Neutrality and Information Warfare

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"There is nothing new about revising neutrality; it has undergone an almost constant process of revision in detail," Philip Jessup concluded in 1936. He also believed

... [N]othing could be more fallacious than the attempt to test the application of rules of neutrality by the principles of logic. Since they are products of compromise and of experience, logic has found practically no place in their development and cannot properly be used in their application.

Over half a century into the UN Charter era, little would change these observations, even in the information warfare (IW) context. New considerations have appeared, including the Charter itself; the process of analyzing the law of neutrality defies a straightforward, positivist, black-letter approach. Principles of neutrality for maritime warfare have been seen to be less rigid, from an historical perspective, than those for air or land warfare, for example.

Some claim neutrality is in “chronic obsolescence.” A major reason, according to those who say future applications of the law of neutrality will be minimal, is an argument that the Charter has ended the rights and duties of the old law of neutrality. Another argument is that since the Charter has outlawed war, there can be no state of war, and therefore there is no need for a law of neutrality.
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This position might be considered in light of the Pact of Paris [1928], outlawing aggressive war. World War II began a decade later.

Many others, reflecting State practice and claims in the Charter era, maintain that the law of neutrality continues to exist. The San Remo Manual recognizes maritime neutrality. The 1992–96 International Law Association Committee on Maritime Neutrality studied neutrality, and the 1998 ILA conference accepted the Committee’s final report. Individual researchers assert that neutrality remains a valid legal concept, albeit modified by the impact of the Charter and other considerations.

Like the reports of Mark Twain’s passing, accounts of neutrality’s demise in the Charter era have been greatly exaggerated, as the ensuing analysis of the application of neutrality principles to information warfare demonstrates.

Application of the Principles of the Law of Neutrality to Information Warfare

The law of warfare has little, if any, direct reference to problems of armed conflict involving IW. The Charter applies across the board to all treaties, and perhaps customary law as well. Although there are a few treaties with some bearing on transmission of information, e.g., Hague V and XIII, in most cases the analysis must proceed from general custom, general principles, and analysis by analogy. General principles of law occupy an anomalous position among sources of international law. Although the Statute of the International Court of Justice lists them among primary sources that may be cited in cases before the Court, and some commentators include them among primary sources for deriving rules of law, others accord them secondary status, perhaps as gap-fillers. Whichever view one might take, in a new and fast-moving area of the law where there are few guideposts, resort to general principles of law, and commentators that discuss them, may be the only sources that are available.

What then should be the method of analysis for IW issues?

The first and primary rule should be application of mandatory Charter norms, e.g., the right of self-defense, with, e.g., its limitations of necessity and proportionality for reaction in self-defense, or UN Security Council decisions. The next level of analysis should employ the mixture of treaties, custom, etc. that must apply in specific neutrality situations. For example, if Hague V and XIII principles applicable to telecommunications are customary law, they should be applied, perhaps alongside general law of armed conflict (LOAC) principles such as necessity and proportionality in a given situation, except where there is a prohibitory rule, e.g., no first use of poison gas, for which there can be no proportionality or necessity qualifications. In applying these principles to the
modality of transmitting Internet messages, States will indirectly affect use of and messages through the Internet. The fact that cables may be used for Internet-based messages as well as traditional telephone or telegraph messages can be necessity and proportionality factors.

Where there is no "hard law," i.e., black-letter rules governing conduct, resort must be had to general customary LOAC principles, i.e. military objective, necessity and proportionality, which may be different from similar principles to be observed in self-defense responses. The content of the law for these situations might be informed by analogies from custom, treaties and principles applied in the law of land, sea, air and space law. As will be seen, the law of the sea (LOS) and the law of naval warfare may offer the most and best analogies for neutrals in IW situations.

**Neutrality, Land Warfare, and Information Warfare**

The implications for IW from the law of neutrality relating to neutral land territory are several. The Charter may impact decisions on the law of neutrality, and treaty suspension or termination principles may apply for international agreements other than those dealing with warfare. The Security Council may make legally binding decisions under Articles 25 and 48 of the Charter, and therefore may obligate UN Members under Articles 41-42 to take action that might be inconsistent with traditional neutrality principles. The Council also may make nonbinding "call[s] upon" Members under Articles 40-41. It also may make nonbinding recommendations under Articles 39-40. If Council decisions differ from traditional neutrality principles, the latter must give way. If Council or General Assembly resolutions are at variance from traditional neutrality principles, and restate customary or other binding sources of law, these resolutions also will affect the traditional law of neutrality.

Thus, Council decisions may compel a State to behave inconsistently with traditional neutrality practice by requiring what would otherwise be belligerent acts or by restricting rights neutrals traditionally enjoy. Nevertheless, belligerent attacks must be conditioned on general warfare principles of military objective, necessity, and proportionality.

A neutral has a duty to prevent use of its territory for a belligerent's operations, base, or as a sanctuary. The activity, depending on personnel involved, e.g., belligerent forces operating the Internet computer, may be a violation of the neutral's territorial integrity under the Charter. If a neutral knows or has reason to know of activity within its territory involving Internet use that is non-neutral in nature, the neutral must act to end that activity under the LOAC,
and may invoke the Charter if the activity involves a violation of the neutral's territorial integrity. If a neutral may be required to mobilize forces to ensure fulfillment of its responsibility to prevent belligerent forces from crossing into neutral territory, and thus act in self-defense, by analogy it may be argued that a neutral may mobilize or order its forces to counter an Internet attack conducted from its territory, even if a belligerent's forces are not involved. If war materials and supplies belonging to a belligerent, either as a matter of title or use, are employed in an Internet attack while situated within a neutral's borders, the neutral can act against the materials and supplies. If belligerent forces operate the computers, etc., the case for neutral action is stronger.

If a neutral does not or cannot effectively enforce compliance, an aggrieved belligerent may take proportional action, either under the law of self-defense or the LOAC, to counter these Internet activities. Of course, there is a risk that the neutral may assert a violation of its territorial integrity by the aggrieved belligerent and resort to self-defense measures. In these situations, an aggrieved belligerent's prior notice to the neutral may be prudent, unless the neutral is seen to be cooperating with the offending belligerent.

If belligerents may not build radio stations on neutral territory, by analogy they cannot use Internet "stations" in neutral territory, and a neutral must shut these down. If a neutral does not have the means, or the willingness to do so, an aggrieved belligerent may take proportional action. It would seem, however, that if neutrals need not control their own stations, or acts of their nationals acting in a private capacity, then there is no obligation to do the same for Internet information thus passed to a belligerent under the Hague law. Query whether the pattern of neutrals' controlling radio stations in two World Wars gives credence to establishing a customary norm obliging neutrals to do so in future conflicts.

The land warfare rules for railway rolling stock offer an interesting parallel. Hague V provides that belligerents may not requisition railway rolling stock of companies chartered by a neutral State except if absolutely necessary. However, if a private company chartered by a neutral consents to the stock's use for warlike purposes, the stock acquires enemy character and may be seized and appropriated as though it is enemy State property. If a belligerent may not use neutral-owned rolling stock unless absolutely necessary but may seize stock a belligerent uses for carrying war goods, could it not be argued by analogy that a belligerent may not "seize" neutrals' Internet transmissions except in emergency, but that if the neutral allows the Internet to be used for messages harmful to the belligerent, those aspects of the Internet are fair game?
Humanitarian law allows a neutral to authorize passage of wounded and sick from belligerent forces if vehicles transporting them carry no combatants or war materials. If a neutral allows passage, the neutral assumes responsibility for providing for control and safety of these personnel. If a neutral has discretion to authorize passage for belligerents' sick and wounded armed forces personnel while assuming responsibility for their control and safety, it would seem that the neutral may, but is not required to, allow Internet messages regarding belligerent sick and wounded, if the neutral can be sure that no information affecting the war is passed home. Similarly, a prisoner of war staying in neutral territory may not be allowed Internet access to send information home that amounts to belligerent activity, any more than the prisoner of war should be allowed to mail, telephone, televise, etc., such information.

