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Bilateral Defense-Related Treaties and the Dilemma Posed by the Law of Neutrality

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Abstract

To effectively counter current and emerging threats to U.S. and global security, the United States needs to rely on defense cooperation from allies and partners. That defense cooperation is frequently reflected in bilateral defense-related treaties. The United States has many such treaties and it continues to negotiate more. Using a selection of U.S. defense-related treaties as exemplars, this Article explores how states and their lawyers should prioritize the international legal obligations of defense-related treaty partners, when the partners' treaty obligations to one belligerent and their customary law neutrality obligations to the opposing belligerent in an international armed conflict are incompatible. The Article proffers that an analogous application of the treaty conflict framework from Article 30 of the Vienna Convention on the Law of Treaties is the appropriate methodology to use. Further, this Article examines the potential consequences, under the law of state responsibility, when a partner nation chooses to uphold its treaty obligations to one belligerent and necessarily breaches its neutrality obligations to the opposing belligerent.

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I. Introduction

In the early morning hours of January 3, 2020, an American MQ-9 Reaper drone fired several missiles into a motor vehicle convoy leaving Baghdad International Airport.[1] Among those killed in the U.S. attack was Major General Qassim Soleimani, Iran's top security and intelligence commander and the leader of the powerful Qods Force of the Islamic Revolutionary Guard Corps.[2] U.S. President Donald Trump directed the drone strike in response to "an escalating series of armed attacks in recent months by the Islamic Republic of Iran and Iran-supported militias on U.S. forces," in an effort "to deter the Islamic Republic of Iran from conducting or supporting further attacks against the United States or U.S. interests," and for the purpose of "degrad[ing] the Islamic Republic of Iran and Islamic Revolutionary Guard Corps Qods Force-supported militias' ability to conduct attacks."[3] On January 8, 2020, in response to what it characterized as a "terrorist attack perpetrated by the armed forces of the United States of America,"[4] Iran fired more than a dozen ballistic missiles at two American air bases in Iraq.[5] In light of earlier incidents between their militaries (e.g., the January 20, 2019, Iranian shoot-down of a U.S. Navy drone over the Strait of Hormuz),[6] tensions between the United States and Iran could easily have escalated into a protracted international armed conflict.

Although in the aftermath of the attacks contemporary international law scholars expressed differing opinions about whether or not the U.S. attack and the Iranian counterattack meant the United States and Iran were engaged in an international armed conflict,[7] the foregoing events satisfy the generally accepted

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[1] *See* Michael Crowley, Falih Hassan & Eric Schmitt, *U.S. Strike in Iraq Kills Commander of Iranian Force*, N.Y. TIMES (Jan. 3, 2020), https://nyti.ms/36iPzyp [https://perma.cc/65UD-A8S8].

[2] *See id.*; President Donald Trump, Remarks on the Death of Islamic Revolutionary Guard Corps Major General and Quds Force Commander Qasem Soleimani of Iran (Jan. 3, 2020).

[3] Letter from Kelly Craft, U.S. Ambassador to the U.N., to Dang Dinh Quy, President of the U.N. SCOR (Jan. 8, 2020), https://www.justsecurity.org/wp-content/uploads/2020/01/united-states-article-51-letter-soleimani.pdf [https://perma.cc/PY9D-KDRB].

[4] Letter from Majid Takht Ravanchi, Iranian Ambassador to the United Nations, to Antonio Guterres, United Nations Sec'y Gen. & Dang Dinh Quy, President of the U.N. SCOR (Jan. 8, 2020) (on file with author).

[5] *See* Alissa J. Rubin, Farnaz Fassihi, Eric Schmitt & Vivian Yee, *Iran Fires on U.S. Forces at 2 Bases in Iraq, Calling It 'Fierce Revenge'*, N.Y. TIMES (Jan. 7, 2020), https://nyti.ms/300oQEB [https://perma.cc/845S-BTLP].

[6] *See* Rory Jones, *Trump Says Downing of U.S. Drone May Have Been Unintentional; Iran Shot Down a U.S. Military Drone Amid Tensions in the Middle East*, WALL ST. J. (June 20, 2019), https://www.wsj.com/articles/iran-says-it-shot-down-a-u-s-drone-11561005235 [https://perma.cc/BJQ9-NW9B].

[7] *See, e.g.*, Marko Milanovic, *Iran Unlawfully Retaliates Against the United States, Violating Iraqi Sovereignty in the Process*, EJIL: TALK! (Jan. 8, 2020), https://www.ejiltalk.org/iran-unlawfully-retaliates-against-the-united-states-violating-iraqi-sovereignty-in-the-process/ [https://perma.cc/9FGU-FJ26] (concluding that "[i]t is now also unambiguously clear that, as a matter of international humanitarian law, an international armed conflict (IAC) exists between the US and Iran"); *National Security Law Today: Iran and the Law of Armed Conflict with Bill Banks and John Bellinger*, AM. BAR ASSOC. (Jan. 9, 2020), https://soundcloud.com/nsltoday/iran-and-the-

definition of international armed conflict articulated by the International Criminal Tribunal for the former Yugoslavia ("ICTY").[8] Further, the Geneva Conventions, as interpreted by the International Committee for the Red Cross, support the conclusion that the United States and Iran were briefly, if not are still, in a state of international armed conflict.[9] Finally, concluding that the United States and Iran entered into international armed conflict, in the material sense,[10] comports with prior U.S. government statements about what constitutes an international armed conflict.[11] The international armed conflict triggered by the U.S. drone strike on Major General Soleimani portends a future scenario in which U.S. partners will find themselves caught between their customary law neutrality obligations to the opposing belligerent and their defense-related treaty obligations to the United States.

The global security environment is more complicated and unstable than it has been in many years.[12] The 2018 U.S. National Defense Strategy specifically classifies China and Russia as long-term strategic competitors and identifies North Korea and Iran as rogue regimes that threaten international peace and security.[13] The reemergence of long-term, strategic state-on-state competition is the primary

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law-of-armed-conflict-with-bill-banks-and-john-bellinger [https://perma.cc/697R-GAZB] (Bellinger concluding that the United States and Iran were not in an international armed conflict); Pouria Askary & Katayoun Hosseinnejad, *Taking Territory of a Third State Seriously: Beginning of IAC and the Strike Against Major General Soleimani (Part I)*, OPINIO JURIS (Jan. 24, 2020), https://opiniojuris.org/2020/01/24/taking-territory-of-a-third-state-seriously-beginning-of-iac-and-the-strike-against-major-general-soleimani-part-i/ [https://perma.cc/555S-YSJT] (asserting that the U.S. drone strike on Soleimani "cannot be understood as triggering an international armed conflict (IAC) between Iran and the US").

[8] *See* Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the former Yugoslavia Oct. 2, 1995) (stating an international armed conflict exists "whenever there is a resort to armed force between States"); *see also* INT'L COMM. FOR THE RED CROSS, COMMENTARY TO GENEVA CONVENTION I FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD ¶ 218 (2d ed. 2016) ("[The Tadić definition of armed conflict] has since been adopted by other international bodies and is generally considered as the contemporary reference for any interpretation of the notion of armed conflict under humanitarian law.").

[9] *See* INT'L COMM. FOR THE RED CROSS, *supra* note 8, ¶ 223 ("The fact that a State resorts to armed force against another suffices to qualify the situation as an armed conflict within the meaning of the Geneva Conventions.").

[10] *See* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 33 (5th ed. 2011) (writing that "[w]ar in the material sense unfolds irrespective of any formal steps" and "[it] may commence with an air raid (*à la* Pearl Harbor) or an artillery bombardment").

[11] *See, e.g.*, U.S. Dep't of State, *Telegram 348126 to American Embassy at Damascus*, Dec. 8, 1983, 1981–88 CUMULATIVE DIG. OF U.S. PRAC. IN INT'L L. 3456, 3457 (1981–88) (stating that armed conflict "includes any situation in which there is hostile action between the armed forces of two parties, regardless of the duration, intensity or scope of the fighting and irrespective of whether a state of war exists between the two parties").

[12] *See* U.S. DEP'T OF DEF., SUMMARY OF THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES 1 (2018).

[13] *Id.* at 4.

challenge to U.S. security.[14] Russia is the challenge in the United States European Command ("USEUCOM") area of responsibility ("AOR") because it "violate[s] the borders of nearby nations and pursues veto power over the economic, diplomatic, and security decisions of its neighbors,"[15] with the goal of "shatter[ing] the North Atlantic Treaty Organization and chang[ing] European and Middle East security and economic structures to its favor."[16] In the United States Central Command ("USCENTCOM") AOR, Iran "remains the most significant challenge to Middle East stability."[17] Iran-sponsored terrorist activities, its network of proxies and militia groups, and its missile program enable Iran to project its influence and sow instability throughout the region.[18] In this Article, hypothetical conflicts between the United States and Russia, and between the United States and Iran, will help illustrate the legal questions posed by our foreign partners' conflicting international law obligations and will highlight the reality of the dilemmas they will face in having to choose a course of action.

To successfully counteract Russia, Iran, and other emerging nation-state threats, the United States needs to cultivate and leverage the cooperation of foreign partners around the globe.[19] Defense cooperation enables the United States to project its power outside the United States, increases the ability of U.S. forces to respond quickly to threats to U.S. and international security, enhances the U.S. ability to deter potential bad actors, and promotes collective security by enhancing the defense capacity of U.S. allies and partners.[20] The United States enables its defense cooperation abroad through a variety of defense-related treaties that, for example, establish mutual defense obligations in the event of an armed attack, permit the United States to indefinitely station its troops abroad, and record cooperative arrangements for, among other things, collaborative training, air and

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[14] *Id.* at 1.
[15] *Id.*
[16] *Id.* at 2; *see also* THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES 47 (2017) ("Russia is using subversive measures to weaken the credibility of America's commitment to Europe, undermine transatlantic unity, and weaken European institutions and governments.").
[17] U.S. DEP'T OF DEF., *supra* note 12; *see also* THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES 49 (2017) ("Iran, the world's leading state sponsor of terrorism, has taken advantage of instability to expand its influence through partners and proxies, weapon proliferation, and funding.").
[18] *See* U.S. DEP'T OF DEF., s*upra* note 12, at 2.
[19] *See* U.S. DEP'T OF DEF., s*upra* note 12, at 8 (recognizing that "a robust constellation of allies and partners, will [help] sustain American influence and ensure favorable balances of power that safeguard the free and open international order"); *see also* THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES 46–49 (2017) (recognizing the value of South Korea and Japan as allies in the Indo-Pacific region and the importance of revitalizing partnerships and encouraging cooperation among partners in the Middle East).
[20] *See, e.g.*, THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES 48 (2017) ("European allies and partners increase our strategic reach and provide access to forward basing and overflight rights for global operations.").

ground transit, and strategic prepositioning of U.S. munitions, supplies, and materiel.[21]

The law of neutrality governs the legal relationship between states participating as belligerents and states not participating as belligerents in an international armed conflict.[22] It also recognizes rights and duties belonging to both belligerent and neutral states, and it establishes a scheme under which each right or duty belonging to one state corresponds to a duty or right for the other state.[23] At its simplest level, the law of neutrality requires neutral states to refrain from participating in the armed conflict and discriminating between the belligerents,[24] and it requires belligerents to refrain from attacking or operating in the neutral state's territory, territorial sea, or airspace.[25] Neutrality law's system of rights and duties serves both to protect the neutral state from being directly harmed by the armed conflict and to protect the belligerents by preventing a purportedly neutral state from participating in the armed conflict and either aiding one belligerent to the disadvantage of the other or supporting both belligerents in their cross-purposes of harming each other.[26]

Neutrality law recognizes only two possible statuses for states: "belligerent" or "neutral."[27] What, then, is the status of a state obligated by a pre-existing treaty with the United States to act inconsistently with a present determination that neutrality best serves its national interest? How, if at all, can that state square its treaty obligations to the United States with its neutrality obligations to the opposing belligerent?

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[21] *See generally* U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INT'L AGREEMENTS OF THE U.S. IN FORCE ON JAN. 1, 2019 (2019). The term "treaty" is used throughout this Article not in the narrow, U.S. domestic law sense of an international agreement concluded by the executive branch but requiring the Senate's advice and consent prior to entry into force, but rather in the broad, international law sense, reflected in the Vienna Convention on the Law of Treaties, art. 2(1)(a), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT] (defining a treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation").

[22] *See, e.g.*, ERIK CASTRÉN, THE PRESENT LAW OF WAR AND NEUTRALITY 422 (1954) (describing the law of neutrality as "those rules of law which regulate the mutual relations between belligerent and non-participating States"); Michael Bothe, *The Law of Neutrality*, *in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 485, 485 (Dieter Fleck ed., 1995) (describing neutrality as "the particular status, as defined by international law, of a state not party to an armed conflict").

[23] *See* CASTRÉN, *supra* note 22, at 440.

[24] *See, e.g.*, Bothe, *supra* note 22, at 485.

[25] *See, e.g.*, Bothe, *supra* note 22, at 494–95.

[26] *See* DINSTEIN, *supra* note 10, at 25 (identifying the law of neutrality's fundamental rationales as guaranteeing minimal war-related injury to the neutral State and guaranteeing belligerents that neutral States "will be neutral not only in name but also in deed").

[27] *See, e.g.*, DINSTEIN, *supra* note 10, at 25 (stating that "any State which is not a Belligerent Party is considered neutral").

For a variety of legal, political, and institutional capacity reasons, when deterrence efforts fail and armed conflict breaks out, the United States' foreign partners sometimes either will not or cannot contribute military forces and join the armed conflict as co-belligerents. In times of armed conflict, the United States will look to capitalize on allies' and partners' prior bilateral treaty commitments to cooperate and collaborate with U.S. defense activities abroad. If the foreign partner elects to remain neutral, its bilateral treaties present the state with a legal quandary. With both neutral state obligations to the opposing belligerent and defense-related treaty obligations to the United States as a belligerent, the state's international legal obligations are in tension.

This Article will begin by confirming the continued relevance of the customary law of neutrality. Next, it will explore the fundamental requirements the law of neutrality imposes on neutral states. After that, it will establish a factual context for further analysis by reviewing some key provisions from bilateral defense-related treaties in force between the United States and Japan, the Republic of Korea, Latvia, and Hungary, respectively. These treaties represent the type of agreements the United States either has or seeks to have in-place in countries around the world. This Article will then propose a conceptual legal framework for prioritizing a neutral state's treaty obligations to the United States and its customary law neutrality obligations to the opposing belligerent. Finally, this Article will explore how potential acts of retorsion and the availability of countermeasures under the law of state responsibility turn the neutral state's dilemma from an academic exercise into a practical concern. In the end, the Article will demonstrate that determining which obligation prevails in a conflict between neutrality and a defense-related treaty is not legally difficult. However, the potential consequences that attend a state's domestic policy choice between breaching its treaty obligations to the United States, in favor of strict neutrality, and breaching its neutrality obligations to the opposing belligerent, in favor of the neutral state's treaty obligations to the United States, likely present a diplomatic dilemma.

II. Neutrality

Early in the 20th Century, the central tenets of the law of neutrality were captured in two of the Hague Conventions.[28] In 1996, the International Court of Justice ("ICJ") recognized the law of neutrality's continued vitality and relevance to the law applicable in times of international armed conflict.[29] Unfortunately, although the ICJ's opinion seemed to hint at it, the ICJ neither expressly said the

[28] For discussion of neutrality in the context of land warfare, see Convention No. V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague V), Oct. 18, 1907, 36 Stat. 2310 [hereinafter Hague V]; For discussion of neutrality in the context of naval warfare, see Convention No. XIII Concerning the Rights and Duties of Neutral Powers in Naval War (Hague XIII), Oct. 18, 1907, 36 Stat. 2415 [hereinafter Hague XIII].

[29] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J Rep. 226, ¶ 89 (July 8, 1996) (finding that "the principle of neutrality, whatever its content . . . is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict").

law of neutrality was customary international law nor did it specify the content of the rule.[30]

Despite concerns that "[t]he diversity of views on [the law of neutrality] makes it almost impossible to establish the continuing validity of [it as a] body of law, its scope of applicability, and its content,"[31] the law of neutrality continues to receive detailed attention in national military manuals,[32] and in scholarly works on the law of armed conflict.[33] Actual operational state practice would more strongly indicate the content and continued vigor of the customary international law of neutrality.[34] However, the lack of available evidence establishing the general and consistent practice of an abundance of states concerning neutrality compels this Article to rely instead on states' military manuals and the work of international law

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[30] *See, e.g.*, Claus Kreb, *The International Court of Justice and the Law of Armed Conflicts*, *in* THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT OF JUSTICE 279 (Christian J. Tams & James Sloan eds., 2013); SHABTAI ROSENNE, THE PERPLEXITIES OF MODERN INTERNATIONAL LAW 151 (2004).

[31] Wolff Heintschel von Heinegg, *The Current State of the Law of Naval Warfare: A Fresh Look at the San Remo Manual*, 82 INT'L L. STUD. 269, 282 (2006). *See also* WILLIAM H. BOOTHBY & WOLFF HEINTSCHEL VON HEINEGG, THE LAW OF WAR: A DETAILED ASSESSMENT OF THE US DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 371 (2018) (characterizing neutrality law as "probably the one branch of the law of international armed conflict whose continuing applicability in the twenty-first century is unsettled, or at least highly controversial").

[32] *See, e.g.*, OFFICE OF THE GENERAL COUNSEL, U.S. DEP'T OF DEF., LAW OF WAR MANUAL (2015) [hereinafter OFFICE OF THE GENERAL COUNSEL]; U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (2017) [hereinafter U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD]; U.K. MINISTRY OF DEFENCE, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT (2004) [hereinafter U.K. MINISTRY OF DEFENCE]; FEDERAL MINISTRY OF DEFENSE (GERMANY), ZDV 15/2, LAW OF ARMED CONFLICT MANUAL (2013) [hereinafter FEDERAL MINISTRY OF DEFENSE (GERMANY)]; CHIEF OF DEFENCE STAFF (CANADA), B-GJ-005-104/FP-021, LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS (2001) [hereinafter CHIEF OF DEFENCE STAFF (CANADA)].

[33] *See, e.g.*, DINSTEIN, *supra* note 10; THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS (Dieter Fleck ed., 1995); PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH AT HARVARD UNIVERSITY, MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE (2009) [hereinafter PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH]; TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS (Michael N. Schmitt, gen. ed., 2017); SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (Louise Doswald-Beck ed., 1995) [hereinafter SAN REMO MANUAL].

[34] *See, e.g.*, Letter from John Bellinger III, Legal Adviser, U.S. Dept. of State, and William J. Haynes, General Counsel, U.S. Dept. of Def., to Dr. Jakob Kellenberger, President, Int'l Comm. of the Red Cross, Regarding Customary International Law Study (Nov. 3, 2006), *reprinted in* 46 INTERNATIONAL LEGAL MATERIALS 514, 515 (2007) (expressing the U.S. concern that the State practice volumes of the ICRC study "place[] too much emphasis on written materials, such as military manuals and other guidelines published by States, as opposed to actual operational practice by States during armed conflict").

scholars to gain insight into states' views on the law of neutrality.[35] Although not all scholars agree, this Article accepts that the neutrality rights and obligations expressed in Hague V and Hague XIII generally reflect customary international law.[36] Therefore, this Article proceeds from the fundamental premise that the customary law of neutrality binds all states that have not persistently objected to the rule's formation.[37]

A basic understanding of the key rights and duties of neutral and belligerent states, under the law of neutrality, is required to fully appreciate the difficult position of U.S. defense-related treaty partners, if they wish to remain neutral during an international armed conflict in which the United States is a belligerent. The law of neutrality is broad in scope, but this Article is primarily concerned with the neutral state's right to territorial inviolability and chooses to categorize the neutral state's principal duties as follows:

(1) Impartiality;

(2) Abstention from hostilities;

(3) Non-participation (e.g., refraining from supplying the belligerents with supplies or other support);

(4) Prevention (i.e., resisting belligerent use of its territory or resources); and

(5) Internment of belligerent forces, vehicles, vessels, aircraft, and equipment located in neutral territory.

