

Article

THE LAW AND POLITICS OF A NORM VIOLATION: PUNITIVITY AND THE SINO- VIETNAMESE WAR OF 1979

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Abstract

In the law and politics of *jus ad bellum*, three typical types of justifications for war have existed in the historical record, namely self-defence, preventative war, and punitive war. Since 1945, only self-defence in line with article 51 of the UN charter and UNSC authorized operations are legitimate according to the UN charter. However, as we have seen particularly since the end of the Cold War, punitivity has become an integral part of the justification to go to war with examples such as the 1st or 2nd Gulf War or the Libyan Civil War. This paper will seek to illuminate the importance of understanding the norm violation of punitivity in *jus ad bellum* since 1945 following a prohibition on the use of force. The Sino-Vietnamese war will serve as an example of one of the most overtly punitive wars from 1945-1991 which was met with little blowback from the international community, thus begging the question: how strong is the norm against punitivity in the law and politics of *jus ad bellum*, and what structural foci enable the continued integration of punitivity in war?

Introduction

In contemporary warfare following the institutionalisation of the prohibition on the use of force in 1945,¹ justifications of military campaigns by state actors must be thoughtfully legitimized with care taken as to the perceived lawfulness of the campaign by the international community and at the domestic level. Consequently, perceived notions of a right for a state to use force (*jus ad bellum*) in regards to article 51 of the UN Charter are often established due to diverse interpretations of the article on self-defence.² This article is based on a principle of the sovereign equality of states, which emphasizes the lack of a recognized hierarchy of states. Before such a period of prohibition on the use of force, an inconsistent tradition of legitimisation of warfare on the basis of motivations like revenge or compensation thrived on conceptual justifications like reprisals or the principle of hot pursuit in warfare as a

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¹ Article 2(4) of the UN Charter.

² This interpretation is effectually a defence in many cases from accusations of the crime of aggression as expressed in the UN Charter.

valid source of international normative behaviour.³ But how is punitivity in war different from other wars, and how has it changed since 1945? How have punitive wars been articulated and accepted in practice both domestically and internationally, in keeping with aforementioned systematizations of international peace and security supposedly upheld by the UN charter? These key conceptual questions will be attempted to be answered with particular respect attributed to both international political norms and overarching norms of international humanitarian law (IHL) such as the principles of limitation, proportionality, and necessity.⁴ In addition, rhetoric contained in justifications will be sought in relation to the criminalisation and vilification of the actor to be punished as this attribution often strengthens the claim to punitive war upon such an actor.⁵ Punitivity in warfare has little to no place in modern international legal institutions (ILIs) and yet punitive acts of war could be argued to be an integral part of warfare.⁶ This disparity will be analysed with an underlying assertion that punitive responses to norm violations can be a remarkably powerful justification for war depending on the wider immediate political context.

As a case study, the Sino-Vietnamese War of 1979⁷ will be instrumental in portraying the law and politics of punitive warfare, and it will help illuminate the framework by which some more contemporary punitive wars like the first and second Gulf Wars were justified. By these merits, the Sino-Vietnamese War will constitute the majority of this essay as it serves as a unique punitive expedition by The People's Republic of China (PRC, but will be largely referred to as China hereafter) in the midst of the late 70's, which is important both in its context in the Cold War and within the dry spell of explicitly punitive warfare in both literature and empirical examples from 1945-1991.

The first section of this note will introduce the three frameworks of just cause for going to war, which are often framed as being self-defence, preventive war, and punitive war.⁸ Particular attention will be paid to the nuances of the most important framing of just cause for war in our study, namely punitive war. The second section will focus on the contextualisation of the Sino-Vietnamese War of 1979 with a historical narrative, focusing on a broader contextualisation in the Cold War which helps to illuminate the political and legal setting of the day. The third section will establish that the Chinese incursion of the Socialist Republic of Vietnam (SRV but will be hereafter addressed as Vietnam) was a systematic abuse of Chinese hegemonic power, used symbolically to denote superiority and influence. This war serves as an example of a punitive war that does not effectively prove to be lawful under the prohibition on the use of force and the principle of self-defence as expressed in the UN Charter, as well as through the established principles of proportionality and necessity in according to established *jus ad bellum*.

³ S. Neff, *War and the Law of Nations*, Cambridge: Cambridge University Press 2006, pp. 246-249.

⁴ See R. Kolb, *Advanced Introduction to International Humanitarian Law*, Northampton: Edward Elgar Publications 2014, pp. 80-83.

⁵ See P. Liberman, 'An Eye for an Eye: Public Support for War Against Evildoers', *International Organization* 2006-3, p. 690.

⁶ A.F. Lang Jr., 'Just War as Political Theory: Intention, Cause and Authority', *Political Theory* 2016-2, p. 296.

⁷ Also referred to as the Third Indo-China war but will be referred to primarily in this work as the Sino-Vietnamese War of 1979.

⁸ R. Kaplan, 'Punitive Warfare, Counterterrorism and Jus Ad Bellum', in *The Routledge Handbook of Ethics and War*, eds. F. Allhoff, N. G. Evans, & A. Henschke, Abingdon: Routledge 2013, p. 236.

The primary sections are integral to the fourth and fifth sections. These sections will focus on the normative climate of punitivity in war, which will be looked at on two fronts regarding the Sino-Vietnamese War of 1979: first, the claim to a norm violation of Vietnam by China will be assessed, looking at both the rules of the game and the players involved. Second, the impact of China's incursion and respective responses will be of great significance to this paper, namely to both identify and analyse the precepts of punitivity in war and its relationship with the concept of justifiable *jus ad bellum*.

The larger and more critical question that is vital to this paper will be addressed in the final section. This question is as follows: is the degree of acceptable violation of a norm against punitive action in international politics dominated by the normative foundations of the contextual international political climate or by the global collective security structure, namely Chapter VII of the Charter and the UN Security Council? This question will be explored considering the legality, justification by China, and the reception and initial responses of other states and organisations to the Sino-Vietnamese War of 1979.

I. Jus ad bellum and Normative Violations: Self-defence and Preventive War (Defensive War)

In warfare, three premises of just cause⁹ serve as justifications for going to war as a claim according to *jus ad bellum*. These premises are based on a claim to self-defence, a claim to preventive action, and a claim to punitive action.¹⁰ The degree of legitimacy and authority of states to justify going to war has fluctuated immensely in recent history, resulting in very fluid foundations of *jus ad bellum*.¹¹ We argue that it is important to briefly articulate the underlying principles of both war in self-defence and preventive war; likewise, such fundamental justifications for going to war along with punitive war have been often subject to conflation and blurring between each other in practice by states, making the issue of a fluid *jus ad bellum* even more problematic. Since 1945, the UN Charter had imposed a prohibition on the use of force against a state unless it is with that state's consent, it is in self-defence according to article 51, or such action has been authorized by the UNSC according to Chapter VII.¹² The prohibition on the use of force is also strengthened by the UN General Assembly's definition of aggression of 1974, which emphasizes that the "first use of armed force," including invasion, bombardment of armed forces, blockades *et al.* qualify as aggression and are not condoned for any reason whatsoever.¹³

Of the three justifications for war, a claim to self-defence is the strongest of the three; it is the only justification for war that is codified in the UN Charter, and is often merged together with

⁹ A state's justification to resort to force.

¹⁰ See Kaplan, 'Punitive Warfare', p. 236.

¹¹ S.D. Murphy, 'Protean Jus Ad Bellum', *Berkeley Journal of International Law* 2009-1, pp. 22-23; See S.R. Ratner, 'Jus Ad Bellum and Jus In Bello Since 9/11', *The American Journal of International Law* 2002-4, pp. 905ff.

