]” in *Xinshu 贾谊新书 [The New Book of Jia Yi]*.

<sup>93</sup> “Shang jun lie zhuan 商君列传 [Biography of Lord Shang]” in SIMA Qian, *supra* note 61.

<sup>94</sup> *Shui hu di qin mu zhu jian 睡虎地秦墓竹简 [Bamboo tablets from the Qin Tomb at Sanhudi], yu shu [语书]*.

<sup>95</sup> *Ibid.*, citing Lanny B. FIELDS, “The Legalists and the Fall of Ch’in: Humanism and Tyranny” (1983) 17 *Journal of Asian History* 1, at 26.

<sup>96</sup> “Laozi Han Feizi lie zhuan 老子韩非列传 [Biographies of Laozi, Zhuangzi, Shen Buhai, and Han Feizi]”, in SIMA Qian, *supra* note 61.

<sup>97</sup> Paul R. GOLDIN, “Han Fei’s Doctrine of Self-Interest” in Paul R. GOLDIN, ed., *After Confucius: Studies in Early Chinese Philosophy* (Honolulu: University of Hawai’i Press, 2005), at 58–65.

<sup>98</sup> DUYVENDAK, *supra* note 91, at 125.

<sup>99</sup> Chen She shijia 陈涉世家 [The Hereditary House of Chen She], in SIMA Qian, *supra* note 96.



further became the state ideology. On the other hand, the Legalist principles of rule were integrated into the new configuration of Confucianism. For instance, the Code of Han incorporated part of the Code of Qin, which was initially composed by the Legalist reformer Li Kui of the Wei state and brought by Shang Yang to the Qin state. Moreover, the Legalist method of eliciting strong social cohesion added to the monarch's authoritarian toolbox. Early Han Confucian scholars thus positively evaluated the effective state reigned over by the first emperor of Qin and his predecessors. However, as they emphasized, the inability to adapt to a more lenient rule after exhausting the people was the cause of Qin's decline.<sup>100</sup> In short, the Legalist formula for building a strong state, raising the status of the ruler, and demanding absolute popular obedience had persisted throughout the imperial history, but it was not used independently for regulating norms of conduct.<sup>101</sup>

### B. Overview of Post-Qin Practice

No humanitarian expedition was recorded after the third century BCE, either between regional political competitors or between the Chinese Empire and her neighbours. Occasionally, though, some religious figures assumed modest roles in stopping the massacres or helping the victims.

The lack of recorded expeditions does not indicate that atrocities were rare. On the contrary, massacres abounded especially during periods of division. For example, after the "Rebellion of the Eight Princes" (291–306), which led to the downfall of the Western Jin in 316, several non-Han regimes took the chance to rule the North for centuries. In this context, inter-ethnic hatred triggered frequent ethnic cleansing and at least one recorded genocide.<sup>102</sup> In 350, Ran Min, the kingmaker of Han origin ordered a genocidal campaign against all non-Han populations, especially the Jie, following a failed attempt on his life by the Jie ruler he had just installed. As described in historical texts and literary works, after the executions, more than 200,000 corpses were stacked outside the city walls, eaten by jackals, wolves, and wild dogs.<sup>103</sup>

Atrocities such as massacres of those who had surrendered and extermination of civilians were also frequent. Soon after the Rebellion of the Eight Princes, massacres of inhabitants and detainees became common practice among the early non-Han conquerors, especially the armies of Jie and Xiongnu. As recorded in *The Book of Jin* and *History as a Mirror*, the state-sponsored historical records written by Tang and Song literati, the founder of the later Zhao regime Shi Le ordered the death of more than 100,000 prisoners of war in Ning Pin and over 20,000 in Ye. The scale of slaughter culminated in the early conquests of the Mongols, who defeated the Song dynasty and founded the Yuan Empire. Within a decade of the early thirteenth century, Mongol conquerors wiped out the Karazmian Empire and the Western Xia, a Tangut-ruled regime, and killed around 5 million Jurchens.

While historians have detailed these atrocities, there is little mention of humanitarian support from outsiders. Exceptionally, religious figures helped tame the violence. At a time when the Mongols were conquering westward, the Taoist minister Qiu Cuiji trekked to the Hindu Kush Mountains in 1222, after hearing news of the fall of the Karazmian

<sup>100</sup> Jia Yi, *supra* note 92.

<sup>101</sup> Duyvendak, *supra* note 91 at 129.

<sup>102</sup> See KAWAMOTO Yoshiaki, "The Jin and the Sixteen States" in Yoon-rim KIM trans., *Routledge Handbook of Imperial Chinese History* (Routledge, 2018), at 84.

<sup>103</sup> FANG Xuanling, ed., *Jin shu*, at 2791–2; SIMA Guang et al., eds., *Zizhi tongjian*, vol: 98 [History as a Mirror]. *History as a Mirror* was an influential chronicle finished in 1084, which recorded major events between 403 BCE to 959.

Empire. Qiu pleaded with Genghis Khan, the founder of the Mongol Empire, not to engage in mass killings. Having gained Genghis Khan's reverence, Qiu convinced him that respect for the Heaven and love for the people was the foundation of his rule, and that an ascetic life was the key to longevity.<sup>104</sup> Qiu's sermons were recorded as crucial in reducing violence.

Likewise, Buddhist personages helped revoke atrocious policies. Horrified by Shi Le's massacres of inhabitants in his conquered cities, Fotucheng, a learned Buddhist master from Kucha, criticized it as unjust and converted Shi Le into a believer. Fotucheng's influence helped change the annihilation policy.<sup>105</sup> However, as historians noticed, Shi Le's turn to Buddhist teachings was an easy blend of personal belief and political expedience. After it was introduced to China around the Common Era, Buddhism swiftly permeated the Han Court because of the ease with which it could be incorporated into traditional Chinese thought.<sup>106</sup> By the time of the Northern and Southern dynasties, Buddhism had received enthusiastic support from many rulers. Like Shi Le, King of Former Qin (r. 357–85), Emperor Wencheng of the Northern Wei (r. 452–65), and Emperor Wu of Liang (r. 502–49) all actively identified with Buddhism to strengthen their rule.<sup>107</sup>

As said, humanitarian expeditions did not occur between China and her neighbours, and this is partly because of their unequal relationships. As early as the Han dynasty (206 BCE–220), a tributary system started to evolve which lasted until the Opium war in 1840.<sup>108</sup> Within this Sino-centric community of states, China exerted its influence over junior members primarily in the light of its cultural superiority. Correspondingly, the Confucian doctrines of benevolence and obedience became the all-embracing norm of conduct.<sup>109</sup> In this context, no intervention was directed at the Chinese.