What follows is a brief overview of those rights and duties under the law of neutrality relevant to the land, air, and sea domains.

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[35] *See* BOOTHBY & HEINTSCHEL VON HEINEGG, *supra* note 31, at 371 (noting there are states not participating in international armed conflicts that reject impartiality as an obligation, states that reject neutrality obligations without a formal declaration of war, states that believe neutrality obligations arise only after a state formally declares its neutrality, states that subscribe to "benevolent neutrality," and that the wide divergence in state positions on neutrality is potentially the result of aggrieved belligerents being unable to effectively sanction States that violate the law of neutrality).

[36] *See, e.g.*, BOOTHBY & HEINTSCHEL VON HEINEGG, *supra* note 31, at 374; Jeffrey T. Biller & Michael N. Schmitt, *Classification of Cyber Capabilities and Operations as Weapons, Means, or Methods of Warfare*, 95 INT'L L. STUD. 179, 192 (2019) (stating Convention No. V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague V) and Convention No. XIII Concerning the Rights and Duties of Neutral Powers in Naval War (Hague XIII) "are generally considered reflective of customary international law") (citing Eric Talbot Jensen, *Sovereignty and Neutrality in Cyber Conflict*, 35 FORDHAM INT'L L.J. 815, 819–20 (2012)). *But see* OFFICE OF THE GENERAL COUNSEL, *supra* note 32, § 15.1.4 (asserting that provisions of the treaties that address neutrality "may reflect customary international law").

[37] *See generally* Dr. Abdul G. Koroma, *Foreword* to 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, at xii (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

A. *Neutral State Territorial Integrity*

A central principle of neutrality law is that the land territory and airspace of neutral states is inviolable.[38] This means the belligerents may not attack neutral territory or invade the territory or airspace of the neutral state.[39] Likewise, belligerents generally may not conduct hostilities against each other in, or from, neutral territory or airspace.[40] Belligerents are also prohibited from moving forces, munitions, and other supplies through neutral territory or airspace.[41] Finally, belligerent military aircraft and missiles may not fly through a neutral state's airspace.[42]

Although there is broad consensus that neutral state territorial waters are protected throughout armed conflict,[43] the territorial sea of a neutral state is not inviolable.[44] For example, belligerent warships may make repairs in neutral ports,

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[38] *See* Hague V *supra* note 28, art. 1; OFFICE OF THE GENERAL COUNSEL, *supra* note 32, § 15.3.1.1; FEDERAL MINISTRY OF DEFENSE (GERMANY), *supra* note 32, ¶¶ 1205, 1246; CHIEF OF DEFENCE STAFF (CANADA), *supra* note 32, ¶¶ 703(3), 1304(1); PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH AT HARVARD UNIVERSITY, COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE ¶ 166, cmt. 2 (2009) [hereinafter COMMENTARY ON THE HPCR MANUAL]; CASTRÉN, *supra* note 22, at 459. *But see* PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, *supra* note 33, ¶ 172(a).

[39] *See* CASTRÉN, *supra* note 22, at 459.

[40] *See, e.g.*, OFFICE OF THE GENERAL COUNSEL, *supra* note 32, §§ 15.3.1.2, 15.5; U.K. MINISTRY OF DEFENCE, *supra* note 32, ¶ 1.43; CHIEF OF DEFENCE STAFF (CANADA), *supra* note 32, ¶¶ 711, 717; FEDERAL MINISTRY OF DEFENSE (GERMANY), *supra* note 32, ¶ 1249; PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, *supra* note 33, ¶¶ 166, 167(a), 171; CASTRÉN, *supra* note 22, at 459.

[41] *See* Hague V *supra* note 28, art. 2; *see also* OFFICE OF THE GENERAL COUNSEL, *supra* note 32, § 15.5.4 (2015); PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, *supra* note 33, ¶ 167 (a).

[42] *See, e.g.*, OFFICE OF THE GENERAL COUNSEL, *supra* note 32, § 15.10.2 (2015); FEDERAL MINISTRY OF DEFENSE (GERMANY), *supra* note 32, ¶ 1247; PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, *supra* note 33, ¶ 167(a).

[43] *See, e.g.*, Heintschel von Heinegg, *supra* note 31, at 283.

[44] *See* Hague XIII *supra* note 28, art. 12 ("In the absence of special provisions to the contrary in the legislation of a neutral Power, belligerent war-ships are not permitted to remain in the ports, roadsteads, or territorial waters of the said Power for more than twenty-four hours, except in the cases covered by the present Convention."). If the belligerent warship does not depart neutral territory or waters at the end of the authorized period for repairs or during which it may revictual, the neutral State may "take such measures as it considers necessary to render the ship incapable of taking the sea during the war." Hague XIII *supra* note 28, art. 24. *See also, e.g.*, CHIEF OF DEFENCE STAFF (CANADA), *supra* note 32, ¶ 809 ("[A] neutral state may, without jeopardizing its neutrality, permit the following acts within its neutral waters: a. innocent passage through its territorial sea or its archipelagic waters by warships, auxiliary vessels and prizes of belligerent states (warships, auxiliary vessels and prizes may employ pilots of the neutral state during passage); b. replenishment by a belligerent warship or auxiliary vessel of its food, water and fuel sufficient to reach a port in its own territory; and c. repairs of belligerent warships or auxiliary vessels found necessary by the neutral state to make them seaworthy, but such repairs may not restore or increase their fighting strength."); SAN REMO MANUAL, *supra* note 33, art. 20 (providing that, so long as the neutral State

so as to again be seaworthy,[45] and they may revictual in neutral ports.[46] Belligerent warships also continue to enjoy the rights of innocent passage through a neutral state's territorial sea,[47] and archipelagic sea lanes passage.[48] However, belligerents are prohibited from taking any action in neutral waters that would violate neutrality.[49] Beyond the general statement in Hague XIII, Article 1, belligerent warships are specifically prohibited from perpetrating acts of hostility in neutral territorial waters.[50] Further, neutral ports and waters are off-limits as bases of belligerent naval operations.[51] Finally, belligerent warships may not replenish or augment their armaments while in the territorial waters or ports of a neutral state.[52]

B. *Neutral State Obligations*

Neutrality law not only provides rights to neutral states, but also imposes duties. A fundamental neutral state duty is to treat belligerents impartially.[53] Neutral states must refrain from assisting one belligerent to the detriment of the other and must refrain from harming one belligerent and thereby advantaging the other.[54]

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does so impartially, it may permit belligerent warships and auxiliary vessels to pass through its territorial sea and archipelagic waters; permit such vessels to replenish food, water and fuel in an amount to enable the vessel to reach its own port in its own territory; and permit such repairs of these belligerent vessels as the neutral State believes are necessary to make them seaworthy).

[45] *See* Hague XIII *supra* note 28, art. 17 ("In neutral ports and roadsteads belligerent war-ships may only carry out such repairs as are absolutely necessary to render them seaworthy, and may not add in any manner whatsoever to their fighting force.").

[46] *See* Hague XIII *supra* note 28, art. 19 ("Belligerent war-Ships may only revictual in neutral ports or roadsteads to bring up their supplies to the peace standard.").

[47] *See* Hague XIII *supra* note 28, art. 10.

[48] *See* SAN REMO MANUAL, *supra* note 33, art. 23.

[49] *See* Hague XIII *supra* note 28, art. 1; SAN REMO MANUAL, *supra* note 33, art. 12.

[50] *See* Hague XIII *supra* note 28, art. 2 ("Any act of hostility, including capture and the exercise of the right of search, committed by belligerent war-Ships in the territorial waters of a neutral Power, constitutes a violation of neutrality and is strictly forbidden."). The term "act of hostility" extends to preparations for actual military engagement (e.g., laying mines and visit, search, diversion or capture of merchant ships of the opposing belligerent State). *See* SAN REMO MANUAL, *supra* note 33, art. 16. *See also* OFFICE OF THE GENERAL COUNSEL, *supra* note 32, § 15.7; U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, *supra* note 32, ¶ 7.3; FEDERAL MINISTRY OF DEFENSE (GERMANY), *supra* note 32, ¶ 1216; CHIEF OF DEFENCE STAFF (CANADA), *supra* note 32, ¶ 806(1).

[51] *See* Hague XIII *supra* note 28, art. 5. *See also, e.g.*, OFFICE OF THE GENERAL COUNSEL, *supra* note 32, § 15.7; FEDERAL MINISTRY OF DEFENSE (GERMANY), *supra* note 32, ¶ 1215.

[52] *See* Hague XIII *supra* note 28, art. 18.

[53] *See, e.g.*, OFFICE OF THE GENERAL COUNSEL, *supra* note 32, § 15.3.2; U.K. MINISTRY OF DEFENCE, *supra* note 32, ¶ 1.42; FEDERAL MINISTRY OF DEFENSE (GERMANY), *supra* note 32, ¶ 1208; CHIEF OF DEFENCE STAFF (CANADA), *supra* note 32, ¶ 1304(2); 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE §§ 293–94, at 475–77 (Arnold D. McNair ed., 4th ed. 1926) [hereinafter 2 OPPENHEIM]; CASTRÉN, *supra* note 22, at 471.

[54] *See, e.g.*, OFFICE OF THE GENERAL COUNSEL, *supra* note 32, § 15.3.2; U.K. MINISTRY OF DEFENCE, *supra* note 32, ¶ 1.42; FEDERAL MINISTRY OF DEFENSE (GERMANY), *supra* note 32, ¶ 1207; CHIEF OF DEFENCE STAFF (CANADA), *supra* note 32, ¶ 1304(2); 2 OPPENHEIM, *supra* note 53, § 294, at 476–77; CASTRÉN, *supra* note 22, at 471.

The duty of abstention means neutral states are under an obligation not to engage in hostilities against either belligerent.[55] By perpetrating attacks against one or both belligerent states, a purportedly neutral state places itself into a state of armed conflict with one or both belligerents, thereby expanding the scope of the armed conflict.[56] Relatedly, the duty of non-participation means neutral states are prohibited from providing warships, ammunition, or any form of war materials of any kind to belligerents.[57] Neutral states also may not furnish belligerents with forces, supplies, or other forms of support (e.g., logistics services, including basing and re-supply points).[58] Finally, neutral states are prohibited from providing belligerents with intelligence or allowing the belligerents to use its territory, airspace, or territorial sea to gather intelligence on the opposing belligerent.[59]

Neutral states are also obligated to affirmatively act to prevent and, if unsuccessful in preventing, to terminate belligerent violations of its neutrality.[60] This includes the obligation to prevent belligerents from moving forces, munitions, or supplies across its territory.[61] In cases where there is neither time nor available alternative means to compel the belligerent to cease its unlawful use of the neutral state's territory, waters, or airspace, the neutral state is permitted to use force, if

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[55] *See, e.g.*, OFFICE OF THE GENERAL COUNSEL, *supra* note 32, § 15.3.2; U.K. MINISTRY OF DEFENCE, *supra* note 32, ¶ 1.42; FEDERAL MINISTRY OF DEFENSE (GERMANY), *supra* note 32, ¶ 1208; 2 OPPENHEIM, *supra* note 53, § 320, at 507.

[56] *See* OFFICE OF THE GENERAL COUNSEL, *supra* note 32, § 15.3.2 ("The principal duties of a neutral State are to abstain from any participation in the conflict and to be impartial in conduct towards contending parties.") (footnote omitted). By expanding the scope of the international armed conflict through its failure to abstain from hostilities, the neutral State contravenes the object and purpose of neutrality law; 2 OPPENHEIM, *supra* note 53, § 320, at 507 ("Hostilities by a neutral are acts of force performed for the purpose of attacking a belligerent. They are acts of war, and they create a condition of war between such neutral and the belligerent concerned."). *See generally* BOOTHBY & HEINTSCHEL VON HEINEGG, *supra* note 31, at 374.

[57] *See* Hague XIII, *supra* note 28, art. 6.

[58] *See, e.g.*, OFFICE OF THE GENERAL COUNSEL, *supra* note 32, § 15.3.2.1; FEDERAL MINISTRY OF DEFENSE (GERMANY), *supra* note 32, ¶ 1207; 2 OPPENHEIM, *supra* note 53, § 349, at 561–62; CASTRÉN, *supra* note 22, at 471–74; Bothe, *supra* note 22, at 485.

[59] *See* CASTRÉN, *supra* note 22, at 479–80.

[60] *See, e.g.*, OFFICE OF THE GENERAL COUNSEL, *supra* note 32, §§ 15.3.2.2, 15.10.3; U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, *supra* note 32, ¶¶ 7.2, 7.3; FEDERAL MINISTRY OF DEFENSE (GERMANY), *supra* note 32, ¶¶ 1206, 1250; CHIEF OF DEFENCE STAFF (CANADA), *supra* note 32, ¶¶ 703(5), 811(1); U.K. MINISTRY OF DEFENCE, *supra* note 32, ¶ 1.43(a); SAN REMO MANUAL, *supra* note 33, art. 22.

[61] *See* Hague V, *supra* note 28, art. 5 (requiring a neutral State to not allow belligerents to move troops, munitions, or supplies across its territory); *see also, e.g.*, OFFICE OF THE GENERAL COUNSEL, *supra* note 32, §§ 15.3.2.2 (affirming the neutral State obligation to prevent belligerent violations of its neutrality); FEDERAL MINISTRY OF DEFENSE (GERMANY), *supra* note 32, ¶ 1207 (recognizing a neutral State is prohibited from permitting the belligerent military to transit through neutral territory by water, land or air); U.K. MINISTRY OF DEFENCE, *supra* note 32, ¶ 1.43(a) (stating a neutral State must not allow a belligerent to use neutral territory for military operations); CASTRÉN, *supra* note 22, at 460–62 (citing Hague V, Art. 5, para. 1, and recognizing a belligerent's exercise, during the armed conflict, of transit rights granted by a neutral State pre-conflict entitles the opposing belligerent to take countermeasures preventing transit).

required, to terminate the neutrality violation.[62] A belligerent is required to acquiesce in a neutral state's exercise of its right to resist efforts to violate its neutrality.[63] So long as the neutral state does not exceed that degree of force required to expel the offending belligerent forces and to reassert its neutrality, the neutral state's forcible resistance does not constitute a hostile act against the offending belligerent.[64] However, if the acts of resistance undertaken by the neutral state exceed what is necessary to halt the belligerent's violation of its neutrality, the violating belligerent has the right to take countermeasures.[65]

The final neutral state duty is one of internment. Neutral states are obligated to intern belligerent forces, vehicles, vessels, and aircraft unlawfully present in their territory, airspace, or waters.[66] This obligation supports the correlative neutral state duties to prevent movement of belligerent forces and equipment through its territory and to prevent belligerent use of neutral territory.

III. Bilateral Defense-Related Treaties

The law of neutrality poses challenges to the defense relationships reflected in the bilateral defense-related treaties between the United States and its foreign partners. To establish a context within which we may consider these challenges, this Article will briefly outline the relevant rights and duties established by certain bilateral treaties between the United States and Japan, the Republic of Korea (hereinafter "South Korea"), Latvia, and Hungary. Examining the key provisions of these treaties and juxtaposing those provisions against the neutral state obligations previously outlined will help the reader understand the nature of these states' defense-related treaty obligations and will illustrate that each of these states potentially faces a domestic policy choice between breaching its treaty obligations in favor of strict neutrality and breaching its neutrality obligations in favor of satisfying its treaty obligations to the United States.

Under the treaties with Japan and South Korea, the United States is authorized to indefinitely station military forces on Japanese and South Korean soil,

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[62] *See, e.g.*, Hague V, *supra* note 28, art. 10; OFFICE OF THE GENERAL COUNSEL, *supra* note 32, § 15.4.3; FEDERAL MINISTRY OF DEFENSE (GERMANY), *supra* note 32, ¶¶ 1206, 1250; CHIEF OF DEFENCE STAFF (CANADA), *supra* note 32, ¶ 1304(3); PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, *supra* note 33, ¶ 168(b).

[63] *See, e.g.*, Hague V, *supra* note 28, art. 10; Hague XIII, *supra* note 28, art. 26; OFFICE OF THE GENERAL COUNSEL, *supra* note 32, § 15.4.3; PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, *supra* note 33, ¶ 169.

[64] *See, e.g.*, Hague V, *supra* note 28, art. 10; Hague XIII, *supra* note 28, art. 26; OFFICE OF THE GENERAL COUNSEL, *supra* note 32, § 15.4.3; FEDERAL MINISTRY OF DEFENSE (GERMANY), *supra* note 32, ¶¶ 1206, 1250; CHIEF OF THE GEN. STAFF (CANADA), *supra* note 32, ¶ 1304(3); PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, *supra* note 33, ¶ 169.

[65] *See* PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, *supra* note 33, ¶ 169. The concept of countermeasures will be discussed in further detail later in this Article.

[66] *See* Hague V, *supra* note 28, art. 11; Hague XIII, *supra* note 28, art. 24; *see also, e.g.*, OFFICE OF THE GENERAL COUNSEL, *supra* note 32, § 15.10.3; PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, *supra* note 33, ¶ 172 (b); FEDERAL MINISTRY OF DEFENSE (GERMANY), *supra* note 32, ¶¶ 1213, 1250; CHIEF OF DEFENCE STAFF (CANADA), *supra* note 32, ¶ 703(6).

respectively.[67] The treaties with Japan and South Korea are indicative of the longstanding relationships the United States has in the Indo-Pacific region.[68] The treaties with Latvia and Hungary do not authorize indefinite placement of U.S. military forces in those countries, but they do contemplate some rotational U.S. force presence, principally for the purposes of training and exercises.[69] The treaties with Latvia and Hungary also envision the forward positioning of U.S. defense materiel likely to be useful in a future armed conflict.[70] The Latvia and Hungary treaties are more recent and represent the type of treaty the United States has, or increasingly seeks to have, with other countries throughout Europe because the United States' firm commitment to Article 5 of the North Atlantic Treaty,[71] and to the defense of its European allies, manifests itself most prominently through the persistent presence of U.S. forces.[72]

The military alliance between the United States and Japan dates to 1952.[73] Underlying this military alliance is the mutual understanding that an armed attack against either state in Japanese territory represents a threat to the security of both states.[74] Under the U.S.-Japan Mutual Cooperation Treaty,[75] both states are committed, within the margins of their respective constitutional and institutional processes, to meeting shared dangers.[76] To enable the United States to help guarantee the security of Japan and also to help ensure continuing peace and security in the Indo-Pacific region, Japan grants U.S. military forces the right to use mutually agreed facilities and areas in Japan.[77] Under Article VI of the Treaty of Mutual Cooperation and Security Regarding Facilities and Areas and the Status of

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[67] *See* Treaty of Mutual Cooperation and Security, U.S.-Japan, art. VI, Jan. 19, 1960, 11 U.S.T. 1632 [hereinafter U.S.-Japan Mutual Cooperation Treaty]; Mutual Defense Treaty, U.S.-S. Kor., art. IV, Oct. 1, 1953, 5 U.S.T. 2368 [hereinafter U.S.-ROK Mutual Defense Treaty].

[68] *See* Security Treaty, U.S.-Japan, Sep. 8, 1951, 3 U.S.T. 3329 [hereinafter U.S.-Japan Security Treaty]. The U.S.-Japan Security Treaty was superseded by the U.S.-Japan Mutual Cooperation Treaty. *See also* U.S.-ROK Mutual Defense Treaty, *supra* note 67.

[69] *See* Agreement on Defense Cooperation, U.S.-Lat., art. III(1), Jan. 12, 2017, T.I.A.S. 17-405 [hereinafter Latvia DCA]; Agreement on Defense Cooperation, U.S.-Hung., art. III(1), Apr. 4, 2019, T.I.A.S. 19-821 [hereinafter Hungary DCA].

[70] *See* Latvia DCA, *supra* note 69, art. IV(1); Hungary DCA, *supra* note 69, art. IV(1).