¹² Besides the UN Charter, see M. Hakimi, 'To Condone or Condemn? Regional Enforcement Actions in the Absence of Security Council Authorization', Working Paper no. 198 (Cardozo Legal Studies, 2007), *Vanderbilt Journal of Transnational Law*, p. 645.

¹³ United Nations General Assembly, Resolution 3314, 'Definition of Aggression', art. 2-3, 14 December 1974, at:<http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/739/16/IMG/NR073916.pdf?OpenElement> (accessed on 13 Jan 2016).

the other two justifications in order to strengthen a claim to the use of force.¹⁴ Self-defence as a justification for *jus ad bellum* is a just cause argument that has fully penetrated international politics and international law as an established norm.¹⁵ Self-defence can be broadly summarized as a right to defend oneself from an armed attack of other actors which was rooted in a medieval right to self-preservation of the individual.¹⁶ This right had been reflected in both referring to individual self-defence and self-defence of a legally recognized authority like a state.¹⁷ Throughout history, the right to self-defence is by far the most pronounced right to use force for a sovereign; it has been codified in Roman law,¹⁸ the teachings of Aquinas,¹⁹ Legano,²⁰ Grotius,²¹ and many other sources influential to international politics and international law. In modern politics, self-defence is a norm of *jus ad bellum* that has been articulated through the vernacular of sovereignty and statehood, whereby a state claims a right to go to war in an effort to cut short an aggressive attack by another actor and ultimately preserve its own existence with immediate recourse to arms.

Preventive war, also known as defensive war in some cases, is the assertion of a right to go to war on the basis of a claim to a perceived future threat to a state.²² The parameters of preventive war and its perceived degree of legitimacy in international politics and international law has been divisive throughout the history of just war theory and in contemporary warfare.²³ The preventive war argument is not strictly imminent in nature; in other words, a preventive war is claimed often without necessarily an immediate threat to the claimant state. Preventive justifications for war occurred at the outbreak of WWI by Germany, during the Seven Years' War, and when Japan attacked Pearl Harbour.²⁴

II. Punitivity and the Law of Punitive Warfare

Kaplan offers a succinct definition of punitive warfare, stating that it is typically when a state “responds to past acts of aggression or ‘wrongdoing’,” which can include reprisals, targeted killings, punitive interventions, or punitive war.²⁵ However, as expressed above, after 1945, only warfare on the basis of a claim to self-defence and most recently humanitarian intervention through action mandated by UNSC Chapter VII resolutions has resulted in a legal paradigm that has irrevocably blurred the distinctions between justifications of warfare.

¹⁴ See Kaplan, ‘Punitive Warfare’, p. 236; C. O’Driscoll, ‘Re-negotiating the Just War: The Invasion of Iraq and Punitive War’, *Cambridge Review of International Affairs* 2006-3, pp. 405-406.

¹⁵ Murphy, ‘Protean Jus Ad Bellum’, p. 22; D. Kretzmer, ‘The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum’, *The European Journal of International Law* 2013-1, pp. 238-240.

¹⁶ Neff, *War and*, p. 127.

¹⁷ *Idem*, p. 60.

¹⁸ J. von Elbe, ‘The Evolution of the Concept of Just War in International Law’, *The American Journal of International Law* 1939-4, p. 673.

¹⁹ T. Aquinas, *Summa Theologiae II, II*: 40.1.

²⁰ J. Legnano, *Tractatus de Bello, de Represaliis et de Duello*, eds. J.L. Brierly, T.E. Holland, Washington: Carnegie Institute 1917, p. 308.

²¹ H. Grotius, *On the Law of War and Peace*, at: <http://www.encyclopaedia.com/ebooks/29/16.pdf> (accessed on 8 Jan 2016), p. 28, 30.

²² See J.S. Levy, ‘Declining Power and the Preventive Motivation for War’, *World Politics* 1987-1, pp. 82-83.

²³ See *Idem*, pp. 30-31; Neff, *War and*, p. 128; J. McMahan, ‘Just cause for war’, *Ethics and International Affairs* 2005-3, pp. 14-15.

²⁴ Levy, ‘Declining Power’, p. 85, 89, 90, footnote 17.

²⁵ Kaplan, ‘Punitive Warfare’, p. 236.

This has left the differentiation between self-defence and punitive action hard to distinguish, particularly with the involvement of a multiplicity of authorities in the international political realm.²⁶ What historical sources justify punitivity in war?

The right to go to war in order to punish has been justified by many legal and political scholars before 1945 in just war theory. For example, in the Middle Ages, war was seen as an indirect punishment from God through sovereigns who represented the word of God.²⁷ Grotius wrote that those who exact suffering upon others deserve a proportional amount of suffering in return.²⁸ Aquinas, just like Augustine before him, openly supported punitive war in the name of God in order to punish for the sake of the common good.²⁹

The years from 1945-1991, the period integral to this paper, has seen little attention paid to the violation of a norm against punitivity in international politics. In the 20th century, punitive war was a waning norm in international law and politics. Due to challenges such as the rise of international legal institutions (ILIs) to adjudicate conflict between states, the notion that states have a right to exact punishment against a sovereign peer (another state) had become less digestible in international politics.³⁰ This had resulted in a dwindling norm of punitive war in the 20th century, not to mention the authoritative principle of international peace and security promoted by the UN Charter since 1945. This principle was instrumental in institutionalising collective security as a paradigm of global security through the authority of the UNSC. Punitive actions in warfare since 1945 have seldom been openly touted as exclusively punitive by the state actor, which correlates with the downfall of reprisals as an international norm and the prohibition on the use of force except for self-defence.³¹

Nevertheless, select scholars have critically deliberated on punitive just cause and norm violations from 1945-1991 and beyond. Blum, in her article titled “The Crime and Punishment of States”, critically assesses the notions of punishment in international politics, concluding that, following the institutionalisation of the UN and the imposing drive for peace and security, there has been a change in “the language of ‘guilt’ and ‘punishment’ to the language of ‘threat’ and ‘prevention’,” thereby masking punitive warfare in a shroud of institutionalized legitimacy.³² Blum articulates that the post-WWII era ushered in a sweeping charter of the UN that left unilateral use of force by states such as armed reprisals and other forms of blatant punitive force out of the picture.³³ Walzer’s book grapples with —among a plethora of other manifestations of war— the problem that punishment in war has not been properly institutionalized despite its prevalence as a reoccurring just cause argument in *jus ad bellum*, and that the only consensus is that punishment should be utilitarian and not

²⁶ Idem, p. 237; Kretzmer, ‘The Inherent Right’, p. 256.

²⁷ Von Elbe, ‘The Evolution’, p. 668.

²⁸ Grotius, *On the Law*, p. 98.

²⁹ Aquinas, *Summa Theologiae, II, II*: 40.1.

³⁰ Kaplan, ‘Punitive Warfare’, 237; also see V. Tadros, ‘Punitive War’, Legal Studies Research Paper No. 3, University of Warwick 2010, p. 12.

³¹ See O’Driscoll, ‘Re-negotiating the Just War’, p. 405. Gardam articulates that reprisals are nearly unanimously considered to be illegal in *jus ad bellum* since the Charter era, see J. Gardam, *Necessity, Proportionality, and the Use of Force by States*, Cambridge: Cambridge University Press 2004, p. 49.

³² G. Blum, ‘The Crime and Punishment of States’, *The Yale Journal of International Law* 2013-1, p. 60.

³³ Idem, pp. 68-72.

retributive.³⁴ On the other hand, scholars like Murphy and Husak seek to defend retributivism as a model of punitive force since 1945.³⁵

On contemporary war, there is little scholarship that supports punitive warfare *per se*.³⁶ Regardless, the thematic framework of punitivity is at least twofold: (a) punitivity has been justified as a retributive model for the equalisation of suffering, while (b) a more utilitarian aim in punitivity seeks to restore international society by punishing a non-conformer until obligations are met once again, thereby deterring non-conformity.³⁷ Yamauchi justly argues that both of these justifications for punishment arise out of an assumed perceived prerogative to law enforcement due the violation of an international norm of some sort.³⁸ The norm of punitivity, however, has changed greatly since the early Middle Ages, and law enforcement as such is nowadays strictly limited to multilateral bodies rather than to traditional applications through unilateral force.

