Neutrality in Cyber War

Andrew Carswell
Armed Forces Delegate
International Committee of the Red Cross
Outline

• Review: legal classification of conflicts

• Overview of the law of neutrality

• International armed conflict
  ▶ The concept of neutrality in cyber space

• Non-international armed conflict
  ▶ The rights and obligations of belligerents
Hague Convention V of 1907

"Tweeting", circa 1907
Legal classification of conflicts

- Rationale for separation of *jus ad bellum* from *jus in bello*

- Types of conflict
  - state vs. state – IAC
  - state vs. non-state armed group (NSA) – NIAC
  - NSA vs. NSA – NIAC
  - delimitation of the battlefield
The law of neutrality

- Applies *de jure* in IAC
- Regulates coexistence of states at war and states at peace
- "The attitude of impartiality adopted by third states towards belligerents and recognized by belligerents ... creating rights and duties between the impartial states and the belligerents"
The law of neutrality

• No declaration of neutrality is required

• Rules of neutrality in Hague Convention V (land) and VIII (sea) a codification of customary law

• These laws have a "slightly musty quality"

• Look to object and purpose of the law
The law of neutrality

- **Duties** of neutral states:
  - refrain from participating in the conflict
  - impartial treatment of belligerents
  - prevent belligerents from committing violations of their neutrality on their territory
    - including use of force if necessary
  - intern combatants found on territory until end of hostilities

- **Rights** of neutral states:
  - continue normal diplomatic and trade relations
  - territory is inviolable (cf. UN Charter)
The law of neutrality

• **Duties** of belligerent states:
  ▶ may not move troops, weapons or other materials of war across neutral territory, air space
  ▶ may not recruit "corps of combatants" from neutral state
  ▶ telecommunications – later

• **Rights** of belligerent states:
  ▶ a guarantee that neutral territory will not be used to launch attacks, recruit/shelter troops, etc.
The law of neutrality

• **Consequences** of a neutral state violating its own neutrality: (ultimately) treatment as a co-belligerent
  - slight vs. severe violations – Oppenheim
  - correlation with *jus ad bellum*

• **Consequences** of a belligerent state violating the neutrality of a state: right of latter to use self-defense to expel belligerent
  - slight vs. severe violations
  - correlation with *jus ad bellum*
International armed conflict

• ~60% of internet traffic worldwide traverses through U.S. servers owned by private enterprise

• How can wired neutral countries maintain neutrality during cyber conflict?

• **Central issue**: does routing of attacks by a belligerent state through the internet nodes of a neutral country violate its neutrality? If so, consequences?
International armed conflict

• 4 potential avenues in Hague V:
  ▶ using cyber infrastructure in a neutral country's territory as violation of that territory – art. 1
  ▶ cyber means of warfare as "munitions of war" moved across neutral territory – arts. 2, 5
  ▶ (cyber means as "erecting" or "using" own communications equipment on neutral territory for military purposes – arts. 3, 5)
  ▶ cyber transmissions as **permissible** use of neutral state's telecommunications systems – arts. 8, 9
International armed conflict

- Examples:
  - A belligerent soldier sitting in neutral territory launching a cyber attack
  - A belligerent soldier sitting in his own territory and launching a cyber attack via servers on neutral territory

- Violation of neutral country's territory per art. 1?

- Or: moving "munitions of war" through a neutral country per art. 2?

- Or: permissible use of neutral state's communication infrastructure?
International armed conflict

• **Is awareness** of the belligerent cyber means required before a neutral party can be held responsible for a violation of its duties of neutrality?

• Acts vs. omissions

• Possible keys:
  ▶ look to object and purpose of law of neutrality
    ▪ Is the neutral state's act / omission in question tantamount to participation in the conflict?
    ▪ Oppenheim: severe vs. slight violations / consequences
  ▶ is cyber *space* different from cyber *infrastructure*?
  ▶ State practice, *opinio juris*
Non-international armed conflict

- Parallel between law of neutrality (IAC) and non-participation in a NIAC?
- Hypothetical 1:
Non-international armed conflict

- Hypothetical 2: