

The Criminalization of Damage to Submarine Cables: Problems and Prospects

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Outline

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PART I:

The Importance of Making Damage to Submarine Cables a Criminal Offence

Importance of Criminalization

- Majority of cable faults are caused by “external human aggression” [UNEP Report], although not clear what proportion is the result of accidents, gross negligence or intentional action
- A critical aspect of the approach of governments in the protection of cables should be to ensure that damage to submarine cables resulting from gross negligence or intentional action is a criminal offence under national legislation
- Establishing and enforcing criminal offences related to damage to cables is important:
 - Holds Offenders Accountable
 - Serves as a Deterrent/Disincentive to would-be Offenders
 - Enables restitution to cable owners

Key Elements of Offence

Offence to Break or Injure Submarine Cables

Clearly Defined
Offence

Requisite
Intention i.e.
negligence,
recklessness or
intentional

Apply in
Maritime
Zones Outside
Territorial
Sovereignty

Adequate
Penalty
Proportionate
to the Offence

PART II:

**Principles Governing Criminal
Jurisdiction under International Law**

Some Key Terms

- ***Jurisdiction*** is the power of a State under international law to govern persons and property by its national laws
- ***Civil Jurisdiction*** is the jurisdiction that national courts have over private disputes between two or more parties usually initiated by individuals or companies in their private capacity
- ***Criminal Jurisdiction*** is the jurisdiction that national courts have over criminal complaints by States against individuals or companies
- ***Extraterritorial Criminal Jurisdiction*** refers to the authority of a State to exercise jurisdiction over criminal conduct **occurring wholly or primarily outside its territory**

Types of Jurisdiction

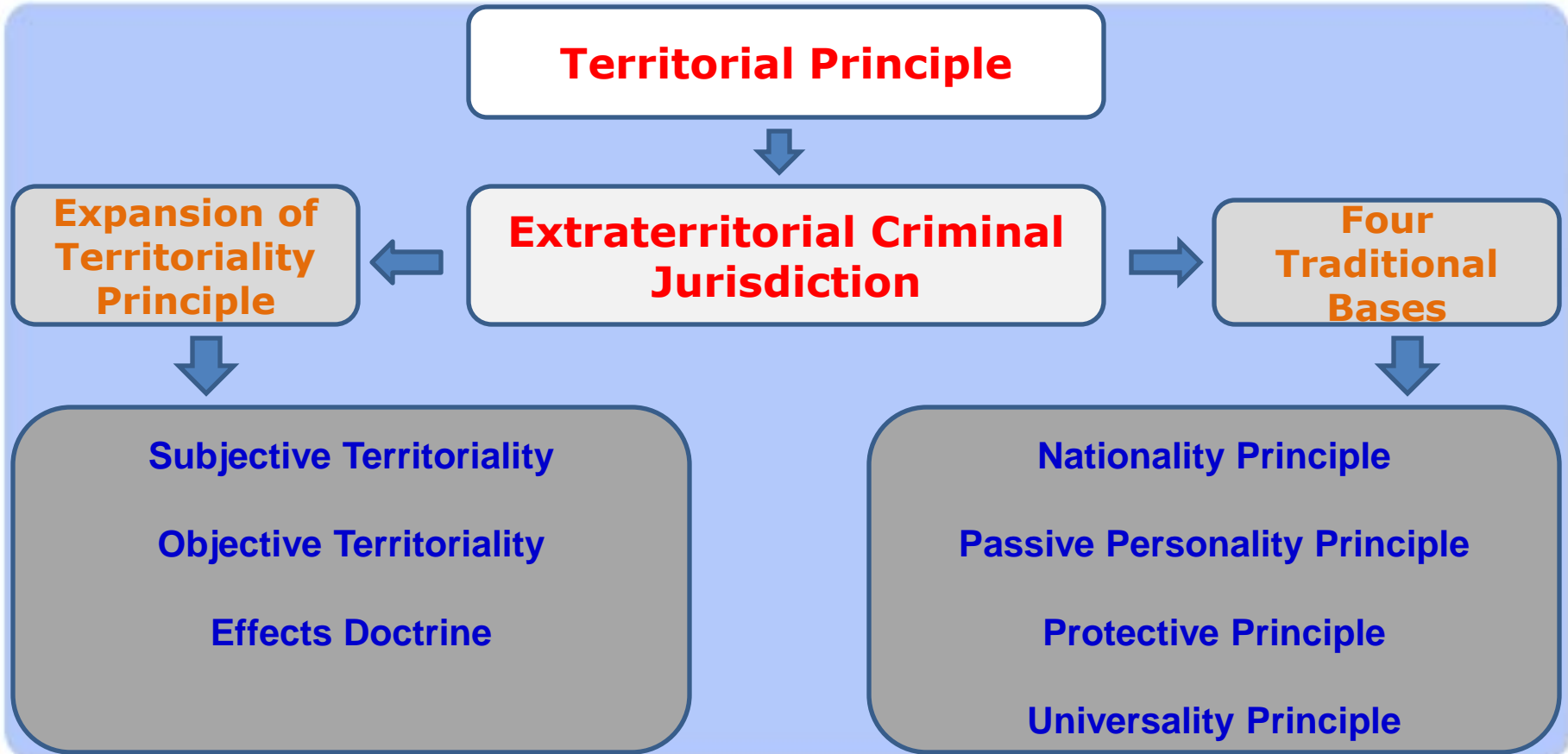
1. *Prescriptive Jurisdiction:*

- Authority of a State to *prescribe* laws and make them applicable to persons or circumstances, usually through the adoption of legislation
- Divided view on whether international law places limits on States in their exercise of prescriptive jurisdiction outside its territory

2. *Enforcement Jurisdiction*

- Authority of a State to take action to enforce those laws through, for example, arresting, detaining, prosecuting, convicting, sentencing, and punishing persons for breaking national laws
- General agreement that subject to a permissive rule to the contrary, a State may not exercise enforcement jurisdiction in the territory of another State without the second State's consent

Bases of Criminal Jurisdiction Under International Law



Expansion of Territoriality Principle

Principle of Territorial Jurisdiction

All States have both prescriptive and enforcement jurisdiction over all persons, property and events occurring within its territory



Subjective Territoriality

Jurisdiction over all offences **commencing** in its territory even if some element including the completion of the offence takes place abroad

Objective Territoriality

Jurisdiction over all offences that are **completed** in its territory even if some element of the offence took place abroad

Effects Doctrine?

Jurisdiction over certain conduct by foreigners outside its jurisdiction where the conduct has a **certain effect** within the State

Four Traditional Bases of Extraterritorial Jurisdiction

Nationality Principle

Allows States to prosecute its nationals for crimes committed anywhere in the world, if at the time of the offence, they were such nationals

Passive Personality

Allows States to prosecute a foreigner for a crime committed outside its territory against one of its own nationals

Protective Principle

Allows States to prosecute a limited range of crimes committed by foreigners outside its territory where the crime prejudices the State's vital interests

Universality Principle

Allows States to prosecute certain crimes committed by foreigners occurring outside the State's territory and having no connection to or impact on prosecuting state

PART III:
**The Criminalization of Damage to
Submarine Cables in Territorial Waters
under International Law**

General Principles on Criminal Jurisdiction in Territorial Waters

- Coastal States/Archipelagic States have sovereignty over their territorial waters i.e. internal waters, archipelagic waters and territorial seas
- Pursuant to this sovereignty, coastal States have both prescriptive and enforcement jurisdiction over acts and events in territorial waters
- No foreign State may exercise enforcement jurisdiction in maritime zones under the sovereignty of another State without its express consent

Criminal Jurisdiction over Damage to Submarine Cables in Territorial Waters:

- Coastal States/Archipelagic States have a general competence to adopt laws establishing criminal offences relating to damage of submarine cables pursuant to general sovereignty over territorial waters
- UNCLOS provides that coastal State/archipelagic State have a right to adopt laws and regulations relating to innocent passage through territorial waters
- No issue of asserting extra-territorial criminal legislation

Part IV:

The Criminalization of Damage to Submarine Cables under International Law Outside of Territorial Waters

General Principles Governing Criminal Jurisdiction Outside Territorial Waters

- Offences which occur in maritime zones such as the Exclusive Economic Zone and High Seas are acts which occur outside the territory of the coastal State
- Coastal States can **enact legislation** for offences which occur in these zones provided that they are given such rights and jurisdiction under UNCLOS e.g. offences concerning fisheries regulations, oil and gas exploration, marine scientific research, marine environmental regulations etc

Principles Governing Criminal Jurisdiction Outside Territorial Waters

- However, general principle concerning **enforcement jurisdiction** is that **ONLY** the flag State can exercise enforcement jurisdiction over vessels in the EEZ and on the high seas (i.e. the right to board and arrest vessels)
- Limited exceptions recognized under UNCLOS:
 - All States may board and arrest ships in the EEZ and on the high seas for acts of piracy
 - All States can board another ship in the EEZ/high seas if there are reasonable grounds for suspecting that the ship is engaged in piracy, slave trade, unauthorized broadcasting, the ship is without nationality
 - International Treaties may also establish the right to board and arrest ships
 - Coastal State has certain rights of enforcement in relation to their sovereign rights in the EEZ over seabed and fisheries resources as well as jurisdictional competences over marine scientific research and environment

Criminal Jurisdiction over Submarine Cables Outside Territorial Waters

- Historically, there has been some support for States having *universal jurisdiction* over intentional damage to submarine cables i.e. they have the right adopt legislation over such intentional acts no matter where such acts occur
 - ⇒ Some writings of scholars suggest that States have universal jurisdiction over damage to submarine cables
 - ⇒ 1928 Convention on Private International Law provides that destruction of submarine cables committed on the high seas shall be punished by the captor in accordance with its penal laws
 - ⇒ 1935 Harvard Draft Research on International Law listed injury to submarine cables as *delicta juris gentium* and supported universal jurisdiction for its punishment

Criminal Jurisdiction over Submarine Cables Outside Territorial Waters

- However, it appears as if international law now only recognizes the assertion of extra-territorial criminal jurisdiction over acts of damage to submarines on the basis of **nationality of the perpetrator or the flag State principle**

Criminal Jurisdiction over Submarine Cables Outside Territorial Waters

1884 Convention on Protection of Submarine Cables:

- Applies outside territorial waters to all legally established submarine cables landing in territory of State Parties
- It is a **punishable offence** to break or injure a submarine cables, **wilfully or by culpable negligence**, in such manner as might interrupt or obstruct telegraphic communication, either wholly or partially, such punishment being without prejudice to any civil action for damages [Article II]
- Recognized the exercise of criminal jurisdiction over such offences either by Courts of the flag State or under general rules of criminal jurisdiction under international law [Article VIII]
- Allowed State Parties to board a vessel suspected of breaking or injury of cables and request for documents proving nationality, and other information relevant to the offence (Article X)

Criminal Jurisdiction over Submarine Cables Outside Territorial Waters

Article 113 of 1982 UNCLOS

- Obligation for State Parties to adopt laws and regulations which establishes the breaking or injury of a submarine cable, or conduct calculated or likely to result in breaking or injury is a punishable offence provided that:
 - ⇒ The breaking or injury is done **wilfully** or through **culpable negligence**;
 - ⇒ The act is committed by a **ship flying its flag** or by a **person subject to its jurisdiction**;
 - ⇒ The act occurs in the EEZ or high seas;
 - ⇒ That the breaking or injury is liable to interrupt or obstruct telegraphic or telephonic communications.

PART V

Some Examples of National Legislation on Criminal Offences Relating to Damage to Submarine Cables

1996 Submarine Cables and Pipelines Protection Act of New Zealand

- Section 11: Every person commits an offence and is liable on summary conviction to a fine not exceeding \$250,000, who –
 - a) wilfully or negligently either damages, or causes or permits a ship or equipment belonging to a ship to damage a submarine cable or submarine pipeline
 - b) Is the owner or master of a ship that is used in the commission of an offence against paragraph (a)
- Section 13 sets out offences in relation to damage to submarine cables/pipelines in “Protected Areas” and Section 15 sets out the penalties for these offences

1996 Submarine Cables and Pipelines Protection Act of New Zealand

- Sections 20 – 23 gives certain powers to enforcement officers including the power to request relevant information from master/crew (certificate of registration, log book, information relevant to location, conduct and movements of ships) etc
- The 1996 Act only applies to acts or omissions if they are committed by a person **within the territorial seas or internal waters** of New Zealand or by a person on board a **New Zealand ship** or a **New Zealand citizen** on the high seas (Section 4)
- Also provides that the consent of the Attorney-General is necessary before proceedings against offences outside the territorial sea or carried out by a non-New Zealand ship or carried out by a person who is not a New Zealand citizen

