

Third Interim Report of the
ILA Committee on Submarine
Cables and Pipelines
28 June 2024
Athens



Outline

- I) Overview of work of the ILA Committee on Submarine Cables and Pipelines
- II) Rationale & Objectives
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(I) Overview of Work of ILC Committee on Submarine Cables & Pipelines

Date	Event	Description
2018	ILC Committee Established	To examine the current international legal regime governing submarine cables and pipelines on the basis that international law may not adequately address the myriad of challenges that States and entities engaged in cable and pipeline activities currently face in the development of law and policies relating to submarine cables and pipelines
2020	First Interim Report	Mapped the field to identify the existing law on submarine cables and pipelines, with a specific focus on the 1982 UN Convention on the Law of the Sea (LOSC) and to assess whether there is a need for further clarification or development of the law
2022	Second Interim Report	Committee's conclusions on two substantive issues identified in the First Report relating to (1) the difference between marine scientific research and surveys for laying cables and pipelines under the LOSC; and (2) issues relating to LOSC Article 51
2024	Third Interim Report	Focuses on the international law that governs the measures that States can take in response to intentional acts of damage to submarine cables and pipelines committed by States and non-State actors in peacetime

(II) Rationale & Objectives

Most incidents of damage to submarine cables and pipelines are caused by fishing and anchoring activities and few publicly verified instances of intentional damage to submarine cables and pipelines BUT

Incidents in 2022 – 2024 highlighting the vulnerability of undersea infrastructure

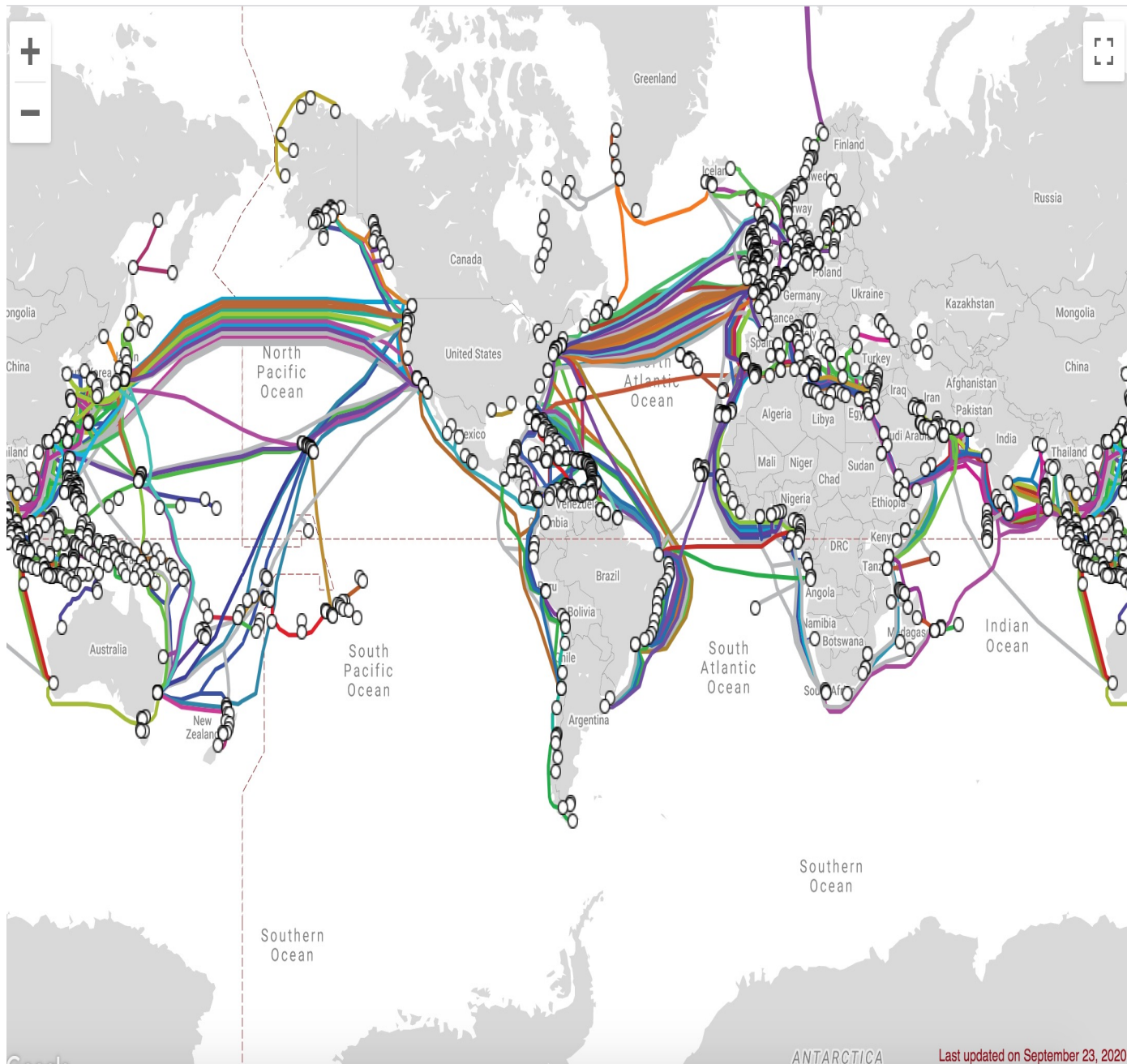
- Jan 2022: cable off Svalbard was cut
- **Oct 2022: attacks against Nord Stream pipelines**
- Oct 2022: cable connecting Shetland Islands and Faroe Islands was cut
- April 2023: cables connected to Taiwan were cut
- Oct 2023: cuts to Baltic connector gas and pipeline in Baltic Sea