[71] North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

[72] *See* U.S. DEP'T OF DEF., OFFICE OF THE UNDER SECRETARY OF DEFENSE (COMPTROLLER), REPORT ON THE EUROPEAN DETERRENCE INITIATIVE AND THE DEPARTMENT OF DEFENSE BUDGET FOR FISCAL YEAR (FY) 2020 (Mar. 2019), https://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2020/fy2020_EDI_JBook.pdf) [https://perma.cc/2RR3-55NQ].

[73] *See* EMMA CHANLETT-AVERY, MARK E. MANYIN & BROCK R. WILLIAMS, CONG. RESEARCH SERV., IF10199, U.S.-JAPAN RELATIONS 1 (2019); *see also* U.S.-Japan Security Treaty, *supra* note 68. The United States-Japan Security Treaty was superseded by the U.S.-Japan Mutual Cooperation Treaty, *supra* note 67.

[74] *See* U.S.-Japan Mutual Cooperation Treaty, *supra* note 67, art. V.

[75] U.S.-Japan Mutual Cooperation Treaty, *supra* note 67.

[76] *See* U.S.-Japan Mutual Cooperation Treaty, *supra* note 67, art. V.

[77] *See* U.S.-Japan Mutual Cooperation Treaty, *supra* note 67, art. VI.

United States Armed Forces in Japan,[78] Japan is obligated to permit U.S. armed forces personnel, as well as vessels and aircraft operated by or for the United States for official U.S. purposes, to move freely both between agreed facilities and areas and between such agreed facilities and areas and Japanese ports and airports.[79]

South Korea is another key location in the Indo-Pacific region where the United States has a large number of military personnel stationed. The United States's right to station its military forces in South Korea, as mutually agreed, traces its origins to the Mutual Defense Treaty which entered into force in 1954.[80] Similar to Japan, a mutual understanding, namely that an armed attack on either state in the Pacific region endangers the peace and safety of the other, undergirds the military alliance between the United States and South Korea.[81] Under the U.S.-ROK Mutual Defense Treaty, both South Korea and the United States pledge to meet the common danger posed by an armed attack on the other in accordance with its constitutional processes.[82] Just as we saw with Japan, South Korea is obligated to accord, to both U.S. forces personnel and to vessels and aircraft operated by the United States or for official U.S. purposes, free movement and access between mutually agreed facilities and between such facilities and areas and South Korean ports and airports.[83]

Not all U.S. defense-related treaties contemplate ongoing, indefinite stationing of U.S. forces on foreign soil. According to the Latvia DCA[84] and the Hungary DCA, [85] U.S. military personnel, as well as U.S. military vehicles, vessels, and aircraft, are granted access to and use of mutually agreed facilities and areas.[86] Both DCAs grant the United States the right to access and use mutually agreed facilities and areas for purposes of, *inter alia*, transit, refueling of aircraft, bunkering of vessels, accommodation of personnel, staging and deploying of forces and materiel, and pre-positioning of equipment, supplies, and materiel.[87]

Building upon the broad access and prepositioning authorizations contained in Article III of both the Latvia DCA and the Hungary DCA, U.S. forces aircraft, vessels, and vehicles are permitted to enter, exit, and move freely within areas under Latvian and Hungarian national sovereignty, respectively.[88] In addition, U.S. forces have the right to transport defense equipment, supplies, and materiel into and within

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[78] Agreement under Article VI of the Treaty of Mutual Cooperation and Security Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, U.S.-Japan, Jan. 19, 1960, 11 U.S.T. 1652 [hereinafter U.S.-Japan Facilities and Status Agreement].
[79] *See id*. art. V.
[80] *See* U.S.-ROK Mutual Defense Treaty, *supra* note 67, art. IV.
[81] *See* U.S.-ROK Mutual Defense Treaty, *supra* note 67, art. III.
[82] *See* U.S.-ROK Mutual Defense Treaty, *supra* note 67., art. III.
[83] *See* Facilities and Areas and the Status of United States Armed Forces in Korea, U.S.-S. Kor., art. X, Jul. 9, 1966, 17 U.S.T. 1677 [hereinafter U.S.-ROK Facilities and Status Agreement].
[84] Latvia DCA, *supra* note 69.
[85] Hungary DCA, *supra* note 69.
[86] *See* Latvia DCA, *supra* note 69, art. III(1); Hungary DCA, *supra* note 69.
[87] *See* Latvia DCA, *supra* note 69, art. III(1); Hungary DCA, *supra* note 69, art. III(1).
[88] *See* Latvia DCA, *supra* note 69, art. XI(1); Hungary DCA, *supra* note 69, art. XI(1).

Latvia and Hungary, as well as the right to preposition and store such items at agreed facilities and areas and at other locations within those states as mutually agreed.[89] U.S. forces also exclusively control access to, and use and disposition of, such prepositioned materiel.[90] Further, U.S. forces possess the unencumbered right to remove prepositioned materiel from the territory of Latvia and Hungary at any time.[91] In order to fully enable the U.S. right to access, use, and remove prepositioned materiel, Latvia and Hungary grant aircraft, vehicles, and vessels operated by or for U.S. forces access to aerial and marine ports in their respective territories.[92]

To illustrate how these states' neutrality obligations to the opposing belligerent and their treaty obligations to the United States intersect, imagine Japan, South Korea, Latvia, and Hungary wish to remain neutral vis-à-vis a hypothetical armed conflict between the United States and Iran. If Japan and South Korea were to permit U.S. forces and U.S. forces' vessels and aircrafts to freely move through their territories, territorial seas, and airspace and to access ports and airports within their territories, they would contradict, for example, their respective neutrality obligations to intern U.S. military personnel, vehicles, vessels, and aircraft within their territories for the duration of the armed conflict.[93] Conversely, if Japan and South Korea choose to honor their neutrality obligations over their treaty obligations, they would have to prevent the United States from employing personnel stationed in these countries as part of the warfighting force. To appreciate the magnitude of that adverse impact, consider that the United States had approximately 50,000 personnel stationed in Japan as of May 2019,[94] and had approximately 28,500 personnel stationed in South Korea as of August 2019.[95] Further, if Japan and South Korea acquiesce to the United States moving munitions and supplies to and from their ports and airports, as well as through their territories, territorial seas, and national airspace, both states would be in breach of their neutrality obligations to prevent the United States, as a belligerent, from moving munitions, supplies, and war materiel through neutral territory.[96] Permitting U.S. military aircraft to transit or conduct aerial refueling operations within their

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[89] *See* Latvia DCA, *supra* note 69, art. IV(1); Hungary DCA, *supra* note 69, art. IV(1).
[90] *See* Latvia DCA, *supra* note 69, art. IV(2); Hungary DCA, *supra* note 69, art. IV(2).
[91] *See* Latvia DCA, *supra* note 69, art. IV(2); Hungary DCA, *supra* note 69, art. IV(2).
[92] *See* Latvia DCA, *supra* note 69, art. IV(3); Hungary DCA, *supra* note 69, art. IV(3).
[93] *See* Hague V, *supra* note 28, art. 11; Hague XIII, *supra* note 28, art. 24; *see also, e.g.*, OFFICE OF THE GENERAL COUNSEL, *supra* note 32, § 15.10.3; PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, *supra* note 33, ¶ 172(b); FEDERAL MINISTRY OF DEFENSE (GERMANY), *supra* note 32, ¶¶ 1213, 1250; CHIEF OF DEFENCE STAFF (CANADA), *supra* note 32, ¶ 703(6).
[94] CHANLETT-AVERY, MANYIN & WILLIAMS, *supra* note 73, at 1.
[95] *See* MARK E. MANYIN, EMMA CHANLETT-AVERY & BROCK R. WILLIAMS, CONG. RESEARCH SERV., IF10165, SOUTH KOREA: BACKGROUND AND U.S. RELATIONS (2019).
[96] *See, e.g.*, OFFICE OF THE GENERAL COUNSEL, *supra* note 32, §§ 15.3.2.2, 15.10.3; U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, *supra* note 32, ¶¶ 7.2, 7.3; FEDERAL MINISTRY OF DEFENSE (GERMANY), *supra* note 32, ¶¶ 1206, 1250; CHIEF OF DEFENCE STAFF (CANADA), *supra* note 32, ¶¶ 703(5), 811(1); U.K. MINISTRY OF DEFENCE, *supra* note 32, ¶ 1.43 (a); SAN REMO MANUAL, *supra* note 33, at 12.

airspace would similarly violate Japan's and South Korea's prevention obligations under the law of neutrality.[97]

Likewise, if Latvia and Hungary wished to remain neutral in our hypothetical international armed conflict, the law of neutrality would prohibit them from complying with their treaty obligations to permit U.S. forces and U.S. forces' vehicles, vessels, and aircraft to enter, move freely, and transit their national airspace and territory.[98] The law of neutrality would require Latvia and Hungary, just like Japan and South Korea, to intern U.S. forces personnel and to impound U.S. vehicles, vessels, and aircraft in their territory and airspace.[99] Similarly, permitting U.S. forces to preposition, store, or remove munitions, equipment, and supplies would mean these states violate their neutral duties of impartiality and their neutral obligations to prevent belligerent uses of their territory and airspace, as well as its territorial sea, in the case of Latvia.[100] Further, the law of neutrality would be an obstacle to Latvia and Hungary fulfilling their treaty obligations to use best efforts to provide U.S. forces with any requested logistics support in connection with the myriad of activities contemplated in Article III of the Latvia and Hungary DCAs, subject to their own internal requirements and capabilities.[101] Providing U.S. forces with logistics support would violate these states' duties of non-participation.[102]

Having now seen that a state's legal obligations under the law of neutrality and its international legal obligations under bilateral defense-related treaties can quite easily come into direct conflict, this Article reaches the first of the two central questions it intends to address: How should a foreign partner state and its international lawyers reconcile the state's competing treaty obligations to the

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[97] *See, e.g.*, OFFICE OF THE GENERAL COUNSEL, *supra* note 32, §§ 15.3.2.2, 15.10.3; U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, *supra* note 32, ¶¶ 7.2, 7.3; FEDERAL MINISTRY OF DEFENSE (GERMANY), *supra* note 32, ¶¶ 1206, 1250; CHIEF OF THE GEN. STAFF (CANADA), *supra* note 32, ¶¶ 703(5), 811(1); U.K. MINISTRY OF DEFENCE, *supra* note 32, ¶ 1.43 (a); SAN REMO MANUAL, *supra* note 33, at 12.

[98] *See, e.g.*, OFFICE OF THE GENERAL COUNSEL, *supra* note 32, §§ 15.3.2.2, 15.10.3; U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, *supra* note 32, ¶¶ 7.2, 7.3; FEDERAL MINISTRY OF DEFENSE (GERMANY), *supra* note 32, ¶¶ 1206, 1250; CHIEF OF THE GEN. STAFF (CANADA), *supra* note 32, ¶¶ 703(5), 811(1); U.K. MINISTRY OF DEFENCE, *supra* note 32, ¶ 1.43 (a); SAN REMO MANUAL, *supra* note 33, at 12.

[99] *See* Hague V, *supra* note 28, art. 11; Hague XIII, *supra* note 28, art. 24; *see also, e.g.*, OFFICE OF THE GENERAL COUNSEL, *supra* note 32, § 15.10.3; PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, *supra* note 33, ¶ 172 (b); FEDERAL MINISTRY OF DEFENSE (GERMANY), *supra* note 32, ¶¶ 1213, 1250; CHIEF OF DEFENCE STAFF (CANADA), *supra* note 32, ¶ 703(6).

[100] *See, e.g.*, OFFICE OF THE GENERAL COUNSEL, *supra* note 32, §§ 15.3.2, 15.3.2.2; U.S. NAVY , U.S. MARINE CORPS & U.S. COAST GUARD, *supra* note 32, ¶¶ 7.2, 7.3; U.K. MINISTRY OF DEFENCE, *supra* note 32, ¶¶ 1.42, 1.43 (a); FEDERAL MINISTRY OF DEFENSE (GERMANY), *supra* note 32, ¶¶ 1206, 1208, 1250; CHIEF OF DEFENCE STAFF (CANADA), *supra* note 32, ¶¶ 703(5), 811(1), 1304(2); SAN REMO MANUAL, *supra* note 33, at 12; 2 OPPENHEIM, *supra* note 53, § 294, at 476–77; CASTRÉN, *supra* note 22, at 472.

[101] *See* Latvia DCA, *supra* note 69, art. VIII(1); Hungary DCA, *supra* note 69, art. VIII(1).

[102] *See, e.g.*, Hague XIII, *supra* note 28, art. 6; OFFICE OF THE GENERAL COUNSEL, *supra* note 32, § 15.3.2.1; FEDERAL MINISTRY OF DEFENSE (GERMANY), *supra* note 32, ¶ 1207; 2 OPPENHEIM, *supra* note 53, § 349, at 561–62; CASTRÉN, *supra* note 22, at 471–74; Bothe, *supra* note 22, at 485.

United States, and its customary law neutrality obligations to the opposing belligerent?

IV. The Matter of Legal Conflicts

International lawyers responsible for advising states on how to prioritize their incompatible treaty obligations to the United States and their customary law neutrality obligations to the opposing belligerent should apply an analogous framework to Article 30 of the VCLT.[103] Adopting an analogous methodology to Article 30 recognizes both the treaty and customary legal obligations of the triangulated states as valid and continuing. This approach also does not relieve any state involved from its responsibility to uphold its promises, express or implied, under international law.

The application of Article 30 to conflicts between treaty obligations and customary law obligations must be done through analogy because Article 30 is concerned strictly with resolving conflicts between two or more treaties.[104] This Article will begin by exploring the application of Article 30 in its intended context, before considering the merits of applying its framework to prioritization of a neutral state's incompatible treaty and customary neutrality obligations. The analogous application of the Article 30 rules provides a practical, rational approach to prioritizing competing treaty and customary obligations.

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[103] VCLT, *supra* note 21, art. 30.

[104] *See* VCLT, *supra* note 21, art. 30. The full text of Article 30 reads as follows:

> 1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.
>
> 2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
>
> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
>
> 4. When the parties to the later treaty do not include all the parties to the earlier one:
>
> (a) As between States parties to both treaties the same rule applies as in paragraph 3;
>
> (b) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.
>
> 5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

A. *Equivalence of Treaties and Customary International Law*

Although there are those who disagree, it is widely accepted that there is no hierarchy between treaties and custom as sources of international law.[105] Treaty law and customary law are co-equal branches of international law because their creation, continuity, and demise are, by nature, independent of one another.[106] A treaty governs the relationship between states because the party states expressed their consent to the treaty's governance directly, by concluding the treaty, and subsequently bringing it into force.[107] Likewise, a treaty may be terminated either by a state party acting unilaterally to bring it to an end,[108] or by the states party agreeing to terminate the treaty, either expressly or through supersession.[109]

Customary international law, in contrast, is based on the general consent of states, rather than the consent of the individual states it governs.[110] The formation and demise of a customary law rule depends on the extent to which the rule is generally followed by the collective of states, not whether individual states follow the rule.[111] The nature and recognition of treaties as an independent source of

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[105] *See, e.g.*, MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES: A MANUEL ON THE THEORY AND PRACTICE OF THE INTERRELATION OF SOURCES 57–58 (2d ed. 1997) ("The order of sources mentioned in subparas. 1(a)–(c) [of the Statute of the International Court of Justice], if contrasted with their relationship to subpara. 1(d), leads to the conclusion that Article 38 does not envisage a hierarchy between customary law and treaties."); Rebecca Crootof, *Change Without Consent: How Customary International Law Modifies Treaties*, 41 YALE J. INT'L L. 237, 238–39 (2016) ("As a matter of formal doctrine, treaty and customary international law are coequal sources of a state's international legal obligations."). *But see, e.g.*, 1 HERSCH LAUTERPACHT, INTERNATIONAL LAW: COLLECTED PAPERS 86–89 (Elihu Lauterpacht ed., 1970) (asserting that "[t]he rights and duties of States are determined, in the first instance, by their agreement as expressed in treaties" and that "the hierarchy of sources of international law, as indicated in the Statute of the International Court, provides an authoritative basis for the application of international law.").

[106] *See* VILLIGER, *supra* note 105, at 58 ("[C]ustomary law and treaties are *autonomous sources*: the conditions for their formation, existence and termination are such that the rules of one source do not depend for their formation on the rules of the other source. This autonomy of sources necessitates customary law and treaties being equivalents, and any relationship between the two depending on other criteria *in casu*."); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. j (AM. LAW INST. 1987) ("Customary law and law made by international agreement have equal authority as international law.").

[107] *See* ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 87 (3d ed. 2013).

[108] *See* VCLT, *supra* note 21, art. 54; AUST, *supra* note 107, at 246.

[109] *See* VCLT, *supra* note 21, arts. 54, 59; AUST, *supra* note 107, at 254, 257–58.

[110] *See* NANCY KONTOU, THE TERMINATION AND REVISION OF TREATIES IN THE LIGHT OF NEW CUSTOMARY INTERNATIONAL LAW 2–3 (1994) ("Customary law is based on the consent of States in general, but not necessarily of each and every State. Unlike treaties, customary law is the product of general consensus and not of the meeting of the wills of individual States.") (citing LAUTERPACHT, *supra* note 105, at 66).

[111] *See* LAUTERPACHT, *supra* note 105, at 66 ("[I]n the sphere of international law it is not necessary—or, normally, possible—to show that a rule, has been followed (i.e. consented to) by all States . . . The fact that universal consent is not required for the creation of custom and that general consent is sufficient, is not a factor pointing to the irrelevance of consent in the creation of custom; it is merely a factor pointing to the irrelevance of the consent of every single State."); VILLIGER, *supra* note 105, at 55 ("The rule continues to exist as long as there is general, uniform and constant

international law, coupled with the customary international law doctrine of *pacta sunt servanda*,[112] means states are able to conclude and bring into force treaties that reflect, supplement, or even contradict pre-existing rules of customary international law, and have those treaties, rather than the pre-existing customary law rule, govern their *inter se* relations.[113]

Treaty rules are able to modify customary rules (and vice versa) because treaty law and customary law are equivalent.[114] If there were a hierarchy, only the superior rule in the hierarchy would be able to change or supersede the inferior rule.[115] Relatedly, because neither treaty law nor customary law is, by nature, inherently superior to the other as a body of law; treaties and customs impose separate, equally binding legal obligations on states whose conduct in a given circumstance is governed by both.[116] When the simultaneous application of a customary rule and a treaty rule to the same situation produces incompatible or contradictory results, there is a conflict that must be resolved.[117] Just as in prioritization of competing treaties, dogmatic conceptions of "same subject-matter" are misplaced and unhelpful.[118] Building consensus around a uniform, functional methodology for addressing practical incompatibility between a state's international legal obligations promotes stability and predictability in the transnational legal order. In order to promote that stability and predictability of outcomes, this Article tenders the methodology set out in VCLT, Article 30(3) and (4), as an expedient approach to adopt when prioritizing a state's conflicting

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practice accompanied by *opinio juris*. If one of these conditions falls away, for instance, if the practice is no longer widespread (or the specially affected States no longer adhere to the rule) or if it is inconsistent, the rule will pass out of use.").

[112] Translating to "agreements must be kept." *See* VCLT, *supra* note 21, art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

[113] *See* Michel Virally, *The Sources of International Law*, *in* MANUAL OF PUBLIC INTERNATIONAL LAW 116, 165–66 (Max Sorensen ed., 1968); KONTOU, *supra* note 110, at 1 ("Treaties are concluded in the context of general international law in force at the time of the parties' agreement. They can repeat the general norm, refine and complete it, or apply special rules in the relations between the contracting parties."); LAUTERPACHT, *supra* note 105, at 60 ("States may—within very wide limits—by treaty modify, *inter se*, the rules of customary international law.").

[114] *See* VILLIGER, *supra* note 105, at 58 ("[I]t is precisely because customary law and treaties are autonomous that any one may affect—i.e., abrogate or modify—the other . . . .").

[115] *See* VILLIGER, *supra* note 105, at 58–59 (stating that "in a hierarchical relationship *only* one source could influence the other" and that "[t]he requirement of municipal systems of an *acte contraire*, i.e., that a rule can only be altered by a rule of the same kind, does not apply to international law").