Meanwhile, though China sometimes adhered to the Just War tradition by launching punitive expeditions against foreign rulers for violating the rituals,<sup>110</sup> expeditions to expel despots did not occur. Nevertheless, the Chinese ruler would withdraw his support from a foreign prince who was deemed unworthy. This was the case with the

<sup>104</sup> *Changchun zhenren xiyouji* 长春真人西游记 [The Journey to the West of Qiu Changchun]; *Yuanshi, Qiuchuji zhuan* 元史·丘处机传 [History of the Yuan Dynasty: Biography of Qiu Chuji]; *Yuanshi, shilao zhuan* 元史·释老传 [History of the Yuan Dynasty: On Sakyamuni and Laozi].

<sup>105</sup> John KIESCHNICK, "Buddhism", in Albert E. DIEN and Keith N. KNAPP, eds., *The Cambridge History of China, Volume 2: The Six Dynasties, 220–589* (Cambridge University Press, 2019), at 536.

<sup>106</sup> *Ibid.*, at 531.

<sup>107</sup> Scott PEARCE, "A King's Two Bodies: The Northern Wei Emperor Wencheng and Representations of the Power of his Monarchy" (2012) 7 *Fronts of History in China* 90; Kieschnick, *supra* note 105 at 536.

<sup>108</sup> Yongjin ZHANG, "The Tribute System" in Tim WRIGHT, ed., *Oxford Bibliographies of Chinese Studies* (Oxford University Press, 2013).

<sup>109</sup> Wang, *supra* note 28, at 216–7.

<sup>110</sup> Denouncing the imperial court's superior status by rebellion was certainly considered a violation of "li". The 1757 military expedition against Kashgaria was a case in point, where an unpunished offence to the Manchu Court was deemed dangerous to encourage rebellion in other quarters. See Giovanni ANDORNINO, "The Nature and Linkages of China's Tributary System under the Ming and Qing Dynasties" (2006) 21/06 *Working Papers of the Global Economic History Network* at 19; David C. KANG, Dat X. NGUYEN, Ronan Tse-min FU, and Meredith SHAW, "War, Rebellion, and Intervention under Hierarchy: Vietnam-China Relations, 1365 to 1841" (2018) 20 *Journal of Conflict Resolution* at 22 ("The few times that China did intervene in Vietnam follows a pattern: China only intervened Vietnam when the Chinese court felt the need to restore a fallen dynasty/state ... almost every Chinese intervention into Vietnam was requested by Vietnam first."); Edward L. DREYER, *Early Ming China: a political history, 1355–1435* (Stanford University Press, 1982), at 117; ZHANG Xiaoming [张小明], "Zhongguo yu zhoubian guojia guanxi de lishi yanbian" 中国与周边国家关系的历史演变：模式与过程 [Historical Evolution of the Relationship between China and Its Neighboring Countries: Patterns and Process] (2006) 1 *The Journal of International Studies* [国际政治研究]; John CRANMER-BYNG, "The Chinese View of Their Place in the World: An Historical Perspective" (1973) 53 *The China Quarterly* 67 at 68.

1780s Vietnamese rebellion. The revolt was triggered by long-standing corrupt rule of two principalities that had divided Vietnam and reigned on behalf of the Lê dynasty. One of the rebel leaders, Nguyễn Huệ conquered the northern principality and restored the Lê emperor. Soon afterwards, he established his own kingdom bordering the Lê territory.

When Nguyễn Huệ went to Hanoi in 1788 to execute one of the emperor's ministers, the emperor felt threatened and fled to seek refuge in China. The Chinese court heard of the insurgence once a local official reported that the Vietnamese king had lost his seal given by the Qing emperor, and his heir requested to be invested.<sup>111</sup> The Chinese emperor then sent Sun Shiyi, the governor-general of two Cantonese provinces to investigate "into the reason for the rebellion before taking any definite action".<sup>112</sup> In his memorial, Sun concluded that the country had not entirely fallen to the rebels and that many local officials remained loyal to the dynasty.<sup>113</sup>

Sun's findings convinced the court to assist the Lê emperor. The court sent a small-sized army following the Vietnamese troops only to give them confidence in pacifying the rebellion.<sup>114</sup> The Grand Council justified their action on the ground that the Lê dynasty had served the Chinese Empire respectfully for more than a century and, therefore, "we cannot bear to see this family destroyed".<sup>115</sup>

When Sun asked to proceed "to the rebel's nest", the Grand Council ordered him to return once he had achieved the initial military objectives.<sup>116</sup> Apart from reasons related to cost and climate, the court was careful not to let the Vietnamese misunderstand its motives<sup>117</sup> and, in addition, was convinced that the Lê emperor had lost his Mandate.<sup>118</sup> As documented, by fleeing twice from his capital, the Vietnamese king proved to be an incompetent ruler. Moreover, Sun's subsequent report confirmed that "among Vietnamese officials, he had met no worthy people".<sup>119</sup> This suggests that, given the loss of the Mandate, the Chinese Empire considered it appropriate to suspend its support to the prince facing rebellion, without helping to install a new Mandate holder.

### C. Tentative Explanations for the Discontinued Humanitarian Expeditions

#### I. The Mandate as an inadequate basis for atrocity prevention

Until the end of the Warring States periods, humanitarian expeditions could be carried out against a tyrant who failed to uphold the Mandate from Heaven. The first explanation for the subsequent discontinuity of such practice is that the interpretation of the Mandate supported a paternalistic conception of a monarch's responsibility.<sup>120</sup> The Chinese concept of "tyrants" was defined by something other than their atrocious deeds.

<sup>111</sup> *Shi chao sheng xun* [Sacred instructions of ten reigns], at 274: 3b, citing Truong Buu LAM, "Tribute in Sino-Vietnamese Relations" in John King FAIRBANK, ed., *The Chinese World Order: Traditional China's Foreign Relations* (Harvard University Press, 2013), at 167.