Nevertheless, although the norm of punitive war was waning, punitivity in warfare still took place regularly in the 20th century and thrived at the turn of the 21st. In the 20th century, the theory of indiscriminate war that rose to prominence in the late 19th century held that war was permissible for any reason as long as international laws were not broken; this included the right to punish for norm violations.³⁹ Some examples demonstrating this model include the USA taking punitive measures against Pancho Villa and his men in an infamous retributive expedition into Mexico in 1916-1917. Seemingly a war act, the United States destroyed half of Iran's navy in response to Iran damaging USS Samuel B. Roberts, resulting in Iran filing a suit against the United States in 1992 at the International Court of Justice. Although the initial legitimate claim to self-defence between actors is hard to pinpoint,⁴⁰ the ICJ concluded that the actions of the United States were completely unjustified, but that nothing could be done to uphold either Iran's claims to reparation or United States' claims to self-defence.⁴¹

Finally, the first Gulf War certainly had strong punitive elements surrounding the West's vilification of Saddam following his invasion of Kuwait.⁴² As Saddam had reportedly broken a number of international *jus cogens* norms—norms that no state may deviate from—like war crimes, the prohibition on aggression, and use of chemical and biological weapons, the Gulf

³⁴ Walzer notably considers the Korean War from the point of view of America as law enforcement against aggression, giving it a punitive undertone. In any event, see M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations, fourth edition*, New York: Basic Books 2006, pp. 58-62, 116-117; also, Tadros argues against retributivism, Tadros, 'Punitive War', pp. 3ff. See the following paragraph in this paper for a concise definition on utilitarian and retributive models for punitivity.

³⁵ J.G. Murphy, 'Legal moralism and retribution revisited', *Criminal Law and Philosophy* 2007-1, pp. 6ff; D. Husak, 'Retributivism *In Extremis*', *Law and Philosophy* 2013-32, pp. 3ff.

³⁶ O'Driscoll, 'Re-negotiating the Just War', p. 405. At least part of this has to do with the fact that punishment will always be an interpretative model for action considering its subjectivity seconded by the punish-punished dichotomy it proposes that is now very controversial in our system of states that proposes a principle of sovereign equality, that no state is above the other in international affairs.

³⁷ See Grotius, *On the Law*, p. 98; McMahan, 'Just cause for war', p. 11; Tadros, 'Punitive War', pp. 3-4; Liberman, 'An Eye for an Eye', p. 690.

³⁸ S. Yamauchi, 'New Just War Theory of the 20th Century: The Rebirth of Grotius and the United States', *Hitotsubashi Journal of Law and Politics* 2008-36, p. 1.

³⁹ Yamauchi, 'New Just War Theory', p. 12; Von Elbe, 'The Evolution', p. 684.

⁴⁰ G. Gordon, 'The Oil Platforms Opinion: The Elephant in the Eye of a Needle', *Amsterdam Law Forum* 2009-2, pp. 132-133.

⁴¹ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I.C.J. Reports 2003, p. 161, para. 125.

⁴² Liberman, 'An Eye for an Eye', p. 697.

War was portrayed by many as a punitive expedition to restore international order in the Middle East. Iraq was forced, under the newly established United Nations Compensation Committee, to recognize retroactive wrongdoings to be repaid to foreign states and persons, while most of the effects of such conditions were felt by the general population rather than the Saddam regime.⁴³ The war went hand in hand with UNSC Resolution 687 calling for a stop to all international normative violations aforementioned, the most crucial being the restoration of territorial integrity of Kuwait.⁴⁴ Intervention was a means to both liberate those who have felt the oppression of the Iraqi state and to punish Saddam and his regime for its international crimes, ending in an ultimatum to destroy chemical weapons and respect territorial integrity among other requirements. But in reality, the bigger question was: how would the United States portray its first war in a unipolar world system as a natural leader of international political norms?

The underlying assumption of punitive warfare is that state A—or the community at large—has been violated in some way by state B, and state A takes responsive measures including the use of force. It is sometimes held by supporters that this violation must be held accountable; otherwise, the organisational framework of state sovereignty and the upholding of international norms will suffer. However, the framework of punitive warfare is not clear amid the international collective security schema of the UN Security Council considering the overlap in their thematic structure of justification. Thus, many factors must be taken into account such as just war theory, contemporary justifications for war, punishment in IHL, and international legal-political norms which are all but consistent with each other. These four modes of normative foundational logic push and pull actors in the international politics to behave in certain ways according to justifications seen as legitimate in particular circumstances in the absence of a truly universal and codified normative formation of punitivity.

Punitive action has been plagued by differing justifications and motives throughout modern warfare in particular in the wake of competing paradigms of legitimate violence in the 20th century. But ultimately, the current international legal and political normative frameworks of state behaviour is the most powerful paradigm for punitive warfare, and through the example of China's punitive war in Vietnam, this theory will be proven.

III. Norm Violations in the Case of China's Punitive War

Five segments will lead the analysis below, namely: (a) a contextual overview of the Sino-Vietnamese War of 1979, (b) an argument that China's war in Vietnam was illegal according to the UN Charter among other sources, (c) an introduction to norm violations in international politics and China's claim to punitive war, and subsequently that (d) China violated a number of norms of international politics by invading Vietnam but that little was done in response to China. The concluding section(s) will articulate the fact that the norm of punitivity had never left international politics from 1945-1991 but that it has been re-established through both state interest and the structural failures of the UNSC. This has left the legal *jus ad bellum* as nothing more but an instrumental whitewashing of justifications to use force according to the UN Charter.

⁴³ Blum, 'The Crime and Punishment', p. 102.

⁴⁴ United Nations Security Council, Resolution 687, 3 April 1991, at: <http://www.un.org/Depts/unmovic/documents/687.pdf> (accessed 12 Jan 2016).

III.1 Operational Overview of the Sino-Vietnamese Conflict of 1979

An overview of the Sino-Vietnamese conflict of 1979 must be expressed as a separate section. The reasoning behind this is twofold: this section both introduces the conflict itself and the contextual political climate of the timeframe. Both are integral to punitivity and the role of contextual politics on *jus ad bellum* and respective responses by key players.

The operations in the context of the Sino-Vietnamese War of 1979 took place in a month, spanning from 17 February 1979 and culminating with the end of the Chinese withdrawal by 17 March 1979.⁴⁵ More than 400,000 Chinese People's Liberation Army (PLA) soldiers invaded the border of Vietnam on February 17.⁴⁶ Only ground forces were used by the PLA.⁴⁷ This act of war marked the first time a communist state invaded another without either alleged permission from its people or an ideological justification.⁴⁸ China's military objectives were specifically to take the border cities of Lang Son and Cao Bang in Vietnam and then retreat.⁴⁹ Stating that the PLA had trouble achieving these objectives would be a misleading euphemism. However, the Vietnamese were completely caught off guard by the invasion.⁵⁰ Cao Bang had almost no troops to defend itself, and was taken hastily.⁵¹ However, the Vietnamese used guerrilla tactics—such as smaller battalions and tactical advantages of the terrain—to ultimately frustrate PLA forces. The use of tunnels, trenches, and other means to confuse and bog down the Chinese offensive helped the Vietnamese cause.⁵² Lang Son became the point of interest of the war in the latter half, leading to its fall by 3 March. On 5 March, China announced its preliminary withdrawal from Vietnam, while on the same day Vietnam ironically called for a “nationwide general mobilization” to assist in the war effort.⁵³ The punitive war abruptly ended on March 17 with the conclusion of the Chinese withdrawal.