Extensive reliance on submarine cables and pipelines for critical services

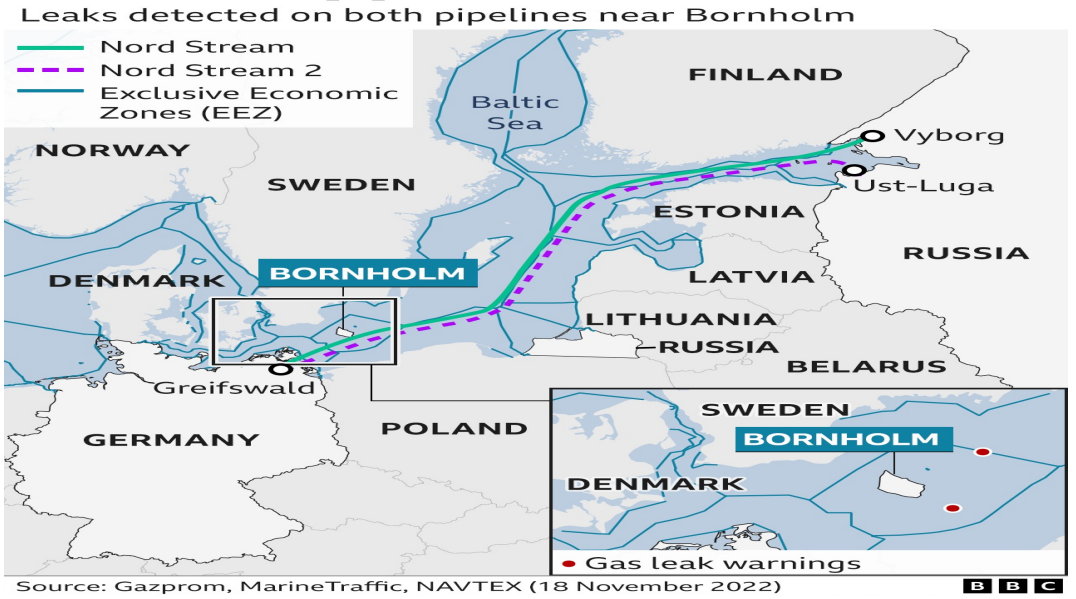
- Submarine communication cables facilitate 99 % of world's telecommunications needs
- Submarine power cables and pipelines serve critical energy supplies
- Used for military purposes and data collection on the marine environment
- Increasingly being used to supply power and communications to offshore infrastructure for oil & gas and renewable energy

Possibility of serious consequences in event of damage

- Interruption to Internet & associated services with consequent disruption to critical financial, health, education, safety, security and government services
- Interruption to critical energy supplies with consequent disruption to heating, water and electricity
- Possible damage to the marine environment