<sup>112</sup> *Da qing li chao shi lu* [Veritable records of successive reigns of the Qing dynasty], at 1307: 5b-6, citing *ibid.*, at 167, n. 6.

<sup>113</sup> *Ibid.*, at 1307: 34-36.

<sup>114</sup> *Ibid.*, at 1309: 39b-40.

<sup>115</sup> *Dong hua lu* [Dong hua records of the Qian Long reign], at 108: 7-8 citing Lam, *supra* note 111 at 169.

<sup>116</sup> *Qing shi gao* [Draft history of the Qing dynasty], at 15: 205; *ibid.*, at 171.

<sup>117</sup> *Ming qing shi liao* [Historical materials of the Ming and the Qing periods], at 2: 104b-105, quoting edict of Jan. 21, 1789; *ibid.*, at 170.

<sup>118</sup> *Da qing li chao shi lu* [Veritable records of successive reigns of the Qing dynasty], at 1319: 19b.

<sup>119</sup> *Ibid.*, at 1319: 31.

<sup>120</sup> Elisa Levi SABATTINI, "How to Surpass the Qin" (2017) 65(2) *Monumenta Serica* 263.

Originally, the moral belief in the Mandate derived from the Zhou precept: “[a]ll under Heaven is not one man’s domain”, but for “all under Heaven”, namely all the people. Accordingly, “anyone who shares profit with all the people under Heaven will gain the world”.<sup>121</sup>

Therefore, what underscored the Mandate doctrine was the recognition that “all under heaven” was collectively owned by the people.<sup>122</sup> Nevertheless, as Confucianists believed, the people should follow their monarch in public life and patriarch in private life. In other words, the monarch was not conceived as a delegate following the people’s will, but at best a devoted parent taking care of the people’s needs. Xunzi, who initiated the rationalist trend in Confucianism, further developed justifications for authoritarian rule. While recognizing that the Heaven appointed the king only for the sake of the people,<sup>123</sup> Xunzi proposed that monarchs should maintain good social order by using ethics and law to curb people’s selfish and antisocial instincts. He therefore favoured restrictive policies including thought control and travel bans.

Though Mencius’ moral idealism set him apart from Xunzi, he likewise had a paternalistic conception of the sovereign. In particular, he believed that a king honoured his responsibility by enriching and educating his people.<sup>124</sup> When King Hui of the Liang state asked Mencius about the way to achieve hegemony, Mencius answered:

[o]nly a gentleman can maintain a faithful heart in the absence of a proper livelihood. As for the people, depriving them of their livelihood will lead them to self-abandonment and moral degradation. When they thus commit crimes, to punish them is to entrap them.<sup>125</sup>

In summary, Mencius said that the ruler of a state never failed to be a true king where people in their seventies wear silk and eat meat and the pepper-haired are neither hungry nor cold.<sup>126</sup> Thus, Mencius imbued his standard moral argument with a pragmatic touch.

Indeed, ensuring people’s livelihood was the practical key to staying in power. In an agrarian society as in ancient China, popular opposition capable of eventually dethroning a monarch often came from the society-wide crisis, such as excessive taxes or natural calamities that would ruin the livelihood of the majority. In contrast, persecutions on a limited scale usually did not trigger a widespread response. Therefore, even if Emperors Yong Zheng (r. 1722–35) and Qian Long (r. 1736–96) of Qing reached the

<sup>121</sup> Lü Shang, “Taigong’s Six Secret Teachings: Civil Secret Teaching” in Sawyer, *supra* note 1 at 41. *Six Secret Teachings* is nominally attributed to Taigong, and reportedly collected his political advice and military instructions to Kings of Wen and Wu of Zhou. Since evidence suggests that the book actually dates from the Warring States period and preserves the tradition of Qi’s military studies, it could be the oldest strata of Chinese military thought. See “Translator’s Introduction” in Sawyer, *supra* note 1 at 23. A similar expression can be found in other parts of the Six Secret Teachings, for example, “if you profit All under HEAVEN, All under Heaven will be open to you. If you harm All under Heaven, All under Heaven will be closed. All under Heaven is not the property of one man but of All under Heaven.” Martial Secret Teaching: Opening Instructions, at 54; “All under Heaven is not the realm of one man. The only one who possesses the Tao can dwell [in the position of authority].” Martial Secret Teaching: Instructions on According with the People, at 58.

<sup>122</sup> YU Ronggen [俞荣根], *Ru yan zhi shi* 儒言治世[Governance through Confucian Teachings] (Sichuan People’s Publishing House, 1995), at 91–2.

<sup>123</sup> Xunzi, Book XXVII [荀子·大略].

<sup>124</sup> *Ibid.*

<sup>125</sup> Mencius, BOOK 1A [孟子·梁惠王上] This is my own translation. See also Bloom, *supra* note 67 at 11.

<sup>126</sup> *Ibid.*, at 12.

apex of the literary inquisition (*wen zi yu*), they remained model kings contributing to the last “prosperous age” (*sheng shi*) of imperial China,<sup>127</sup> as the people of Qing believed.<sup>128</sup>

As such, Confucianists took the monarch’s ability to secure people’s wellbeing, especially their material wealth as the touchstone of legitimate rule. Correspondingly, “tyrants” were the “unworthy kings” who fundamentally failed to do so. In the stereotypical descriptions of Confucian historians, those were the “bad last emperor” who indulged in a building spree and hearty sensual appetites.<sup>129</sup> Their violent and debauched characters often took on society-wide effects through reckless war-waging or excessive taxes and corvée policies, which would seriously disrupt the social or economic order.