**Neutrality at Sea, Naval Warfare, and Information Warfare**

The same Charter principles applicable to land warfare apply to war at sea, including any IW component. Oceans users, whether neutral or belligerent, must pay due regard to other oceans users' rights and freedoms besides the rules of naval warfare, which apply in armed conflict situations through the LOS conventions' other rules clauses. Treaty suspension or termination principles also may apply. Although many treaties may bear on IW issues, during armed conflict they may be impossible to perform, fundamental change of circumstances may intervene, or there may be a material breach. Jus cogens norms, e.g., perhaps the inherent right of self-defense, may trump treaty law. War, or armed conflict, may end or suspend treaty obligations. General principles of necessity and proportionality in attack govern as in land warfare.

Hague XIII, governing maritime neutrality, imposes virtually the same rules as Hague V, governing land warfare, in forbidding belligerent use of neutral ports and waters for erecting wireless telegraphy stations or any apparatus for communicating with belligerent forces. Belligerents cannot use neutral ports or waters as a base of operations. The same considerations and applications of these principles in land warfare to IW issues should apply in maritime warfare situations. Moreover, because these principles appear in two major multilateral treaties and the regional Maritime Neutrality Convention, their common principles are strengthened.

There is an important difference between neutrals' duties with respect to movement of belligerent troops across neutral land territory and movement of belligerent naval forces into neutral ports and waters. The duty to repel troop movements is absolute, while the duty to detect and oust belligerent naval
forces is subject to the neutral’s having the means to do so.57 A neutral is only “entitled,” not required, to intern a belligerent warship when that warship should have departed neutral waters.58 When the Hague Conventions were signed in 1907, there were many countries that may not have had naval forces or detection capability sufficient to oust a belligerent naval force or to intern it. There must have been a presumption that any State could use its military or other forces, perhaps police, to repel a belligerent troop movement, but that might not be the case for naval incursions. The same is true today. For IW neutrality principles, it could be argued that the duty of a neutral to act to prevent belligerent IW warfare from within its territory is not absolute, but conditional on the ability of the neutral to detect IW activity and to be able to act to counter this activity. Not every country has computer and related systems as sophisticated as, e.g., the United States, and these countries should not be held to an absolute duty. Such being the case, computer-sophisticated nations like the United States must be held to the same duty, i.e., use of means at the disposal of the United States, which might be quite considerable.

Principles governing destruction of undersea cables strengthen a view that belligerents can operate to seize or destroy Internet connections in enemy territory and in areas subject to no State’s sovereignty, e.g., the high seas, if a belligerent controls that area, e.g., for blockade. Belligerents can seize or destroy cables connecting enemy territory with neutral territory, but only a terminus in enemy territory. These cables may be seized or destroyed only “in cases of absolute necessity,” i.e., general principles of necessity and proportionality59 must be observed. No distinction is made between publicly and privately owned cables.60 Neutrals’ control of radio broadcasting within their territorial waters during two World Wars61 is another example of proper control of electronic emissions by neutrals within their territories. If neutrals had this obligation for radio, the “Internet” of the day, is it not also true for today’s World Wide Web of communications?

Issues related to contraband, visit and search or diversion, and the possibility of destruction of neutral merchant ships that have acquired enemy character62 or ships or aircraft that are believed to be aiding the enemy although otherwise exempt63 might seem to have little to do with IW. However, certain general principles might be derived and used in the IW context.

Given Internet technology’s exponential growth, it would seem extraordinarily useless to go through a lengthy treaty negotiation process to draft an agreement listing prohibited Internet behaviors or actions that would be as out of date as the computers that began to produce the treaty at the start of the drafting and negotiation process. This has been the experience of trying to define
contraband. The lesson from contraband law is that in a fast-developing or ever-changing scenario, trying to go beyond general principles is rarely wise, except in the obvious, "hospital ship" or poison gas situation, where everyone agrees on the rules, at least for hospital ships if they are not used to further an enemy war effort, and for poison gas as long as there is no use.64

If we analogize dealing with Internet messages to neutral merchantmen on the high seas, could an electronic "visit and search," followed by appropriate proportional and necessary action, perhaps electronic diversion, be devised for belligerents to use with neutrals?65

If an Internet message or "hack" contributes to enemy war-fighting or war-sustaining efforts, assists an enemy's armed forces intelligence system, or acts as an auxiliary military or naval channel of communication or information, is not the attack and destruction option available, subject to necessity and proportionality principles?66 To be sure, perhaps special principles analogous to the passenger and crew safety rule when a merchantman must be destroyed,67 might be devised. For example, if messages relating to safety of civilians are involved, can they be electronically isolated and allowed through?

Might an electronic "firewall" analogous to blockade principles in the law of naval warfare68 be devised to let appropriate messages get through? The Internet might be used for traditional blockades and other interdictions, besides the usual Notices to Airmen (NOTAMs) and Notices to Mariners (NOTMARs) published, e.g., by radio.

Is it useful to think in terms of specific exemptions for neutral Internet usage? Hague XI lists enemy vessels exempt from capture and possible destruction because of their nature, among them a debatable exemption for mails as distinguished from mail ships.69 Would it be helpful to develop exempted computer systems, kinds of messages, or Internet systems exempt from "capture" and possible destruction unless used to aid an enemy? What about generally exempt ships, e.g., hospital ships unless they aid an enemy, that send Internet-based messages that might be construed by a belligerent to be encrypted messages? Would this raise a suspicion, however unfounded, such that use of Internet-based messages by neutral exempt vessels should be banned or somehow restricted? Can system segregation be done with today's technology? Is it too early for this? Could the Internet itself be used to advise of these exemptions, if a case by case basis seems appropriate?

Might military commanders consider declaring control of immediate areas of military operations on the Internet, analogous to the immediate area of naval operations?70 To be sure, this kind of declaration may invite more trouble than it is worth, i.e., it could tell adversaries where to go. The Internet can, of course, be
used to send these notices, besides NOTAMs and NOTMARs sent by more tradi-
tional means for addressees who lack Internet capability, or to assure transmis-
sion and receipt, i.e., where there is a possibility that an Internet-based message
did not go through.

Although it is not part of the law of neutrality, any country can declare tem-
porary use of the high seas for naval maneuvers, including air operations. These maneuvers can be conducted during armed conflict. Is there a correla-
tive right of declaring temporary use of part of the Internet for “IW maneu-
vers”? Might notice of these IW maneuvers be posted on the Internet besides
more traditional means, e.g., NOTAMs or NOTMARs? (As in the case of
warning of immediate area of naval operations during war, such a notice,
whether by NOTAM or NOTMAR through traditional media or the Inter-
net, invites attention.)

Could or should an “Internet exclusion zone” be declared, warning neu-
trals of higher risk if they “surf” in the area or otherwise use the “zone”? Like no-
tices for immediate areas of naval operations, these warnings could be posted on
the Internet, as well as by more traditional means, e.g., NOTAMs and
NOTMARs. (Notice of blockade, immediate area of naval operations, or ex-
clusion zones, must be effective; while the Internet might be a valuable com-
munication medium, it cannot replace more traditional and widely available
methods until it has become as universal as more traditional means; this may be a
problem for vessels flagged in countries that are not as advanced in Internet tech-
nology as, e.g., the United States.)

Could States declare temporary “defense zones” for parts of the Internet
spectrum, analogous to a high seas defense zone or cordon sanitaire that may be
announced for an area of naval and air operations, to warn other countries of a
risk of self-defense responses? This is not a feature of naval warfare but an inci-
dent of self-defense. And because the technology is still emerging, and any
treaty now might be premature, down the road when and if the problem set-
tles down, could agreements modeled on the INCSEA agreements be con-
sidered to minimize confrontation? Longstanding treaties promoting safety at
sea offer another model.

Might states proclaim an “Internet Identification Zone” (IIZ) for parts of the
Internet spectrum, analogous to an ADIZ? The IIZ would be a warning, per-
haps published on the Internet and in other sources to assure notice, of a possi-
Bility of interception if Internet users approach too close to a neutral State’s vital
interests (analogous to its territory, the anchor for an ADIZ), including, e.g., de-
fense and central economic communications systems. The ADIZ is not an air
warfare feature; it serves as an identification method. An IIZ might have a similar function.