Although the PLA had the element of surprise, strength in numbers, and a tactical advantage as Vietnam was distracted by their war in Cambodia, the Vietnamese ended up being the side credited with both the material and psychological victory.⁵⁴ This assumption begs the question: what was the goal of the war in the first place? This question will be addressed through the context of the 1979 war within the Cold War. This lens will help us focus analysis

⁴⁵ K.C. Chen, *China's War with Vietnam, 1979: Issues, Decisions, and Implications*, Stanford: Hoover Institution Press 1987, p. 105. Not specifically addressed in this paper, violence also took place in subsequent years around the Sino-Vietnamese border, namely in 1981 and 1984, see E.C. O'Dowd, *Chinese Military Strategy in the Third Indochina War: The last Maoist war*, London: Routledge 2007, p. 4.

⁴⁶ O'Dowd, *Chinese Military*, p. 3; see Chen for a detailed account of China's military capabilities, Chen, *China's War*, pp. 102-103.

⁴⁷ K.C. Chen, 'China's War against Vietnam 1979: A Military Analysis', Occasional Papers/Reprint Series in *Contemporary Asian Studies* 1983-5, p. 8.

⁴⁸ H.W. Jencks, 'China's "Punitive" War on Vietnam: A Military Assessment', *Asian Survey* 1979-8, p. 801.

⁴⁹ X. Zhang, 'China's 1979 War with Vietnam: A Reassessment', *The China Quarterly* 2005-184, p. 860; see also Jencks, 'China's "Punitive" War', pp. 803-804 on the motivation for the timing of the war by China.

⁵⁰ Idem, p. 863.

⁵¹ Ibid.

⁵² Chen, *China's War*, p. 107.

⁵³ Idem, p. 111; O'Dowd, *Chinese Military*, p. 58.

⁵⁴ Idem, p. 866; Jencks, 'China's "Punitive" War', p. 814; O'Dowd, *Chinese Military*, p. 4.

on the punitive nature of the war when looking at China's manipulative psychological reasoning for going to war.

The broader thematic basis for contextualisation of the Sino-Vietnamese conflict of 1979 is ultimately the Cold War. China's apparent border war with Vietnam, instigated in 1977 by skirmishes across the Sino-Vietnamese border,⁵⁵ was not the true motivation for invasion. Through a contextual lens of the Cold War, a number of underlying justifications and realistic motivations have been expressed in the literature explaining China's incursion of 1979. Let this be clear: these alternative claims to China's motivation for the war are important to contextualize for the main argument of this note, precisely that the international legal and political framework reigns supreme when figuring the possibility of norm violations without repercussions when considering punitive warfare.

III.2 Contextualisation of Punitivity in Cold War Asia

For decades leading up to the Sino-Vietnamese War, Vietnam and China had been mutually revered allies. Since the successes of the PRC in 1949 and the ensuing Sino-Soviet Agreement, it had become the duty of China to assist the new Vietnamese communist regime.⁵⁶ During the first two Indo-China wars, China was benevolent in its support, first against the French from 1945-1954 and then against the southern Vietnamese government backed by the Americans from the late 50's until 1975. Since 1945 and leading up to 1979, China had given approximately 20 billion USD in aid to Vietnam.⁵⁷ In 1975 alone, China donated 200 million USD in foreign aid.⁵⁸ By this year, the Vietnam War was lost. In the same year of the Sino-Vietnamese War, a new proxy war in Afghanistan was about to unfold that would result in insurmountable tragedy and great scourge.

Authors give a number of important factors that inevitably played into China's willingness to pursue punitive use of force against Vietnam. Although China was not willing to admit it, part of the reason the state used force was in order to weaken growing Vietnamese military capacity and to ultimately serve as a paternalistic figure in foreign policy to both Cambodia and Vietnam.⁵⁹ China was attempting to prove a more reliable Asian ally than The Union of Soviet Socialist Republics (USSR) in the wake of Vietnam's USSR backed invasion of Cambodia on 25 December 1978.⁶⁰ China had recently shifted its diplomatic attitude towards the United States, which was regarded as a *de facto* alliance even during the Vietnam War.⁶¹ Regarding Cambodia, China had been an ally of the Khmer Rouge regime, and

⁵⁵ Jencks, 'China's "Punitive" War', p. 802.

⁵⁶ M. Olsen, *Soviet-Vietnam relations and the Role of China, 1949-1964: Changing Alliances*, London: Routledge 2006, pp. 13ff.

⁵⁷ X. Zhang, 'Deng Xiaoping and China's Decision to go to War with Vietnam', *Journal of Cold War Studies* 2010-3, p. 11. Zhang admits that this statistic is from Beijing and that the method of achieving this number is not clear, see footnote 38 of the aforementioned page.

⁵⁸ O'Dowd, *Chinese Military*, p. 35.

⁵⁹ For sources on Chinese paternalism with Vietnam, see Zhang, 'Deng Xiaoping', p. 12; O'Dowd, *Chinese Military*, pp. 89ff; K.C. Chen, *China's War*, pp. 2-3.

⁶⁰ The flourishing relationship between the Soviets and Vietnam will not be able to be discussed in this paper extensively despite its relevance to the conflict at hand. For resources on the matter in relation to the Sino-Vietnamese War of 1979, see O'Dowd, *Chinese Military*, p. 3, 6, pp. 33-39; Zhang, 'Deng Xiaoping', pp. 3-4; Chen, *China's War*, pp. 22ff.

⁶¹ P. Vámos, "'Only a Handshake but no Embrace': Sino-Soviet Normalization in the 1980s", in *China Learns From the Soviet Union: 1949-Present*, eds. T.P. Bernstein & H. Li, Lanham: Lexington Books

wished to ultimately drive out Vietnamese insurgency from Cambodia by diverting Hanoi's defences through a punitive expedition of sorts.⁶²

But how was a war based on a claimed "self-defence counterattack"⁶³ of border forces not met with international scrutiny and a Security Council resolution? How can a state reportedly act unilaterally on wishes to "teach Vietnam a lesson", and that "a slap in the face of [Vietnam] to warn and punish them" was needed?⁶⁴ How was China not reprimanded for its assertion that Vietnam should "face the consequences"?⁶⁵ Most importantly, how did this conflict not accumulate widespread international condemnation considering a violation of the inherent right to territorial sovereignty and the prohibition on the use of force? Such an invasion today would most likely spark a multilateral or at least unilateral political response, especially considering China's expansionist geopolitical behaviour as of late.

During the Cold War, this was not the case, and this is partly due to the veto powers vested in the P-5 of the UNSC, namely the USSR and China. Both powers had contesting interests in hegemonic influence over states across Asia, and China certainly felt the heat of a boisterous Vietnam, newly aligned with the USSR. Secondly, while punitive war was in effect prohibited by the UN Charter, the "crime of aggression" along with other terminology like "a threat to the peace" had been remarkably ambiguous, leaving the UNSC with substantial flexibility in their interpretation and application.⁶⁶ Considering the Vietnamese invasion of Cambodia and the subsequent invasion of Vietnam by China, little was done to mitigate conflict following the political fallout of a disastrous American proxy war in Vietnam.