[116] *See* VILLIGER, *supra* note 105, at 58–59 ("[I]t matters not whether a norm is clad in a customary rule or in a treaty rule, since in either case the effectiveness of the binding force is the same.").

[117] *See* VILLIGER, *supra* note 105, at 59 ("[A] conflict arises when a customary rule and a treaty rule on the same subject-matter regulate a situation with different, i.e. incompatible or contradictory results.").

[118] *See, e.g.*, Christopher Borgen, *Resolving Treaty Conflicts*, 37 GEO. WASH. INT'L L. REV. 573, 580 (2005) (discussing how the language of Article 30 "has led to much debate over whether or not certain treaties are concerned with the 'same subject-matter'" and how favoritism for one genre of subject-matter adversely impacts analysis of overlapping treaties from seemingly different topical regimes).

customary law and treaty law obligations. In light of the legal equivalence of treaty and customary law, it would be nonsensical to postulate disparate rules for prioritizing incompatible treaties on the one hand and incompatible treaty and customary law obligations on the other hand.

Inter se, states are free to conclude treaties that run contrary to a rule of customary international law that is binding on both parties to the treaty.[119] Between states whose *inter se* relations are governed by a treaty that conflicts with a rule of customary international law binding on both, the treaty rule is to prevail, unless either the states party intend otherwise or the customary rule is a *jus cogens* norm.[120] Just as we saw in the context of conflicting treaties, complications arise when the provisions of the treaty conflict with the customary international law obligations states party owe to third states.

Although states party to a treaty may choose to have their *inter se* relations governed by the treaty, rather than a contrary rule of customary law, it is the customary rule that governs relations between the states party to the treaty and third states. To illustrate, this Article returns to the hypothetical armed conflict between the United States and Iran in which Japan, South Korea, Latvia, and Hungary wish to remain neutral, but the United States wishes to exercise its treaty rights. The customary law of neutrality and the applicable defense-related treaties conflict because simultaneous application of the neutrality rules and these treaties demands incompatible behavior; obeying one requires breaching the other. For example, Japan, South Korea, Latvia, and Hungary breach their duties of prevention[121] and internment[122] by permitting U.S. forces and U.S. forces' vehicles, vessels and aircrafts to enter, move freely within, and transit their national territories, territorial seas, and airspace (including conducting aerial refueling operations). Likewise, Latvia and Hungary violate their duties of impartiality and prevention by permitting U.S. forces to preposition, store, or remove munitions, equipment, and supplies

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[119] *See* Virally, *supra* note 113, at 165–66; KONTOU, *supra* note 110, at 1 ("Treaties are concluded in the context of general international law in force at the time of the parties' agreement. They can repeat the general norm, refine and complete it, or apply special rules in the relations between the contracting parties."); LAUTERPACHT, *supra* note 105, at 60 ("States may—within very wide limits—by treaty modify, *inter se*, the rules of customary international law.").

[120] *See* RESTATEMENT, *supra* note 106 ("Unless the parties evince a contrary intention, a rule established by agreement supersedes for them a prior inconsistent rule of customary international law. However, an agreement will not supersede a prior rule of customary law that is a peremptory norm of international law."); VCLT, *supra* note 21, arts. 26, 53.

[121] *See, e.g.*, OFFICE OF THE GENERAL COUNSEL, *supra* note 32, §§ 15.3.2, 15.10.3; U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, *supra* note 32, ¶¶ 7.2, 7.3; FEDERAL MINISTRY OF DEFENSE (GERMANY), *supra* note 32, ¶¶ 1206, 1250; CHIEF OF DEFENCE STAFF (CANADA), *supra* note 32, ¶¶ 703(5), 811(1); U.K. MINISTRY OF DEFENCE, *supra* note 32, ¶ 1.43 (a) (2004); SAN REMO MANUAL, *supra* note 33, at 12.

[122] *See* Hague V, *supra* note 28, art. 11; Hague XIII, *supra* note 28, art. 24. *See also, e.g.*, OFFICE OF THE GENERAL COUNSEL, *supra* note 32, § 15.10.3; PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, *supra* note 33, ¶ 172 (b); FEDERAL MINISTRY OF DEFENSE (GERMANY), *supra* note 32, ¶¶ 1213, 1250; CHIEF OF DEFENCE STAFF (CANADA), *supra* note 32, ¶ 703(6).

from their territories.[123] Finally, Latvia and Hungary breach their non-participation duties by providing U.S. forces with logistics support.[124]

The defense-related treaties are solely between the United States and its foreign partners, but the customary law of neutrality imposes *erga omnes* obligations. Although the U.S. treaty partners face a dilemma of choosing between conflicting legal obligations, there is no conflict from Iran's point of view. From Iran's perspective, the customary law of neutrality is the only operative rule set between it and Japan, South Korea, Latvia, and Hungary, respectively, regarding their status vis-à-vis the international armed conflict.

B. *The Need for a Clear Methodology*

The importance of treaties as a source of rights and obligations governing the international conduct of states has grown dramatically since the mid-18th century.[125] The increasing number of treaties between states means there is more opportunity for states to create for themselves competing obligations under overlapping treaties and thereby generate uncertainty regarding the prevailing arrangement in a given circumstance.[126] The customary international law rule *pacta sunt servanda* "undergirds much of international law and explains states' willingness to invest energies in concluding treaties."[127] Tremendous chaos and uncertainty would ensue if states were free to not perform their treaty obligations.[128] The *pacta sunt servanda* rule heightens the importance of the inquiry because the proliferation of treaties, as a means of recording the respective rights and obligations between states, means it is entirely possible that a state will conclude and bring into force treaties that are in tension with other treaties to which it is a party or with that state's customary law obligations.[129]

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[123] *See, e.g.*, OFFICE OF THE GENERAL COUNSEL, *supra* note 32, §§ 15.3.2, 15.3.2.2; U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, *supra* note 32, ¶¶ 7.2, 7.3; U.K. MINISTRY OF DEFENCE, *supra* note 32, ¶¶ 1.42, 1.43 (a); FEDERAL MINISTRY OF DEFENSE (GERMANY), *supra* note 32, ¶¶ 1206, 1208, 1250; CHIEF OF DEFENCE STAFF (CANADA), *supra* note 32, ¶¶ 703(5), 811(1), 1304(2); SAN REMO MANUAL, *supra* note 33, at 12; 2 OPPENHEIM, *supra* note 53, § 294, at 476–77; CASTRÉN, *supra* note 22, at 474.

[124] *See, e.g.*, Hague XIII, *supra* note 28, art. 6; OFFICE OF THE GENERAL COUNSEL, *supra* note 32, § 15.3.2.1; FEDERAL MINISTRY OF DEFENSE (GERMANY), *supra* note 32, ¶ 1207; 2 OPPENHEIM, *supra* note 53, § 349, at 561–62; CASTRÉN, *supra* note 22, at 471–74; Bothe, *supra* note 22, at 485.

[125] *See* 1 OPPENHEIM, *supra* note 112, §§ 11–12, at 14–17.

[126] *See* Borgen, *supra* note 118, at 573, 574 ("The very success of treaties as a policy tool has caused a new dilemma: a surfeit of treaties that often overlap and, with increasing frequency, conflict with one another.").

[127] Crootof, *supra* note 105, at 239.

[128] *See, e.g.*, AUST, *supra* note 107, at 160 ("*Pacta sunt servanda* embodies a rule that is an elementary and universally agreed principle fundamental to all legal systems, and is of prime importance for the stability of treaty relations.").

[129] *See, e.g.*, Borgen, *supra* note 118, at 574 ("The very success of treaties as a policy tool has caused a new dilemma: a surfeit of treaties that often overlap and, with increasing frequency, conflict with one another.").

Without a clear, sensible, and reliable manner of resolving treaty conflicts, treaties lose value as a tool for expressing the relative rights and obligations of states and they become unreliable signposts by which states can formulate their foreign policy positions and predict inter-state relational outcomes.[130] States and their international lawyers need a practical, dependable approach to resolving conflicts between treaties and customary law for the same reason—so that they can execute their foreign policy with some level of certainty regarding the rules governing their legal relationships vis-à-vis other states and so that they can understand the ramifications of the foreign policy decisions they make.

C. *Survivability of Treaties During Armed Conflicts*

Neutrality law is only applicable when there is a state of armed conflict.[131] Therefore, the first step in determining how to prioritize a state's defense-related treaty obligations to the United States and its obligations to the opposing belligerent under the law of neutrality is to determine whether the treaty continues to operate during an armed conflict.[132] If, as a matter of international law, the treaty between the neutral state and the United States terminates or suspends automatically upon the outbreak of an armed conflict, then there are no competing state obligations to be prioritized. In such a case, only the neutral state's obligations under the law of neutrality would be applicable during the armed conflict.

In 2004, in an effort to identify the applicable rules regarding the effects of armed conflict on treaties, the International Law Commission added the topic to its program of work for the fifty-seventh session.[133] In 2011, the International Law Commission adopted 18 draft articles and an annex and submitted them to the United Nations General Assembly for consideration as a possible starting point for

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[130] *See* Borgen, *supra* note 118, at 647 ("The lack of a principled method of treaty conflict resolution decreases the predictability of outcomes of actual and potential conflicts and consequently debases the value of treaties.").

[131] *See, e.g.*, CASTRÉN, *supra* note 22, at 423 (stating that "neutrality presupposes war between some Powers").

[132] The general rule is that armed conflict terminates "'political' treaties, treaties incompatible with the existence of hostilities and treaties the maintenance of which is 'incompatible with national policy in time of war.'" Int'l Law Comm'n, Rep. on the Work of Its Sixty-Third Session, U.N. Doc. A/66/10, cmt. to Art. 3, at 112 (2011), *reprinted in* [2011] 2 Y.B. Int'l Law Comm'n 112, U.N. Doc. A/CN.4/SER.A/2011/Add.1 (Part 2) [hereinafter Rep. on the Work of Its Sixty-Third Session]. *See also, e.g.*, Karnuth v. United States, 279 U.S. 231, 236–37 (1929) (finding that while law on the subject of treaty survival during armed conflict "is still in the making," there is general agreement that "stipulations in respect of what shall be done in a state of war; treaties of cession, boundary, and the like; provisions giving the right to citizens or subjects of one of the high contracting powers to continue to hold and transmit land in the territory of the other; and, generally, provisions which represent completed acts" persist, even between belligerents, but "treaties of amity, of alliance, and the like, having a political character, the object of which 'is to promote relations of harmony between nation and nation,' are generally regarded as belonging to the class of treaty stipulations that are absolutely annulled by war"); Techt v. Hughes, 128 N.E. 185, 191 (N.Y. 1920) (concluding that, even between belligerents, "provisions compatible with a state of hostilities, unless expressly terminated, will be enforced, and those incompatible rejected").

[133] *See* G.A. Res. 59/41, ¶ 5 (Dec. 16, 2004) (endorsing the International Law Commission's decision to include the topic on its agenda for the fifty-seventh session).

the development of a convention.[134] Although, to date, the Draft Articles on the Effects of Armed Conflicts on Treaties have not been codified in a convention,[135] they represent the work of respected international law scholars. Further, in 2017, the United Nations General Assembly "[e]mphasize[d] the value of the articles on the effects of armed conflicts on treaties in providing guidance to States, and invite[d] States to use the articles as a reference whenever appropriate."[136] States have expressed varying views concerning how, precisely, the key principles should be articulated. However, throughout the development of the Draft Articles on the Effects of Armed Conflicts on Treaties and afterwards, states have generally supported the principles they reflect and the fact that they preserve treaty obligations in armed conflict where it is reasonable to do so.[137] Therefore, because they represent an accessible, common reference source enjoying broad state support, in principle if not in their particular phrasing, this Article adopts and applies the Draft Articles on the Effects of Armed Conflicts on Treaties as the relevant rules governing the effect of armed conflict on treaties.

The analysis in the Draft Articles on the Effects of Armed Conflicts on Treaties begins from the predicate conclusion that neither treaties between parties to an armed conflict, nor treaties between a party to the armed conflict and a state not party to the armed conflict, are *ipso facto* terminated or suspended by the armed conflict.[138] This Article 3 pronouncement places the analysis beyond the threshold matter of automatic termination or suspension and prolongs our inquiry, because further consideration is necessary under Articles 4–7 to determine whether a particular treaty continues to operate in the event of an armed conflict.

The first step to determining whether a particular treaty remains in force, is to review the treaty for continuity or discontinuity language.[139] Treaty language expressly providing for the treaty to continue in the case of armed conflict or, alternatively, language calling for the treaty to terminate or suspend should armed conflict occur, may settle the question of the effect of armed conflict on the

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[134] *See* Rep. on the Work of Its Sixty-Third Session, *supra* note 132, at 106.
[135] *See* G.A. Res. 72/121, ¶ 2 (Dec. 7, 2017).
[136] *Id*.
[137] *See* Int'l Law Comm'n, Effects of Armed Conflicts on Treaties: Comments and Info. Received from Gov'ts, U.N. Doc. A/CN.4/622 (2010), *reprinted in* [2010] 2 Y.B. Int'l Law Comm'n 117–34, U.N. Doc. A/CN.4/SER.A/2010/Add.1 (Part 1) [hereinafter Effects of Armed Conflicts on Treaties: Comments and Info. Received from Gov'ts].
[138] *See* G.A. Res. 66/99, annex, Effects of Armed Conflicts on Treaties, art. 3 (Dec. 9, 2011). *See also* 2 OPPENHEIM, *supra* note 53, § 99, at 202 ("[T]he opinion is pretty general that war by no means annuls every treaty."); AUST, *supra* note 107, at 271 ("Armed conflict between parties to a treaty does not *per se* terminate the treaty as between them, but exactly which treaties may be affected, and in what manner, is uncertain.").
[139] *See* G.A. Res. 66/99, *supra* note 138, art. 4 ("Where a treaty itself contains provisions on its operation in situations of armed conflict, those provisions shall apply.").

treaty.[140] Where the treaty either contains no continuity or discontinuity language or that language is unclear, the next step is interpretation of the treaty.[141] In cases where the question of treaty continuity is not resolved through examination of the treaty text or through treaty interpretation using the established international law rules, practitioners, following the Draft Articles on the Effects of Armed Conflicts on Treaties, look to the treaty's subject matter, object and purpose, number of parties, and the characteristics of the armed conflict (e.g., territorial scope, general scale and intensity, and duration).[142] If, after progressing through draft Articles 4–7, it appears that a party may terminate, withdraw from, or suspend a treaty on account of the armed conflict, the state that wants to terminate, withdraw from, or suspend the operation of a treaty must provide notice to the other party or parties to

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[140] *See* Rep. on the Work of Its Sixty-Third Session, *supra* note 132, at 112 ("Article 4 recognizes the possibility of treaties expressly providing for their continued operation in situations of armed conflict. It lays down the general rule that where a treaty so provides it continues to operate in situations of armed conflict. The effect of this rule is that, in principle, the first step of the inquiry should be to establish whether the treaty so provides, since it will, depending on the terms of the provision and its scope, settle the question of continuity.").

[141] *See* Rep. on the Work of Its Sixty-Third Session, *supra* note 132, at 112. Contrary to the language in the commentary, Article 5 is properly applicable not only when a continuity or discontinuity provision is missing or unclear, but also when such a treaty provision is present and the words seem, on their face, to resolve the matter. This is so because even reading the plain text of a treaty text is, in fact, an exercise in interpretation. Take, for example, a hypothetical defense cooperation treaty under which the United States and Norway agree that the United States may, *inter alia*, store defense materiel in the territory of Norway, remove such defense materiel from Norway at its sole discretion, and that U.S. military aircraft may freely transit Norwegian national airspace. Assume also that the treaty contains a provision that says: "In the event of an armed conflict, the rights and obligations of the parties under this treaty shall be terminated." Does the treaty terminate in a situation in which Norway and the United States are jointly engaged in an armed conflict with Russia? If one applies draft Articles 4 and 5 sequentially and in the manner the commentary suggests, the answer is likely that it does. Under Article 4, there is a treaty provision on-point that is required to be applied. The commentary to draft Article 5 states that article would only come into play if one were to conclude that the treaty provision was inconclusive or failed to clearly indicate whether the treaty is to continue in the event of armed conflict. This result seems unreasonable and likely would be contrary to the practical interests and desires of both parties under such circumstances. Therefore, the more appropriate manner of viewing the relationship between draft Articles 4 and 5 is to apply the treaty interpretation principles of Articles 31 and 32 of the VCLT to *all* cases in which there is a treaty provision present as well as to cases when there is no such provision. *See* AUST, *supra* note 107, at 209 ("The determination of the ordinary meaning [of the terms of a treaty] cannot be done in the abstract, only in the *context* of the treaty and in the light of its *object and purpose*. The latter concept . . . can be elusive. Fortunately, the role it plays in interpreting treaties is less than the search for the ordinary meaning of the words in their context. In practice, having regard to the object and purpose is more for the purpose of confirming an interpretation. If an interpretation is incompatible with the object and purpose, it may well be wrong. Thus, although paragraph 1 [of Article 31 of the VCLT] contains both the textual (or literal) and the effectiveness (or teleological) approaches, it gives precedence to the textual.").

[142] *See* G.A. Res. 66/99, *supra* note 138, art. 6; G.A. Res. 66/99, *supra* note 138, art. 7 (referring the practitioner to the Annex to the draft articles for an indicative list of the types of treaties "the subject matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict").

the treaty, who can object and have the dispute resolved in accordance with Article 33 of the United Nations Charter.[143]

The United States–Japan Mutual Cooperation Treaty and the United States–ROK Mutual Defense Treaty do not expressly say they are intended to survive the outbreak of an armed conflict. However, they contemplate Japan and South Korea rendering assistance in the event the United States is attacked within Japanese territory or the Pacific region, respectively, and therefore involved as a belligerent in an international armed conflict.[144] The Latvia DCA and the Hungary DCA also do not expressly provide for continuation or termination in the event of an armed conflict, but they too contemplate, albeit less acutely than the United States–Japan Mutual Cooperation Treaty and the United States–ROK Mutual Defense Treaty, rights and obligations persisting when the United States is engaged as a belligerent in an international armed conflict.[145] These treaties could be eligible for termination or suspension if the foreign state party elected to assert armed conflict as a ground for such action.[146] However, it is unlikely the United States, as the state party benefiting under the treaty, would acquiesce in termination or suspension of the partner's treaty obligations precisely when it wishes to exercise its treaty rights.

If we recognize (a) that these states' customary neutrality law obligations to Iran begin to operate with the outbreak of the hypothetical armed conflict between the United States and Iran, (b) that international law neither automatically terminates nor automatically suspends the defense-related treaties between these states and the United States on account of armed conflict, and (c) that the language and subject matter of these treaties suggest they were not conceived in a manner to be terminable on the basis of armed conflict with a third state, then the potential legal conflict begins to emerge. The next step, then, is to examine what it means for multiple obligations to present a legal conflict.

D. *Identifying Conflicting Legal Obligations*

This Article advances the analogous application of the VCLT, Article 30, framework as the appropriate methodology to employ when prioritizing a state's competing treaty and customary law obligations.[147] Therefore, as a preliminary matter, we must grapple with the principal impediment to application of Article 30 in its traditional treaty vs. treaty context—identifying whether the treaties at issue "relat[e] to the same subject-matter."[148] Before discussing the application of Article 30 in detail, we will briefly examine how certain provisions of the VCLT relate to the issue of conflicting treaties, as well as the respective rationales and resulting

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[143] *See* G.A. Res. 66/99, *supra* note 138, art. 9.
[144] *See* U.S.-Japan Mutual Cooperation Treaty, *supra* note 67, art. V; U.S.-ROK Mutual Defense Treaty, *supra* note 67, art. III.
[145] *See* Latvia DCA, *supra* note 69, art. III(1); Hungary DCA, *supra* note 69, art. III(1).
[146] *See* G.A. Res. 66/99, *supra* note 138, annex, art. 9.
[147] *See* VCLT, *supra* note 21.
[148] *See* VCLT, *supra* note 21, art. 30(1).

ramifications of narrowly or more broadly construing the "same subject-matter" language in Article 30.