I do not have technical competence to respond to these questions, or perhaps to ask others, but might they be asked? Some inquiries may be far-fetched or impractical, but given the exponential growth of technology, some of which may be shrouded for national security reasons, I ask them.

The Internet is like a merchant shipping system or the US public highway system. There is no regulation of the Internet akin to systems regulating radio and television broadcasting. It is up to the individual or government as to the nature of vehicles used (the computers) and, beyond a small access charge paid Internet access providers, the user is largely on its own as to how the Internet is employed as to content and destination. Therefore, although there may be belligerent and neutral rights, perhaps by analogy to those for naval warfare as I have posited them, there are relatively few positive duties, apart from a requirement to respect belligerents’ and neutrals’ rights, however those may be stated.

As a final point, the due regard principle, derived from the LOS and its law of naval warfare counterpart, might be part of the analysis; i.e., belligerents must have due regard for rights of Internet users that are neutral, even as Internet users must have due regard for others on the Net in the absence of armed conflict. And even as belligerents must have due regard for the maritime environment in today’s wars at sea, might they be required to have due regard for the general Internet environment?

Neutrality, Aerial Warfare, and Information Warfare

As in the cases of land and sea warfare, Charter principles may apply in given situations. Treaty suspension or termination principles may apply. Besides air warfare rules, belligerents must observe principles of military objective, necessity, and proportionality applying to all modes of war.

Like neutrality rules for land and sea warfare, air warfare rules require respect for neutral airspace; belligerent military aircraft cannot enter it. When coupled with identical treaty-based neutrality rules applicable to land and sea warfare, this principle is strengthened. The Hague Air Rules principle, the same as those for land warfare but differing from the weaker requirements for neutrals for naval warfare, is that actions taken by a neutral to enforce neutral rights, cannot be construed as a hostile act. Since two branches of the law of neutrality protect the neutral in its actions to enforce neutrality, particularly since Internet activity necessarily ultimately involves the land in terms of sending and reception of messages, and the flight of Internet messages through lines might be
analogized to aircraft flight, should not the rule be that actions taken by a neutral should not be deemed a hostile act, and not an unfriendly one, as the law of naval warfare has it? A neutral might enforce its rights by an unfriendly act, i.e., a retorsion, a lesser action in that it does not involve proportional reprisals, i.e., an unlawful act designed to compel compliance.

There is an important difference between neutrals' duties with respect to movement of belligerent troops across neutral land territory and movement of belligerent naval forces into neutral ports and waters, or movement of belligerent military aircraft into neutral airspace. The duty to repel troop movements is absolute, while the duty to detect and oust belligerent naval or air forces is subject to a neutral having the means to do so. When the Hague Conventions were signed, many countries may not have had naval forces or detection capability sufficient to oust a belligerent naval force. The same assumption may underlie the 1923 Hague Air Rules regarding intruding belligerent military aircraft and their internment. There must have been a presumption that any State could use its military or other forces, perhaps police, to repel belligerent troop movements, but that might not be the case for every country for naval or military aircraft incursions. The same is true today. For IW neutrality rules, it could be argued that a neutral's duty to act to prevent belligerent IW from within its territory is not absolute, but conditional on the neutral's ability to detect IW activity and to act to counter it. Not every nation has computer and related systems as sophisticated as, e.g., the United States, and these countries should not be held to an absolute duty. Such being the case, computer-sophisticated nations like the United States must be held to the same duty, i.e., use of means at the disposal of the United States, which might be quite considerable.

A neutral's duty to prescribe a route away from belligerents' military operations for aircraft ordered by a belligerent might be seen, by analogous precedent for IW, to say a neutral must prescribe Internet "routes" not to interfere with military operations. The qualifying phrase in the Hague Air Rules, that a neutral must exact guarantees, indicates a possible weakness of the prescription, however. For IW, if a neutral prescribes a "route," can the neutral enforce the prescription, given the Internet's decentralized nature? The Hague Air Rules principle that a neutral must, commensurate with the means at its disposal, prevent aerial observation of belligerent operations, is in the same vein. Should neutrality law for IW say that a neutral must, commensurate with the means at its disposal, prevent IW observation, through reading Internet traffic, of belligerent military operations?

The Hague Air Rules, like naval warfare rules, allow a belligerent's force commander to prohibit neutral aircraft from passing in an immediate vicinity of
a commander's forces or to make aircraft follow a particular route, if the commander considers the aircraft is likely to prejudice success of military operations. If an aircraft, once notified, refuses to comply, a belligerent may fire on it.91 In the IW context, might a belligerent assert a similar right to prohibit Internet activity in an immediate electronic or physical vicinity of military operations, or direct that Internet traffic follow routes? Can the belligerent "shoot down" non-complying Internet traffic, using proportional means, coming close to military Internet operations, after notice? Might notice of these areas of operations be posted on the Internet besides more traditional means? (A correlative problem is that any radio or Internet message invites attention to the location of belligerent forces.)

Although it is not part of the law of neutrality, any country can declare temporary use of the high seas for naval maneuvers, including air operations.92 These maneuvers can be conducted during armed conflict. Is there a correlative right of declaring temporary use of part of the Internet for "IW maneuvers"? Might notice of these "maneuvers" be posted on the Internet? (As in the case of the warning of the immediate area of naval operations during war, such a notice, whether by NOTAM or NOTMAR through traditional media or the Internet, invites attention.)

Exclusion zones for neutral aircraft as well as ships, reasonable in scope and duration and which are properly noticed, are a valid method of warfare at sea today. They are not free-fire zones but are designed to warn neutral aircraft of heightened danger if they enter a zone.93 Might an "IW exclusion zone" with similar qualifications be declared to warn Internet users of a heightened risk of being "fired on" if they venture into certain "areas" of the Internet? Might notice of these zones by NOTAMs and NOTMARs be posted on the Internet besides more traditional means?

Could States declare temporary "defense zones" for certain parts of the Internet spectrum, analogous to a high seas defense zone or cordon sanitaire that may be announced for an area of air operations, to warn other countries of a risk of self-defense responses? This is not a feature of air warfare but an incident of self-defense. Here too INCSEA and safety of life at sea treaties could be models for advance agreements for these situations.94

Might States proclaim an "Internet Identification Zone" (IIZ) for certain parts of the Internet spectrum, analogous to the ADIZ?95 The IIZ would be a warning, perhaps published on the Internet and in other sources to assure notice, of a possibility of interception if Internet users approach too close to a neutral State's vital interests (analogous to its territory, the anchor for an ADIZ), including, e.g., its defense and central economic communications systems. The ADIZ
is not a feature of air warfare; it serves as an identification method. The IIZ might have a similar function.

**Neutrality and Information Warfare in Space**

There is little new "hard law" in norms applicable to conflict in outer space, other than applying Charter law, the law of suspension or termination of treaties, and general principles of necessity and proportionality, and perhaps due regard in some cases, applying to armed conflict anywhere. There is no special neutrality law like that applying to land, sea, or air warfare. Any law of neutrality applicable to IW in space must be derived by analogy from these other sources, as was the case before agreements like the Outer Space Treaty, the Liability Convention, the Registration Convention, etc., were negotiated. And it is this general methodology that may be the most useful. If law for outer space could be derived by analogy from other systems before formal treaties appeared, cannot the same be said for IW? Which legal system(s) should supply the model(s)?

**Conclusions: Appraisal of Neutrality in the Charter Era in the Context of Information Warfare**

As the manned space flight era became a reality, commentators recommended applying other, well-established law to space age situations by analogy. UN Charter law applies to situations in space, as it does for interactions on land, at sea, and in the air. Today treaties, and practice pursuant to them, govern many other aspects of space interactions, but not all of them. These agreements are subject to Charter law primacy and to law of treaties rules for suspension or termination. Beyond the treaties, some space law issues remain unresolved, and applying other systems of law by analogy seems to be the norm.

Internet warfare issues involving neutrals, and the law to be applied to them, seem close to the situation for warfare in space. Charter-based norms, e.g., prohibition against violating States' territorial integrity or political independence, the right of self-defense and the primacy of Security Council decisions, must be applied. There are telecommunications treaties to which Charter norms and law of treaties rules for suspension and termination are subject. Some LOAC principles, e.g., those related to telegraphy, will apply to Internet messages as well as more conventional communications, although these are also subject to Charter norms, e.g., self-defense. Beyond these relatively well-established norms, there are many principles, primarily in the law of naval warfare but also some from the
law of land and air warfare, that may be cited by analogy in IW situations involving neutrals.