The Vietnamese invasion of Cambodia was met with fervent opposition from the UNSC, but the USSR and Czechoslovakia managed to ensure nothing was done about it at the time.⁶⁷ The Sino-Vietnamese conflict and the situation of Southeast Asia on the whole was "irreconcilably divided" after 5 days of meetings from 23-28 February, and both China and the Soviets attempted to pass draft resolutions but to no avail.⁶⁸ Yet, the period from 1945 until the end of the Cold War was one marked with adamant adherence to state territoriality, and examples like Vietnam's intervention in Cambodia and Tanzania's intervention in Uganda received considerable disapproval from the international community, demonstrating a norm against the breaching of a state's sovereignty no matter what the justifications by the

2010, p. 80; K.C. Chen, *China's War*, p. 19, pp. 107-108. Chen articulates that the United States was very clear in its statement on the invasion of Vietnam. While remaining neutral, a statement was released, whereby the United States called "immediate Withdrawal of Vietnamese troops from Cambodia and Chinese troops from Vietnam." Furthermore, the "Chinese invasion of Vietnam was preceded by the Vietnamese invasion of Kampuchea." Evidently, the United States at this point in time with an alliance with China but was hesitant to proceed with support to the Chinese side of the conflicts after lessons learned from direct involvement in Vietnam. See also Zhang, 'Deng Xiaoping', pp. 10-11.

⁶² Many authors attribute both punishment and a possible Vietnamese retreat from Cambodia as the prime motivations for China to use aggressive force, see O'Dowd, *Chinese Military*, pp. 33-34; Zhang, 'Deng Xiaoping', p. 8, 12, 19; Zhang, 'China's 1979 War', p. 853; Vámos, "Only a Handshake", p. 82.

⁶³ See, for example, Zhang, 'Deng Xiaoping', p. 7; Zhang, 'China's 1979 War', p. 860. Such sources attest to direct quotation from the Chinese administration.

⁶⁴ *Idem*, p. 12, 28.

⁶⁵ W.J. Duiker, *China and Vietnam: The Roots of Conflict*, Berkeley: Institute of East Asian Studies, University of California 1986, p. 83.

⁶⁶ Blum, 'The Crime and Punishment', pp. 69-70.

⁶⁷ B. Frederking, *The United States and the Security Council: Collective security since the cold war*, London: Routledge 2007, p. 30.

⁶⁸ Chen, *China's War*, pp. 111-112.

intervening state.⁶⁹ Before critically articulating a definition the violation of an international norm and the repercussions or lack thereof, it will be important to show that China did in fact breach *jus ad bellum* leading up to and including 1979. This will both contextualize the legality of the attack and introduce the conflation of law and politics in the violation of a norm before the subsequent section that will specifically address norm violations in international political behaviour.

III.3 *Jus ad bellum* and the Lawfulness of China's "counterattack"

China's attempt at an argument for just war in 1979 was not convincing. To help justify the war, it was argued as a self-defensive counteroffensive,⁷⁰ or a self-defence counterattack.⁷¹ In light of skirmishes along the Sino-Vietnamese border from 1976 onward, China took a stance against the aggressive nature of Vietnam's expansionism, with the Vietnamese invasion of Cambodia as a turning point in China's outlook on its foreign policy decision making. But was it lawful, and consequently, within the normative framework of state behaviour? At least three considerations are of utmost relevance to the question of lawful *jus ad bellum*: the prohibition on the use of force in article 2(4) of the UN Charter, the interpretation of an "armed attack" in article 51 of the UN Charter and its limits as of 1979, and important universal principles of IHL such as proportionality and necessity that are relevant to *jus ad bellum*.⁷²

First, let's consider article 2(4). Article 2(4) of the UN charter is considered to be integral to the makeup of the entire post-WWII international framework of states. It reads, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."⁷³ But what is use of force? We know that the gravest use of force is spelled out in the 1974 definition of aggression, namely being the violation of the territorial integrity of a state by another state.⁷⁴ The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations of 1970 looked to elaborate on crucial articles of the UN Charter like 2(4), but failed to express what the use of force really entails.⁷⁵ Rather, with commentary from the *Nicaragua* case,⁷⁶ we can assess from the Declaration that the gravest form of use of force is a war of aggression, while the least grave

⁶⁹ Frederking, *The United States*, p. 131.

⁷⁰ Chen, *China's War*, p. 96.

⁷¹ *Op. cit.* footnote 60.

⁷² Kolb, *Advanced Introduction*, p. 89.

⁷³ This article is deemed to be customary international law, see *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Merits, 1986, ICJ Rep. 14 (Judgment of June 27), para. 172ff.

⁷⁴ UN General Assembly, "Definition of Aggression," art. 1.

⁷⁵ This document did not elaborate extensively on the parameters of the use of force in international relations, but did help to illuminate that the threat or the use of force by violating the territorial integrity of a state is ultimately at the heart of the prohibition on the use of force. UNGA res. 2625, "The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations," article 1, 24 October 1970, at: <http://www.undocuments.net/a25r2625.htm> (accessed 24 Jan 2016).

⁷⁶ Although this case took place after the events of the Sino-Vietnamese war of 1979 had transpired, it is a crucial source for international legal theorists on the use of force and *jus ad bellum*. Considering this, we have included such deliberations in this paper as they represent a relatively recent adjudication and are helpful to deliberations on such a topic.

use of force can be secondary acts such as the assisting of armed groups or the support of terrorist acts by a state.⁷⁷

China certainly used force, and it was in violation of article 2(4) despite a number of prior skirmishes with Vietnam. Authors like Greenwood duly express that only two exceptions exist to the prohibition on the use of force through article 2(4): UNSC authorised military action, and a claim to a right to self-defence through article 51.⁷⁸ UNSC military action certainly did not occur in this instance, so this leads us to the definition of an “armed attack” and the lawful responses to it, bringing us yet again to the *Nicaragua* case. Article 51 specifies that the inherent right to individual or collective self-defence exists if an “armed attack” is waged against a state. Did Vietnam engage in such an attack, and did that entitle China to wage a war in the name of self-defence? The answer to both of these questions is no. As border clashes were ever-increasing, attacks came from both sides and were small in scale.⁷⁹ The PLA invasion of Vietnam was not a border clash, and was not in response to one. The ICJ’s definition of an “armed attack” is when regular armed forces breach the territorial integrity of another state, whereas mere frontier incidents do not constitute an armed attack, no matter their rate of occurrence.⁸⁰ According to this evidence, China’s only right to self-defence is nullified.

Even if the response by China were to be legitimate on the basis of self-defence, the attack on Vietnam was neither necessary nor proportional. Let us first consider the latter. Proportionality in *jus ad bellum* can refer to both the proportionality of the use of force itself, and the means-end proportionality to which the response by the defending state meets its ends, meaning self-defence.⁸¹ In neither of the frameworks was there proportionality to the border clashes which took place before 17 February 1979. Nor was the invasion necessary. Military necessity is an ambiguous term in *jus ad bellum*,⁸² but it typically refers to the requirement for a resort to violence as being necessary considering the threat perceived by the state claiming a right to just war.⁸³ Military necessity in *jus ad bellum* emphasises that a state must show “a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation”.⁸⁴ China did not seek out bilateral diplomacy or a multilateral solution to the border clashes before the invasion, the state’s attack on Vietnam was premeditated and was not out of self-preservation,⁸⁵ and the final criteria does not apply as China was not in immediate danger of an act of aggression from Vietnam with “no moment for deliberation”.⁸⁶

The Chinese invasion of Vietnam in February of 1979 was certainly illegal according to the treaties and customs of international law as of 1979. The UN Charter was breached

⁷⁷ ‘Declaration on Principles’, art. 1.

⁷⁸ C. Greenwood, ‘Historical Development and Legal Basis’, in *The Handbook of International Humanitarian Law, second edition*, ed. D. Fleck, Oxford: Oxford University Press 2000, p. 1.

⁷⁹ O’Dowd, *Chinese Military*, p. 42.

⁸⁰ See *Nicaragua* case, merits, para. 194-195.

⁸¹ Kretzmer, ‘The Inherent Right’, p. 239.

⁸² Kolb, *Advanced Introduction*, pp. 82-92.

⁸³ Murphy, ‘Protean Jus Ad Bellum’, p. 47.

