

Legal Considerations on the Protection of Subsea Cables in the International and National Legislative Framework

Jason Halog
*Institute for the Protection of Maritime
Infrastructures*
German Aerospace Center
Bremerhaven, Germany
jason.halog@dlr.de

Paul Margat
*Institute for the Protection of Maritime
Infrastructures*
German Aerospace Center
Bremerhaven, Germany
paul.margat@dlr.de

Michael Stadermann
*Institute for the Protection of Maritime
Infrastructures*
German Aerospace Center
Bremerhaven, Germany
michael.stadermann@dlr.de

Abstract—The present paper concerns the protection of submarine infrastructures, i.e. submarine cables. After giving an overview over the applicable legal framework, the paper addresses problems relating to the competences in international law. Especially in areas beyond national jurisdiction, the respective competences are unclear. Therefore, it is argued that the current system is not sufficiently adequate for the effective protection of submarine infrastructure

Keywords—international law, law of the sea, submarine infrastructures, subsea cables

I. INTRODUCTION

Subsea infrastructures, such as high-speed data cables and underwater pipelines, are critical for our modern form of life. Subsea data cables provide essential connection to the internet worldwide, while pipelines power entire nations with energy. With the attacks on the Nord Stream pipelines in mind, these kinds of infrastructure are targeted more and more frequently with acts that do not amount to an armed attack on a State's sovereignty although being disruptive for the economy or security of that State [1]. Such hybrid threats are, however, not easily dealt with in international law. In this context, the desire to increase the protection of said infrastructures – by using the armed forces if necessary – is more than understandable. But there are both practical and legal challenges to face when dealing with subsea infrastructures which will be outlined by this paper.

First and foremost, it is estimated that 1.4 million kilometres of submarine cables exist all around the world [2]. Monitoring and protecting this enormous amount of cables especially in areas beyond national jurisdiction such as the high seas and the Exclusive Economic Zone requires international cooperation. The competences and responsibilities in these areas are, however, far from clear and derive from different sources of law. The first convention dealing with such a matter is the Convention on Submarine Telegraph Cables from 1884 [3] which is still in force as of today. The United Nations Convention for the Law of the Sea (UNCLOS [4]) has since incorporated many rules and regulations into its framework for the international law of the Sea [5]. To address the legal problems relating subsea infrastructure, the International Law Association has established a Committee on Submarine Cables and Pipelines

under International Law in November 2018. The committee plans to set out the existing law, highlighting gaps and give specific recommendations on how the legal framework should be improved [6]. The present paper gives an overview over some critical aspects why the current legal system is not entirely adequate to deal with all of the modern problems.

The following paper will analyse the different legal mechanisms applicable in the protection of subsea cables or the enforcement of jurisdiction against the perpetrators of sabotage acts. This will be done according to the following scenario: An attack against a subsea cable in a zone outside the sovereignty of a State, i.e. an EEZ or the high seas. The sabotage is carried out by a non-military ship mandated by its flag State, e.g. by cutting a subsea cable, so as to weaken the target's integrity. The mechanisms analysed in this paper are the ones employable in a time frame preceding or subsequent to the attack. Accordingly, military defence options will first be looked into (II), followed by international law mechanisms, with a focus on the law of the sea (III) and concluded by criminal prosecution tools on a national level (IV).

II. MILITARY DEFENCE

Is it justified to counter such an attack through military means? Such an approach, or the role of the military in protecting Atlantic submarine cables in particular, is currently being addressed both by NATO [7] and the EU [8]. In February 2023, NATO established the Critical Undersea Infrastructure Coordination Cell within NATO Headquarters to focus on this issue [9].

In the event of violent confrontations between States, the peacekeeping law of the UN Charter (UNCh) is the benchmark for determining whether the behaviour of the States involved conforms to international law. Questions arise as to whether an attack on underwater infrastructure violates peacekeeping law, what this violation qualifies as and whether military defence measures against this attack are permissible.