Since its enactment, the VCLT has been the lodestar by which states and their international lawyers have examined questions of treaty law.[149] Regarding treaty conflicts, three articles of the VCLT are particularly relevant. Article 53 declares void treaties that conflict with *jus cogens* norms of international law in effect at the time of the treaty's conclusion.[150] Articles 59 and 30 are the closest the VCLT comes to dealing with treaties that are incompatible with each other. Under Article 59, an earlier treaty is terminated or suspended when all the states party to the treaty subsequently conclude a later treaty, relating to the same subject-matter, and either (a) it appears that the parties intend the later-in-time treaty to prevail or (b) the later-in-time treaty is so incompatible with provisions of the earlier treaty that it is impossible to apply the treaties simultaneously.[151] Article 59's focus, however, is on the end of a treaty's application, not on how to prioritize the ongoing obligations embodied in competing treaties.[152] Addressing how states, hopefully in consultation with their international lawyers, should prioritize competing, ongoing treaty obligations is the province of Article 30.[153] However, by its own title and terms, Article 30 is only applicable in cases of "successive treaties relating to the same subject-matter."[154] Unfortunately, because scholars and practitioners ascribe different meanings to the vague phrase "relating to the same subject-matter," there is no consensus understanding of the term.[155] Consequently, Article 30 fails to yield a uniformly understood rule by which to satisfactorily address the topic of

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[149] *See* DUNCAN B. HOLLIS, THE OXFORD GUIDE TO TREATIES 2 (2012).

[150] *See* VCLT, *supra* note 21, art. 53 ("A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.").

[151] *See* VCLT, *supra* note 21, art. 59.

[152] *See* VCLT, *supra* note 21, art. 59; ANDREA SCHULZ, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, PREL. DOC. NO 24, THE RELATIONSHIP BETWEEN THE JUDGMENTS PROJECT AND OTHER INTERNATIONAL INSTRUMENTS 8 (2003), https://assets.hcch.net/upload/wop/jdgm_pd24e.pdf [https://perma.cc/9845-SGGW] ("The basic rule for successive treaties, to which Article 30(3) refers, is contained in Article 59 of the Vienna Convention. It states that normally, where the parties to a treaty conclude a later treaty relating to the same subject matter, in case of incompatibility the earlier treaty shall be considered as terminated. Only where the will of the parties leads us to assume that they wanted both treaties to coexist, Article 30(3) comes into play.").

[153] *See* VCLT, *supra* note 21, art. 30.

[154] VCLT, *supra* note 21, art. 30(1).

[155] *See, e.g.*, AUST, *supra* note 107, at 204 (asserting the phrase "should probably be construed strictly, so that the article would not apply when a general treaty impinges indirectly on the content of a particular provision of an earlier treaty"); IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 98 (Manchester Univ., 2d ed., 1984) (declaring that "the expression 'relating to the same subject-matter' must be construed strictly" and that infringement on a particular provision of an earlier treaty by a general treaty "is not a question of the application of successive treaties relating to the same subject matter" but rather "a question of treaty interpretation involving consideration of the maxim *generalia specialibus non derogant"*). *But see, e.g.*, E.W. Vierdag, *The Time of the "Conclusion" of a Multilateral Treaty: Article 30 of the Convention on the Law of Treaties and Related Provisions*, 59 BRIT. Y.B. INT'L L. 75, 100 (1988) ("If an attempted simultaneous application of two rules to one set of facts or actions leads to incompatible results it can safely be assumed that the test for sameness is satisfied.").

conflicting treaties. Contrary to its explicit wording, international lawyers should apply the rules of Article 30 whenever incompatible outcomes result from applying two or more treaties to the same facts.[156]

A strict reading of Article 30's "same subject-matter" language elevates form over both substance and practicality.[157] There are two readily-identifiable, but overly narrow, conceptions of treaty subject-matter that need to be addressed. The first is the form of two treaties from different categories (e.g., trade, environment, justice, defense) that seem applicable to the same circumstances.[158] The other narrow conception of treaty subject-matter to be wary of involves treaties that are facially similar and that rationally apply to the facts, but, because of changed circumstances and the passage of time, one treaty contemplates developments and circumstances that the other could not have considered (e.g., Caspian Sea mineral rights).[159] These misconceptions of the phrase "same subject-matter" present false obstacles to the application of Article 30.

Narrowly reading "same subject-matter" to be concerned with typological labels or as bounded by temporal considerations leads international lawyers to drastically limit the applicable scope of Article 30 by reading out of existence those conflicts where one treaty frustrates the purpose of another treaty.[160] To demonstrate how a narrow reading fails to appreciate the applicability of Article 30, a scenario could arise where state A and state B have in force between them a treaty requiring them to fully recognize each other's court decisions and to refrain from any action impeding their full enforcement. Simultaneously, state B has in force with state C a treaty under which state B is obligated not to surrender nationals of state C to any other state for purposes of criminal trial or punishment. In

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[156] *See, e.g.*, Vierdag, *supra* note 155, at 100 ("If an attempted simultaneous application of two rules to one set of facts or actions leads to incompatible results it can safely be assumed that the test for sameness is satisfied.").

[157] *See* Borgen, *supra* note 118, at 606 ("Of particular interest . . . is the theory that treaties that may affect each others' goals do not conflict because they do not regulate the 'same subject-matter.' Such an argument is neither legally correct nor practically sound.").

[158] *See* Borgen, *supra* note 118, at 580 (noting "[s]ome of the most important potential conflicts arise . . . when treaties of seemingly different subject-matter overlap either in effect or in regulatory scope"). The International Law Commission Study Group examining the fragmentation of international law rejects the proposition that "relating to the same subject-matter" means treaties from different categories cannot present a conflict for purposes of VCLT, Article 30. *See* Int'l Law Comm'n, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, 17-18, 129-131, U.N. Doc. A/CN.4/L.682 (April 13, 2006).

[159] *See* Borgen, *supra* note 118, at 606–08 (discussing the argument among some Caspian Sea littoral States that the Treaty of Commerce and Navigation, Iran-U.S.S.R., Mar. 25, 1940, does not conflict with present efforts to conclude a treaty on natural resource allocation because the Treaty of Commerce and Navigation was concluded prior to the discovery of oil beneath the Caspian Sea).

[160] *See* Borgen, *supra* note 118, at 639 ("[C]ases that would seem to conflict are read out of existence by the application of the same subject-matter clause from VCLT Article 30."); SCHULZ, *supra* note 152, at 12 ("[T]he narrow interpretation given to the requirement that the successive treaties must relate to 'the same subject matter' very quickly leads us outside of the scope of Article 30 of the Vienna Convention, and into other sources of public international law.").

appropriate circumstances, the treaty between state A and state B conflicts with the treaty between state B and state C, even though it is not factually impossible in all cases for state B to simultaneously fulfill its treaty obligations to both state A and state C—because not all extradition requests from state A will concern a national of state C. In cases where a national of state C is to be extradited, both treaties are implicated. State B's treaty obligation to state C is incompatible with its obligation to state A because it frustrates the purpose of that treaty in cases where state A requests state B extradite a national of state C.

In the strictest sense, treaties conflict when their terms make it such that a state party common to all of the treaties concerned is factually incapable of complying with all sets of its treaty obligations concurrently.[161] Such a conflict arises, for example, in a case where state A enters into separate treaties under which it grants exclusive basing rights, at the same particularly described location, for the same time period, to both state B and state C. It is not factually possible for both state B and state C to exclusively occupy the same physical location, at the same time. Therefore, state A's basing treaties with state B and state C conflict.[162] Such impossibility is not, however, the only way to conceive of treaty conflicts.

Rather than strictly reading "same subject-matter" in a way that renders Article 30 largely inapplicable, except when the potentially conflicting treaties are of the same categorical type, were concluded within the same or similar factual context, or present obvious factual impossibility, international lawyers should apply the rules of Article 30 whenever the facts call for application of two or more treaties and those treaties intersect in a way that evidences incompatibility. Incompatibility is expressly referred to in Article 30 itself,[163] and it is also recognized by scholars in international law as a valid conception of "same subject-matter."[164] States and the international lawyers advising them are best served by

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[161] *See* C. Wilfred Jenks, *The Conflict of Law-Making Treaties*, 30 BRIT. Y.B. INT'L L. 401, 426 (1953) ("A conflict in the strict sense of direct incompatibility arises only where a party to the two treaties cannot simultaneously comply with its obligations under both treaties.").

[162] Inability to simultaneously perform under competing treaties is not the type of impossibility of performance addressed in the VCLT. Article 61(1) of the VCLT states: "A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty." VCLT, *supra* note 21, art. 61(1). In cases in which it remains factually possible to perform the competing obligations in both treaties standing alone (i.e., if we imagine, in turn, that each of the competing treaties did not exist), then Article 61(1) is not applicable. Allowing a State to terminate, suspend, or withdraw from a treaty on the ground that it cannot simultaneously perform a separate treaty obligation it has undertaken would render hollow the fundamental principle of *pacta sunt servanda*.

[163] *See* VCLT, *supra* note 21, arts. 30(2)–(3).

[164] *See* VCLT, *supra* note 21, arts. 30(2)–(3); *see also, e.g.*, Vierdag, *supra* note 155, at 100 ("If an attempted simultaneous application of two rules to one set of facts or actions leads to incompatible results it can safely be assumed that the test for sameness is satisfied."); Borgen, *supra* note 118, at 575–76 ("States are not only concerned with when it is impossible for a state to abide by two treaties, but also when one treaty frustrates the goals of another. Thus, treaty conflicts can be conceived more

abandoning a dogmatic reading of Article 30.[165] They must understand and apply the structured approach set out in Article 30 in an inclusive manner that effectuates the fundamental purpose of that article for as many treaties as possible.

If international lawyers resist broadly applying Article 30 to cases where the facts implicate multiple treaties, on the basis that those treaties ostensibly concern different subjects, they were concluded in different eras or factual circumstances, [166] or for some similar reason, then they perpetuate both legal uncertainty and the devaluing of treaties. In a world where *ad hoc* methodologies for resolving practical treaty incompatibility persist, states are unlikely to feel confident that they and the other states party share a common understanding of how their respective treaty rights and responsibilities should be prioritized. That uncertainty introduces unnecessary inter-state friction that is counterproductive to stable foreign policy positions and predictable inter-state relations. Once states and their international lawyers get past the paper tiger conundrum of whether to apply Article 30, they will find that the rules reflected in Article 30(2)–(4) form a coherent framework for use in determining how to prioritize incompatible treaties.[167] For the same reasons set forth in the section that follows, Article 30 is also the appropriate methodology to apply to prioritize incompatible treaties and customary law obligations.

1. Traditional Application of VCLT, Article 30

When one treaty expressly subordinates itself to an earlier or later treaty, it is logical to elevate the identified treaty as superior.[168] Likewise, when a treaty expressly states it is not to be considered incompatible with an earlier- or later-in-time treaty, it is rational to apply the treaty on-point, whether earlier- or later-in-time, rather than the treaty that declares it is not to be viewed as incompatible.[169] There is no need to prioritize one treaty over another unless they are incompatible. It is in cases where the treaties do not establish a hierarchy between themselves, the treaties are facially or practically incompatible, and where both treaties are intended to continue in force, that Article 30 provides the critical framework necessary for

broadly as when a state is party to two or more treaty regimes and either the mere existence of, or the actual performance under, one treaty will frustrate the purpose of another treaty.").

[165] *See, e.g.*, Borgen, *supra* note 118, at 580 (discussing how the language of Article 30 "has led to much debate over whether or not certain treaties are concerned with the 'same subject-matter'" and how favoritism for one genre of subject-matter adversely impacts analysis of overlapping treaties from seemingly different topical regimes).

[166] *See, e.g.*, Borgen, supra note 118, at 606–08 (discussing the growing disagreement among Russia, Azerbaijan, Kazakhstan, and Turkmenistan concerning whether the 1940 Iran-U.S.S.R. Treaty or the bilateral and multilateral treaties being negotiated among the littoral States should govern the exploitation of the huge reservoirs of oil under the Caspian Sea).

[167] *See* VCLT, *supra* note 21.

[168] *See* VCLT, *supra* note 21, art. 30(2) ("When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.").

[169] *See* VCLT, *supra* note 21, art. 30(2).

prioritizing competing treaty obligations, particularly in cases in which the rights of third states are directly impacted.

Leaving aside the, hopefully, limited number of cases in which the United Nations Charter is one of the treaties in conflict,[170] the VCLT approach to prioritizing competing obligations in coextensive treaties can be summarized in two relatively straight-forward rules. First, "as between parties to one treaty who become parties to a second, the second governs on any point where it is incompatible with the first."[171] This rule effectively codifies the legal doctrine of *lex posterior derogat legi priori*, or *lex posterior*, by directing that the most recent expression of the parties' intent receive priority.[172] The second rule is that "if some of the parties to the first treaty are not parties to the second treaty, and vice versa, the first governs between a party to both and a party only to the first; the second governs between a party to both and a party only to the second."[173] This second rule, in which there is not a unity of states party across all of the treaties, reflects the maxim that states are bound only by the treaties to which they are party.[174] For the state party to both treaties, this second rule codifies either the interpretive doctrine of *lex posterior* or *lex prior*, depending on whether it is to the first or second treaty in the chronology that the other state is not a party.

When advising their client state, international lawyers must keep in mind that Article 30 addresses treaty priority in cases of conflict, not the validity or

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[170] U.N. Charter art. 103 states: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." The VCLT recognizes and reaffirms, vis-à-vis its rules of treaty prioritization, the supremacy of the U.N. Charter. *See* VCLT, *supra* note 21, art. 30(1) ("Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.").

[171] Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495, 517 (1970); *see also* VCLT, *supra* note 21, art. 30(3) ("When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty."); VCLT, *supra* note 21, art. 30(4)(a) ("When the parties to the later treaty do not include all the parties to the earlier one . . . [a]s between States parties to both treaties the same rule applies as in paragraph 3.").

[172] *See* Borgen, *supra* note 118, at 587 ("By contrast, *lex posterior derogat legi priori* (*lex posterior*) considers the evolving intent of the parties and favors the most recent treaty by the same parties.").

[173] Kearney & Dalton, *supra* note 171, at 517*; see also* VCLT, *supra* note 21, art. 30(4)(b) ("When the parties to the later treaty do not include all the parties to the earlier one . . . [a]s between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.").

[174] *See* SCHULZ, *supra* note 152, at 9–10 ("Article 30(4)(b) clarifies the obvious, namely that States that are not party to *all* of the treaties in question remain unaffected by a treaty to which they are not a party. *E.g.* where out of 30 States parties to an earlier treaty, 20 enter into a new one, the old treaty still governs the relations among the 10 States not party to the new treaty, as well as between each of them and each of the 20 States parties to both treaties, respectively."); VCLT, *supra* note 21, art. 26; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 106, § 321.

invalidity of the treaty to which priority is not given.[175] To illustrate, imagine two versions of a three-state hypothetical in which there is overlap, but not full unity of states party, between the earlier- and later-in-time treaties. First, an approach to treaty conflict resolution that voids a later-in-time treaty in force between state A and state C because it conflicts with an earlier-in-time treaty between state A and state B distorts the *lex prior* rule and strips state C of its rights and obligations under its treaty with state A without any fault on the part of state C. Second, an approach to treaty conflict resolution that invalidates an earlier-in-time treaty in force between state A and state B, on the ground that a contradictory later-in-time treaty between state A and state C is the last expression of the will of state A, drains virtually all life from *pacta sunt servanda* in favor of the *lex posterior* rule. This approach strips state B of its rights and obligations under its treaty with state A, solely because its treaty conflicts with a later-in-time treaty to which it is not a state party and of which it may not even be aware. A proper incarnation of the *pacta sunt servanda* rule recognizes the politically uncomfortable, but legally defensible, position that, in both versions of this three-state hypothetical, all treaties remain in force. Such a conception of *pacta sunt servanda* evidences good faith, ascribes the ordinary meaning of the phrase to the principle, recognizes and promotes the value of treaties as a relatively stable means of regulating inter-state relationships,[176] and "opens the door to state responsibility and places the burdens on the potentially breaching state or states to negotiate a solution."[177]

For purposes of applying this analytical framework, assume a hypothetical armed conflict—this time between the United States and Russia—in which only Hungary wishes to remain neutral. Russia, Hungary, and the United States are all states party to Hague V.[178] Hague V and the Hungary DCA are rightly viewed as conflicting because the facts of the hypothetical call for the application of both

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[175] The series of ILC Rapporteurs charged with examining the law of treaties widely disagreed concerning the issue of the invalidity of conflicting treaties. Sir Hersch Lauterpacht concluded that a second treaty "is void if its performance involves a breach of a treaty obligation previously undertaken by one or more of the contracting parties." Int'l Law Comm'n, Rep. on the Law of Treaties, U.N. Doc. A/CN.4/63, at 156 (1953), *reprinted in* [1953] 2 Y.B. Int'l Law Comm'n 156, U.N. Doc. A/CN.4/SER. A/1953/Add. 1; Sir Lauterpacht's successor, Sir Gerald Fitzmaurice, concluded that a second treaty would be invalid only if it conflicted with an earlier treaty "embodying or generally regarded as containing excepted rules of international law in the nature *of jus cogens*." Int'l Law Comm'n, Rep. on the Law of Treaties, U.N. Doc. A/CN.4/115 and Corr. 1, at 27 (1958), *reprinted in* [1958] 2 Y.B. Int'l Law Comm'n 27, U.N. Doc. A/CN.4/SER. A/1958/Add. 1; In the end, Sir Fitzmaurice's successor, Sir Humphrey Waldock, did not find a second treaty that conflicted with an earlier treaty invalid. *See* Int'l Law Comm'n, Rep. on the Law of Treaties, U.N. Doc. A/CN.4/156 and Add. 1–3, at 53 (1963), *reprinted in* [1963] 2 Y.B. Int'l Law Comm'n 53, U.N. Doc. A/CN.4/SER. A/1963/Add. 1.

[176] *See* Crootof, *supra* note 105, at 238–39 ("The need for stability in treaty regimes, reflected in the customary rule of *pacta sunt servanda* ('agreements must be kept'), undergirds much of international law and explains states' willingness to invest energies in concluding treaties.").

[177] Borgen, *supra* note 118, at 589, 617 ("[T]he rules of the VCLT, which allow each treaty to control as between its members, provide no real solution to the underlying conflict. Rather, the VCLT rules merely put the problem back into the arena of diplomatic negotiation.").

[178] Hague V, *supra* note 28.

treaties and, as was shown earlier, the rights and obligations under these treaties are incompatible with each other. Article 30(4) provides the applicable rule for understanding how to prioritize the competing international legal obligations of Hungary and the United States under Hague V and the Hungary DCA. Through application of Article 30(4)(a), the Hague V neutrality rights and obligations that would otherwise have existed between Hungary and the United States are overcome by the incompatible rights and obligations in the Hungary DCA. This is an example of states entering into a subsequent treaty the provisions of which override incompatible provisions in their earlier-in-time treaty. Treaty provisions of the earlier-in-time treaty that are compatible with the later-in-time treaty remain operative. In addition, because Hague V reflects customary international law,[179] the United States and Hungary also agreed to supersede a pre-existing rule of customary international law in their *inter se* relations. As a result, for example, Hungarian territory is not inviolable to the United States and the United States has the right to move troops, munitions, and supplies through Hungary. However, the primacy of the rights and obligations in the Hungary DCA, over those in Hague V, is not true between Hungary and Russia.