Undeniably neutrality as a general concept has as much vitality today as in the pre-Charter era. The claim, that there is a customary right to assert an intermediate status of nonbelligerency between traditional neutrality and belligerency, may have been strengthened since 1945, although most States and commentators do not recognize it. The precedents in some cases are almost identical with those in the last two centuries. Even if nonbelligerency cannot be asserted as a customary norm, the overlay of principles of self-defense, retorsion, reprisals not involving use of force, and state of necessity apply to support actions at variance with a practice of strict neutrality in the traditional sense. 101

Because of options under the Charter for non-binding resolutions by the Security Council and perforce the General Assembly, the potential for exceptions even with a binding Council decision and the opportunity for claims of neutrality—perhaps modified by a new non-belligerency concept in the Charter era—remains large. “Far from being moribund, these traditional rights [of neutrality and self-defense] apply logically in conditions of limited wars”—the type of conflicts that have beset the planet since 1945—even more rigorously than in conditions of total war. 102

The advent of information war may call for modifying Jessup’s remarks published in 1936 when the world was recovering from a world war and preparing for the next one. 103 Transoceanic communication was dependent on undersea cables for urgent messages, although radio signals could also reach across the seas. The most advanced countries had cross-border telephone and telegraph access by landlines. Most transoceanic communications went by ship, although the first international air mail deliveries were beginning for transoceanic and transcontinental communications. However, the usual means of communication then for most messages was what we call “snail mail” today. The Internet was a Cold War creation. 104 Today, Jessup might say that although the basic neutrality rules remain in place and they apply for IW, their application for IW must be by analogy.

One option is a non-law analysis 105 although that alternative is less than fashionable today, given a tendency to find some law (perhaps publicist’s views if there is no customary law, treaty, or general principle available). 106 Commentators correctly assert that it is almost universally accepted that a considerable body of law applies to States’ use of force in cyberspace contexts. 107 If that is true, a correlative is that the considerable body of traditional neutrality law, some of it restated in treaties of longstanding duration that are now almost universally recognized as declaring custom, and the rest in customary norms or general
principles, also exists. If we choose to operate in the context of law, under a rule of law, the law of neutrality developed for more traditional warfare modalities offers useful analysis by analogy where there are no positive standards, e.g., rules governing cables.

Today one exception to the traditional law is Charter law, e.g., the inherent right to individual and collective self-defense, which predates the Charter. Others include prohibitions against violating a State’s territorial integrity, and the primacy of UN Security Council decisions. Another might be human rights, although human rights treaties’ derogation clauses reflect traditional rules of suspension or termination during international armed conflict. The policies of peacetime telecommunications treaties, although perhaps limited in application during armed conflict because of their terms or because of general rules of treaty suspensions or termination, are another. Analysis of IW issues in a context of the law of neutrality as it applies to land, sea, and air warfare reveals common denominators and differences. For example, belligerents have a duty not to cross neutral’s land territory by land or air, or to use neutral land or seas (i.e., the territorial sea) for a base of operations. A neutral’s duty to repel these incursions varies with the modality of incursion. If it is by land, there is apparently an absolute duty, at least to try. If the incursion is by belligerent air or naval forces, the neutrals’ duty is relative. It must use the means at its disposal to counter an incursion, including means at its disposal to intern an intruding aircraft and those aboard. A neutral may elect to detain a belligerent warship that has remained in port when it is not entitled to stay there. Undoubtedly the 1907 Hague drafters, and the 1923 Commission of Jurists that prepared the Hague Air Rules, believed every country had some semblance of ground forces to repel a belligerent’s troop movements across neutral lands, but that not every State had the means of detecting or repelling incursions by air or sea, or of interning belligerent military vessels or aircraft. The “means at a neutral’s disposal” principle should be the test for a neutral’s duty for belligerents’ IW incursions; the neutral should be held to apply the means at its disposal to detect and repel these incursions. Such being the case, the correlative right of a belligerent aggrieved by IW incursions should be that the belligerent may take such actions as are necessary in the territory of a neutral that is unable (or perhaps unwilling) to counter enemy IW force activities, making unlawful use of that territory, a principle from the law of naval warfare.

Beyond these general rules applying to neutrality in a context of all warfare modes, the rules begin to diverge among the different kinds of armed conflict, the closest kinship being seen between the law of naval warfare and aerial warfare, particularly naval warfare. From a geographic perspective, these mediums
for combat offer more persuasive reasons for analogy to IW. Both are concerned with "fluid" mediums, like the Internet's electronic pathways. The law of naval warfare is concerned with warfare on the high seas, a part of the globe that is no nation's property. It also is concerned with ocean areas over which coastal States may exercise sovereignty, i.e., the territorial sea; or jurisdiction, i.e., the exclusive economic zone (EEZ). There is also a relatively well-developed set of rules or general principles in the LOS and the law of naval warfare upon which analogies for IW may be drawn. Closer examination of the LOS and the law of naval warfare in connection with and its interfaces with Charter law, the LOS and treaty termination or suspension principles may produce analogies suitable for developing IW principles.

The LOAC is replete with notice requirements. The new technology might be employed to give notice, adequate under the circumstances, in traditional warfare situations in addition to the usual means of doing so. Given IW technology's fluidity and exponential growth, the relative lack (thus far) of practice in IW situations, and the relatively minimal number (again thus far) of claims and counterclaims in the worldwide electronic arena, any international agreement(s) on IW would likely be obsolete in terms of hardware and practice before their ink would be dry. Haphazard as the prospect may be, rules for IW should be left to developing customary norms and general principles, perhaps with help from commentators, before serious consideration of a treaty begins.

Notes


3. Id. at 16, quoting Philip C. Jessup & Francis Deak, Neutrality: The Origins xiii-xiv (1935). Oliver Wendell Holmes wrote in similar vein that a page of history is worth a volume of logic and that the life of the law has not been logic but experience. New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) (Holmes, J.); Oliver Wendell Holmes, The Common Law 5, 244 (Mark DeWolfe Howe ed. 1963).

4. Information warfare (IW) is information operations (IO), i.e., actions taken to affect adversary information and information systems while defending one's own information and information systems, conducted during crisis or conflict to achieve or promote specific objectives over a specific adversary or adversaries. Joint Chiefs of Staff, Joint Pub 1-02, Dictionary of Military and Associated Terms 422 (2001). See also Walter G. Sharp, Sr., Cyberspace and the Use of Force 23-24 (1999) [hereinafter Sharp].

5. E.g., Myres S. McDougal & Florentino Feliciano, Law and Minimum World Public Order ch. 5 (1961); Nils Orvik, The Decline of Neutrality 1914-1941 ch. 6 (2d ed. 1971); Walter L. Williams, Jr., Neutrality in Modern Armed Conflict: A

6. CASTREN, supra note 5, at 427.

7. Janis, supra note 5, at 148, citing NEILL H. ALFORD, JR., MODERN ECONOMIC WARFARE) 326 (1963 (Vol. 56, US Naval War College International Law Studies); see also Norton, supra note 5, at 249, citing Richard R. Baxter, HUMANITARIAN LAW OR HUMANITARIAN POLITICS? THE 1974 CONFERENCE ON HUMANITARIAN LAW, 16 HARVARD INTERNATIONAL LAW JOURNAL 1, 2 (1975) (Neutrality has had a “juridical half-life” since World War II).