⁸⁴ See note of US Secretary of State Daniel Webster in the *Caroline Case*, 29 British and Foreign State Papers 1137–1138, 24 April 1841, at: http://avalon.law.yale.edu/19th_century/br-1842d.asp (last accessed 14 July 2016), this source has set a precedent now known as the Caroline test on necessity for anticipatory self-defence, see also Gardam, *Necessity, Proportionality*, p. 149.

⁸⁵ Zhang, ‘China’s 1979 war’, p. 856; Jencks, ‘China’s “Punitive” War’, pp. 802-803.

⁸⁶ See *Caroline* case, supra note 83.

considering article 2(4) and the perceived limits of article 51 in carrying out a legitimate act of self-defence. Not only that, but if the attack were to be legal, the principles of proportionality and military necessity in *jus ad bellum* were not fulfilled. The invasion of Vietnam by China serves to us as an exemplary case: it constitutes an act of aggression at least partly punitive in nature in the Charter era of *jus ad bellum*. Moreover, this case fulfills another criteria that will be analysed, namely the conceptualisation of a norm violation in international politics. The collision of the two frameworks of law and politics is inevitable when studying norm violations; the next section will attempt to make sense of this collision through the analysis of the violation of a norm against punitivity.

III.4 Norm Violations and Punitive War in 1979

Three subsections will help illustrate norm violations through the Sino-Vietnamese war of 1979. The first section will introduce the concept of a norm in international politics and international law and how a state can violate one. Seeking to elaborate on theoretical expressions of norm violations, the claim that China had a right to *jus ad bellum* in response to a norm violation by Vietnam will constitute the second subsection. The third subsection will assess the certain violation of a norm against punitivity carried out by China in 1979.

III.4.1 Norms in International Law and Politics and the Norm Violation

Norms in international politics and international law have certainly found solidification from 1945 onward in both theory and empirical examples in international society.⁸⁷ Finnemore and Sikkink define a norm as “a standard of appropriate behavior for actors with a given identity”.⁸⁸ The relevant actors in the cases of international politics and international law that will be addressed in this paper are states. An institution is a “collection of practices and rules defining appropriate behavior for specific groups of actors in specific situations”.⁸⁹ The normative institution in our area of interest is the institution of *jus ad bellum*, or the right to go to war in international law and politics. Norms within an institution are birthed from a consensus on appropriate behaviour. In the international law and politics of *jus ad bellum*, such unanimities arise from influential sources such as international organisations, government policies and reactions to events and behaviours, international courts, and non-governmental organisations among other actors. Moreover, international law itself is central to the promulgation and dissemination of norms in international society.⁹⁰

But what happens when a state does not conform to a given norm? Similar to individuals in a society, states can be penalised or ostracised for not conforming to norms in a particular institution. This helps ensure the integrity of the norm through incentivising cohesion by hampering the non-conformist state's chance for success in international society.⁹¹

⁸⁷ M. Finnemore & K. Sikkink, ‘International Norm Dynamics and Political Change’, *International Organization* 1998-4, pp. 887-891.

⁸⁸ Idem, p. 891.

⁸⁹ J.G. March & J.P. Olsen, ‘The Institutional Dynamics of International Political Orders’, *International Organization* 1998-4, p. 948.

⁹⁰ C. Reus-Smit, ‘The Politics of International law’, in *The Politics of International Law*, ed. C. Reus-Smit, Cambridge: Cambridge University Press 2004, p. 15.

⁹¹ R.O. Keohane, ‘International Relations and International Law: Two Optics’, *Harvard International Law Journal* 1997-2, p. 491.

Constructivists claim that norms shape identities and consequently, among other things, interests.⁹² However, Shannon rightly asserts that although the violation of a norm is often premeditated and balances the inherent equilibrium of conformity in international society versus a state's perceived national interest, a norm violation is "what states make of them" in many cases.⁹³ This means that norms are fluid, self-imposed, and are subject to change as the aftermath of WWII certainly displayed in international law and politics.⁹⁴

The first critical analysis of the Sino-Vietnamese conflict is the issue of China's claim that Vietnam violated a norm of international behaviour. Ultimately, China sought to use unilateral force in a punitive war seeking to force Vietnam to conform to its interests, and justified its actions on that general basis. It has been proven in the above section that this action was illegal, thus violating legal and debatably political norms of international society which will be taken up following the coming subsection. Nevertheless, China's claim to a norm violation by Vietnam is as necessary an issue as analysing in what way China itself violated norms; a justification by China is crucial in the analysis of how norms affect state behaviour and interests which is at the heart of the final section of this paper.

III.4.2 China's Claim to a Norm Violation by Vietnam

The PRC did not only justify its war against Vietnam in IHL in response to the surface narrative of the border confrontations but also asserted its counterattack as being in response to a norm violation by Vietnam. This norm is ambiguous and generalised to the degree that it is difficult to critique; nevertheless, possible critique stems from such ambiguity.⁹⁵

The evidence is as follows. In the heat of the Cold War, China alleged that Vietnam committed a norm violation. This norm, while difficult to spell out, ostensibly refers to the foreign policy of Vietnam as unacceptable, seen by China as an affront to their relationship and a traitorous act. According to Zhang, "[t]he historical-cultural element, along with national sentiment, induced Chinese leaders to launch a war that would 'teach Vietnam a lesson'".⁹⁶ China's administration expressed that Vietnam *deserved* an incursion; they deserved it for two main reasons: betraying what China considered a fruitful communist alliance that had existed for decades, leaving China behind while seeking out a new powerful ally in the USSR,⁹⁷ and for invading Cambodia as explained previously. Chinese sentiments of superiority helped guide a conviction by the Chinese administration that although China

⁹² Reus-Smit, 'The Politics', pp. 21-23.

⁹³ V.P. Shannon, 'Norms are What States Make of Them: The Political Psychology of Norm Violation', *International Studies Quarterly* 2000-2, p. 294.

⁹⁴ An outline of the stages of crystallization of a norm cannot be covered here; however, for such an analysis see *Idem*, pp. 295-296. The norm of *jus ad bellum* particularly fluctuates, seeing as *jus ad bellum* has gone through major normative changes in international law in, among other years, 1945, 1977, 1986, and 1999/2001 onward. See both Murphy, 'Protean Jus Ad Bellum', and R.D. Sloane, 'The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War', *The Yale Journal of International Law* 2009-34. On a thorough account of the Charter era of international law and *jus ad bellum*, see Sir H. Lauterpacht, 'The Limits of the Operation of the Law of War', *British Yearbook of International Law* 1953-30.

⁹⁵ Chen acknowledges the challenge of misinformation that plagues historians of non-Western capitals, particularly those of communist states, see Chen, *China's War*, p. 69.

⁹⁶ Zhang, 'Deng Xiaoping', p. 27.

⁹⁷ *Ibid.*

should treat other communist states as equals, the PRC has leading role in the governance of national liberation movements.⁹⁸

While the war has been understudied, K.C. Chen's book, *China's War with Vietnam, 1979: Issues, Decisions, and Implications*, is one of the most authoritative sources that appeals directly to the conflict. Chen argues that China claimed a norm violation on multiple fronts, and Deng himself stated on 8 June 1978 that Vietnam had already taken 11 steps against China, while the next step—the invasion of Cambodia by Vietnam—sealed the deal to take action against Vietnam.⁹⁹ While the exact objectives of the “punishment” were ambiguous,¹⁰⁰ it was implied as being a sanction against a norm violation, with a planned space/time frame with limited overall objectives rather than full scale war.¹⁰¹

Due to a lack of public justifications for the claim to a norm violation *per se* by China, evidence available can be interpreted as falling under two normative assumptions. China's self-defence counterattack—*jus ad bellum*—appears to have been justified based on Vietnam's foreign policy, namely (1) collusion with the Soviets and (2) Vietnam's invasion of Cambodia. Do such norms exist in international relations, but more specifically in the era of international affairs following 1945 known as the Cold War?