The focal provision of peacekeeping law is the prohibition of the use of force codified in Art. 2(4) UNCh. It generally prohibits States from using or threatening to use force as an option in the context of international relations [10]. Both the

attack on underwater infrastructures and the corresponding military defence measures could constitute a violation of this prohibition of the use of force.

First of all, the question arises, whether the attack in itself falls under the prohibition of the use of force. In the absence of a legal definition of the term "force", the prevailing understanding in legal literature has developed that "force" in the sense of Art. 2(4) UNCh is limited to "armed force" or "military force". This interpretation is derived from the preamble of the Charter as well as from Art. 44 UNCh [11]. Armed or military force in this context means force using weapons of war. Such a limitation of actions amounting to the use of force under international law does not allow to interpret the destruction of underwater infrastructures such as submarine cables in general as a breach of Art. 2(4) UNCh. Indeed, conceivable attack forms according to the scenario presented in the introduction (e.g. cutting the cable, tearing it apart with the help of an anchor, etc.) are below the threshold of armed or military force. Such a use of non-military physical force would not be covered by the prohibition of the use of force according to the prevailing opinion [12]. However, an attack against subsea cables could nevertheless constitute a violation of the prohibition of intervention, as recognised by customary international law and enshrined in Art. 2(1) UNCh. This provision prohibits States from subjecting other States to coercions below the threshold of armed forces [13].

Second of all, the classification of the attack as an intervention violating international law makes military defence or sanctions within the limits of international law more difficult. Indeed, it is assumed here that any defence countermeasure against the ship committing the offense also amounts to use of force, prohibited by Art. 2(4) UNCh. Nevertheless, the defence measures could be permissible if they are accepted as an exception to the prohibition of the use of force under international law. Such exceptions are coercive measures of the UN Security Council according to Art. 42 UNCh and the individual and collective right to self-defence according to Art. 51 UNCh [14]. For the underlying scenario, only an immediate intervention and thus a self-defence measure according to Art. 51 UNCh could come into consideration. However, the right of self-defence presupposes an "armed attack", which has an even higher threshold than the use of force. Moreover, it has been argued earlier that intentional damages done to a subsea cable as in the scenario described in the introduction does not amount to a use of force. For this reason, self-defence measures would not be justified and would thus constitute a violation of the prohibition of the use of force, according to Art. 2(4) UNCh. The high application threshold for exceptions to the prohibition of the use of force serves the purpose of guaranteeing its effectiveness. In the framework of peacekeeping law, the use of violence is thus extremely restricted and represents an ultima ratio measure, as confirmed by the definition of "aggression" given in the Resolution 3314 (XXIX) of the UN General Assembly. According to Art. 5 para. 1 of the Resolution, aggression (such as armed force) cannot be justified by any consideration, be it political, economic, military or otherwise [15].

Consequently, defence countermeasures against hostile actions lying below the activation of the prohibition of the use of force must in turn limit themselves to the same threshold. Accordingly, the underlying scenario can only be poorly addressed through military intervention. Nevertheless, the deployment of warships is inevitable, as they are assigned special enforcement rights in areas beyond national jurisdiction. These rights, especially defence against piracy, are discussed in the following section.

III. INTERNATIONAL LAW MECHANISMS

This section will be devoted to the mechanisms found in international law, so as to address subsea cables, but more specifically, their protection against sabotage acts (A). As will be explained, the current regime presents strong limitations. Thus, this section will also examine whether these shortcomings could be solved through the qualification as a piracy act (B).

A. *The applicable international legal regime*

Two treaties are to be taken into consideration for the protection of subsea cables: The Convention for the Protection of Submarine Telegraph Cables and the United Nations Convention for the Law of the Sea which, when it comes to the regime applicable to subsea cables, was strongly inspired by the Geneva Conventions on the High Seas and on the Continental Shelf [16] (1). However, these treaties do not entirely cover the question of States' jurisdiction over subsea cables (2).