10. GABRIEL, supra note 5, at 69; see also ORVIK, supra note 5, at 251–56.


14. E.g., COLOMBOS, supra note 5, § 759; McDougall & Feliciano, supra note 5, at 197–436; 2 O'CONNELL, supra note 5, at 1141–42; Bothe, Neutrality at Sea, supra note 5, at 205; Thomas A. Clingan, Jr., Submarine Mines in International Law, in Robertson, supra note 5, at 351, 352 (argument that neutrality no longer exists is specious); Gioia & Ronzitti, supra note 5, at 223; Vaughan Lowe, The Commander's Handbook of the Law of Naval Operations, in Robertson, supra note 5, at 109, 134–38; McNeill, supra note 5, at 642–43; Natalino Ronzitti, The Crisis of the Traditional Law Regulating International Armed Conflicts at Sea and the Need for Its Revision, in THE LAW OF NAVAL WARFARE; A COLLECTION OF AGREEMENTS AND DOCUMENTS 1, 6–12 (Ronzitti ed. 1988); Williams, supra note 5, at 47–48; Wiswall, supra note 5, at 619. Even commentators arguing that the force of the law of neutrality has been greatly diminished do not say it has disappeared in the Charter era. See, e.g., ALFORD, supra note 7, at 326; Janis, supra note 5, at 153; Norton, supra note 5, at 311.

15. UN Charter, art. 103. In 1928 the Pact of Paris was concluded, supra note 11. Subject to later agreements such as the Charter, the Pact remains in force today. See Pact of Paris, supra note 11, arts. 1–2, 46 Stat. 2343, 2345–46, 94 L.N.T.S. 57, 63; UN Charter, art. 103; United States Department of State, Treaties in Force 447 (1999) (TIP); GOODRICH ET AL., supra note 9, at 614–17; SIMMA, supra note 9, at 1116–25.


19. Nearly all agree that qualified scholars are only a secondary source, or are evidence of rules of law. I.C.J. Statute, art. 38(1)(d); BROWNLE, supra note 17, at 24; 1 OPPENHEIM, supra note 17, § 14; RESTATEMENT (THIRD), supra note 18, § 103(2)(c); VON GLAHN, supra note 18, at 21; but see Annotated Supplement, supra note 5, at xxxvi-xxxviii, ¶¶ 5.4-5.4.2 (only custom, treaties recognized).


21. UN Charter, arts. 25, 48, 103 (Council decisions). See also Lalive, supra note 5, at 78–81; Sydney D. Bailey & Sam Daws, The Procedure of the UN Security Council ch. 1.5 (3d ed. 1998); Jorge Casteneda, Legal Effects of United Nations Resolutions ch. 3 (Alba Amoia trans. 1969); Goodrich et al., supra note 9, at 126, 144, 290–314; Simma, supra note 9, at 284, 407–18, 605–36, 652; Castren, supra note 5, at 434. Nonbinding Assembly or Council resolutions can add strength to a preexisting norm to evidence its existence and vitality or can contribute to development of a new norm. Brownlie, supra note 17, at 14–15, 694; 1 Oppenheim, supra note 17, § 16, at 47–49; RESTATEMENT (THIRD), supra note 18, § 103(2)(d), cmt. c, r.n.2.


23. See supra note 20 and accompanying text.

24. One example of Charter law modifications is the UN Charter, art. 103, treaty trumping provision.


26. RESTATEMENT (THIRD), supra note 18, § 103.


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28. UN Charter, art. 2(5); Quincy Wright, The Outlawry of War and the Law of War, 47 AMERICAN JOURNAL OF INTERNATIONAL LAW 365, 371-72 (1953). Permanently neutral countries have supported UN action. See, e.g., GABRIEL, supra note 5, at 132-33 (Swedish, Swiss economic aid and/or support during Korean War); ROSS, supra note 5, chs. 7-9 (Swedish, Swiss actions against Rhodesia).


31. UN Charter, arts. 2(4), 103; see also note 9, Pact of Paris, supra note 11; United States Department of State, Treaties in Force 439 (1998) (TIF); GOODRICH ET AL., supra note 9, at 614-17; SIMMA, supra note 9, at 1116-25. Commentators and countries continue debating whether anticipatory self-defense, i.e., a response with force that is necessary, proportional and admitting of no other alternative, is permitted in the UN Charter era. Compare, e.g., Nicaragua Case, supra note 20, at 14, 347 (Schwebel, J., dissenting); STANIMAR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 296 (1996); BOWETT, supra note 5, at 187-93; 1 OPPENHEIM, supra note 20, § 127; KELSEN, COLLECTIVE SECURITY, supra note 5, at 27; MCCORMACK, supra note 20, at 122-24, 238-39, 253-84, 302; MCDougal & FELICIANO, supra note 5, at 232-41; SCHACHTER, supra note 18, at 152-55; SHARP, supra note 4, at 33-48 (real debate is the scope of the anticipatory self-defense right; responses must be proportional); STONE, supra note 20, at 3; THOMAS & THOMAS, supra note 20, at 127; Bunn, supra note 20, at 69-70; Greenwood, Remarks, in Panel, supra note 20, at 158, 160-61; Linnan, supra note 20, at 57, 65-84, 122; Lowe, supra note 14, at 127-30; McHugh, supra note 20, at 61; Mullerson & Scheffer, supra note 20, at 93, 109-14; Murphy, supra note 20, at 241; Reisman, supra note 20, at 25, 45; Robertson, supra note 20, at 89, 101; Turner, supra note 20, at 43, 62-80; Waldock, supra note 20, at 451, 496-99 (anticipatory self-defense permissible, as long as principles of necessity, proportionality observed) with, e.g., BROWNLE, supra note 5, at 257-61, 275-78, 366-67; DINSTEIN, supra note 5, at 182-87, 190; HENKIN, supra note 20, at 121-22; JESSUP, supra
220. Rules for the Control of Radio

A neutral Power must see to the same obligation being observed by companies or individuals owning telegraph or telephone cables or wireless telegraphy installation of this kind established by them before the war on the territory of a neutral Power for purely military purposes, and which has not been opened for the service of public self-defense or other responses by the invaded neutral; or (b) (a) Erect on the territory of a neutral Power a wireless telegraphy station or other apparatus for communicating with belligerent forces on land or sea; or [or] (b) Use any installation of this kind established by them before the war on the territory of a neutral Power for purely military purposes, and which has not been opened for the service of public messages.”


26. See supra note 33 and accompanying text.

37. A neutral cannot, however, allow belligerents to establish intelligence offices on its territory. 2 OPPENHEIM, supra note 5, § 356, at 748–51; see also 11 WHITEMAN, supra note 5, at 220.

38. See supra note 35.
39. Hague V, supra note 30, art. 19, 36 Stat. at 2326; compare Convention with Respect to Laws & Customs of War on Land, July 29, 1899, Regulations, art. 54, 32 id. 1803, 1823; see also 2 LEVIE, supra note 30, at 832.

40. 2 OPPENHEIM, supra note 5, § 355, at 747.


42. This is by analogy from the rule that vehicles transporting sick and wounded carry no combatants or war materials and rules for belligerent radio stations on neutral territory. See supra notes 35-36 and 39-41 and accompanying text.