Australia

- **1963 Submarine Cables and Pipelines Protection Act of Australia**
 - ⇒ **Applies to cables in the high seas or EEZ and which is not a submarine cable in a protection zone (within the meaning of Schedule 3A to the 1997 Telecommunications Act)**
 - ⇒ **It is an offence for Australian ships to break or injure a cable in the high seas/EEZ**
 - ⇒ **It is an offence for Australian ships to negligently break or injure a cable in the high seas/EEZ**

Australia

- **Telecommunications and Other Legislation Amendment (Protection of Submarine Cables and Other Measures) Act 2005**
 - ⇒ ACMA can declare protection zones in relation to submarine cables installed in Australian waters (territorial seas, EEZ and waters above outer continental shelf)
 - ⇒ Offence to engage in conduct which results in damage to a submarine cable in a protection zone
 - ⇒ Offence to negligently engage in conduct that results in damage to cables

PART VI:

Problems in Current Approaches to Criminalizing Damage to Submarine Cables and Some Recommendations

Problems

- 1) Many States do not have criminal legislation making it offence to damage cables within territorial waters
- 2) Many States have not implemented their obligation in Article 113 of UNCLOS to adopt extra-territorial criminal legislation against ships flying their flag or against their citizens
- 3) States which have adopted criminal legislation making it an offence to damage cables are usually parties to 1884 Convention, and such legislation has not been updated.

Problems

- 4) Article 113 of UNCLOS is arguably not adequate to address intentional damage to cables either by terrorists or those seeking to cause significant destruction to public infrastructure
- ⇒ Article 113 only allows States whose vessels or citizens are responsible for intentional damage to be tried for offences against cables
 - ⇒ Such States may not have an interest or political will to prosecute offences done to cables which do not serve their telecommunications needs
 - ⇒ Coastal States which do have an interest in prosecuting damage to submarine cables laid on their continental shelf and which land in their territory presently do not have jurisdiction over offences committed **by foreign vessels/foreigners**
 - ⇒ No obligation on the part of States which do have jurisdiction based on flag State principle or nationality principle to extradite offenders to States which have an interest in prosecution

Problems

⇒ Article 113 only deals with prescriptive jurisdiction and not enforcement jurisdiction i.e. it does not give States the right to arrest foreign vessels in the EEZ/High Seas for suspected intentional breaking of cables or inspect relevant documents

5) Issues of Investigations, Evidence Collection for Crimes Committed at Sea

Some Recommendations

- 1) All States should adopt legislation making it a criminal offence to intentionally or negligently damage submarine cables in territorial waters, with appropriate penalties
- 2) With regards to damage to cables outside of territorial waters,
 - all States should adopt legislation in accordance with Article 113 of UNCLOS to ensure that the breaking/injury of cables caused by negligence or wilful conduct is an offence under national law and should give their maritime enforcement agencies the power to arrest their citizens or vessels flying their flag guilty of such offence
 - Coastal States should also consider adopting legislation that makes it an offence for anyone to intentionally damage submarine cables on the continental shelf but which lands in their territory. This is on the basis that such damage committed outside the territory of the coastal State has effects within the territory of the coastal State (**effects doctrine**) or that it prejudices the States' vital interests (**protective principle**)

Some Recommendations

- 3) States should also seriously consider adopting an **international instrument** relating to intentional damage to submarine cables based on the structure of existing international crimes conventions
- ⇒ Obliges State Parties to make specific acts relating to damage to submarine cables an offence under their national laws
 - ⇒ Obliges State Parties to establish extra-territorial jurisdiction over damage to cables outside its territory based on some connection to the offence (nationality, flag State, territory)
 - ⇒ Obliges State Parties to establish extra-territorial jurisdiction over damage to cables outside its territory based on the presence of the offender/offending vessel in their territory

Some Recommendations

- ⇒ State Party would be required to take the offenders into custody and either extradite him to another State Party with jurisdiction or prosecute the offender
- ⇒ Establishes mechanisms for legal co-operation such as extradition and mutual legal assistance in investigations, evidence collection etc
- ⇒ Could also conceivably establish a framework for ship boarding in cases of suspected intentional damage to cables amongst States Parties (similar to the 2005 SUA Protocol) premised on consent of State Parties

THANK YOU