Under Article 30(4)(b), Hungary continues to owe Hague V treaty obligations to Russia.[180] From Russia's perspective, the DCA between the United States and Hungary is irrelevant because Russia is not a state party. In Russia's view, Hungary remains bound by its Hague V neutrality obligations because, as states party to Hague V, it is binding on both Hungary and Russia. Therefore, Russia has a right to expect that Hungary will, for example, resist U.S. presence in, and use of, Hungarian territory;[181] resist U.S. efforts to move troops, munitions, or supplies across Hungary,[182] and intern U.S. personnel, vehicles, aircraft, and

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[179] *See, e.g.*, BOOTHBY & HEINTSCHEL VON HEINEGG, *supra* note 31, at 374; Biller & Schmitt, *supra* note 36, at 192 (stating Hague V and Hague XIII "are generally considered reflective of customary international law"). *But see* OFFICE OF THE GENERAL COUNSEL, *supra* note 32, § 15.1.4 (asserting that provisions of the treaties that address neutrality "may reflect customary international law").

[180] *See, e.g.*, VCLT, *supra* note 21, art. 30(4)(b) ("As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.").

[181] *See* Hague V, *supra* note 28, arts. 1, 10; *see also* OFFICE OF THE GENERAL COUNSEL, *supra* note 32, §§ 15.3.2, 15.10.3; U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, *supra* note 32, ¶¶ 7.2, 7.3; FEDERAL MINISTRY OF DEFENSE (GERMANY), *supra* note 32, ¶¶ 1206, 1250; CHIEF OF DEFENCE STAFF (CANADA), *supra* note 32, ¶¶ 703(5), 811(1); U.K. MINISTRY OF DEFENCE, *supra* note 32, ¶ 1.43 (a); SAN REMO MANUAL, *supra* note 33, at 12.

[182] *See* Hague V, *supra* note 28, art. 5 (requiring a neutral state to not allow belligerents to move troops, munitions, or supplies across its territory). *See also* OFFICE OF THE GENERAL COUNSEL, *supra* note 32, § 15.3.2 (affirming the neutral State obligation to prevent belligerent violations of its neutrality); FEDERAL MINISTRY OF DEFENSE (GERMANY), *supra* note 32, ¶ 1207 (recognizing a neutral State is prohibited from permitting the belligerent military to transit through neutral territory by water, land or air); U.K. MINISTRY OF DEFENCE, *supra* note 32, ¶ 1.43 (a) (stating a neutral State must not allow a belligerent to use neutral territory for military operations); CASTRÉN, *supra* note 22, at 460–62 (citing Hague V, Art. 5, para. 1, and recognizing a belligerent's exercise, during the armed conflict, of transit rights granted by a neutral State pre-conflict entitles the opposing belligerent to take countermeasures).

materiel located in its territory.[183] Hungary, therefore, finds itself with a potentially difficult choice to make: (a) it can breach its DCA obligations to the United States, but uphold its neutrality obligations to Russia; or (b) it can breach its neutrality obligations to Russia, but uphold its DCA obligations to the United States. Rather than resolving the conflict for Hungary by declaring one or the other treaty void or superseded, Article 30 puts a finer point on Hungary's diplomatic dilemma by recognizing the continued validity of Hungary's obligations under both treaties.

2. Treaty and Customary Law Conflicts: A New Application of VCLT, Article 30

Substituting Iran for Russia in the hypothetical armed conflict does not change the outcome between Hungary and the United States—the Hungary DCA prevails over Hague V. However, because Iran is not a state party to Hague V,[184] there are no treaty law neutrality rights and obligations governing the interaction between Iran and Hungary to be addressed. Recall, however, that the rights and obligations embodied in Hague V and Hague XIII reflect customary international law.[185] As a result, Hungary has neutrality obligations vis-à-vis all states, not only those party to Hague V and Hague XIII.[186] This requires prioritization of Hungary's treaty obligations to the United States and its customary international law neutrality obligations to Iran, and also to Russia in the earlier hypothetical.

Article 30(4) is useful, by analogy, for understanding how Japan, South Korea, Latvia, and Hungary should prioritize their neutrality obligations to Iran under customary law and their obligations to the United States under their respective defense-related treaties. Article 30(4)(a) calls for application of the rule in Article 30(3) to prioritize the obligations between these states and the United States. Consistent with the principle that states may enter into treaties that conflict with a pre-existing rule of customary international law, the terms of the defense-related treaties with the United States prevail over these States' otherwise valid obligations under the customary law of neutrality.[187] However, there is still the matter of Iran's expectations under international law. How should these states

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[183] *See* Hague V, *supra* note 28, art. 11; *see also* OFFICE OF THE GENERAL COUNSEL, *supra* note 32, § 15.10.3; PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, *supra* note 33, ¶ 172 (b); FEDERAL MINISTRY OF DEFENSE (GERMANY), *supra* note 32, ¶¶ 1206, 1250; CHIEF OF DEFENCE STAFF (CANADA), *supra* note 32, ¶ 703(6).

[184] Hague V, *supra* note 28.

[185] *See, e.g.*, BOOTHBY & HEINTSCHEL VON HEINEGG, *supra* note 31, at 374; Biller & Schmitt, *supra* note 36, at 192 (stating Hague V and Hague XIII "are generally considered reflective of customary international law"). *But see* OFFICE OF THE GENERAL COUNSEL, *supra* note 32, § 15.1.4 (asserting that provisions of the treaties that address neutrality "may reflect customary international law").

[186] *See generally* Koroma, *supra* note 37.

[187] *See, e.g.*, Virally, *supra* note 113, at 165–66; KONTOU, *supra* note 110, at 1 ("Treaties are concluded in the context of general international law in force at the time of the parties' agreement. They can repeat the general norm, refine and complete it, or apply special rules in the relations between the contracting parties."); LAUTERPACHT, *supra* note 105, at 60 ("States may—within very wide limits—by treaty modify, *inter se*, the rules of customary international law.").

prioritize their customary neutrality obligations to Iran as the opposing belligerent in the hypothetical?

Applying Article 30(4)(b), by analogy, these states continue to owe customary law neutrality obligations to Iran.[188] Therefore, Iran has a right to expect that these states, in meeting their neutrality obligations, will resist U.S. presence in, and use of, their territory;[189] that these states will resist U.S. efforts to move troops, munitions, or supplies across their territory and through their airspace;[190] and that these states will intern U.S. personnel, vehicles, aircraft, and materiel located in their territory.[191] There is, therefore, a clear legal tension present for these states. Each of them faces the same potentially difficult choice between breaching its defense-related treaty obligations to the United States and breaching its neutrality obligations to Iran under customary international law.

V. State Responsibility and Conflicts between Treaties and Customary Neutrality

Neutral states can easily find themselves caught between their defense-related treaty obligations to the United States and their customary law neutrality obligations to the opposing belligerent. The bilateral treaties between these states and the United States prevail *inter se* because the parties agreed to have their relations governed by the treaty rather than the pre-existing customary rule. However, those bilateral treaties are of zero consequence to the opposing belligerent—Iran in the current hypothetical—because the relevant rules in force between these states and Iran are the pre-existing customary law neutrality rules. The treaties between these states and the United States and the customary law of neutrality impose equally valid legal obligations on these states. As a result, unless the neutral state can navigate the tensions between the belligerents' respective self-

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[188] *See* VCLT, *supra* note 21, art. 30(4)(b) ("As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations."); *see generally* Koroma, *supra* note 37.

[189] Hague V, *supra* note 28, arts. 1, 10. *See also* OFFICE OF THE GENERAL COUNSEL, *supra* note 32, §§ 15.3.2.2, 15.10.3; U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, *supra* note 32, ¶¶ 7.2, 7.3; FEDERAL MINISTRY OF DEFENSE (GERMANY), *supra* note 32, ¶¶ 1206, 1250; CHIEF OF DEFENCE STAFF (CANADA), *supra* note 32, ¶¶ 703(5), 811(1); U.K. MINISTRY OF DEFENCE, *supra* note 32, ¶ 1.43 (a); SAN REMO MANUAL, *supra* note 33, at 12.

[190] *See* Hague V, *supra* note 28, art. 5 (requiring a neutral State to not allow belligerents to move troops, munitions, or supplies across its territory); *see also, e.g.*, OFFICE OF THE GENERAL COUNSEL, *supra* note 32, § 15.3.2.2 (affirming the neutral State obligation to prevent belligerent violations of its neutrality); FEDERAL MINISTRY OF DEFENSE (GERMANY), *supra* note 32, ¶ 1207 (recognizing a neutral State is prohibited from permitting the belligerent military to transit through neutral territory by water, land or air); U.K. MINISTRY OF DEFENCE, *supra* note 32, ¶ 1.43(a) (stating a neutral State must not allow a belligerent to use neutral territory for military operations); CASTRÉN, *supra* note 22, at 460–62 (citing Hague V, art. 5, ¶ 1, and recognizing a belligerent's exercise, during the armed conflict, of transit rights granted by a neutral State pre-conflict entitles the opposing belligerent to take countermeasures).

[191] *See* Hague V, *supra* note 28, art. 11; Hague XIII, *supra* note 28, art. 24; *see also* OFFICE OF THE GENERAL COUNSEL, *supra* note 32, § 15.10.3; PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, *supra* note 33, ¶ 172 (b); FEDERAL MINISTRY OF DEFENSE (GERMANY), *supra* note 32, ¶¶ 1206, 1250; CHIEF OF DEFENCE STAFF (CANADA), *supra* note 32, ¶ 703(6).

interests and successfully negotiate an outcome in which neither belligerent perceives a conflict between the defense-related treaty and customary neutrality, the neutral state will have a political choice to make. That choice will be informed, no doubt, by consideration of what, if any, are likely to be the consequences for the foreign state of choosing to meet one obligation at the expense of the other. In order to appreciate the international legal consequences the foreign partner faces in making that choice, this Article will now examine the partner state's dilemma under the law of state responsibility as reflected in the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts.[192]

The Draft Articles on State Responsibility are the product of more than 40 years of effort by the International Law Commission ("ILC").[193] Although they have not yet become a formal convention, the U.N. General Assembly adopted the Draft Articles on State Responsibility and commended them to the attention of states in 2001.[194] The Draft Articles on State Responsibility are concerned with "the general conditions under international law for the State to be considered responsible for wrongful acts or omissions and the legal consequences which flow therefrom."[195]

Under the Draft Articles on State Responsibility, an internationally wrongful act of a state is an act or omission that (a) is "attributable to the State under international law" and (b) "constitutes a breach of an international obligation of the State."[196] The first element of an internationally wrongful act, attribution, "is the process by which international law establishes whether the conduct of a . . . person . . . can be considered an 'act of state', and thus be capable of giving rise to state responsibility."[197] The general rule of attribution is that "the only conduct

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[192] Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 32 (2001), *reprinted in* [2001] 2 Y.B. Int'l Law Comm'n 32, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) [hereinafter Draft Articles on State Responsibility].

[193] In 1947, the U.N. General Assembly established the International Law Commission to carry-out the General Assembly's responsibility under the U.N. Charter, Article 13(1). The ILC's study of State responsibility began with the inclusion of the topic on its agenda during the seventh session in 1955. Int'l Law Comm'n, Adoption of the Provisional Agenda for the Seventh Session, U.N. Doc. A/CN.4/89 (1955), *reprinted in* [1955] 1 Y.B. Int'l Law Comm'n 1, U.N. Doc. A/CN.4/SER.A/1955.

[194] *See* G.A. Res. 56/83, Responsibility of States for Internationally Wrongful Acts, ¶ 3 (Dec. 12, 2001). Although numerous States acknowledge that the Draft Articles on State Responsibility have been influential and are widely referred to and cited by international lawyers, Governments, and courts (both national and international), States remain divided regarding whether a convention is appropriate. The main concern among States seems to be reopening discussion of the substance of the draft rules and thereby preempting the organic development of customary international law around those provisions of the Draft Articles on State Responsibility that are not believed to reflect current customary international law. *See, e.g.*, Sixth Committee, Summary Record of the 9th Meeting, ¶¶ 27-75, U.N. Doc. A/C.6/71/SR.9 (Nov. 7, 2016); Julian Simcock, Deputy Legal Adviser, U.S. Mission to the U.N., Remarks at a UN General Assembly Meeting of the Sixth Committee on Agenda Item 75: Responsibility of States for Internationally Wrongful Acts (Oct. 14, 2019).

[195] Draft Articles on State Responsibility, *supra* note 192, at 31.

[196] G.A. Res. 56/83, *supra* note 194, art. 2.

[197] JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 113 (2013).

attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State."[198] Although conduct by a variety of actors can potentially be attributed to the state,[199] any breach of the foreign partner's defense-related treaty obligations to the United States or its neutrality obligations to the opposing belligerent will almost certainly be the product of acts or omissions by employees of the foreign state's ministries of foreign affairs or defense, enacting institutional choices. Consequently, this Article concerns itself only with attribution through the acts or omissions of individuals as organs of the state.[200] Accordingly, this Article proceeds with its analysis on the assumption that the facts would properly support attribution on that basis. Therefore, the analysis turns to the remaining constituent element of an internationally wrongful act—breach of a valid international legal obligation.[201]

International legal obligations may arise through customary international law, a treaty, or a general principle of international law.[202] The Draft Articles on State Responsibility address neither the content of the state's obligations nor the content of the primary rules from which the obligations stem.[203] Instead, the Draft Articles on State Responsibility focus on recognizing and codifying the basic international law rules governing the accountability of states for nonconformity with their legal obligations, regardless of the source or content of the obligations themselves.[204] After identifying the purportedly nonconforming act or omission, and attributing it to a state through the application of one or more of Articles 4–11, it is necessary to look to "the precise terms of the obligation, its interpretation and application, [and] tak[e] into account its object and purpose and the facts of the case," to determine whether the state has breached its international obligation and, if so, when the breach occurred.[205] The fact that a state is complying with a treaty obligation to one state, and in the process necessarily breaches a customary international law obligation owed to another state, or the reverse, does not eliminate the wrongfulness of the breach and acts of retorsion and countermeasures remain available in response.[206]

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[198] Draft Articles on State Responsibility, *supra* note 192, at 38.
[199] G.A. Res. 56/83, *supra* note 194, annex, arts. 4–11.
[200] G.A. Res. 56/83, *supra* note 194, art. 4 ("The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.").
[201] Draft Articles on State Responsibility, *supra* note 192, cmt. to art. 2, ¶ 7.
[202] Draft Articles on State Responsibility, *supra* note 192, cmt. to art. 12, ¶ 3 ("International obligations may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order.").
[203] Draft Articles on State Responsibility, *supra* note 192, at 54.
[204] Draft Articles on State Responsibility, *supra* note 192, at 31.
[205] Draft Articles on State Responsibility, *supra* note 192, at 54.
[206] The Draft Articles on State Responsibility of States identify only consent, self-defense, countermeasures, *force majeure*, distress, and necessity as circumstances which preclude the wrongfulness of a state's breach of its international obligations. Draft Articles on State Responsibility, *supra* note 192, arts. 20–25.

As we have seen, a state's legal status as a neutral state carries obligations of impartiality,[207] abstention,[208] non-participation,[209] prevention,[210] and internment of belligerent forces, vehicles, vessels, aircraft, and materiel unlawfully present in neutral territory.[211] For the minority of states party to Hague V and Hague XIII, neutrality obligations stem from both treaty law and the recognition of these treaties as customary international law. For most states, however, their neutrality obligations stem solely from customary international law. However, in assessing accountability, the Draft Articles on State Responsibility draw no distinction based on the source of the legal obligation.[212]

Japan, South Korea, Latvia, and Hungary, by breaching their customary law neutrality obligations to Iran, perpetrate internationally wrongful acts.[213] These states remain under a duty to perform the obligations they breach.[214] If they had not already done so, these states also would be required to cease breaching their

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[207] *See, e.g.*, OFFICE OF THE GENERAL COUNSEL, *supra* note 32, § 15.3.2; U.K. MINISTRY OF DEFENCE, *supra* note 32, ¶ 1.42; FEDERAL MINISTRY OF DEFENSE (GERMANY), *supra* note 32, ¶ 1208; CHIEF OF DEFENCE STAFF (CANADA), *supra* note 32, ¶ 1304(2); SAN REMO MANUAL, *supra* note 33, at 12; 2 OPPENHEIM, *supra* note 53, § 294, at 476–77; CASTRÉN, *supra* note 22, at 471.

[208] *See, e.g.*, OFFICE OF THE GENERAL COUNSEL, *supra* note 32, § 15.3.2; U.K. MINISTRY OF DEFENCE, *supra* note 32, ¶ 1.42; FEDERAL MINISTRY OF DEFENSE (GERMANY), *supra* note 32, ¶1208; CHIEF OF DEFENCE STAFF (CANADA), *supra* note 32, ¶ 1304(2); SAN REMO MANUAL, *supra* note 33, at 12; 2 OPPENHEIM, *supra* note 53, § 320, at 507–08.

[209] *See, e.g.*, Hague XIII, *supra* note 28, art. 6; OFFICE OF THE GENERAL COUNSEL, *supra* note 32, § 15.3.2.1; FEDERAL MINISTRY OF DEFENSE (GERMANY), *supra* note 32, ¶ 1207; 2 OPPENHEIM, *supra* note 53, § 349, at 561–62; CASTRÉN, *supra* note 22, at 471–74; Bothe, *supra* note 22, at 485.

[210] *See, e.g.*, OFFICE OF THE GENERAL COUNSEL, *supra* note 32, §§ 15.3.2, 15.10.3; U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, *supra* note 32, ¶¶ 7.2, 7.3; FEDERAL MINISTRY OF DEFENSE (GERMANY), *supra* note 32, ¶¶ 1206, 1250; CHIEF OF DEFENCE STAFF (CANADA), *supra* note 32, ¶¶ 703(5), 811(1); U.K. MINISTRY OF DEFENCE, *supra* note 32, ¶ 1.43 (a) (2004); SAN REMO MANUAL, *supra* note 33, at 12.

[211] *See* Hague V, *supra* note 28, art. 11; Hague XIII, *supra* note 28, art. 24. *See also* OFFICE OF THE GENERAL COUNSEL, *supra* note 32, § 15.10.3; PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, *supra* note 33, ¶ 172(b); FEDERAL MINISTRY OF DEFENSE (GERMANY), *supra* note 32, ¶¶ 1206, 1250; CHIEF OF DEFENCE STAFF (CANADA), *supra* note 32, ¶ 703(6).

[212] *See* Draft Articles on State Responsibility, *supra* note 192, cmt. to art. 2, ¶ 7 ("The second condition for the existence of an internationally wrongful act of the State is that the conduct attributable to the State should constitute a breach of an international obligation of that State. The terminology of breach of an international obligation of the State is long established and is used to cover both treaty and non-treaty obligations.").

[213] Draft Articles on State Responsibility, *supra* note 192, cmt. to art. 2, ¶ 7 ("The second condition for the existence of an internationally wrongful act of the State is that the conduct attributable to the State should constitute a breach of an international obligation of that State. The terminology of breach of an international obligation of the State is long established and is used to cover both treaty and non-treaty obligations."); G.A. Res. 56/83, *supra* note 194, annex, art. 12 ("There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."); Rainbow Warrior (N.Z v. Fr.), 20 R.I.A.A. 215, 251 (Arb. Trib. 1990) ("[A]ny violation by a State of any obligation, of whatever origin, gives rise to State responsibility….").