43. See supra note 41 and accompanying text.

44. See UN Charter, art. 103. United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 221, 1833 U.N.T.S. 3, 489 (LOS Convention); Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Nov. 29, 1969, art. 1(1), 26 U.S.T. 765, 767, 970 U.N.T.S. 211, 212 (Intervention Convention); see also 4 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY ¶¶ 221.1-221.9(h) (Myron H. Nordquist et al. eds., 1991); 2 O’CONNELL, supra note 5, at 1006-8. The 1958 Law of the Sea Conventions and the LOS Convention “other rules” clauses, repeated in the navigational articles, have almost universally been said to mean the LOS is subject to the LOAC in appropriate situations. Compare, e.g., LOS Convention preamble (matters not regulated by Convention to be governed by rules, principles of international law), arts. 2(3) (territorial sea), 19(1), 21(1), 31 (innocent passage), 34(2) (strait transit passage), 38(1), 58(3) (EEZs), 78(2) (continental shelf; coastal State cannot infringe or interfere with “navigation and other rights and freedoms of other States as provided in this Convention”), 87(1) (high seas), 138 (the Area), 303(4) (archaeological, historical objects found at sea; “other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature”), 1833 U.N.T.S. at 398, 400, 404-05, 408, 410, 419, 431-32, 446, 517, with, e.g., Convention on the High Seas, Apr. 29, 1958, preamble, art. 2, 13 U.S.T. 2312, 2314, 450 U.N.T.S. 11, 82 (High Seas Convention), (treaty restates customary law); Convention on the Territorial Sea & Contiguous Zone, Apr. 29, 1958, arts. 1(2), 14(4), 17, 22(2), 15 id. 1606, 1608, 1610, 1611, 1612, 516 U.N.T.S. 205, 206-08, 214, 216, 220 (Territorial Sea Convention). Although the other 1958 law of the sea conventions do not have other rules clauses, they say they do not affect the status of waters above that are part of the high seas, for the continental shelf; or other high seas rights, for high seas fisheries. Convention on the Continental Shelf, Apr. 29, 1958, arts. 1, 3, id. 471, 473, 499 U.N.T.S. 311, 312, 314 (Continental Shelf Convention); Convention on Fishing & Conservation of Living Resources of the High Seas, Apr. 29, 1958, arts. 1-8, 13, 17 id. 138, 140-43, 559 U.N.T.S. 285, 286-92, 296 (Fishery Convention); Territorial Sea Convention, supra, art. 24(1), 15 id. at 1612, 516 U.N.T.S. at 220 (contiguous zone). Thus the High Seas Convention regime, including its Article 2 other rules provision, is incorporated by reference into these Conventions, which specify some High Seas Convention principles but not the Article 2 other rules clause. The LOS Convention, supra, art. 33, 1833 U.N.T.S. at 409, governing the contiguous zone, refers to an ocean belt contiguous to the territorial sea, which is part of the high seas except declared EEZ, fishing or continental shelf areas, otherwise subject to the high seas regime. See also JESSUP, supra note 2; JESSUP & DEAK, supra note 3; W. ALISON PHILLIPS & ARTHUR H. REEDE, NEUTRALITY: THE NAPOLEONIC PERIOD (1936); EDGAR TURLINGTON, NEUTRALITY: ITS HISTORY, ECONOMICS AND LAW (1936).

45. The LOS conventions also promote a due regard principle for shared ocean uses; one user must observe due regard for other users’ rights, e.g., a right to lay cables that might carry Internet messages. Compare LOS Convention, supra note 44, arts. 87, 112-15, 1833 U.N.T.S. at 433, 440 with High Seas Convention, supra note 44, arts. 2, 26-29, 13 U.S.T. at 2314, 2319-20, 450 U.N.T.S. at 82, 96-98; Convention for Protection of Submarine Cables, Mar. 14, 1884, 24 Stat. 989; Declaration Respecting Interpretation of Articles II & IV, Dec. 1, 1886, 25 id. 1424; see also

46. See supra note 44 and accompanying text.


49. Vienna Convention, supra note 20, art. 60, 1155 U.N.T.S. at 346; see also Gabčíkovo-Nagymaros Project, supra note 48, at 39 (Article 60 a customary norm); Namibia, 1971 I.C.J. 4, 47; BROWNLE, supra note 17, at 622–23; ILC Report, supra note 47, at 253–255; MCNAIR, supra note 47, ch. 36; 1 OPPENHEIM, supra note 17, § 649; SINCLAIR, supra note 48, at 20, 166, 188–90.


Retorsion, or retortion, is a target State's lawful but unfriendly response to another State's unfriendly practice or act whether illegal or not, to coerce the latter to discontinue that practice or act. Retorsionary responses must be proportional. BRIELEY, supra, at 399; WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW § 120 (A. Pearce Higgins ed., 8th ed. 1924); 2 HYDE, supra note 5, § 588; FRITS KALSHOVEN, BELLIGERENT REPRISALS 27 (1971); 7 MOORE, DIGEST § 1090; 2 OPPENHEIM, supra note 5, § 135; RESTATEMENT (THIRD), supra note 18, § 905 & r.n.8; SIMMA, supra note 9, at 104; STONE, supra note 5, at 288–89; WALDOK, supra note 20, at 451, 458.

51. Vienna Convention, supra note 20, arts. 53, 64, 1155 U.N.T.S. at 344, 347.

52. Vienna Convention, supra note 20, does not provide for the operation of war, or armed conflict, on international agreements. However, other authorities agree that war may suspend or
terminate treaties, depending on the nature of the treaty and the circumstances of the conflict. See, 
ext., ILC Report, supra note 47, at 267; Institut de Droit International, The Effects of Armed Conflict
on Treaties, Aug. 28, 1985, arts. 2, 3, 5, 11, 61(2) Annaire 278, 280–82 (1986); Regulations
Regarding the Effect of War on Treaties, 1912, arts. 1, 4, 7–10, reprinted in 7 AMERICAN JOURNAL
OF INTERNATIONAL LAW 153–55 (1913); Clark v. Allen, 331 U.S. 503, 513 (1947); Kamath v. United
States, 79 U.S. 231, 240–42 (1929); Tchek v. Hughes, 128 N.E. 185, 191 (N.Y.), cert. denied, 254 U.S.
643 (1920); 2 OPPENHEIM, supra note 5, §§ 99(4)–99(5); George B. Davis, The Effects of War
Upon International Conventions and Private Contracts, 1927 PROCEEDINGS OF THE AMERICAN SOCIETY
OF INTERNATIONAL LAW 124–29; G.G. Fitzmaurice, The Judicial Clauses of the Peace Treaties, 73
RECUIEL DES COURS DE L’ACADÉMIE DE DROIT INTERNATIONAL 255, 307–17 (1948); Harvard Draft
Convention on the Law of Treaties, art. 28, 29 AMERICAN JOURNAL OF INTERNATIONAL LAW SUPPLEMENT
657, 662–64 (1935); Cecil J.B. Hurst, The Effect of War on Treaties, 2 BRITISH YEARBOOK OF INTERNATIONAL
LAW 37, 40 (1921); James J. Lenoir, The Effect of War on Bilateral Treaties, with Special Reference to Reciprocal
Impossibility or fundamental change of circumstances claims may overlap war suspension or
termination claims. Impossibility, fundamental change, etc., are the only bases for termination
or suspension for treaty relations between belligerents and neutrals. Herbert W. Briggs, The Attorney
General Invokes Rebus Sic Stantibus, 36 AMERICAN JOURNAL OF INTERNATIONAL LAW 89
(1942); Oliver J. Lissitzyn, Treaties and Changed Circumstances, 61 AMERICAN JOURNAL OF
INTERNATIONAL LAW 911 (1967); Walker, supra note 47, at 68–69.
53. See supra note 33 and accompanying text.
54. See supra note 30 and accompanying text.
55. See supra notes 30–33 and accompanying text.
56. Hague V, Hague XIII, Maritime Neutrality Convention, supra note 30; Vienna
Convention, supra note 20, preamble, art. 38, 1155 U.N.T.S. at 333, 341; BROWNIE, supra note 17,
at 5; 1 OPPENHEIM, supra note 17, §§ 10, 11, at 32–36; RESTATEMENT (THIRD), supra note 18, § 102(3) & cmt. f.
57. Hague V, supra note 30, art. 5, 36 Stat. at 2323; Hague XIII, supra note 30, art. 25, id. at
2432; Maritime Neutrality Convention, supra note 30, arts. 4(a), 26, 47 id. at 1991, 1994, 135
L.N.T.S. at 196, 208; General Declaration, supra note 30, 3(c), at 605; Hague Air Rules, supra note 30,
arts. 42, 47, at 214–15; AFP 110–31, supra note 30, ¶ 2–6c (air operations principle; Hague Air
Rules, supra, not cited); 3 HYDE, supra note 5, §§ 855, 856A, 888; 2 LEVIE, supra note 30, at 788;
ANNOTATED SUPPLEMENT, supra note 5, ¶ 7.3; 2 OPPENHEIM, supra note 5, §§ 316, 323, 325;
TUCKER, supra note 5, at 260–61; but see Helsinki Principle 2.2, supra note 13, at 502 (neutral
“must” take measures to enforce warship transit, sojourn rules).
58. This includes interning crew. If an enemy prize is brought to a neutral port under distress
or similar conditions and does not leave when directed, its crew must be interned. Hague XIII,
supra note 30, arts. 21, 22, 24, 36 Stat. at 2431–32; see also Maritime Neutrality Convention, supra
note 30, art. 17, 47 Stat. at 1993, 135 L.N.T.S. at 204; Nordic Neutrality Rules, supra note 30, art.
4(1), 188 L.N.T.S. at 299, 305, 311, 319, 325. Hague XIII, supra note 30, art. 23 provides for an
exception to this rule, entry of prizes under other than distress conditions, but several nations,
including the United States, reserved to art. 23. See 36 Stat. at 2432, 2438. Hague XIII, arts. 21–22
are customary law; art. 23 is not because of US and UK reservations, now applying to more States
through treaty succession principles. The S.S. Appam, 243 U.S. 124, 150–51 (1917); 3 HYDE, supra
note 5, §§ 862, 864; 2 OPPENHEIM, supra note 5, §§ 328a; 333, at 706; 345; Symposium, State
Succession in the Former Soviet Union and in Eastern Europe, 33 VIRGINIA JOURNAL OF
INTERNATIONAL LAW 253 (1993); Walker, supra note 47. Neutrals must allow belligerent
warship entry for asylum, distress or other purposes if they comply with innocent passage rules.
LOS Convention, supra note 44, arts. 18–19, 1833 U.N.T.S. at 404 (innocent passage in distress,
but subject to other rules of international law, i.e., LOAC); Territorial Sea Convention, supra note 44, arts. 1(2), 14, 15 U.S.T. 1608, 1610, 516 U.N.T.S. 206, 214; Helsinki Principle 2.2, supra note 13, at 502; ANNOTATED SUPPLEMENT, supra note 5, ¶ 3.2.2.1; 2 OPPENHEIM, supra note 5, §§ 343-46; SAN REMO MANUAL, supra note 12, ¶ 21.