For example, the first emperor was a standard tyrant in the narratives of later dynasties. Lu Jia (240–170 BCE), a political thinker who helped Liu Bang establish the Han dynasty, reasoned that Qin’s rapid collapse was because of its rulers’ penchant for cruel punishment and tyranny over the masses, including the frequent raising of an army for conquests and the massive building programmes.<sup>130</sup> Another early Han politician Chao Cuo (220–154 BCE) criticized the first emperor for exhausting the people with his insatiable ambitions and desires.<sup>131</sup> Indeed, as analysts revealed, while the total population at the time did not exceed 20 million, the concentrated labour for construction projects was more than 2.2 million, and the number of infrastructure workers elsewhere in the Empire must have been very large.<sup>132</sup> By the same token, *The Book of Jin* portrayed Shi Le’s successor Shi Hu (295–349) as a tyrannical ruler who had conscripted a vast number of peasants for the construction of his palace.<sup>133</sup>

Legalists conceptualized tyranny quite similarly with Confucianists. The Legalist efforts to purge individuals of their selfishness also applied to monarchs. Thus, as opposed to the public-minded rulers, tyrants enslaved his people for private needs.<sup>134</sup> The early Legalist thinker, Han Fei, therefore constantly asked rulers to restrain their selfish desires for luxurious palaces as these constructions would overwork the people and cause their own destruction.<sup>135</sup> Nevertheless, contrary to Confucianists’ insistence on benevolent rule, Legalists supported tough measures to rescue the state from chaos and to bring long-term benefits despite people’s protest.<sup>136</sup> In this regard, if we say that Confucianists favoured a paternalistic monarch who ruled with moral indoctrination and leniency, the Legalists’ paternalistic monarch ruled with harsh punishment.

<sup>127</sup> Mark ELLIOTT, “The Historical Vision of the Prosperous Age (*shengshi* 盛世)” *China Heritage Quarterly* (2011) online: *China Heritage Quarterly* <[http://www.chinaheritagequarterly.org/articles.php?searchterm=029\\_elliott.inc&issue=029](http://www.chinaheritagequarterly.org/articles.php?searchterm=029_elliott.inc&issue=029)>; See also William T. ROWE, *China’s Last Empire: The Great Qing* (Harvard University Press, 2009).

<sup>128</sup> LI Huachuan [李华川], “‘Kangqian shengshi’ shuo yuanyuan kao” “康乾盛世”说渊源考[*Origin of the Discourse on the High Qing*] (2011) *Qingshi luncong* [清史论丛].

<sup>129</sup> For an examination of the “bad last emperor” stereotype, see Arthur F. WRIGHT, “Sui Yang-Ti: Personality and Stereotype” in Arthur F. WRIGHT, ed., *The Confucian Persuasion* (Stanford University Press, 1960), at 47.

<sup>130</sup> Xun yu: Wu wei [新语·无为] citing WANG Zhantong [王占通], *Qin chao mie wang fei fajia sixiang zhi zui* 秦朝灭亡非法家思想之罪 [The fall of the Qin dynasty was not the fault of legalism], *Guji zhengli yanjiu xuekan* (2012) 5 [古籍整理研究学刊] *Journal of ancient books collation and studies*, at n.5.

<sup>131</sup> *Hanshu: Ai Ang Chao Cuo Zhuan* [The Book of Han: Biographies of Ai Ang and Chao Cuo] 汉书·爱盎晃错传] The Book of Han was primarily composed by Ban Gu (32–92), a Han Court official. It is written in the form of annuals-biography narrating Han’s history from 206 BCE to 23.

<sup>132</sup> Su Jing [粟劭], *Qin lv tong lun* 秦律通论 [On the Code of Qin] (Shandong People’s Publishing House, 1985), at 58–9.

<sup>133</sup> David GRAFF, “Medieval Chinese Warfare, 300–900” (Routledge, 2002), at 62.

<sup>134</sup> Fields, *supra* note 95 at 5.

<sup>135</sup> W. K. LIAO, trans., “The complete works of Han Fei Tzu: A Classic of Chinese Political Science” (London: Cambridge University Press, 1939–1959) vol. I, 265 at 275, citing Fields, *supra* note 95 at 13.

<sup>136</sup> Fields, *supra* note 95, at 12.

The Legalist School petered out during the Han dynasty but, as Glanville observed, the Han continued to use Legalist methods while claiming Confucianism as its official ideology. And this practice of “Legalism with a Confucian façade” was recycled by all subsequent dynasties.<sup>137</sup> For instance, in his influential polemics, early Han court-scholar, Jia Yi, argued that Qin’s downfall was because the first emperor discarded the Way (*Dao*), and instead followed his self-interest.<sup>138</sup> Here, the Confucianist reverence of the Way complemented the Legalist reproach of self-interest. And Jia went on to comment that the people as an unstable mass needed to be kept peaceful to prevent turmoil, which sounds deeply Legalist.<sup>139</sup>

So, how is the Chinese concept of tyranny different from its European counterpart, which has been crucial to justify external interventions? In Europe, the problem of tyranny was the cause of intervention during the Reformation on which basis princes tried to save their spiritual kins persecuted in another state. Massacres at the time took place by virtue of victims’ identities. Such was the case in 1572 for the 3,000 Protestants slaughtered on Saint Bartholomew’s Day, another 7,000 killed by imitation elsewhere in France, and 3,000 burnt by the Spaniards at Naarden.<sup>140</sup> In this context, widely circulated polemics condemned tyrants for being guilty of shedding blood on a factional bias.<sup>141</sup> As a result, cross-border intervention became a legitimate response, as Queen Elizabeth I did in France under Valois and in the Netherlands under the Habsburg,<sup>142</sup> and Oliver Cromwell, Lord Protector of the Commonwealth, did on behalf of the Vaudois in Savoy.<sup>143</sup>

In general, tyranny for the ancient Chinese was the *selfish* rule of monarchs over their subjects. As long as the monarch did not severely oppress the majority for the private good, especially by exhausting them through conscription or depriving them of their livelihood, the ruler might be tolerated. Thus, targeted persecutions, such as those directed against literati or religious sects, would not necessarily constitute tyranny. In contrast, the Europeans understood tyranny primarily as the *biased* rule resulting in identity-based persecutions. Therefore, those who sided with some particular subjects in brutal oppression of the others would appear to be open to challenge from other princes.

## 2. “Atrocity” and “minority protection” as alien concepts

While tyranny was conceived differently from that in Europe, “atrocity”, especially those against minorities, was also an unfamiliar concept to ancient Chinese and did not form a separate cause for just war. Thus, calamities defined as atrocities in early modern Europe were framed in different terms in ancient China. The Five Persecutions of Buddhism, for example, were all narrated as actions out of practical necessity rather than confessional purge.