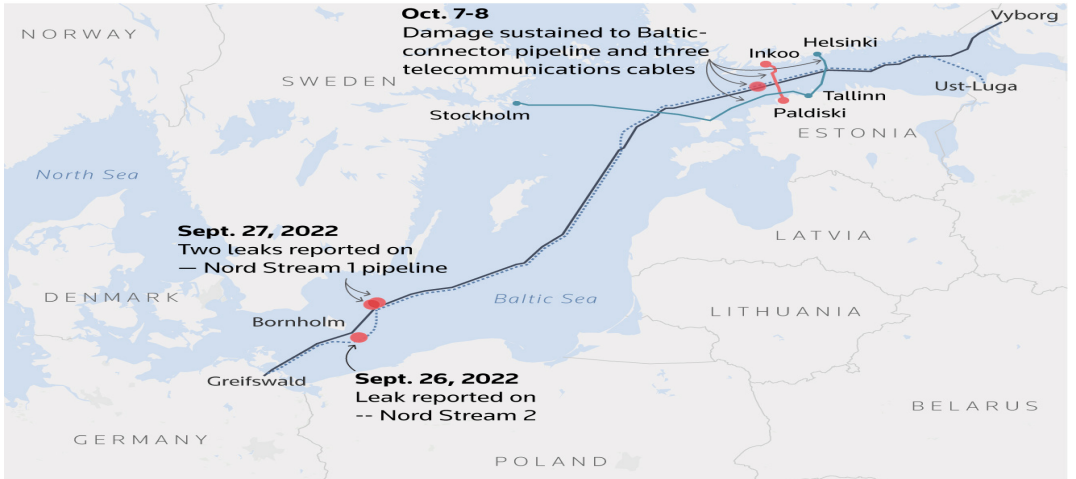


Nord Stream pipelines from Russia



Baltic gas pipeline and telecoms cables damaged

A subsea gas pipeline between Estonia and Finland, and three telecommunications cables—two connecting Estonia with Finland and Sweden, and one connecting Russia's mainland with its Kaliningrad exclave—were damaged on Oct. 7-8 in the Baltic Sea. The damage comes more than a year after the larger Nord Stream gas pipelines were damaged by explosions.



(II) Rationale & Objectives

- **General Assembly Oceans and Law of the Sea Resolution 2023:**
 - Recognized the crucial role of international cooperation at the global, regional, subregional and bilateral levels in combating, in accordance with international law, threats to maritime security, including...terrorist acts against...submarine cables and pipelines and other critical infrastructure and maritime interests, through bilateral and multilateral instruments and mechanisms aimed at **monitoring, preventing and responding to such threats**, the **enhanced sharing of information among States** relevant to the detection, prevention and suppression of such threats, and **the prosecution of offenders** with due regard to national legislation, and the need for sustained capacity-building to support such objectives (para. 125)
 - Urged all States “to improve the protection of...submarine cables and pipelines and other critical infrastructure by adopting measures related to the prevention, reporting and investigation of acts of violence against such infrastructure, in accordance with international law, and by implementing such measures through national legislation to ensure proper and adequate enforcement” (para. 147)
 - Noted that “submarine cables and pipelines are vitally important to the global economy and national security of all States” and that these cables and pipelines “are susceptible to intentional and accidental damage” (para. 175)
 - Called upon States “to take measures to protect submarine cables and pipelines and to fully address issues relating to these cables and pipelines, in accordance with international law, as reflected in the [LOSC]” (para. 175)

(II) Rationale & Objectives

- Third Report examines the international law that governs the measures that States can take in response to intentional acts of damage to submarine cables and pipelines by States and non-State actors applicable in peacetime
- International law only sets out States' rights and obligations in general terms, and operationalizing or implementing such measures in practice may give rise to problematic scenarios and potential disputes where clear legal solutions are difficult to identify and open to contestation
- Third Report (1) identifies the applicable international law; (2) explores the uncertainties in interpretation that may exist; and (3) where possible, highlights legal questions which would benefit from further clarification
- Third Report not intended to be prescriptive and only identifies and analyses the issues that arise when States take measures in response to intentional damage to submarine cables and pipelines
 - intended to assist States in developing practical solutions consistent with international law to effectively respond to acts of damage to submarine cables and pipelines
- BUT note the Committee's future work plan