[214] *See* G.A. Res. 56/83, *supra* note 194, annex, art. 29.

neutrality obligations,[215] and to make full reparations to Iran for injuries caused by their internationally wrongful acts.[216]

Under Article 31 of the Draft Articles on State Responsibility, making reparations for internationally wrongful acts is an obligation of the responsible state, which is triggered by the wrongful act, rather than being an actionable right to be invoked by the injured state.[217] Article 31 does not offer a new international law principle. The rule, requiring states to repair the harm that results from breaches of their legal obligations, is already resident in international law.[218] The Permanent Court of International Justice ("PCIJ") set-out the basic rule of reparations under international law in the *Case Concerning the Factory at Chorzów (Indemnity)* judgment.[219] In *Chorzów Factory*, the PCIJ stated,

> The essential principle contained in the actual notion of an illegal act . . . is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[220]

Building upon this fundamental rule, the Draft Articles on State Responsibility identify three forms of reparations: restitution, compensation, and satisfaction.[221]

The state responsible for an internationally wrongful act is obliged to make restitution (i.e., restore the *status quo ante*) so long as doing so is actually possible and does not impose a burden on the responsible state that is grossly disproportionate to the benefit the injured state would receive from restitution rather

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[215] G.A. Res. 56/83, *supra* note 194, annex, art. 30.
[216] G.A. Res. 56/83, *supra* note 194, annex, art. 31.
[217] *See* Draft Articles on State Responsibility, *supra* note 192, cmt. to art. 31, ¶ 4 ("The general obligation of reparation is formulated in article 31 as the immediate corollary of a State's responsibility, i.e. as an obligation of the responsible State resulting from the breach, rather than as a right of an injured State or States.").
[218] *See* Dinah Shelton, *The ILC's State Responsibility Articles: Righting Wrongs: Reparations in the Articles on State Responsibility*, 96 AM. J. INT'L. L. 833, 835 (2002) ("The core of the provisions on reparations clearly represents existing law: every breach of an international obligation carries with it a duty to repair harm caused.").
[219] Factory at Chorzów (Ger. v. Pol.), Indemnity, 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13, 1928) [hereinafter *Chorzów Factory*].
[220] *Id.* at 47.
[221] *See* G.A. Res. 56/83, *supra* note 194, annex, art. 34 ("Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.").

than mere compensation.[222] The goal of restitution under the Draft Articles on State Responsibility is somewhat narrower than that suggested by the wording of the rule from *Chorzów Factory*. Rather than "wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed,"[223] restitution under Article 35 aims to "re-establish the situation which existed before the wrongful act was committed."[224] This narrower scope is focused on assessing the factual circumstances prior to the breach of the international obligation, rather than trying to make the injured state whole for speculative losses— e.g. loss of future use or revenue.[225] Restitution comes first among the three forms of reparations recognized in the Draft Articles on State Responsibility "because restitution most closely conforms to the general principle that the responsible state is bound to wipe out the legal and material consequences of its wrongful act by re-establishing the situation that would exist if that act had not been committed."[226]

Where the responsible state cannot repair the damage caused by its internationally wrongful act through restitution because (a) restitution is not factually possible, (b) the burden imposed on the responsible state by making restitution would be disproportionate to the additional benefit the injured state would receive from restitution rather than monetary compensation, or (c) the injured state prefers compensation instead of restitution, the responsible state must compensate the injured state financially.[227] Unlike with restitution, the scope of which is limited to restoring the *status quo ante*, compensation includes "any financially assessable damage including loss of profits insofar as it is established."[228] The notion of compensation as a form of reparations is expressed well in the *Lusitania Cases*.[229] There the Umpire expressed the function of compensation as follows: "The fundamental concept of 'damages' is satisfaction, reparation for a *loss* suffered; a judicially ascertained *compensation* for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole."[230] Compensation is restorative in nature, rather than serving either to

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[222] G.A. Res. 56/83, *supra* note 194, annex, art. 35.
[223] Factory at Chorzów, *supra* note 219, at 47.
[224] G.A. Res. 56/83, *supra* note 194, annex, art. 35.
[225] *See* Draft Articles on State Responsibility, *supra* note 192, cmt to art. 35, ¶ 2.
[226] Draft Articles on State Responsibility, *supra* note 192, cmt to art. 35, ¶ 3.
[227] *See* G.A. Res. 56/83, *supra* note 194, annex, art. 36, ¶ 1; *see also* Draft Articles on State Responsibility, *supra* note 192, cmt to art. 36, ¶ 3 ("[Restitution] may be partially or entirely ruled out either on the basis of the exceptions expressed in article 35, or because the injured State prefers compensation or for other reasons.").
[228] G.A. Res. 56/83, *supra* note 194, annex, art. 36, ¶ 2.
[229] Opinion in the Lusitania Cases, 7 R.I.A.A 32 (1923) [hereinafter *Lusitania Cases*].
[230] *Id.* at 39.

punish the responsible state for its internationally wrongful act or to deter other states from similar wrongful conduct.[231]

Satisfaction, the final form of reparation under the Draft Articles on State Responsibility, comes into play when both restitution and compensation are either unavailable or inadequate.[232] Satisfaction may take the form of "an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality . . . [and it] shall not be out of proportion to the injury and may not take a form humiliating to the responsible State."[233] As a form of reparation, satisfaction is most appropriate in cases where the damage suffered by the injured state is not "financially assessable"— e.g., damage to a state's reputation or for acts that merely offend the dignity of the injured state without causing material or financial harm.[234] The use of satisfaction as a form of reparation for non-material harm inflicted upon a state has long been recognized in international law.[235]

Applying VCLT, Article 30(4)(b), as an analogue, and also applying the law of state responsibility, Japan, South Korea, Latvia, and Hungary remain accountable to Iran for upholding their neutrality obligations under customary international law. Simultaneously, these states remain accountable to the United States for upholding their treaty obligations. Each of these states would need to weigh the likely benefits and consequences of breaching each obligation and make a policy choice regarding which obligation it prefers to breach.

The dilemma U.S. partners will face, in having to choose between the treaty obligations they owe to the United States and the customary neutrality obligations they owe to potential U.S. adversaries, makes it necessary and worthwhile to discuss the ramifications of that decision along two tracks. First, what is the impact

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[231] *See*, e.g., *id.* ("The superimposing of a penalty in addition to full compensation and naming it damages, with the qualifying word exemplary, vindictive, or punitive, is a hopeless confusion of terms, inevitably leading to confusion of thought."); Draft Articles on State Responsibility, *supra* note 192, cmt to art. 36, ¶ 4 ("Compensation corresponds to the financially assessable damage suffered by the injured State or its nationals. It is not concerned to punish the responsible State, nor does compensation have an expressive or exemplary character.").

[232] *See* G.A. Res. 56/83, *supra* note 194, annex, art. 37, ¶ 1; *see also* Draft Articles on State Responsibility, *supra* note 192, cmt to art. 37, ¶ 1 ("It is only in those cases where [restitution and compensation] have not provided full reparation that satisfaction may be required.").

[233] G.A. Res. 56/83, *supra* note 194, annex, art. 37, ¶¶ 2–3.

[234] *See* Draft Articles on State Responsibility, *supra* note 192, cmt to art. 37, ¶ 3.

[235] *See* Draft Articles on State Responsibility, *supra* note 192, cmt to art. 37, ¶ 4 (asserting that State practice provides numerous instances in which States have demanded satisfaction for non-material injury and providing as examples cases of violations of embassy grounds, after disrespect of national symbols, and after ill-treatment of foreign heads of State); *see also, e.g.*, Rainbow Warrior (N.Z v. Fr.), 20 R.I.A.A. 215, 272–73 (Arb. Trib. 1990) ("There is a long established practice of States and international Courts and Tribunals of using satisfaction as a remedy or form of reparation (in the wide sense) for the breach of an international obligation. This practice relates particularly to the case of moral or legal damage done directly to the State, especially as opposed to the case of damage to persons involving international responsibilities.").

of the violation of neutrality on the continued validity of that state's status as a neutral? Second, what are the available consequences that the opposing belligerent may lawfully levy on these states for violating the law of neutrality? This Article will take these questions in turn.

A. *The End of Neutrality*

A state's neutral status ends by the neutral state entering the international armed conflict as a belligerent, by one or more belligerents attacking the hitherto neutral state, or by one or more belligerents declaring it and the neutral state are in an armed conflict.[236] A neutral state meeting its abstention obligation under the law of neutrality but violating its impartiality, non-participation, prevention, and internment obligations generally may still validly claim to be a neutral.[237] A state does not transform itself from neutral to co-belligerent by aiding or supporting a belligerent or by acquiescing in belligerent use of its territory, but rather by joining the fighting on the side of one or more of the participating belligerents.[238] A state

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[236] *See* 2 OPPENHEIM, *supra* note 53, § 312, at 492 ("Neutrality ends with the war, or through a hitherto neutral State beginning war against one of the belligerents, or through one of the belligerents commencing war against a hitherto neutral State.").

[237] *See* BOOTHBY & HEINTSCHEL VON HEINEGG, *supra* note 31, at 377 (stating, in essence, that to end its neutral status "a neutral State's violation of its duties of abstention and impartiality must be of such gravity as to justify the conclusion that the neutral State has become a party to the conflict"); 2 OPPENHEIM, *supra* note 53, § 358, at 576 ("If correctly viewed, the condition of neutrality continues to exist between a neutral and a belligerent in spite of a violation of neutrality. A violation of neutrality is nothing more than a breach of a duty deriving from the condition of neutrality."); Bothe, *supra* note 22, at 493 ("Only where a hitherto neutral state participates to a significant extent in hostilities is there a change of status."*); see also* Permanent Rep. of the U.S. to the U.N., Letter dated May 5, 1970 from the Permanent Rep. of the United States to the United Nations addressed to the President of the Security Council, U.N. Doc. S/9781 (May 5, 1970), *reprinted in* Steven C. Nelson, *Contemporary Practice of the United States Relating to International Law*, 64 AM. J. INT'L L. 928, 932–33 (1970); John R. Stevenson, U.S. Dep't of State, Address before the Hammarskjöld Forum of the Association of the Bar of the City of New York (May 28, 1970), *reprinted in* Steven C. Nelson, *Contemporary Practice of the United States Relating to International Law*, 64 AM. J. INT'L L. 928, 933–35 (1970). *But see* "Protected Person" Status in Occupied Iraq Under the Fourth Geneva Convention, 28 Op. O.L.C. 35, 44 (2004) ("Prior U.S. practice is consistent with the conclusion that a country becomes a co-belligerent when it permits U.S. armed forces to use its territory for purposes of conducting military operations.") (citing the State Department Legal Adviser's explanation that U.S. forces entered Cambodian territory to conduct operations against North Vietnamese forces without coordinating with the Government of Cambodia because such coordination would have compromised Cambodia's neutrality and would have made Cambodia a co-belligerent).

[238] *See* MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 531 (1959) ("Incidentally, a 'co-belligerent' is a fully fledged belligerent fighting in association with one or more belligerent powers."); Bothe, *supra* note 22, at 494 (refusing to equate neutral State support for an aggressor State with an armed attack under the U.N. Charter); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, 126–27, ¶ 247 (June 27) (refusing to equate supplying arms and support to an armed attack). *But see* "Protected Person" Status in Occupied Iraq Under the Fourth Geneva Convention, 28 Op. O.L.C. 35, 44 (2004) ("Prior U.S. practice is consistent with the conclusion that a country becomes a co-belligerent when it

does not transform itself from neutral to co-belligerent by aiding or supporting a belligerent, or by acquiescing in belligerent use of its territory, but rather by joining the fighting on the side of one or more of the belligerents.[239] Although a belligerent state may consider itself engaged in an armed conflict with a neutral state that repeatedly violates its neutrality obligations of impartiality, non-participation, prevention, and internment, it is the belligerent state's determination that a state of armed conflict exists, not the neutral state's violations, that ends the hitherto neutral state's neutrality.[240]

B. *Consequences for the Neutral State Under the Law of State Responsibility*

Although a neutral state's violation of its customary law neutrality obligations of impartiality, non-participation, prevention, and internment is generally not fatal to its neutral status,[241] the state perpetrates an internationally

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permits U.S. armed forces to use its territory for purposes of conducting military operations.") (citing the State Department Legal Adviser's explanation that U.S. forces entered Cambodian territory to conduct operations against North Vietnamese forces without coordinating with the Government of Cambodia because such coordination would have compromised Cambodia's neutrality and would have made Cambodia a co-belligerent.); BOOTHBY & HEINTSCHEL VON HEINEGG, *supra* note 31, at 377 (leaving room, in principle, for a State's neutral status to end when it violates its duty impartiality to such extent and with such gravity that the neutral State has effectively become a party to the conflict).

[239] *See* GREENSPAN, *supra* note 238, at 531 ("Incidentally, a 'co-belligerent' is a fully fledged belligerent fighting in association with one or more belligerent powers."); Bothe, *supra* note 22, at 494 (refusing to equate neutral State support for an aggressor State with an armed attack under the U.N. Charter); Nicar. v. U.S., 1986 I.C.J. at 126–27, ¶ 247 (refusing to equate supplying arms and support to an armed attack). *But see* "Protected Person" Status in Occupied Iraq Under the Fourth Geneva Convention, 28 Op. O.L.C. 35, 44 (2004) ("Prior U.S. practice is consistent with the conclusion that a country becomes a co-belligerent when it permits U.S. armed forces to use its territory for purposes of conducting military operations.") (citing the State Department Legal Adviser's explanation that U.S. forces entered Cambodian territory to conduct operations against North Vietnamese forces without coordinating with the Government of Cambodia because such coordination would have compromised Cambodia's neutrality and would have made Cambodia a co-belligerent.); BOOTHBY & HEINTSCHEL VON HEINEGG, *supra* note 31, at 377 (leaving room, in principle, for a State's neutral status to end when it violates its duty of impartiality to such extent and with such gravity that the neutral State has effectively become a party to the conflict.).

[240] *See* 2 OPPENHEIM, *supra* note 53, § 358, at 576 ("Even in an extreme case, in which the violation of neutrality is so great that the offended party considers war the only adequate measure in answer to it, it is not the violation which brings neutrality to an end, but the determination of the offended party."). *But see* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2112–13 (May 2005) (taking the broader view that "a state is deemed to be in an armed conflict with a 'neutral' state that systematically violates its neutral duties.").

[241] *See* BOOTHBY & HEINTSCHEL VON HEINEGG, *supra* note 31, at 377 (stating, in essence, that to end its neutral status "a neutral State's violation of its duties of abstention and impartiality must be of such gravity as to justify the conclusion that the neutral State has become a party to the conflict"); 2 OPPENHEIM, *supra* note 53, § 358, at 576 ("If correctly viewed, the condition of neutrality continues to exist between a neutral and a belligerent in spite of a violation of neutrality. A violation of neutrality is nothing more than a breach of a duty deriving from the condition of neutrality."); Bothe, *supra* note 22, at 493 ("Only where a hitherto neutral state participates to a significant extent in hostilities is there a change of status."). *But see* "Protected Person" Status in Occupied Iraq Under

wrongful act by breaching its neutrality obligations.[242] Likewise, the neutral state commits an internationally wrongful act if, in observing its duties under the law of neutrality, it breaches its treaty obligations.[243] Thus, a neutral state, under defense-related treaty obligations to one or more belligerents in an international armed conflict, finds itself on the horns of a dilemma. International law does not prohibit a belligerent from accepting assistance from a neutral state,[244] but the law of state responsibility means a neutral state can be held responsible and forced to endure adverse consequences for acts and omissions that breach either its neutrality obligations to the opposing belligerent or its treaty obligations to the United States.[245]

This section will discuss the general parameters of the consequences, under the law of state responsibility, that may be visited upon a state in response to it breaching its international legal obligations. In the process, it will highlight the legal guidelines that should serve as background for the domestic policy discussions that will need to take place in the defense ministries and ministries of foreign affairs of U.S. treaty partners. These states will need to balance the relative values of their relationships with both the United States and the opposing belligerent. These states must also assess the type and severity of the pressure and discomfort they anticipate being forced to endure by choosing one bundle of obligations to honor and one bundle of obligations to breach. For purposes of further discussion, this Article will proceed as though the neutral state has chosen to honor its treaty obligations to the United States and, in the process, to breach its neutrality obligations toward the opposing belligerent.

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the Fourth Geneva Convention, 28 Op. O.L.C. 35, 44 (2004); *see also* John R. Stevenson, *supra* note 237, at 935.

[242] *See* Draft Articles on State Responsibility, *supra* note 192, cmt to art. 2, ¶ 7 ("The second condition for the existence of an internationally wrongful act of the State is that the conduct attributable to the State should constitute a breach of an international obligation of that State. The terminology of breach of an international obligation of the State is long established and is used to cover both treaty and non-treaty obligations."); G.A. Res. 56/83, *supra* note 194, annex, art. 12 ("There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."); Rainbow Warrior (N.Z v. Fr.), 20 R.I.A.A. 215, 251 (Arb. Trib. 1990) (". . . the violation of a State of any obligation, of whatever origin gives rise to State responsibility . . ..").

[243] *See supra* text accompanying note 242.

[244] *See* Patrick M. Norton, *Between the Ideology and the Reality: The Shadow of the Law of Neutrality*, 17 HARV. INT'L. L. J. 249, 288 (1976) ("A belligerent has always been entitled to secure what voluntary assistance it could from third states. If such assistance violates neutral duties, the other belligerent's legal grievance is against the complicit neutral, not the fortunate belligerent.").

[245] *See* G.A. Res. 56/83, *supra* note 194; Draft Articles on State Responsibility, *supra* note 192, cmt to art. 12, ¶ 3 ("International obligations may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order.").

First, the aggrieved belligerent could begrudgingly accept the neutral state's breaches of its neutrality obligations and choose to take no action in response.[246] The belligerent may choose this course of action for any number of pragmatic policy reasons, such as maintaining current or future economic or diplomatic relations with the neutral state. However, if the aggrieved belligerent's apparent acceptance of the neutral state's breaches of its obligations continues beyond the length of time in which some form of protest or adverse state response would reasonably be expected, the belligerent runs the risk of foreclosing itself from asserting a state responsibility claim.[247]

A second option available to the aggrieved belligerent would be to respond merely by informally or formally protesting the neutral state's breach of its neutrality obligations, e.g., by issuing a demarche to the neutral state calling upon it to cease the offending behavior.[248] This approach alerts the violating neutral state that its breaches have not gone unnoticed by the aggrieved belligerent, and it gives the belligerent the opportunity to draw the attention of the broader global community to the offending state's breaches of neutrality. Although not strictly a necessary precursor to the aggrieved belligerent's claim for reparations under Articles 34–39 of the Draft Articles on State Responsibility,[249] the plain language of Article 43 requires the state claiming injury to give notice of its claim to the alleged offending state.[250] Providing notice also benefits the aggrieved belligerent's position outside the law of state responsibility, because the aggrieved belligerent is generally required to complain to the neutral state about its breaches and give the offending state the opportunity to resolve the breach, before exercising its right of self-help.[251]

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[246] *See* 2 OPPENHEIM, *supra* note 53, § 360, at 578 ("It is entirely within the discretion of a belligerent whether he will acquiesce in a violation of neutrality committed by a neutral in favour of the other belligerent."). *See also* Wolff Heintschel von Heinegg, *Benevolent Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality*, *in* INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 543, 567 (Michael N. Schmitt & Jelena Pejic eds., 2007) ("In case of non-compliance, the aggrieved belligerent is not obliged to claim a violation of neutral duties.").

[247] *See* CRAWFORD, *supra* note 197, at 70–74 (discussing the concepts of waiver and acquiescence under Article 45(a) and 45(b), respectively, of the Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries).

[248] *See* CRAWFORD, *supra* note 197, at 70–74.

[249] *See* Draft Articles on State Responsibility, *supra* note 192, cmt to art. 43, ¶ 3. *But see* Draft Articles on State Responsibility, *supra* note 192, art. 43.

[250] *See* G.A. Res. 56/83, *supra* note 194, annex, art. 43.

[251] *See, e.g.*, OFFICE OF THE GENERAL COUNSEL, *supra* note 32, § 15.4.2 ("Should the neutral State be unable, or fail for any reason, to prevent violations of its neutrality by the forces of one belligerent entering or passing through its territory (including its lands, waters, and airspace), the other belligerent State may be justified in attacking the enemy forces on the neutral State's territory.") (footnote omitted); PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, *supra* note 33, ¶ 168 (b) ("If the use of the neutral territory or airspace by a Belligerent Party constitutes a serious violation, the opposing Belligerent Party may, in the absence of any feasible and timely alternative, use such force as is necessary to terminate the violation of neutrality."); COMMENTARY ON THE HPCR MANUAL, *supra* note 38, ¶ 168 (b), cmt. 1 ("If a Neutral is either unwilling or unable to

As a third course of action, the aggrieved belligerent may take lawful but unfriendly actions toward the breaching neutral state, e.g., severing or diminishing diplomatic relations, imposing tariffs on goods imported from the neutral state, or suspending voluntary economic aid.[252] Such acts of retorsion may be either temporary or permanent.[253] They may also be retributive in nature,[254] or, akin to countermeasures, motivated by a desire to compel the neutral state to refrain from further breaches of its obligations.