As mentioned earlier, Buddhism had gained increased support among the populace and officials since Han. In particular, it turned several rulers into fervent followers from the fourth to the sixth centuries. Patronized by royal and aristocratic families, Buddhist monasteries became landholders and reservoirs of manpower, and thus rivals of the state in accessing resources.<sup>144</sup> In 446, Emperor Taiwu of Northern Wei (r. 423–52), leader of the

<sup>137</sup> Glanville, *supra* note 20, at 340.

<sup>138</sup> Jia Yi, *supra* note 92.

<sup>139</sup> *Ibid.* Jia Yi developed this idea mainly in chapters of *Xin shu: Da zheng* I, II [新书·大政上/下].

<sup>140</sup> Raymond FAGEL, “The Origins of the Spanish Fury at Antwerp (1576): A Battle Within City Walls” (2020) 4 Early Modern Low Countries 102.

<sup>141</sup> Trim, *supra* note 7, at 52.

<sup>142</sup> Mark GREENGRASS, “Hidden Transcripts: Secret Histories and Personal Testimonies of Religious Violence in the French Wars of Religion” in Mark LEVENE and Penny ROBERTS, eds., *The Massacre in History* (Oxford: Berghahn Books, 1999), at 69.

<sup>143</sup> Trim, *supra* note 7, at 37.

<sup>144</sup> Wicky TSE, “Violence and Warfare in Early Imperial China” in Garrett G. FAGAN, Linda FIBIGER, Mark HUDSON, and Matthew TRUNDLE, eds., *The Cambridge World History of Violence*, vol. 1, *The Prehistoric and Ancient Worlds* (Cambridge University Press, 2020), at 294.

Xian Bei tribes who had established supremacy over northern China, started a full-scale crackdown on Buddhism. Mass killings of monks were ordered. Monasteries were destroyed. The reasons for this campaign might be the monasteries' likely participation in a usurpation and their rapidly expanding wealth.<sup>145</sup>

One century later, the Yuwen regime under Emperor Wu (r. 560–78) launched the second proscription of Buddhism with subdued violence. The aim was straightforward; namely, to reap the enormous wealth and to incorporate the numbers in its armies in the fight against rival regimes.<sup>146</sup> Around three million monks, nuns, and their dependents then became soldiers and peasants, while 40,000 temples with their lands, retainers, and property changed hands overnight.<sup>147</sup> This crackdown happened amid the decades-long upheaval in North China, where rapid depopulation led to greater competition in the control of persons rather than territory.<sup>148</sup> In this sense, monks exempted from corvée, conscription, and taxes were human capital for the authority.<sup>149</sup> The other two persecutions during the Tang dynasty (845) and Later Zhou (955) had the same logic. As noted in the *Six Codes of Tang*, a dynastic administrative record, prerogatives were accorded to Taoist ministers and Buddhist clergy, including sizeable lands,<sup>150</sup> to such an extent that “rich fields and handsome profits mostly flows to the monasteries”.<sup>151</sup>

The five Persecutions were viewed as violent requisition, but not atrocities targeting peoples by their distinct identities. Indeed, the violence was justified as a radical measure to strengthen the regime and, in a subtle twist, redistribute wealth to society. In all five cases, proscription softened within a decade and did not attract society-wide condemnation.

This narrative reflects the general perception that mistreating a particular group was not a separate offence in itself. In comparison, R2P's legal basis in relation to atrocities has long been a *sui generis* concern in Europe. Specifically, the language of atrocity emerged in the Enlightenment to characterize brutality against human bodies as a result of religious persecution, colonial violence, and slavery.<sup>152</sup> This distinctive focus continued into the twentieth century, when international law in the wake of the Holocaust repeatedly addressed identity-based pogroms. At Nuremberg, crimes against humanity were tried as an international crime, thereby changing the existing laws and customs of war where such offences against fellow citizens could not be prosecuted.<sup>153</sup> In 1948, states signed a convention to prevent and punish genocide, defined as “acts of states with an intent to destroy, in whole or in

<sup>145</sup> *Shi lao zhi* (Treatises on Buddhism and Daoism) identified Daoist influence at court as an important cause of the persecution. *Shi lao zhi* is part of *The History of the Northern Wei* that discussed Buddhist and Daoist doctrines and historical facts related to Buddhism and Daoism's development during North Wei. See Leon HURVITZ, “Treatise on Buddhism and Taoism” in Seichi MIZUNO and Toshio NAGAIRO, eds., *Yun-Kang: The Buddhist Cave-Temples of the Fifth Century A.D. in North China*, Vol. 16 (Kyoto: Jimbunkagaku Kenkyusho Kyoto University, 1956), at 64–9. See Lien-sheng YANG and Kenneth CH'EN, “Wei Shou, Treatise on Buddhism and Taoism, an English Translation of the Original Chinese Text of Wei-shu CXIV and the Japanese Annotation of Tsukamoto Zenryū by Leon Hurvitz” (1957) 20 *Harvard Journal of Asiatic Studies* 362.

<sup>146</sup> Antonello PALUMBO, “Exemption not Granted: The Confrontation between Buddhism and the Chinese State in Late Antiquity and the ‘First Great Divergence’ between China and Western Eurasia” (2017) 6 *Medieval Worlds* 118 at 142.

<sup>147</sup> For the figures, see *Lidai sanbao ji* (T vol 49 n. 2034), at 94b 23–28, and *Guang hongming ji* (T vol. 52 n. 2103), at 153c 23–27 citing Palumbo, *ibid.*, at 143.

<sup>148</sup> Graff, *supra* note 123 at 60.

<sup>149</sup> Kieschnick, *supra* note 105 at 534.

<sup>150</sup> See LI Linfu, *Six Codes of Tang*, vol. 3 (Chung Hwa Book Company, 1992), at 74.

<sup>151</sup> SIMA Guang et al. eds., *Zizhi tongjian*, vol: 224 [History as a Mirror].

<sup>152</sup> Kotilainen, *supra* note 8 at 8.