(III) Scope and Assumptions

- **Characteristics of Intentional Damage to Submarine Cables and Pipelines**

1. Means used to commit intentional damage to submarine cables and pipelines can vary from the use of everyday equipment on vessels such as anchors or fishing equipment to reliance on underwater capabilities such as divers, submarines, underwater vehicles (unmanned vehicles, underwater autonomous vehicles or remotely operated vehicles) – intentional damage can be committed under the guise of normal maritime activities
2. It is not always possible to immediately identify the cause of the damage when damage occurs
 - a) Submarine cable and pipeline operators are alerted to disruptions to services in different ways and may not be able to inform competent authorities immediately
 - b) Not always possible to immediately identify the exact cause of damage, whether it is the result of natural hazards, human-made accidental damage, equipment failure, or intentional acts and usually only possible to determine after cable has been recovered
 - c) Vessels may turn off their AIS to evade detection or may not be required to have AIS at all
3. Intentional damage to submarine cables and pipelines can directly or indirectly impact multiple States and consequences may not manifest immediately
 - a) Cable and pipeline systems may serve telecommunication and energy needs of multiple states and the extent of harm suffered may depend on the connectivity of that State;
 - b) Cable or pipeline system may be owned or operated by state-owned entities, private entities or a consortium of both
 - c) Coastal States may be affected due to ancillary consequences to their marine environment or resources in areas under sovereignty or subject to their jurisdiction
4. Intentional damage to submarine cables and pipelines can be committed by non-State actors as well as State actors and because they can be committed under the guise of normal maritime activities, they allow acts to take place under a cloak of plausible deniability and used as part of grey zone/hybrid warfare tactics

(III) Scope and Assumptions

Measures taken by States	Focuses on measures taken by States but notes the importance of cooperation between states and industry actors (eg ICPC Best Practices)
International Law	Focuses on law of the sea; use of force; applicable instruments on terrorism
Means of causing damage	Focuses on physical means of acts of damage (not cyberoperations) and assumes that it will involve at minimum, a vessel and/or submarine and/or underwater vehicle
Intentional acts of damage	Focuses on intentional or deliberate or willful acts of damage i.e., where the acts causing the damage were intended to cause such damage
Submarine cables and pipelines	Focuses on “ cross-border submarine cables and pipelines ” and “submarine cables and pipelines connected to offshore infrastructure”
State and non-State actors	<ol style="list-style-type: none">1) States may commit acts of damage to submarine cables and pipelines<ol style="list-style-type: none">a) using their own warships, government ships, submarines and underwater vehiclesb) using privately owned merchant vessels, submarines or underwater vehicles2) Non-state actors may commit acts of damage using privately owned merchant vessels, submarines or underwater vehicles
Applicable in peacetime	Does not cover the law of armed conflict

(IV) Law of the Sea

- **Holders of the Freedom to Lay Submarine Cables and Pipelines under LOSC**
 - All States have been afforded the freedom to lay submarine cables and pipelines in areas beyond sovereignty, but no State has been expressly granted “exclusive jurisdiction” over such cables and pipelines
 - First Report observed that several States may be considered holders of the freedom to lay submarine cables and pipelines and may hold it at different times depending on the activity undertaken
 - States connected to the submarine cable and pipeline
 - States of nationality of the cable or pipeline owner or operator (state-owned entities or privately owned entities or a consortium of both)
 - Flag State of the vessel conducting activities related to cable and pipelines
 - Potentially multiple States that hold this freedom
 - Coastal States (who are not holders of this freedom) may also have jurisdiction over submarine cables and pipelines depending on the maritime space in which activities related to submarine cables and pipelines take place

(IV) Law of the Sea

- **Material Scope of LOSC provisions on submarine cables and pipelines:**

- LOSC provisions refer to different activities relating to submarine cables and pipelines which raises questions about the material scope of each provision and whether all or some activities are included or excluded
- First Report: “the interpretative method and reasoning for determining that the scope of a LOSC provision encompasses other activities relating to cables and pipelines, and if so which ones, will differ, depending on a variety of factors, including the terms of the provision in question, whether the activity relates to a submarine cable or pipeline, the activity itself as well as the maritime space in which such activity takes place”
- For example, the LOSC Article 87 freedom to lay submarine cables and pipelines includes the operation of cables and pipelines because the purpose of laying in Article 87 is the operation of the cable or pipeline
- Repair and maintenance were not necessary for the laying of submarine cables and pipelines, *but* these activities were necessary for the *operation* of cables and pipelines and hence, the freedom to lay submarine cables and pipelines also encompasses operation, repair and maintenance

(IV) Law of the Sea

Cross-Border Submarine Cables and Pipelines

States connected to submarine cable and pipeline

States of nationality of the owner/operator of submarine cables and pipelines

Flag States of vessels laying submarine cables and pipelines

Flag States of vessels suspected of threatened or actual acts of damage

Coastal States

1) Monitoring of threats to submarine cables and pipelines

2) Prevention & Enforcement Measures at Sea

3) Prosecution of Offences

4) State responsibility for intentional damage to submarine cables & pipelines attributable to states

5) State responsibility for intentional damage to submarine cables & pipelines committed by non-state actors