59. Convention Respecting Laws & Customs of War on Land, Oct. 18, 1907, Regulations, Art. 54, 36 Stat. 2227, 2308. This is limited to land warfare when a belligerent occupies enemy territory and seizes or destroys landing ends of cables connecting that territory with a neutral State. COLOMBOS, supra note 5, § 569.

60. COLOMBOS, supra note 5, § 576; United States Department of the Navy, Law of Naval Warfare: NWIP 10-2 ¶ 520b (1955 through Change 6, 1974) (NWIP 10-2); compare Institute of International Law, The Laws of Naval War Governing the Relations Between Belligerents, art. 54 (1913), reprinted in SCHINDLER & TOMAN, supra note 30, at 857, 867 (Oxford Naval Manual). Modern manuals do not analyze the issue thoroughly, probably because of disuse of cables. See SAN REMO MANUAL, supra note 12, ¶ 37. ANNOTATED SUPPLEMENT, supra note 5, ¶ 1.6, at 24 discusses cables in an LOS context; see also supra note 45 and accompanying text.

61. See supra note 38 and accompanying text.

62. Neutral merchant ships acquire enemy character and may be treated as enemy merchant vessels if they operate directly under enemy control, orders, charter, employment or direction. ANNOTATED SUPPLEMENT, supra note 5, ¶ 7.5.2; SAN REMO MANUAL, supra note 12, ¶¶ 112-17. See also Helsinki Principle 5.1.2(4), supra note 13, at 507; ANNOTATED SUPPLEMENT, supra note 5, ¶ 8.2.2.2; SAN REMO MANUAL, supra note 12, ¶ 67.

63. E.g., hospital ships, medical aircraft; see generally Helsinki Principles 5.1.2(5)-5.1.2(6), supra note 13, at 507; ANNOTATED SUPPLEMENT, supra note 5, ¶ 8.2.3; SAN REMO MANUAL, supra note 12, ¶¶ 47-52, 136-40, 146, 151-52, citing treaties, custom (hospital ships; small coastal rescue craft; vessels granted safe conduct; vessels carrying cultural property; liners carrying only passengers; ships on religious, non-military scientific or philanthropic missions; small coastal fishing boats, coastal traders; vessels that have surrendered; life rafts, life boats). Neutral aircraft carrying passengers, or serving as medical or cartel aircraft, are also protected. See ANNOTATED SUPPLEMENT, supra note 5, ¶ 8.2.3; SAN REMO MANUAL, supra note 12, ¶¶ 140-45, 153-58.

64. Cf. Horace B. Robertson, Jr., Modern Technology and the Law of Armed Conflict at Sea, in Robertson, supra note 5, 362, 370; New Technologies and Armed Conflicts at Sea, 14 SYRACUSE JOURNAL OF INTERNATIONAL LAW AND COMMERCE 678, 704 (1988). This may mean that trying to define IW methods or means that are per se unlawful will fail, particularly when technology is developing exponentially.

65. For a discussion of high seas visit and search, see generally Helsinki Principles 5.2.1, 5.2.7, supra note 13, at 509, 511; ANNOTATED SUPPLEMENT, supra note 5, ¶¶ 7.6-7.6.2; SAN REMO MANUAL, supra note 12, ¶¶ 116, 118-24.

66. See supra note 62 and accompanying text.


68. Neutral merchantmen must observe blockades that are duly established and notified and are effective and impartial. Helsinki Principles 5.2.10, 5.3, supra note 13, at 513; ANNOTATED SUPPLEMENT, supra note 5, ¶¶ 7.7.1-7.7.5; SAN REMO MANUAL, supra note 12, ¶¶ 93-104.

Neutral ships should be aware of the risk and peril of operating in areas where active naval hostilities take place. Belligerents engaged in naval hostilities must, however, take reasonable precautions including appropriate warnings, if circumstances permit, to avoid damage to neutral ships.

This does not authorize converting a naval operations area into a free-fire zone and does not obliterate the customary rule that belligerents must warn away neutral shipping from operational areas. The Helsinki rule might come into play if there is a chance encounter of belligerent forces.

Helsinki Principle 3.2, supra note 13, at 504; ANNOTATED SUPPLEMENT, supra note 5, §§ 7.8–7.8.1; SAN REMO MANUAL, supra note 12, ¶ 108 & cmt. 108.1. Helsinki Principle 3.2, supra at 504, declares:

70. Helsinki Principle 3.3, cmt., supra note 13, at 505; ANNOTATED SUPPLEMENT, supra note 5, §§ 8.7–8.7.1; SAN REMO MANUAL, supra note 12, ¶ 108 & cmt. 108.1. Helsinki Principle 3.2, supra at 504, declares:

Neutral ships should be aware of the risk and peril of operating in areas where active naval hostilities take place. Belligerents engaged in naval hostilities must, however, take reasonable precautions including appropriate warnings, if circumstances permit, to avoid damage to neutral ships.

This does not authorize converting a naval operations area into a free-fire zone and does not obliterate the customary rule that belligerents must warn away neutral shipping from operational areas. The Helsinki rule might come into play if there is a chance encounter of belligerent forces.


73. See supra notes 68, 70, and 72 and accompanying text.


75. See supra note 64 and accompanying text.


78. The legal basis for an ADIZ is a nation’s right to establish reasonable conditions for entry into its territory. AFP 110–31, supra note 30, ¶ 21g; MYRES MCDouGAL ET AL., LAW AND PUBLIC ORDER IN SPACE 307–09 (1963); ANNOTATED SUPPLEMENT, supra note 5, ¶ 2.5.2.3;

79. See supra note 45 and accompanying text.

80. UN Charter, art. 103; see also supra note 15 and accompanying text.

81. Vienna Convention, supra note 20, does not provide for the operation of war, or armed conflict, on international agreements. However, other authorities agree that war may suspend or terminate treaties, depending on the nature of the treaty and the circumstances of the conflict. See, e.g., ILC Report, supra note 49, at 267; Institut de Droit International, The Effects of Armed Conflict on Treaties, Aug. 28, 1985, arts. 2, 3, 5, 11, 61(2) Annuaire 278, 280–82 (1986); id., Regulations Regarding the Effect of War on Treaties, 1912, arts. 1, 4, 7–10, reprinted in 7 AMERICAN JOURNAL OF INTERNATIONAL LAW 153–55 (1913); Clark v. Allen, 331 U.S. 503, 513 (1947); Kannuth v. United States, 79 U.S. 231, 240–42 (1929); Tch庭 v. Hughes, 128 N.E. 185, 191 (N.Y.), cert. denied, 254 U.S. 643 (1920); 2 OPPENHEIM, supra note 5, §§ 99(4)–99(5); Davis, supra note 52, at 124–29; Fitzmaurice, supra note 52, at 255, 307–17; Harvard Draft Convention on the Law of Treaties, supra note 52, art. 35(b), at 662–64; Hurst, supra note 52, at 37, 40; Lenoir, supra note 52, at 129, 173–77; Walker, supra note 47, at 68–71. Impossibility or fundamental change of circumstances claims may overlap war suspension or termination claims. Impossibility, fundamental change, etc., are the only bases for termination or suspension for treaty relations between belligerents and neutrals. Briggs, supra note 52, at 89; Lissitzyn, supra note 52, at 911; Walker, supra note 47, at 68–69.