<sup>153</sup> *Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 8 August 1945, 82 U.N.T.S. 284, art. 6c.

part, a national, ethnic, racial, or religious group”.<sup>154</sup> In 1951, refugee law provided further protection for individuals fearing domestic persecution because of their race, religion, nationality, membership of a particular social group, or political opinion.<sup>155</sup> Those are the rights that the international community tried to enforce in Kosovo, but failed to do so in many places such as Rwanda, Srebrenica, and Syria. This consistent focus on atrocities, which culminated in R2P, was absent in ancient China.

### 3. The Mandate doctrine's shift from normative to apologetic

As Section 1 explained, the early Mandate doctrine traded off the respect for particular groups of people against the assurance about the majority's well-being. This rationale then fostered a general social indifference to persecutions against some populations, including intellectuals and religious practitioners.

But worse, the Mandate soon ceased to be a normative requirement of sovereign responsibility, and became a descriptive statement – the earlier teachings of “sages are the kings” (*sheng wang*) was turned into a political declaration that “kings are sages” (*wang sheng*).

Degradation of the Mandate's meaning dates back to the Han dynasty. Dong Zhongshu (179–04 BCE), an important Han scholar who transformed Confucianism into Han's official ideology, developed a theory of the unity of Heaven and man (*tianren heyi*). As Heaven's ambassador on earth, the emperor's conduct would have a repercussion on natural beings. Disasters such as floods and drought were therefore taken as a warning sign.<sup>156</sup> When a solar eclipse happened in 178 BCE, Emperor Wen of Han, an exemplary sage king, announced his sins to the nation. Emperor Wen declared that the eclipse reflected his faults of not educating his people. He then implored the public to inform him of his wrongdoing and appealed to virtuous advisors to help him avoid immoral behaviour.<sup>157</sup> However, there were more natural calamities than virtuous kings. The practice of the king's public self-reproach was later replaced by the idea that “kings are always sages, and it was the guilty ministers who should be punished” (*tianzi shengming, zuichen dangzhu*).<sup>158</sup> With it, Emperor Yuan (43 BCE) and Emperor Cheng of Han (15 BCE) asked their chancellors to resign after rare celestial events. In 7 BCE, Emperor Cheng even issued an edict for his chancellor to remedy another onerous sign by death. The practice of scapegoating ministers for celestial warnings of bad rule became a legal precedent, according to an ordinance in *Han yi zhu*, which documents rituals in the Han Court.<sup>159</sup>

### 4. The institutionalized inequality of individuals

R2P has its legal origins in anti-atrocity laws, of which conceptual foundations include not only concerns with tyranny, discussed in Section 2, but also respect for individual equality within a polity. Atrocities are unlikely to occur, if no one is treated as inferior by their attributes including religion, race, ethnicity, or class,<sup>160</sup> and if no one is asked to sacrifice their fundamental rights for the good of the collective.

However, “people” as the basis of the Mandate was in plural form. Correspondingly, individual equality was not part of any prominent political or moral theory. In fact,

<sup>154</sup> Genocide Convention, *supra* note 11, art. 2.

<sup>155</sup> See Refugee Convention, *supra* note 12, art. 1.

<sup>156</sup> DONG Zhongshu [董仲舒], *Chunqiu fanlu* 春秋繁露 [Luxuriant Gems of The Spring and Autumn Annals].

<sup>157</sup> See Yu, *supra* note 122.

<sup>158</sup> HAN Yu [韩愈], *Qin cao: Juyou cao* [琴操·拘幽操·文王姜里作].

<sup>159</sup> *Han yi zhu* 汉仪注 [Rituals and Formalities in Han's Court] citing Yu, *supra* note 122 at 27.

<sup>160</sup> See e.g., *Universal Declaration of Human Rights*, GA Res. 217 (III), UN Doc. A/810 (1948), art. 1: “All human beings are born free and equal in dignity and rights”; art. 2: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”



the ancient Chinese society was built on an essentially anti-egalitarian basis shaped by an authoritarian ideology that proclaimed its origin from Confucianism.

Confucius believed that people should be guided to develop their idiosyncratic nature, since they were born dissimilar, as things were made different. Therefore, he developed a code of conduct for all members of society based on their “role responsibility”. Ideally, everyone would behave according to his or her specific duties and rituals to others. Ultimately, this model would establish superior-subordinate relationships in family and in the court. “Let the ruler be a ruler, the subject be a subject, a father be a father, a son be a son”<sup>161</sup> was Confucius’ answer to Duke Jing of Qi about the way of good governance. However, it is important to note that despite Confucius’ endorsement of asymmetrical relationships, the responsibility between superiors and subordinates is mutual. For example, loyalty of ministers requires that the sovereign treat his ministers with courtesy.<sup>162</sup>

Certainly, Confucius was not the only one to conceptualize human relationships. His contemporary, Mozi, firmly defended the idea that men were born equal, and that the rules regulating social relations should be mutually agreed upon by all society members.<sup>163</sup> However, Mohism declined at the end of the Warring States period and was later stamped out by emperor Wu of Han.

Once Confucianism became the sole ruling ideology in Han (134 BCE), it had been favoured by almost all succeeding dynasties and applied in both political and social realms. Adapting Confucianism to Han’s official ideology, Dong Zhongshu first proposed the hierarchical *Three Bonds* between father and son, husband and wife, and prince and minister as a totalitarian mechanism to keep families well maintained, communities (*zongzu*) well organized, and eventually the state well ordered.<sup>164</sup> Based on Confucius’ role responsibility, an additional layer of absolute obedience was prescribed.<sup>165</sup> As a result, chancellors could be ordered to be scapegoats for Emperor Cheng of Han.

In family life, laws of the Yuan, Ming, and Qing dynasties permitted the killing of offspring when the youngsters assaulted their parents or the parents had “good” reasons to do so, including filial disobedience.<sup>166</sup> In earlier periods of Tang (618–907) and Song (960–1279), parents could also petition for the death penalty for their undutiful children.<sup>167</sup>

In social space, various forms of slavery persisted throughout most of the imperial history, only to be officially abolished by a Qing imperial edict in 1909. As late as the Tang dynasty, *nubi*, a form of domestic servants, and *jianren*, the untouchables, still belonged to a specific class that “were taken as chattels in law”.<sup>168</sup> They could be bought, gifted, and inherited. Although the panel code required that slaves should not be subject to wanton killings, masters who violated this rule were punished leniently. After Tang, a slave’s status as property changed into that of employees in the Song dynasty at the height of the commodity-based economy. However, the Yuan conquerors soon changed course.