First, let us address the claim to a norm violation relating to the prior relationship between the Vietnamese and Chinese administrations. Undoubtedly, the Cold War saw many fluctuations in alliances, with China itself emerging as an ally of the United States around 1978, years after the infamous Sino-Soviet Split.¹⁰² Other examples during the Cold War to disprove a norm of fidelity in international relations could be the foreign policies of Somalia, Ethiopia, or Egypt, while many others states (e.g. Yugoslavia) fluctuated between alignment and non-alignment. Not only that, but even if such a norm were to have been cemented in state practice in the Cold War, *jus ad bellum* is certainly not warranted under such circumstances following the prohibition on the use of force under the UN Charter and considering the normative foundations on the right to go to war following 1945. Such a claim would be directly contrary to the premises of the UN's prioritisation of peace and security over the concept of the state's right to employ violence abroad as a continuation or even contingency of policy by alternative means or as a means to retributive justice.¹⁰³ There is the argument that the norm against unilateral use of force has been all but universal since 1945.¹⁰⁴ However, the UN Charter's normative power along with subsequent documents, declarations, and customs of international politics such as the UN General Assembly's Definition of Aggression¹⁰⁵ and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the

⁹⁸ Ibid.

⁹⁹ Chen, *China's War*, p. 85.

¹⁰⁰ Idem, p. 95.

¹⁰¹ Multiple publicised interviews support this claim, see idem, p. 109.

¹⁰² See, for example, S.W. Simon, 'China, Vietnam, and ASEAN: The Politics of Polarization', *Asian Survey* 1979-12, pp. 1173ff.

¹⁰³ This theory is the epitome of war-as-state-policy, see Walzer, *Just and Unjust Wars*, p. 64.

¹⁰⁴ See Blum 2013, supra note 29 and 30.

¹⁰⁵ G.A. Res. 3314, *Definition of Aggression*, 29th sess., 14 December, 1974, at: <http://www.un-documents.net/a29r3314.htm> (accessed Jan 15 2016).

Charter of the United Nations¹⁰⁶ and the customary ban on armed reprisals appear to argue otherwise.¹⁰⁷

The second claim to a norm violation by China was that Vietnam's invasion of Cambodia was an illegal war of aggression, which warranted intervention through a retributive response to Vietnam's attack on the sovereignty of Cambodia's territory. China is correct in asserting that Vietnam did not follow the norm against aggression. However, Vietnam's justification for the war was humanitarian regime change, justified by the atrocities committed by Pol Pot against Vietnamese nationals in Cambodia and across the border into Vietnam preceding Vietnamese mobilisation of forces.¹⁰⁸

History books will conclude that Vietnam committed a grave act of aggression against the territorial integrity of Cambodia while China was equally or more guilty of a norm violation. Armed reprisals have been categorically prohibited since the Charter era.¹⁰⁹ More recently, the culmination of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts¹¹⁰ reveals that countermeasures only involve the directly afflicted party of the original internationally wrongful act, not a third party¹¹¹. Further, the state must comply with articles 50 and 52.¹¹² Article 50 effectively states that even if China were not deprived of its claim to take measures against Vietnam, it would have to refrain from breaching inviolable obligations such as the prohibition on the threat or use of force and other obligations under peremptory norms of international law (i.e. reprisals).¹¹³ Article 52 asserts that, *inter alia*, negotiations must first take place before a state has a right to take countermeasures.¹¹⁴

III.4.3 China's Norm Violation and Responses

Both China's surface narrative of "self-defence counterattack" and its underlying justifications for incursion in Vietnam's territory are not justified when taking into account the law and politics of armed conflict since 1945, considering the law of the use of force, the law of reprisals/countermeasures and respective norms. However, one may argue that numerous breaches of articles such as article 2(4) reflect the lack of existence of a strong norm against

¹⁰⁶ 'Declaration on Principles'.

¹⁰⁷ On the universal custom against armed reprisals, see UNSC res. 188, *Complaint by Yemen*, 5650th sess., 9 April 1964, at: [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/188\(1964\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/188(1964)) (accessed Jan 15 2016). This resolution states that the UNSC is adamant in "condemning reprisals as incompatible with the purposes and principles of the United Nations."

¹⁰⁸ At the time, this principle was still developing, namely the contrast between the legal argument for human rights on the one hand and the respect for the territorial integrity of the state on the other, but for an outline on international legal justifications for humanitarian intervention, see T.M. Frank & N.S. Rodley, 'After Bangladesh: The Law of Humanitarian Intervention by Military Force', *Amsterdam Journal of International Law* 1973-2.

¹⁰⁹ See Gardam 2004 and O'Driscoll 2003, supra note 28.

¹¹⁰ Draft articles on responsibility of states for internationally wrongful acts, 2001, at: http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf (accessed 15 Jan 2016). While this document was issued in 2001 (21 years before the Sino-Vietnamese conflict), it stands as a strong testament as the culmination of the strong development of research on customary and codified state responsibility since research for the project began over 40 years before the issuing of the document.

¹¹¹ *Idem*, p. 130.

¹¹² *Idem*, art. 52, p. 135.

¹¹³ *Idem*, art. 50, p. 131.

¹¹⁴ *Idem*, art. 52, p. 135.

the non-threat or use of force or punitivity. Theorists such as Shannon argue against such an assumption purported by those who employ the sociological approach. While “learning”, a process of international conditioning involving societal foci such as praise, condemnation, and diplomatic/economic sanctions help formulate common normative bases, the absence of pronounced foci does not necessarily mean that a norm violation has not occurred.¹¹⁵ Deviations in the relationship between norm violations and responses occur all the time and are very difficult to measure considering the fluidity of international norms compared to those within a prototypical nation-state.

China violated a norm against overt punitivity in the Charter era from 1945-1991 while committing an illegal act of aggression by invading Vietnam. The Sino-Vietnamese War is one of the most explicit examples of punitivity in that period which has all but subsided since 1945. However, this violation did not receive widespread global condemnation. While a UNSC resolution was proposed, it was vetoed by China and little else was done through other international legal/political institutions.¹¹⁶ The members of the Association of Southeast Asian Nations (ASEAN) in the council held an attempt at a draft resolution, but not even a nation was named in the moderately bipolar attempt led by the US delegation much less a mention of the punitive nature of the attack, hence it failed to pass.¹¹⁷

Responses from state administrations were not overpowering considering the scale of the violence. The United States, who just recently had established itself as a *de facto* ally of China,¹¹⁸ released a well-fabricated response “disapproving” of both China’s mobilisation into Vietnam and the Vietnamese occupation of Cambodia—at the same time attempting to posture that Carter had publicly denounced a Chinese plan to use aggression in Vietnam—which was not the case.¹¹⁹ Little else was done about the war by the United States, who was largely disinterested in directly involving itself again in South-East Asia. Japan’s response was also underwhelming; while an official statement was released condemning the invasion, opposition to the war was not strong and there was no mention of the punitive nature of the invasion.¹²⁰ This is despite the fact that Xiaoping expressly voiced to Kyoto News during the

¹¹⁵ Shannon, ‘Norms are what’, p. 297.

¹¹⁶ See Chen 1987, *supra* note 66.

¹¹⁷ *Idem*, p. 112.

¹¹⁸ On January 1st, 1979, relations were established between China and the United States. From January 28-February 5th, Deng Xiaoping visited Jimmy Carter in the White House to seek counsel on the Xiaoping’s plan to punish Vietnam, most likely as a ploy to gauge the response by Carter and his administration. Carter suggested that war would encourage sympathy for Vietnam in Cambodia. While China’s numerous threats were documented and disseminated to the public, the US did not emit a public response for or against China’s posturing, see Chen, *China’s War*, p. 27.