1) *Conventions on subsea cables*

The Convention for the Protection of Submarine Telegraph Cables dates as far back as 1884 and is still applicable to the States which ratified it. Its provisions oblige States to adopt criminal and civil legislation regarding the wilful or negligent damages done to submarine telegraph cables outside territorial waters [17].

The sole application of this Convention presents, however, important shortcomings if it came to the protection of today's variety of subsea cables. First, as indicated by the treaty's name, it is only applicable to submarine telegraph cables. Even if the term "submarine cable" is used throughout the provisions, Art. II states that a punishable offence as understood by the treaty consists in an act which may "interrupt or obstruct telegraphic communication". Hence, the vast majority of cables ensuring every part of the globe an access to the Internet would arguably fall outside the scope of the 1884 Convention [18]. Second, the Convention creates obligations to only thirty-seven States as of today [19]. This limited number of parties does not represent the state of play, in which every region of the world is connected to subsea cables.

The second and more important Convention is UNCLOS. Its provisions on subsea cables were inspired by the 1958 Conventions on the High Seas and on the Continental Shelf [20] which, in turn, took over parts of the 1884 Convention's provisions, expanding its scope [21]. Under the Geneva Conventions, the protection of submarine cables were included [22].

UNCLOS establishes rules for the laying of subsea cables outside the territorial waters of coastal States, even if it fails to give a precise definition of such submarine infrastructures [23]. According to Art. 87 and Art. 112, there is in the high seas the freedom to lay subsea cables considering other actors' rights, such as the freedom of navigation [24]. Furthermore, Art. 79 details this regime as it applies to the continental shelf, which is – simply put – the EEZ's seafloor. The first paragraph of this provision recognises the right for all States to lay subsea cables on the continental shelf. The second paragraph indicates that the coastal State may not impede this right, except in relation to its sovereign right of exploration and exploitation of natural resources. The third paragraph establishes the right for the coastal State to authorise the delineation of the course for laying pipelines only. Based on the Convention, such a rule does not apply to cables, except if they were to penetrate the territorial sea of the coastal State [25]. In practice however, the course of subsea cables on the continental shelf of another State tends to be subjected to its approbation [26].

2) *Jurisdiction over subsea cables in case of damage*

While the freedom to lay subsea cables in areas beyond the territorial sea is undebated, questions remain as to which State may effectively exercise jurisdiction over such infrastructures if sabotage acts were to be committed. The Committee on Submarine Cables and Pipelines created by the International Law Association indicated on that matter:

“(I)ssues concerning State jurisdiction over submarine cables and pipelines—especially given the multifaceted involvement of non-State actors in activities concerning submarine cables and pipelines explained above—remain ambiguous and complex, because, inter alia, it is difficult to establish which State enjoys legislative and enforcement jurisdiction over cables and pipelines in all maritime zones.” [27]

In order to examine which States could claim some form of jurisdiction in this matter, the scenario described in the introduction will be used as a reference. UNCLOS establishes three types of potential jurisdiction holders: coastal, flag and port State jurisdiction [28]. In this section, the specific case of port State jurisdiction will be left out, for it is not as relevant for the topic at hand.

First, the coastal States whose EEZs and continental shelves are on the trajectory of such cables could be taken into consideration, based on their sovereign rights and jurisdictional powers in those zones. Accordingly, depending on where the incident occurs, impacted States could only claim jurisdiction if the cable was injured in their own EEZs and continental shelves. Beyond that, the high seas are outside the sovereignty of any State and the issue of the suitable coastal State cannot be raised [29]. Thus, the question here is whether an instrument such as UNCLOS recognises specific rights for a coastal State over subsea cables in its EEZ or its continental shelf. The Convention establishes the sovereign rights and jurisdiction areas a coastal State enjoys over its EEZ in Art. 56(1). No mention of subsea cables is made there, thus excluding the coastal State's jurisdiction over such subsea infrastructures. Art. 56(1)(c) also mentions that a coastal State has in its EEZ

“other rights and duties provided for in this Convention.” This encompasses *inter alia* Art. 79, giving all States the right to lay submarine cables on the continental shelf. Thus, the only way a coastal State can enjoy jurisdiction over subsea cables on its continental shelf is if such infrastructures are in direct application of the sovereign rights created by the EEZ regime [30].