In short, among freemen, many were pinned to an institutional framework of subjugation through the “Three Bonds”. Further, through the Sino-centric network, this social

<sup>161</sup> Annping CHIN trans., *The Analects*, Book XII: 11 (Penguin Group, 2014), at 190.

<sup>162</sup> *Ibid.*, Book III: 19, at 63.

<sup>163</sup> See Mozi: *fayi* 墨子·法仪 [Mozi: *On the Necessity of Standards*]; Mozi: *shangtong* 墨子·尚同 [Mozi: *Identification with the Superior*].

<sup>164</sup> “A Preliminary Framework” in John K. FAIRBANK, ed., *The Chinese World Order: Traditional China’s Foreign Relations* (Harvard University Press, 1968), at 5.

<sup>165</sup> Dong, *supra* note 156.

<sup>166</sup> Yuan shi CV: *Xing fa zhi* III 元史·刑法志 [The History of Yuan: Criminal Code]; Ming lv li X: *Xing lv* II 明律例·刑律 [Legal Regulations of Ming: Criminal Regulations]; Qing lv li XXVIII, *Xing lv* 清律例·刑律 [Legal Regulations of Qing: Criminal Regulations] citing QU Tongzu [瞿同祖], *Zhongguo falv yu zhongguo shehui* 中国法律与中国社会 [Chinese Law and Chinese Society] (The Commercial Press, 2012), at 9.

<sup>167</sup> Qu, *ibid.*, at 12. The absolute patriarchy also made children the property of their fathers.

<sup>168</sup> See Tanglv shuyi 唐律疏议 [The Tang Code].

and ethical model applied to China's relations with her tributary states.<sup>169</sup> Within this context, prohibition against identity-based persecution was a foreign concept as the role-based inequality, to the extent of deprivation of life, was recognized and practised at court, within family, and in society.

### 5. The principle of humanity derived from family relations

The principle of humanity that motivated the pre-Qin humanitarian expeditions arose from family relations and did not mature into a broad-based empathy. This partly explains why similar expeditions did not occur in response to the massacres during periods of division or within its neighbours.

The Just War theory in support of humanitarian expeditions originated from the pre-Qin context where vassal states were connected with family ties. The archaic dynasties of Xia, Shang, and Zhou were ruled by clans, and titles of inner feudatories (*nei fan*) were only granted to royal members with the same surname. When the Zhou court established the feudal system, 53 out of 71 states came from the Ji family.<sup>170</sup> Besides lineage, family ties were further consolidated through marriage.<sup>171</sup>

Against this background, pre-Qin warfare was regulated by a whole set of norms.<sup>172</sup> For instance, warfare between states with the same surname was forbidden. Countries could not be attacked during national mourning. Soldiers who had been seriously wounded should not be attacked, and elderly warriors should not be taken hostage.<sup>173</sup> The ethical call to “revive the fallen states and restore the imperilled lineage” also circulated among those with the same ancestry. Such practice shows that the morality among nations in ancient times was actually a code of conduct among families.<sup>174</sup>

These ethical norms of proper conduct (*li*) gained universal validity initially via the auspice of the Zhou house. Later on, when the Zhou authority became weakened, Confucius revived Zhou's *li* in his proposed ethical universe, where the family was still the most important unit for discharging mutual responsibilities. In contrast, Mozi's doctrine on impartial love towards all men was ridiculed by Mencius as acts of unenlightened animals. As encapsulated in the teaching that “Caring for all men to the same extent of caring for your parents means not loving your parents”,<sup>175</sup> the Confucianist conception of differentiated love required that priority be given to people closer to oneself. For example, Confucius' homeland, Lu, had an edict asking travellers to redeem slaves of Lu origin in other states. Once back to the country, the redeemer could ask for state reimbursement.<sup>176</sup> Clearly, nationals were more closely connected as a “family” than they were to foreigners.

In short, the inchoate Chinese conception of “all under heaven” featured family-states which shared similar mental and cultural attributes. Accordingly, the driving force for punishing and remedying tyrannical deeds across borders was found in both ethical

<sup>169</sup> Stephen KRASNER, *Sovereignty: Organized Hypocrisy* (Princeton University Press, 1999), at 8.

<sup>170</sup> *Xunzi: ruxiao* [荀子·儒效].

<sup>171</sup> Examples include the marriage between courts of Qi and Lu [齐鲁通婚], Song and Lu [宋鲁通婚], Lu and Ji [鲁纪通婚], etc. See Plaks and Nylan, eds., Durrant, Li and Schaberg trans., *supra* note 62.

<sup>172</sup> Xin Wanxiang [辛万翔] and Zeng Xianghong [曾向红], “Chunqiu zhanguo shiqi cunzai guojifa ma” 春秋战国时期存在“国际法”吗? [Was There “International Law” during the Periods of the Spring and Autumn and Warring States] (2011) 1 *Guoji zhengzhi yanjiu* [国际政治研究] at 161.

<sup>173</sup> For reviews on the “law of war” before the Qin dynasty, see e.g., Martin, *supra* note 27; HONG Junpei [洪钧培], *Chunqiu guoji gongfa* 春秋国际公法 [Public International Law during the Spring and Autumn Period] (Chung Hwa Book Company, 1939); SUN Yurong [孙玉荣], *Gudai zhongguo guoji fa yanjiu* 古代中国国际法研究 [Studies on International Law in Ancient China] (China University of Political Science and Law Press, 1999).

<sup>174</sup> Lv Simian [吕思勉], *Zhongguo zhidu shi* 中国制度史 [History of Chinese Systems for Governance] (Shanghai Century Publishing, 2005), at 245.

<sup>175</sup> Mencius: *Teng wen gong* II [孟子·滕文公下].

<sup>176</sup> *The Annals of Lü Buwei* [吕氏春秋·先识览·察微篇]

and emotional bonds conceptualized in terms of family relations. The lack of either motivator would make humanitarian expeditions unlikely.