Fourth, the aggrieved belligerent may engage in countermeasures.[255] Countermeasures are otherwise internationally wrongful acts undertaken by one state against another state, in response to that other state's internationally wrongful act, to induce the offending state to cease its wrongful acts and make reparations.[256] Unlike acts of retorsion, countermeasures may not be undertaken to punish the

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prevent or terminate a violation of its neutral status by a Belligerent Party, the aggrieved Belligerent Party is entitled to take the measures necessary to terminate that violation, including — where necessary — the use of force. It follows that, in these exceptional situations, the inviolability of neutral territory is not enforced by the respective Neutral but by the aggrieved Belligerent Party. Where feasible, such measures of 'substitutional' enforcement of the law of neutrality are subject to a prior warning and a reasonable time given to the Neutral to terminate the violation. If the violation of the neutral status by a Belligerent Party constitutes an immediate threat to the security of the enemy, the latter may, in the absence of any feasible and timely alternative, use such force as is necessary to terminate the violation."); SAN REMO MANUAL, *supra* note 33, at 101 ("If the neutral State fails to terminate the violation of its neutral waters by a belligerent, the opposing belligerent must so notify the neutral State and give that neutral State a reasonable time to terminate the violation by the belligerent. If the violation of the neutrality of the State by the belligerent constitutes a serious and immediate threat to the security of the opposing belligerent and the violation is not terminated, then that belligerent may, in the absence of any feasible and timely alternative, use such force as is strictly necessary to respond to the threat posed by the violation."); U.K. MINISTRY OF DEFENCE, *supra* note 32, ¶ 1.43 ("If a neutral state is unable or unwilling to prevent the use of its territory for the purposes of such military operations, a belligerent state may become entitled to use force in self-defence against enemy forces operating from the territory of that neutral state. Whether or not they are so entitled will depend on the ordinary rules of the *jus ad bellum*.")(footnotes omitted); CHIEF OF DEFENCE STAFF (CANADA), *supra* note 32, ¶ 1304(3) ("If enemy forces enter neutral such territory and the neutral state is unwilling or unable to intern or expel them, the opposing party is entitled to attack them there, or to demand compensation from the neutral for this breach of neutrality."). "Unable or unwilling" is the justification the U.S. State Department Legal Adviser provided for U.S. forces entering Cambodian territory to conduct operations against North Vietnamese forces. *See* John R. Stevenson, *supra* note 241.

[252] *See* CRAWFORD, *supra* note 197, at 676; Draft Articles on State Responsibility, *supra* note 192, cmt to part III, chp. II, ¶ 3 (describing retorsion as "'unfriendly' conduct which is not inconsistent with any international obligation of the State engaging in it even though it may be a response to an internationally wrongful act").

[253] *See* Draft Articles on State Responsibility, *supra* note 192, cmt to art. 43, ¶ 2; CRAWFORD, supra note 197, at 67–68.

[254] *See* CRAWFORD, supra note 197, at 677.

[255] *See* G.A. Res. 56/83, *supra* note 194, annex, art. 49.

[256] *See* CRAWFORD, supra note 197, at 685; Draft Articles on State Responsibility, *supra* note 192, cmt to Part III, Ch. II, ¶ 1 (describing countermeasures as "measures that would otherwise be contrary to the international obligations of an injured State *vis-à-vis* the responsible State, if they were not taken by the former in response to an internationally wrongful act by the latter in order to procure cessation and reparation").

offending state.[257] If possible, countermeasures must be done in such a way as not to preclude the state undertaking them from resuming its obligation to the offending state after it ceases countermeasures.[258] Although states have broad discretion in choosing which international legal obligation to disregard in executing their desired countermeasure, a belligerent state threatening or using force against a neutral state breaching its obligations of impartiality, non-participation, prevention, or internment, violates the U.N. Charter, Article 2(4) and customary international law prohibitions on threats or uses of force.[259] Therefore, a belligerent generally cannot attack a neutral state breaching its neutrality obligations and successfully assert that it is doing so as a valid countermeasure.[260]

Once a state of armed conflict exists between states, it is the *jus in bello*, not the *jus ad bellum*, that is the applicable law governing the belligerents' use of force against one another throughout the armed conflict.[261] However, the *jus ad bellum* continues to be the international law applicable to the use of force between the contending belligerents and neutral states. Recall that a state transforms itself from neutral to belligerent by joining in the armed conflict as an active participant in the fighting, and a neutral state becomes a co-belligerent by joining the fighting on the side of one or more of the participating belligerents.[262] So long as the neutral state continues to abstain from participating in the fighting, assisting one belligerent

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[257] *See* G.A. Res. 56/83, *supra* note 194, annex, art. 49 ("An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.").

[258] *See* Draft Articles on State Responsibility, *supra* note 192, cmt to art. 49, ¶ 9 ("*Paragraph 3* of article 49 is inspired by article 72, paragraph 2, of the 1969 Vienna Convention, which provides that when a State suspends a treaty it must not, during the suspension, do anything to preclude the treaty from being brought back into force. By analogy, States should as far as possible choose countermeasures that are reversible.").

[259] Although the substantive content of the customary and treaty law rules prohibiting the use of force between States may not perfectly overlap, it is beyond question that the inter-State use of force is circumscribed by both bodies of law. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, 100–01, ¶ 190 ("A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law."); *Id.* at ¶ 181 (stating that "both the [UN] Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations"); DINSTEIN, *supra* note 10, at 87 ("Although an innovation at the time it was crafted, Article 2(4) – as affirmed by the International Court of Justice in the *Nicaragua* case – reflects customary international law.")

[260] *See* G.A. Res. 56/83, *supra* note 194, annex, art. 50(1)(a) (stating that countermeasures shall not impact the UN Charter obligation of States to refrain from the threat or use of force).

[261] HELEN DUFFY, THE 'WAR ON TERROR' AND THE FRAMEWORK OF INTERNATIONAL LAW 146 n. 10 (2005) ("The *jus ad bellum* is the body of rules governing when force can lawfully be used. It must be distinguished from the *jus in bello* that encompasses the rules that apply once force has been used and a conflict is underway, and which applies irrespective of whether the resort to force (*jus ad bellum*) was lawful.").

[262] *See, e.g.*, GREENSPAN, *supra* note 238, at 531; Bothe, *supra* note 22, at 494; *Nicar. v. U.S.*, 1986 I.C.J. Rep. at 126–27, ¶ 247. *But see* "Protected Person" Status in Occupied Iraq Under the Fourth Geneva Convention, 28 Op. O.L.C. 35, 44 (2004); BOOTHBY & HEINTSCHEL VON HEINEGG, *supra* note 31, at 377.

rather than the other or breaching its neutrality obligations of non-participation, prevention, and internment is generally insufficient to convert a neutral state into a belligerent or co-belligerent.[263]

Even though states routinely fail to refrain from using force in their international relations, they continue to acknowledge that they are not free to use force against one another except in very narrowly defined circumstances.[264] Under the U.N. Charter regime, the inter-state use of force is only permitted pursuant to a Security Council authorization under Article 42 or in the exercise of a state's inherent right of individual or collective self-defense under Article 51.[265] The fact that a neutral state supports one belligerent to the detriment of the other belligerent does not entitle the aggrieved belligerent to use military force against the neutral state in response.[266] A belligerent's military strike against a neutral state merely violating, for example, its non-participation and prevention obligations will contravene both the general customary international law prohibition on the use of inter-state force and Article 2(4) of the U.N. Charter. A state providing assistance to a belligerent state, for example, by supplying arms or logistical support, does not rise to the level of an armed attack which would justify the opposing belligerent to

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[263] *See* BOOTHBY & HEINTSCHEL VON HEINEGG, *supra* note 31, at 377 (stating, in essence, that to end its neutral status "a neutral State's violation of its duties of abstention and impartiality must be of such gravity as to justify the conclusion that the neutral State has become a party to the conflict."); 2 OPPENHEIM, *supra* note 53, § 358, at 576 ("If correctly viewed, the condition of neutrality continues to exist between a neutral and a belligerent in spite of a violation of neutrality. A violation of neutrality is nothing more than a breach of a duty deriving from the condition of neutrality."); Bothe, *supra* note 22, at 493 ("Only where a hitherto neutral state participates to a significant extent in hostilities is there a change of status."). *But see* "Protected Person" Status in Occupied Iraq Under the Fourth Geneva Convention, 28 Op. O.L.C. 35, 44 (2004); *see also* Stevenson, *supra* note 241, at 935.

[264] *See* G.A. Res. 60/1, ¶ 77 (Sept. 16, 2005) ("We reiterate the obligation of all Member States to refrain in their international relations from the threat or use of force in any manner inconsistent with the Charter.").

[265] *See* INT'L LAW ASSOC., FINAL REPORT ON AGGRESSION AND THE USE OF FORCE 5 (2018) ("The relatively wide net cast by Article 2(4) reflects the UN Charter's overall objective to reduce the use of force by States to the point where it can only take place with UN Security Council authorisation or in self-defence against an armed attack."); DUFFY, *supra* note 261, at 149; U.N. Charter art. 42 ("Should the Security Council consider that measures provided for in Article 41 [measures short of the use of armed force] would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."); U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.").

[266] *See, e.g.*, Heintschel von Heinegg, *supra* note 246, at 555 ("Under the UN Charter, violations of the law of neutrality cannot, in principle, be countered by resort to armed force unless the violations constitute 'armed attacks' within the meaning of Article 51."); Bothe, *supra* note 22, at 493 ("[A] reprisal involving the use of force against another state is now permissible only where the violation of the law triggering the reprisal itself constitutes an illegal armed attack.").

use force in self-defense.[267] It is also unlikely that the U.N. Security Council would find, in the exercise of its authority under Article 39, that such assistance constitutes a threat to the peace, a breach of the peace, or an act of aggression. Without such a finding, an Article 42 Security Council authorization for the use of force against the neutral state could not be issued.[268] Because the belligerent is neither acting in self-defense under Article 51, nor pursuant to a U.N. Security Council authorization, no circumstance precluding the wrongfulness of such military action exists. Hence, the belligerent that forcefully strikes a neutral state in breach of its neutrality obligations of impartiality, non-participation, prevention, or internment does so both without legal justification or excuse and at its peril.

Although the aggrieved belligerent may not lawfully attack a neutral state,[269] a belligerent may use military force against opposing belligerent forces attacking it from neutral state territory.[270] Recall that a neutral state is obligated to take active measures to prevent belligerents from using its territory during the armed conflict.[271] By permitting one belligerent to use its territory to attack the other belligerent, the neutral state breaches its obligations of impartiality and prevention. The neutral state also abdicates, temporarily and for a very narrow purpose, its right to expect the opposing belligerent to respect its territorial integrity. If a neutral state is unwilling or unable to prevent one belligerent's forces from using neutral territory in a way that immediately threatens the opposing

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[267] *See Nicar. v. U.S.*, 1986 I.C.J. Rep. at 103–04, ¶ 195 ("But the Court does not believe that the concept of 'armed attack' includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support.").

[268] *See* U.N. Charter art. 39.

[269] *See, e.g.*, BOOTHBY & HEINTSCHEL VON HEINEGG, *supra* note 31, at 377 (stating, in essence, that to end its neutral status "a neutral State's violation of its duties of abstention and impartiality must be of such gravity as to justify the conclusion that the neutral State has become a party to the conflict"); 2 OPPENHEIM, *supra* note 53, § 358, at 576 ("If correctly viewed, the condition of neutrality continues to exist between a neutral and a belligerent in spite of a violation of neutrality. A violation of neutrality is nothing more than a breach of a duty deriving from the condition of neutrality."); Bothe, *supra* note 22 at 493 ("Only where a hitherto neutral state participates to a significant extent in hostilities is there a change of status."). As a matter of both treaty and customary international law, the threat and use of inter-State force is prohibited. *See, e.g.*, DINSTEIN, *supra* note 10, at 87 ("Although an innovation at the time it was crafted, Article 2(4) – as affirmed by the International Court of Justice in the *Nicaragua* case – reflects customary international law . . . ."); *Nicar. v. U.S.*, 1986 I.C.J. Rep. at 96–97, ¶ 181 (stating that "both the [UN] Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations").

[270] *See, e.g.*, 2 OPPENHEIM, *supra* note 53, § 319, at 502 (stating that "neutrals who do not, or are not able to, prevent a belligerent from marching troops through their neutral territories cannot complain if the other belligerent likewise invades these territories and attacks the enemy there . . ."); Eric Talbot Jensen, *Sovereignty and Neutrality in Cyber Conflict*, 35 FORDHAM INT'L L.J. 815, 823 (2012) ("This makes sense, as the alternative would require a belligerent nation to receive attacks without any form of recourse, thus undercutting the foundational rationale for neutrality law.").

[271] *See, e.g.*, OFFICE OF THE GENERAL COUNSEL, *supra* note 32, §§ 15.3.2.2, 15.10.3; U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, *supra* note 32, ¶¶ 7.2, 7.3; FEDERAL MINISTRY OF DEFENSE (GERMANY), *supra* note 32, ¶¶ 1206, 1250; CHIEF OF DEFENCE STAFF (CANADA), *supra* note 32, ¶¶ 703(5), 811(1); U.K. MINISTRY OF DEFENCE, *supra* note 32, ¶ 1.43(a); SAN REMO MANUAL, *supra* note 33, at 12.

belligerent, neutrality law recognizes the right of the belligerent suffering, or about to suffer, harm to use force to terminate the belligerent's violation of the neutral state's neutrality.[272] Where a belligerent exercises this right, its use of force against the opposing belligerent within the sovereign territory of the neutral state does not constitute an armed attack against the neutral state, and the neutral state does not thereby have the right to respond in self-defense under Article 51 of the U.N. Charter.[273]

VI. Conclusion

To successfully meet current and emerging nation state threats, the United States needs to be able to rely on the cooperation of foreign partners around the globe. If it becomes involved as a belligerent in an international armed conflict, the United States will look to collect on its foreign partners' pre-existing defense-related treaty commitments. Without canvassing U.S. partners for their official positions, we cannot know to what extent the law of neutrality entered the mind of those negotiating defense-related treaties like those discussed in this Article. Perhaps the foreign negotiators did not foresee their states asserting themselves as neutrals and, therefore, viewed the issue of potentially conflicting legal obligations as moot. However, it is equally possible that the continued viability of neutrality law was minimally, if at all, in the minds of the negotiators and their international lawyers as they worked to produce an *ad referendum* text. States and the lawyers who advise them need to recognize that future circumstances may pose uncomfortable, but legitimate, questions about how to reconcile their competing treaty and neutrality law obligations. As well, they should think about the potential ramifications of the state's choice.

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[272] *See, e.g.*, OFFICE OF THE GENERAL COUNSEL, *supra* note 32, § 15.4.2 ("Should the neutral State be unable, or fail for any reason, to prevent violations of its neutrality by the forces of one belligerent entering or passing through its territory (including its lands, waters, and airspace), the other belligerent State may be justified in attacking the enemy forces on the neutral State's territory.") (footnote omitted); PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH , *supra* note 33, ¶ 168(b) ("If the use of the neutral territory or airspace by a Belligerent Party constitutes a serious violation, the opposing Belligerent Party may, in the absence of any feasible and timely alternative, use such force as is necessary to terminate the violation of neutrality."); U.K. MINISTRY OF DEFENCE, *supra* note 32, ¶ 1.43 ("If a neutral state is unable or unwilling to prevent the use of its territory for the purposes of such military operations, a belligerent state may become entitled to use force in self-defence against enemy forces operating from the territory of that neutral state. Whether or not they are so entitled will depend on the ordinary rules of the *jus ad bellum*.") (footnotes omitted); CHIEF OF DEFENCE STAFF (CANADA), *supra* note 32, ¶ 1304(3) ("If enemy forces enter neutral such territory and the neutral state is unwilling or unable to intern or expel them, the opposing party is entitled to attack them there, or to demand compensation from the neutral for this breach of neutrality."); CASTRÉN, *supra* note 22, at 462 (recognizing a belligerent may act to drive the opposing belligerent out of neutral territory only where either the neutral State has not acted to do so or the opposing belligerent remains in neutral territory despite the neutral State's resistance).

[273] *See* PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, *supra* note 33, ¶ 168(b), cmt. 312.

There is good reason to conclude that defense-related treaties like those discussed in this Article do not automatically terminate or suspend by operation of law in the event of an international armed conflict. The law of neutrality operates only in times of armed conflict. Therefore, if states with which the United States has such treaties elect to maintain a position of neutrality, and if their defense-related treaty obligations persist in armed conflict, then it is highly probable that those states' treaty obligations and their customary law neutrality obligations will be incompatible.

States, in the free exercise of their sovereignty, can choose to conclude and bring into force treaties that contravene customary international law rules not constituting *jus cogens* norms. However, in doing so, they may find themselves in the legally and diplomatically uncomfortable position of owing valid treaty obligations to one state and equally valid, but incompatible, customary law obligations to another state. U.S. defense-related treaty partners that elect to remain neutral will quickly learn that they cannot satisfy their legal obligations to both the United States and the opposing belligerent.

The VCLT Article 30 framework is the appropriate methodology for states and their international lawyers to apply when prioritizing a state's competing treaty and customary law obligations. Analogous application of Article 30 recognizes each contemporary legal obligation of the triangulated states—whether incurred by treaty or custom—as valid and ongoing. Further, it does not excuse any state from its responsibility to meet its obligations under international law. As with treaties where there is not unity of states party, both the treaty and customary law impose upon the neutral state valid, continuing legal obligations. The law of state responsibility imposes consequences for the breach of either obligation.

Under the law of state responsibility, the neutral state's obligations under the law of neutrality do not excuse the wrongfulness of it breaching its treaty obligations. As well, the state's breach of its neutrality obligations is no less legally wrongful because it was complying with a valid treaty obligation. Where a state cannot meet both its treaty and neutrality obligations, policymakers, perhaps with the assistance and counsel of international lawyers, will need to make a decision regarding which obligations to meet and which obligations to breach. Making this decision will largely depend, as a matter of rational choice theory, on a careful weighing of the anticipated benefits of each decision against the severity of the corresponding adverse consequences anticipated. In either case, a demand for reparations is likely to find its way to the foreign ministry of the neutral state and the neutral state will probably find itself on the receiving end of acts of retorsion and countermeasures from the state aggrieved by the neutral state's nonperformance of its legal obligations.

Generally speaking, so long as the foreign partner does not enter the armed conflict as a belligerent or co-belligerent, the state is entitled to maintain its neutral state status. A state's violation of its impartiality, non-participation, prevention, and internment obligations is not enough to change its legal status. The neutral state

continues to have the right to demand the belligerents respect its territorial integrity, unless and until it demonstrates it is unable or unwilling to prevent or terminate the use of its territory by one belligerent to attack the other belligerent. In that narrow circumstance, the injured belligerent is permitted to conduct attacks against the opposing belligerent in neutral territory. However, any armed attack on the neutral state itself, by either belligerent, even in response to the neutral state failing to meet its impartiality, non-participation, prevention, and internment obligations under the law of neutrality, violates both the U.N. Charter, Article 2(4) and customary international law prohibitions on the use or threat of force by one state against another.

This Article explored the fundamental requirements imposed on states under the law of neutrality, identified some relevant bilateral defense-related treaty rights and obligations, proposed a conceptual framework for prioritizing a neutral state's treaty and neutrality obligations to belligerents, and analyzed the international legal consequences that attend a state choosing either to breach its treaty obligations, in favor of maintaining strict neutrality, or to breach its neutrality obligations, in favor of satisfying its treaty obligations to the United States. In the end, U.S. treaty partners like Japan, South Korea, Latvia, and Hungary face a choice between perpetrating an internationally wrongful act, by breaching their treaties with the United States, and perpetrating an internationally wrongful act, by breaching their neutrality obligations to the opposing belligerent.