Second, the flag State, i.e. the registration State of the ship on board which the offense is committed, could be the one exercising jurisdiction. UNCLOS establishes in Art. 92(1) the exclusive jurisdiction of the flag State on the high seas. This provision also applies to the EEZ with the exception of the sovereign rights awarded to the coastal State by the same Convention. Art. 94(1) also indicates that “Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.” Two other UNCLOS provisions speak for the exclusive flag State jurisdiction, especially with regard to subsea cables: Art. 113 establishes that a State has to adopt legislation making it a punishable offense for ships flying its flag or a person subject to its jurisdiction to break or injure a subsea cable. This provision is applicable to sabotage acts committed in the high seas but also in the EEZ, by way of Art. 58(2). Furthermore, Art. 97 establishes the penal jurisdiction of the flag State in case of incidents of navigation. According to the International Law Commission, “damage to a submarine telegraph, telephone or high-voltage power cable or to a pipeline may be regarded as an ‘incident of navigation’” [31]. Moreover, Art. 97 is also applicable to the high seas and to the EEZ, via the scope of Art. 58(2).

However, in the scenario of sabotage acts on behalf of a State, the flag State jurisdiction presents strong limitations, supposing it is even applicable as the right way to address hybrid attacks. A few elements can be mentioned, which relate to the unsuitability of UNCLOS provisions in the face of acts of terrorisms or State-backed sabotage against subsea cables. Indeed, RAHA indicates that provisions, such as Art. 113 to 115, which relate to injury of subsea cables, assume a “regular exercise of marine activities” [32]. For instance, Art. 113 is not strongly deterrent to ships flying a flag of convenience for the perpetuation of the illegal acts. Moreover, no State which ordered the attack of a subsea cable will take on its responsibility as a flag State to prosecute the alleged offenders.

One provision could be seen as diverging slightly from the sole flag State jurisdiction in matter of sabotage acts against subsea cables. Art. 94(6) UNCLOS gives any State, which suspects that sufficient jurisdiction and control is not guaranteed aboard a ship, the right to notify the issue to the flag State, which may in turn take necessary actions. Here too however, does the counteraction against sabotage acts fall into the hands of the flag State, which will not act against damages it ordered. Furthermore, the provision does not give many indications as to which matters should be under “proper jurisdiction and control” of the flag State [33]. Whether this encompasses the intent to sabotage subsea cables is questionable.

B. Qualification as a piracy act

A residual form of jurisdiction to be exercised against offender ships could be that of a universal nature. In this instance, any State observing an illicit act could intervene in order to arrest and try the responsible parties. In the law of the sea, this option is warranted in cases of piracy [34]. Already in 1869, the United States proposed that crimes against subsea cables be viewed as an act of piracy, subject to universal jurisdiction [35]. This however was never realised and Art. 101 UNCLOS establishing the definition of piracy does not expressly mention damages done to subsea cables.

Acts of piracy consist of precise scenarios indicated in Art. 101 UNCLOS:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State.”

Among the different criteria for sabotage acts against subsea cables to amount to piracy, two of them represent essential obstacles: the qualification of cables as “property outside the jurisdiction of any State” and whether damages done to them can be carried out for “private ends”.

First, the UNCLOS definition of piracy seems to suggest that another ship being the aim of the attack is a central element. The only possibility to include subsea cables under that scope would be through the wording “property in a place outside the jurisdiction of any State”. According to the ILC’s commentary, ships on the shores of unoccupied territories are meant by this phrasing [36]. Despite this historical interpretation of the provision reading this article through today’s scope may shift the perspective. Indeed, the motivation behind universal jurisdiction is to suppress universal crimes, impacting the international community as a whole [37]. Severing inter-continental internet cables would qualify as a crime of such nature.