In history, the conception of this ethical bond became untenable near the end of the Warring States period. As states grew estranged from each other after centuries of rivalry, the “humanized” art of war gave way to strategic warlike techniques. Resultantly, the virtues of killing no elders and capturing no children became a laughingstock.<sup>177</sup> Duke Xiang of Song’s refusal to strike the enemy during their river crossing, which led to his defeat and subsequent death, was seen as ridiculous.<sup>178</sup>

Since the Han dynasty, the “familial qualities of Confucianism” came to characterize the Empire’s relationship with other countries.<sup>179</sup> Therefore, the court’s external campaigns were also framed as punitive expeditions.<sup>180</sup> However, while family *ethos* was applied to the tributary states, it was hard to extend simultaneously family *pathos*. Thus, as in the case of the Qing court’s response to the Vietnamese emperor’s request for support, once the court found that the Lê dynasty had lost its Mandate in the face of the rebels, it withheld its support to the Lê emperor, but had no further involvement in the revolts.

In contrast to the localized humanitarian concern in ancient China, the humanitarian sentiments in Europe started to expand after the Enlightenment, which culminated in various humanitarian interventions in the nineteenth century on behalf of distant strangers.<sup>181</sup> One prominent example was the Abolitionist movement aimed at banning the slave trade. In particular, British citizen activists and Christians worked through the Parliament to secure the 1807 *Act for Abolition of the Slave Trade*, which empowered the British navy to seize ships implicated in the slave trade.<sup>182</sup>

#### IV. Conclusion

By the fourth century BCE, the ancient Chinese had developed a theory of Just War. Framed as humanitarian expedition, deposing unworthy rulers was one of its justified causes. The Just War reasoning was reinforced by the political proposition that Heaven delegated the earthly Mandate to the king to care for his subjects. The manifest failure to uphold this Mandate would justify his displacement.

Through a comparative reading, the Chinese Just War doctrine, which incorporated *jus ad bellum* and *jus in bello*, shared striking similarities with its European counterpart. Both doctrines spelled out conditions for waging wars and prescribed the appropriate way of conducting warfare. The Chinese tradition further highlighted that only “ministers of Heaven”, namely, those with superior moral authority, could depose tyrants of another state. Therefore, in practice, interveners who mistreated populations on whose behalf they claimed to raise armies, would prove themselves illegitimate *ex post facto*. It should be noted that this requirement extended to the military personnel involved through ethics of war.

While the Just War doctrine continued to justify religious interventions during the Reformation and the nineteenth century humanitarian interventions against the Ottomans, Just War in China lost its strength against tyranny with the advent of

<sup>177</sup> LIU An [刘安], *Huai nan zi: fan lun xun* [淮南子·泛论训], para 8.

<sup>178</sup> See Lord Xi 22, in Plaks and Nylan, eds., Durrant, Li and Schaberg trans., *supra* note 62, at 357, 359.

<sup>179</sup> Hoffheimer, *supra* note 54 at 253.

<sup>180</sup> LIANG Zhiping, “Explicating Law: A Comparative Perspective of Chinese and Western Legal Culture” (1989) 3 *Columbia Journal of Asian Law* 55 at 76.

<sup>181</sup> ADAM SMITH, *The Theory of Moral Sentiments* (Indianapolis: Liberty Classics, 1982), at 10: Adam Smith defined sympathy as human’s natural inclination for “fellow-feeling with any passion whatsoever”. The “fellow-feeling” was a result of the imagination, especially to put oneself in the place of another.

<sup>182</sup> Act of the British Parliament for the Abolition of the Slave Trade (25 March 1807) in *British and Foreign State Papers (BFSP)*, vol. V (Great Britain. Foreign and Commonwealth Office), at 559–68.

the Qin Empire. To account for this paradigmatic turn, I discussed both structural and normative reasons. Structurally, the monolithic Empire provided no condition for carrying out humanitarian expeditions internally. Meanwhile, the Empire had long maintained a Sino-centric order externally, where tributary states were not positioned to initiate interventions against the Chinese court.

But why did frequent atrocities, amid turf wars during periods of division, not provoke mutual humanitarian expeditions between warlords, and why did the Empire not consider humanitarian expeditions against her neighbours? In response to this question, this paper posited some normative factors, which also accounted for ancient China's growing divergence from principles forming the foundations of modern anti-atrocity laws.

To begin, the Mandate of Heaven supported paternalistic rule, but not "rule by the people". In particular, the core responsibility of rulers was to ensure the livelihood of the majority. But this legitimating standard spoke little, if anything, about respect for those in the minority. Correspondingly, the Chinese notion of "tyrants" was more narrowly understood as those excessively exploiting the masses to further their own private interests.

For this reason, atrocity and identity-based persecution were rather alien concepts, and acts as such were often tolerated by the society. Furthermore, as early as the Han dynasty, the Mandate, which was originally a limit on sovereigns' authority, became an apologetic tool for their power.

Additionally, individuals were embedded within non-egalitarian ethical relations based on gender, age, and social functions. Oppression became normalized when the king could legally order the death of his ministers in order to remedy his wrongs, and parents legally pleaded for the death penalty against their defiant children.

Finally, as the ethical foundation of Just War, the principle of humanity originally arose from the familial kinship among vassal states during the Zhou dynasty. Humanitarian expeditions were thus contemplated among quasi-family-states. However, this narrowly conceptualized principle did not ripen into a broad-based empathy that would motivate humanitarian expeditions across the border. This explains why the Empire occasionally cited Just War to intervene in her tributary states for their violations of *li*, but not for their atrocious deeds.

**Acknowledgements.** The author wishes to thank Christopher SZABLA, Anna DZIEDZIC, Ryan MITCHELL, Sai MA, Gregoire LUNVEN, Evan ROSEVEAR and the anonymous reviewers of the Journal for their comments on earlier drafts.

**Funding statement.** None.

**Competing interests.** The author declares none.



**Ms. Feng Yuxi** is a Ph.D. student at the Faculty of Law, The Chinese University of Hong Kong. She obtained her bachelor's degree in law and her master's in international law from Fudan University. Her research interests include the responsibility to protect doctrine, international legal history and theories, *jus ad bellum*, and international criminal law.

**Cite this article:** FENG Y (2022). Ancient China and the Responsibility to Protect: An Under-Studied Topic of Legal History. *Asian Journal of International Law* 12, 342–369. <https://doi.org/10.1017/S2044251322000054>