

Submarine Cables in the Law of Naval Warfare

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No technology is as profoundly important to the global economy as the internet, which is dependent on the security of a vast network of some 750,000 miles of seabed cables that criss-cross the oceans' depths. The interdependence of global submarine communication systems means that a break in one cable can have cascading effects on internet access to distant states. While the rules to protect this critical infrastructure in peacetime should be refurbished, the need to further develop the rules to secure this global infrastructure during periods of armed conflict is perhaps even more compelling. Although several peacetime treaties protect submarine cables from disruption and criminal acts, albeit weakly, the rules that apply during naval war are even more antiquated. Because the law of naval warfare is principally based on custom and state practice rather than treaties, there is considerable uncertainty over how submarine cables would fare in conflict at sea.

The internet facilitates \$10 trillion in international financial transactions daily; submarine cables are the backbone of this distributed, global infrastructure. The critical importance of cables underscores the debate within Western states over the prudence of working with the Chinese communications conglomerate Huawei Marine. Russia and China both view submarine cables as strategic assets and could either tap them or sever them in any future conflict. Russia's surface ship Yantar, for example, is monitored by Western naval forces since it is outfitted with cable-cutting gear and deep-sea submersibles.

The principal treaty governing submarine cables, adopted in 1884, sets forth an enlightened and balanced approach that is still followed today. The treaty is supplemented by the 1958 Geneva Convention on the Continental Shelf and the 1982 UN Convention on the Law of the Sea (UNCLOS). While Article 2 of the 1884 treaty criminalizes the breaking or injury of submarine cables done intentionally or through "culpable negligence" that results in disruption of telecommunication services, Article 4 requires cable owners and operators to indemnify each other for damaged cables and, under Article 7, pay for lost anchors and fishing nets sacrificed in order to avoid cutting a cable.

The 1958 convention recognizes that coastal states have sovereign rights over the resources of the seabed. These rights inhere to the coastal state, regardless of its ability to "occupy" the seabed, access the resources or exercise control over the area. This recognition of coastal state rights codified the U.S. claim in the 1945 Truman Proclamation, which had crystallized into customary international law. Article 4 of that treaty ensures that coastal states may not impede the laying or maintenance of submarine cables or pipelines on their continental shelves. Laying submarine cables is a high seas freedom, and Article 2(4) of the treaty recognizes that all states have a right to do so, while exercising "reasonable regard" for other states—such as the coastal state. The act of laying submarine cables is also a high seas right under the peacetime rules reflected in Article 112 of UNCLOS. States are required to adopt necessary laws and regulations to address willful or culpably negligent damage to cables in accordance with Article 113. Articles 114 and 115 of UNCLOS reflect the long-standing regime of liability and indemnity and are derived from the 1884 treaty. Even in peacetime, as set forth by the rules reflected in UNCLOS, the submarine cable system is fragile. The International Cable Protection Committee—an industry group that represents 97 percent of submarine cables—has reported coastal state delays and exorbitant costs, such as those imposed by India and Indonesia, that hinder undersea cable repairs on their continental shelves. China has a lax record of enforcement against its fishing vessels that cut submarine cables.

While Article 10 of the 1884 treaty specifies that warships and other government vessels have a right to verify the nationality of a merchant vessel if it is suspected of having broken a submarine cable, this provision is a departure from the concept of exclusive flag state jurisdiction over ships, as embodied in Article 92 of UNCLOS. Still, it is also possible to suggest that Article 10 persists even now by virtue of Article 30 of the 1958 convention, which states that prior agreements already in force shall continue. Thus, the rule that states may approach and visit merchant vessels to investigate cut or damaged cables may still apply to states party to the 1884 convention and the 1958 convention, or perhaps more broadly under customary international law.

While these peacetime instruments are rather dated and would benefit from new agreements to increase penalties for tampering and other criminal acts that disrupt their operation, the rules that apply during armed conflict are perhaps even more uncertain. The 1907 Hague Regulations forbid seizure or destruction of submarine cables connecting an occupied territory to a neutral territory, except in the case of "absolute necessity." Furthermore, cut cables must be restored and compensation paid once the conflict is over. Not only does this exception practically negate the rule, but the regulations themselves apply only to war on land—occupied land at that—and are silent on destruction of cables in the open sea. State practice is clear, however, that cables connecting two points in enemy territory (or two enemy states) may be cut. (See p. 95 of volume 50 of *International Law Studies*, of the Stockton Center for International Law at the U.S. Naval War College.)

Article 15 of the 1884 treaty states that the rules on submarine cables do not "affect the liberty of action" of belligerent states during armed conflict. This is amplified in Rule 37 in the influential San Remo Manual on the Law Applicable to Conflict at Sea, which states that parties to a conflict shall "take care" to avoid damaging submarine cables and pipelines laid on the seabed that serve neutral states. Article 54 of the 1913 Oxford Manual of the Laws of Naval War prohibits cutting cables in neutral waters connecting neutral states with

an enemy state. Such cables may be cut on the high seas only if the belligerent state doing so is conducting an effective blockade of the enemy state. Yet, even the Oxford Manual cautions that seizure or destruction of a submarine cable may not be done unless there is an “absolute necessity.” This rule applies without discrimination as to nationality of the owner of the cable, whether a natural person or corporate entity. Recently, the 2020 Oslo Manual on Select Topics on the Law of Armed Conflict recognized in Rule 67 that states that have laid submarine cables or pipelines, or whose nationals have done so, are “entitled to take protective measures” to prevent or terminate “harmful interference” of them.

It is unclear, however, the extent to which the rules set forth in the Oxford, San Remo and Oslo manuals, weak as they are, reflect the understanding of states. In short, the content of the law is murky. Further, the willingness of states to acknowledge even the rather circumspect restraints from customary law on their conduct during armed conflict at sea is doubtful. And while legal practitioners and scholars might devise some clarity, such as through the ongoing revision process of the San Remo Manual, the challenge of more crisply defining rights and duties of states concerning submarine cables is daunting. In the meantime, states may expect that adversaries’ plans to disrupt international submarine cables during naval warfare are limited only by their national laws and their imagination.

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