Second, the question can be raised whether damaging a subsea cable can be serving private ends. The discussion around that criterion is one of State-sponsored and politically motivated acts [38]. According to HONNIBALL, there is not enough consistent discussion and practice to give a definite answer [39]. In the scenario detailed in the introduction however, it is doubtful whether individuals damaging a subsea cable are acting for private ends if their purpose is to destabilise international relation for the sake of a particular State.

From both these elements contained in Art. 101 UNCLOS, it is doubtful that sabotaging subsea cables could be seen as piracy. Such a qualification would have far-reaching consequences, such as triggering the right of visit recognised in Art. 110 UNCLOS. The provision establishes the right of warships to board a foreign ship if there is suspicion of piracy,

among other things. This represents an exception to the exclusiveness of flag State jurisdiction beyond the territorial sea [40]. However, there could not be a stand-alone right of visit for the sole suspicion of intent to sabotage subsea cables. Indeed, Art. 110 UNCLOS lists different scenarios triggering that right and the matter of this paper is not one of them [41].

IV. CRIMINAL PROSECUTION ON A NATIONAL LEVEL

A further approach to combat damaging submarine infrastructure is through the process of criminal prosecution. While the approaches that have been discussed so far are essentially concerned with preventive action against the destruction of subsea cables, criminal law comes into focus after a legally protected right has already been violated. Naturally, keeping the purpose of punishment from the perspective of criminal legal theory in mind, criminal law has also a general preventive character [42]. Despite the overall trend of internationalisation of national affairs, criminal prosecution is – with certain exceptions concerning crimes against the international community as a whole – predominantly the responsibility of an individual State [43]. Generally speaking, in order for a State actor to punish someone for a crime this individual has committed, two criteria must be met: Jurisdiction (A) and a punishable offense (B).

A. Jurisdiction

First, in order to institute criminal procedures against an individual after a crime has been committed, a State must exercise some form of jurisdiction over that individual. Typically, in criminal law, there are two central connecting factors to establish jurisdiction, i.e. territorial jurisdiction over a State’s territory and personal jurisdiction over nationals of that State. In the context of the law of the sea, territorial jurisdiction extends to the territorial sea of a State which can reach up to 12 nautical miles from the coastal baseline [44]. Beyond the territorial sea the coastal State only has limited jurisdiction which does not include criminal jurisdiction [45]. Rather, the flag State jurisdiction that a State exercises over a ship – and the persons on board that ship – is exclusive meaning that other States are legally not empowered to access the ship [46]. Consequently, only the ship’s flag State generally has the power to enforce criminal procedure concerning acts that damage submarine infrastructure. Bearing this in mind, Art 113 UNCLOS obliges the flag State to

“adopt laws and regulations necessary to provide that the breaking or injury by a ship flying its flag or by a person subject to its jurisdiction of a submarine cable beneath the high seas (...), and similarly the breaking or injury of a submarine pipeline or high-voltage power cable, shall be a punishable offense.”

Hence, (only) the flag State and the State of which the offender is a national are contractually obliged to criminally prosecute the destruction of subsea infrastructure. In the broader context, these States in many cases may not have sufficient incentive to initiate criminal prosecution which leads to a complete gap in criminal liability [47]. Especially conflict situations between States where methods of hybrid warfare are being used cause the problem that the flag State

V. CONCLUSION

itself is the initiator of the offense and, naturally, has no intentions of criminally prosecute the offender. In these cases, where the State that exercises jurisdiction is unwilling or unable to prosecute the offender, there is no legal possibility of instituting criminal proceedings to repressively punish someone for committing acts of sabotage against subsea infrastructure. As a consequence, the purpose of general prevention has no effect at all since the offender does not have to fear any kind of criminal prosecution. In addition to that, since every State is a sovereign legal personality, the unwilling or unable State cannot be forced to prosecute offenders despite being contractually obligated to do so due to the concept of sovereign equality of the States [48]. The State may simply be subject to State responsibility because it fails to meet its international obligation under the Law of the Sea Convention under customary international law [49].