¹¹⁹ This statement completely left out any mention of the punitive nature of the mobilization despite the fact that it was an important aspect of the meeting between Xiaoping and Carter. However, from ‘Feb 18 1979 China Invades Vietnam Video ABC News’, *Youtube*, at: <https://www.youtube.com/watch?v=2-XPkhyxGh0> (accessed 5 May 2016), we can see that the punitive nature of the war was certainly disseminated to the public. See MDN, 18 February 1979, p. 1 cited in D. Tretiak, ‘China’s Vietnam War and its Consequences’, *The China Quarterly* 1979-740, p. 759; also see Tretiak, ‘China’s Vietnam War’, p. 759; ‘U.S. asks Peking to pull its forces out of Vietnam’, *The Lawrence Daily Journal*, February 18, 1979, p. 1; Zhang, ‘Deng Xiaoping’, p. 23.

¹²⁰ R. Hoppens, ‘The 1979 Sino-Vietnamese War and the Transformation of Japan’s Relations with China in Diplomacy and Discourse’, *Electronic Journal of Contemporary Japanese Studies*, at: <http://www.japanesestudies.org.uk/ejcs/vol14/iss2/hoppens.html> (accessed May 5 2016).

short war that he did not “need military achievements”.¹²¹ The UK —while a coordinator in the attempt at a UNSC resolution— did not have a distinct answer for the invasion which the BBC cited as containing Chinese motivations to treat the Vietnamese “as they deserve”.¹²²

Russia is an irregularity, but considering its growing alliance with Vietnam culminating in the 25-year Treaty of Friendship and Cooperation with Vietnam signed on 3 December 1978 — within days of Vietnam’s incursion in Cambodia— the Soviet denouncing of Chinese aggression was a given.¹²³ The Soviets attempted to portray that they would uphold their aforementioned treaty, but a real intention to participate in the conflict probably did not cross the minds of the Soviet administration as long as the conflict did not escalate greatly.¹²⁴

All in all, China faced little international consequences for its campaign.¹²⁵ As a planned and calculated punitive invasion, the Chinese rightly determined the month-long war a success considering their disciplinary intent, despite the lack of a cease of hostilities in Cambodia and across the border. While China’s relationship with the US was soured following the invasion, Zhang notes that “Washington continued to seek a close relationship with China to counterbalance the Soviet Union.”¹²⁶ More importantly, despite the proven punitive nature of China’s motivations for war, the call to reprimand China as a violator of a norm against punitivity did not come to fruition at all.

IV. Conclusion: Punitivity and International Law and Politics

Since 1945, an institutionalisation of alleged peace was established to help eradicate the scourge of war. Today, contrary to articles 2(4) and 51 of the UN Charter, punishment is an integral part of international politics notwithstanding an established legal framework to accord for its importance in how relations are established between states. This is representative of a quintessential discord between the principle of sovereign equality as an institution of international law and the toleration of the violation of norms such as punitive war. While our post-Cold War framework of international society has debatably been subject to the construction of an unwritten code of punishment,¹²⁷ an even more critical assessment can be established considering the contiguous appearance of punitive action for hundreds of years of warfare. When we think about the punishing of Saddam or Gaddafi for their transgressions against *jus cogens* norms, international society has validated such punishment based on a claim to an exceptionality of the law and the situation on the whole.¹²⁸

¹²¹ *Kyodo News*, 26 February 1979, in FBIS-PRC, 26 February 1979, p. A5, as cited in Zhang, ‘Deng Xiaoping’, p. 28.

¹²² ‘1979: China Invades Vietnam’, *BBC*, at: http://news.bbc.co.uk/onthisday/hi/dates/stories/february/17/newsid_2547000/2547811.stm (accessed May 5 2016).

¹²³ Chen, *China’s War*, p. 27.

¹²⁴ Tretiak, ‘China’s Vietnam War’, pp. 763-764.

¹²⁵ Zhang, ‘China’s 1979 War’, p. 868.

¹²⁶ *Ibid.*

¹²⁷ Lang, ‘Just War’, p. 296.

¹²⁸ A good example is Hussein’s regime and Hussein himself being touted as “rogue”. Wouter Werner critically assesses the interaction between the principle of the norm of punitivity, the *ius cogens* norm of self-defence as set out in the UN Charter, and rogue states since the end of the Cold War when he writes that the UNSC has unyielding power in the creation of a norm through its role in the treatment of the exceptional either directly or indirectly in its processes, see W. Werner, “International Law, Renegade

The punitive invasion of Vietnam by China is an example of punitivity in international politics before such overt transgression of the norm following 1991. However, China in 1979 along with the responses to the norm violation have demonstrated that, ultimately, norms are what states make of them, meaning that norms are abided by when it suits states and when an exception can materialize to the perceived benefit of the state, particularly the P-5, then an exception is made. This appears to be the case when looking at the inability of the UNSC to adopt a resolution or the lack of response by the UN General Assembly, or how mildly states reacted to the act of punitive war that violated the territorial integrity of Vietnam. Xiaoping's visits to the US and Japan shortly before the planned attack particularly highlights how the Chinese administration was fully aware of the fact that they were planning on violating a norm and were seeking comfort in important powers that would assure little blowback, thereby violating a norm but with little consequence in international politics.

This phenomenon can be largely attributed to the lack of a superseding authoritative sovereign in international society. One may claim that the UNSC helps to establish and reinforce norms in international affairs, particularly those of the UN Charter like the principle of sovereign equality among states; this statement is certainly true in some cases. However, in the case of the norm against punitivity, the UNSC actually helps to perpetuate punitive aspects of the use of force —administered by the UNSC or not— through its very essence as an executive body of the five permanent member states, thus leaving the international community with a systematized disparity between de facto motivations to use force and the legal-political justifications under the Charter system. This is because the UNSC is a legal-political mover that is at the heart of the collective security schema and yet it does not truly represent the international community. While the UN Charter explicitly outlawed all justifications of war besides self-defence according to article 51 and UNSC authorized mobilisation, an underlying potential for punitivity put forth by the UN Charter's collective security regime has not coincided with the letter of the international communities' legal efforts to stifle punitive action, particularly punitive war. As Koskenniemi exclaimed in his appeal to some 500-1500 dead Serbians, "what counts as law, or humanitarianism, or morality, is decided with conclusive authority to the world at large by the sensibilities of the Prince".¹²⁹ In doing so, exceptionality blurs with normalcy when it so suits the Prince, inherently changing how global security is conducted and perceived.

Thus, many consequential changes have arisen in *jus ad bellum*, with one of the most perceptible being the conflation of justifications for war like self-defence, preventative war, and punitive war since 1945. This paper has sought to prove that the norm against punitivity, while strongly established in international law and politics, may not have ever strongly established itself in actual practice considering underlying motivations that have often driven states to war, whether they be utilitarian or retributive as was the case with the Sino-Vietnamese war of 1979.

Some scholars tout the return of a fluctuating *jus ad bellum* —highlighted by overt punitivity— following the end of the Cold War. This is due to gradual yet significant global changes like the threat of weapons of mass destruction, terrorism, the international criminalisation of the individual, or the inability or unwillingness for the UNSC to manage every matter of peace

Regimes, and the Criminalization of Enmity," in *Deviance in International Relations: 'Rogue States' and International Security*, eds. W. Wagner, W. Werner, & M. Onderco, Hampshire: Palgrave MacMillan 2014.

¹²⁹ M. Koskenniemi, 'Kosovo Etc. – Beyond the Limits of International Law', *Finnish Yearbook of International Law* 1999-10, p. 186.

and security as codified in Chapter VII of the UN Charter.¹³⁰ However, as we have seen, one may argue that the norm of punitivity in *jus ad bellum* has never left the realm of international politics.

¹³⁰ See Murphy, 'Protean Jus Ad Bellum', p. 23.