82. Helsinki Principles 1.4, 3.1, 4, supra note 13, at 500, 503, 505; ANNOTATED SUPPLEMENT, supra note 5, ¶¶ 8.1–8.13; SAN REMO MANUAL, supra note 12, ¶¶ 34–42, 44, 46; see also supra note 45 and accompanying text.


84. I.C.J. Statute, art. 38(1); RESTATEMENT (THIRD), supra note 18, §§ 102–03.


86. See supra note 50 and accompanying text.

87. Today, most commentators say a State cannot invoke a reprisal involving use of force, except when a State is a belligerent and wishes to respond, after request for the offender to comply with the law, with a proportional reprisal against an enemy. See supra note 50 and accompanying text.

88. See supra note 57 and accompanying text.

89. If a belligerent orders an aircraft from a company or person in neutral territory, the neutral must prescribe a route for the aircraft away from the neighborhood of military operations of the belligerent’s opponent and “must exact whatever guarantees may be required to ensure that the
aircraft follows the route prescribed.” General Declaration, supra note 30, ¶ 3(f), at 605; Hague Air Rules, supra note 30, art. 46, at 214.

90. Hague Air Rules, supra note 30, art. 47, at 215; see also Nordic Neutrality Rules, supra note 30, art. 13, 188 L.N.T.S. at 303, 309, 315, 323, 329; Harvard Draft Convention on Rights & Duties of Neutral States in Naval and Aerial War, art. 6, 33 AMERICAN JOURNAL OF INTERNATIONAL LAW 175, 245 (Supp. 1939) (Harvard Draft Neutrality Convention); 2 LEVIE, supra note 30, at 827.

91. Compare Hague Air Rules, supra note 30, art. 30, at 212 with AFP 110-31, supra note 30, ¶ 2-6b (aircraft entering area of immediate air operations subject to “damages” from hostilities; belligerents cannot deny neutral aircraft access to international airspace even if bound for enemy territory); Annotated Supplement, supra note 5, ¶¶ 7.8–7.8.1; San Remo Manual, supra note 12, ¶ 108 & cmt. 108.1; see also supra note 70 and accompanying text. Helsinki Principle 3.2, supra at 504, might come into play if there is a chance encounter of belligerent forces.

92. ANNOTATED SUPPLEMENT, supra note 5, ¶ 2.4.3.1; see also supra note 71 and accompanying text.

93. ANNOTATED SUPPLEMENT, supra note 5, ¶ 7.9; SAN REMO MANUAL, supra note 12, ¶¶ 105–08; see also supra note 72 and accompanying text.

94. See supra note 74 and accompanying text.

95. See supra note 78 and accompanying text.

96. See supra notes 83, 89 and accompanying text.

97. UN Charter, art. 103; see also supra notes 9, 15, 25 and accompanying text.

98. See supra note 81 and accompanying text.

99. See supra notes 45, 82 and accompanying text.


101. See supra notes 2–53 and accompanying text.

102. 2 O'CONNELL, supra note 5, at 1142. Some limited, or localized, wars may have been total war from the belligerents' perspectives, but on a world scale basis, they might be considered local or limited in nature. One recent example is the 1980–88 Iran-Iraq conflict, the maritime aspects of which are examined in WALKER, supra note 1, ch. 2.

103. JESSUP, supra note 2 at 156 (“There is nothing new about revising neutrality; it has undergone an almost constant process of revision in detail.”) See also supra notes 2–5 and accompanying text.

modalities. Vannevar Bush, As We May Think, 176 ATLANTIC MONTHLY 101 (July 1945); Johnson, supra. Mechanical computers were used aboard warships before World War II to supply fire control solutions to naval guns through electrical circuits. Although most firing corrections on these computers were made aboard ship by telephone communications among gunners and fire control personnel who operated visual or radar-assisted gun directors and ship’s combat information centers (i.e., a room aboard ship where radar repeaters portrayed shell splashes), shore bombardment effects and recommendations for corrections sometimes came by radio communications between ships and shore spotters, e.g., Army or Marine Corps forward artillery observers on the ground or in aircraft. The ship’s computer “stored” prior information that had been inserted and retained this information until it was changed by operators. Information might be relayed through internal ship communications, perhaps to other computers aboard ship, but there was no data transfer among external computers, i.e., those on other vessels. Antisubmarine warfare systems, shipboard torpedo attack systems, and submarine fire control systems for torpedo attack employed similar fire control solutions, using electronics-based systems (e.g., sonar, radar) and mechanical devices operated in similar fashion, but there was little, if any, information exchange between an attacking ship and other stations. These systems operate in similar fashion today, although electronics-based computers have replaced mechanical systems, and missiles have replaced gun projectiles in many cases.

105. “When the legal community first considered the . . . regime that governed state activities and military operations in Cyber Space, some U.S. government attorneys stated rather boldly that (applying) modern information systems technology to military purposes was so new that no law applied.” SHARP, supra note 5, at 5. A policy behind this approach is national sovereignty. See UN Charter, art 2(1); S.S. Lotus (Fr. V. Turk), 1927 PC. I.J., Ser. A, No. 10, at 4,18.

106. Cf. I.C.J. Statute, Art 38(1); RESTATEMENT (THIRD) supra note 18, at 102–03.

107. E.g. Office of General Counsel, Department of Defense, An Assessment of International Legal Issues in Information Operations (Nov. 1999). The paper is appended to this volume at the Appendix. See also GREENBERG, supra note 50, at 17; SHARP, supra note 5, at 5.

108. UN Charter, arts. 2(4), 25, 48, 51, 103; see also supra notes 2–44 and accompanying text.

in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not such a provision. . . . [T]he right not arbitrarily to be deprived of one's life applies also during hostilities. . . . [W]hat is an arbitrary deprivation of life . . . then falls to be determined by the applicable lex specialis . . . the [LOAC] . . . designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to . . . the Covenant, can only be decided by . . . the [LOAC] and not . . . from the terms of the Covenant.” To the extent that human rights treaty norms represent custom, law of treaties analysis does not apply. However, derogations from custom like the persistent objector rule do, and will apply to Declaration norms having status as custom. “The United States has long denied that any obligation rests upon it when a neutral to attempt to control e. . . .pressions of opinion by private persons within its territory and adverse to the cause of any belligerent,” although the US Government has appealed to its citizenry to refrain from partisanship during war. 3 HYDE, supra note 5, § 874.

110. These might be applied through the analogy of the due regard principle, taken from the LOS and applied during armed conflict by analogy. See supra note 79 and accompanying text.

111. See supra note 30 and accompanying text.

112. See supra notes 57, 58 and accompanying text.

113. See supra note 33 and accompanying text.

114. Outer space also has this characteristic, but beyond the Charter and general principles applicable to any situation, there is little law from which analogies for neutrality law in the IW context might be drawn. See supra notes 96–100 and accompanying text.

115. See supra notes 44–79 and accompanying text.

116. See, e.g., supra notes 68, 70–72, 78, 89, 91–93 and accompanying text.


118. See supra note 64 and accompanying text. The law for dropping projectiles from balloons comes to mind. See Declaration Prohibiting Discharge of Projectiles & Explosives from Balloons, Oct. 17, 1907, 36 Stat. 2439, still in force for 28 countries including the United States, and perhaps more if treaty succession principles are taken into account. See TIF, supra note 15, at 450; Symposium, supra note 58; Walker, supra note 47.

119. I.C.J. Statute, art. 38(1); RESTATEMENT (THIRD), supra note 20 §§ 102–03; see also supra notes 18–19 and accompanying text.