To evade this dilemma of no (willing) State being legally competent to prosecute an offender, the system of exclusive flag State jurisdiction must be softened. For example, exceptions from the exclusive jurisdiction by the flag State in the field criminal prosecution in general or only for damaging or destroying subsea infrastructure could be included into the law of the sea.

B. Punishable Offense

As a second requirement, there must be a punishable offense in the State that wants to criminally prosecute an individual for a committed crime. Because an international obligation is usually by itself not applicable in the State, it requires some kind of transformational act into national law. However, it is frequently stated that Art. 113 UNCLOS has so far not sufficiently been implemented in the vast majority of States [50]. In Germany, for example, there are only limited possibilities for criminal liability outside of its territory. Generally speaking, criminal prosecution under the German Penal Code (StGB) is only possible on the territory of the Federal Republic with a few exceptions. One exception is § 6 Nr. 9 according to which German criminal law applies to acts that are to be prosecuted on the basis of an intergovernmental agreement binding on the Federal Republic of Germany even if they are committed abroad. Such an international agreement could be seen in Art. 113 UNCLOS. Another possibility is § 3 StGB in connection with § 9 StGB for criminal offences where the result of the offence occurred within its territory although the criminal act has been committed outside its territory. However, Germany does not have a specialised offense to protect subsea cables. Therefore, one must take recourse to more general provisions of the StGB with very specific requirements. Such general provisions are § 316b StGB (disturbance of public business), § 317 StGB (interference with telecommunication systems), § 88 StGB (anticonstitutional sabotage) and the very general § 303 StGB (damage to property). Some States actually have legislation to implement Art. 113 UNCLOS or the above-mentioned Convention for the Protection of Subsea Telegraphic Cables of 1884 [51]. In many cases, however, these provisions are over a century old and outdated [52]. These examples show that also on a national level, State law is frequently not sufficiently up-to-date to protect these critical infrastructures.

This paper established a picture of the tools (or rather the lack thereof) at a State's disposal to protect efficiently subsea cables from sabotage acts or to prosecute the perpetrator. Even if neither law of the sea instruments nor military options are entirely satisfactory, there is room for regulatory evolutions.

First, existing provisions could be interpreted so as to guarantee a better cooperation between flag and coastal States. As explained earlier, flag State are the sole bearers of jurisdiction when it comes to damages done to subsea cables in the high seas or the EEZ, as established by Art. 92(1) and 94(1) in conjunction with Art. 113 UNCLOS. Moreover, Art. 94(6) gives a State the right to notify the flag State of any ship onboard which proper jurisdiction and control are not exercised. The flag State may in turn "investigate the matter" and "take any action necessary to remedy the situation". In this scenario, the flag State could remain the decision maker but still delegate the actual enforcement of its decision to the State, which observed the offence.

Second, in order to better enforce jurisdiction upon damages done to a subsea cable, an idea could be to award such infrastructures a registration similar to that extended to ships. Indeed, the current situation of transnationals owners' consortia is unsatisfactory [53], so as to determine one State's jurisdiction [54]. Accordingly, that State of registration would be the one responsible to try the damages done to the infrastructures under its jurisdiction.

Third, another possibility could be an interpretative evolution of the definition of piracy, according to Art. 101 UNCLOS. This paper explained that the drafters of the provision meant by "property in a place outside the jurisdiction of any State" ships finding themselves in a territory under no State's sovereignty [55]. However, the very wording of the article can be read as not excluding portions of cables in the high seas or the EEZ. This solution could have the benefit of not necessitating an amendment of UNCLOS.

To sum up, if the international regulation or dispute settlement bodies never came to pronounce themselves on the matter, it could be expected to see States take it into their own hands to combat ships carrying out such damages. This could mean the surge of State practice relying on a certain degree of the use of force, as explained earlier. In turn, these developments may bring about new customary international law on the long term. Consequently, there could be a danger to witness the softening of the prohibition of the use of force, a core principle of international law.

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- [55] International Law Commission, *supra* note 31 at 282.