(IV) (1) Law of the Sea: Monitoring of Threats

- Monitoring of threats to submarine cables and pipelines can be done pursuant to general maritime domain awareness activities or specifically focused on submarine cables and pipelines
- Consists of a range of measures but Third Report focuses on:
 1. **Patrols** in areas where submarine cables and pipelines are located; and
 2. **Detection technology** (for example sonar technology or sensors) used to detect potential threats to submarine cables and pipelines from vessels, submarines, divers or underwater vehicles
 - Detection technology used by vessels, submarines or underwater vehicles
 - Detection technology fixed on seabed or other platforms
 - Detection technology on submarine cables and pipelines itself which can consist of sensors placed on submarine cables and pipelines or for submarine communication cables, using technology that is in-built such as optical fibers in the submarine cable itself (for eg. distributed acoustic sensing or DAS)
- Depending on which State is undertaking monitoring measures, the location of monitoring activities and the type of technology used, patrols and the use of detection technology *may* be considered by some States as “military activities,” “military surveys,” or “intelligence collection”

(IV) (1) Law of the Sea: Monitoring of Threats

States connected to submarine cables and pipelines

States of nationality of the owner/operator of submarine cables and pipelines

Flag States of vessels laying submarine cables and pipelines

Areas Beyond National Jurisdiction (ABNJ) (High Seas & Deep Seabed)

- Monitoring measures can be justified under **freedom of navigation** in LOSC Article 87 (1) (a) subject to due regard obligation in LOSC Article 87 (2) to other high seas freedoms and activities in the Area
- Monitoring measures may also be justified under **freedom to lay submarine cables and pipelines** in LOSC Articles 87 (1) (c) & 112 subject to due regard obligation in LOSC Article 87 (2)
- Freedom to lay submarine cables and pipelines includes the freedom to operate submarine cables and pipelines and monitoring measures are necessary to ensure the continued operation of cables and pipelines
- This is especially true of detection technology that is in-built into the submarine cable (or pipeline)
- Monitoring of threats to submarine cables and pipelines by States is less likely to be contested by other States in ABNJ

(IV) (1) Law of the Sea: Monitoring of Threats

States connected to submarine cables and pipelines

States of nationality of the owner/operator of submarine cables and pipelines

Flag States of vessels laying submarine cables and pipelines

Areas beyond sovereignty but within national jurisdiction (EEZ & Continental Shelf)

- Monitoring measures may be justified under the **freedom of navigation** or the **freedom to lay submarine cables and pipelines** and “**other internationally lawful uses of the sea related to those freedoms, such as those associated with the operation of ships...submarine cables and pipelines...and compatible with the other provisions of this Convention**” in LOSC Article 58 subject to obligation to give due regard to the coastal State
- Conducted for purposes of ensuring the continued operation of submarine cables and pipelines
- **Nicaragua v. Columbia (2022):**
 - ICJ rejected Colombia’s arguments that the actions of its naval vessels in Nicaragua’s EEZ of monitoring, tracking and informing Nicaraguan fishing vessels to leave Nicaragua’s EEZ fell within rights incidental to freedom of navigation in the EEZ
 - Colombian naval vessels’ conduct amounted to exercising control over fishing activities in Nicaragua’s EEZ, implementing conservation measures on Nicaraguan-flagged or Nicaraguan-licensed ships and hindering operations of Nicaragua’s naval vessels
- Coastal States that view military activities, military surveys, or intelligence collection as not permitted in the EEZ may object to monitoring measures to the extent that they are conducted unilaterally by third States

(IV) (1) Law of the Sea: Monitoring of Threats

States connected to submarine cables and pipelines

States of nationality of the owner/operator of submarine cables and pipelines

Flag States of vessels laying submarine cables and pipelines

Areas under sovereignty (territorial sea)

- Depending on the technology & equipment used, monitoring measures undertaken by States in the territorial sea of a coastal State may be objected to on the basis that such activities render passage non-innocent
 - LOSC Article 19 (2) (c): any act aimed at collecting information to the prejudice of the defence or security of the coastal State
 - LOSC Article 19 (2) (f): the launching, landing or taking on board of any military device, which would include underwater vehicles
 - Article 19 (2) (j): the carrying out of research or survey activities
 - Article 19 (2) (l): any activity not having a direct bearing on passage

(IV) (1) Law of the Sea: Monitoring of Threats

Coastal States

Areas beyond sovereignty but within national jurisdiction (EEZ & Continental Shelf)

- General competence to monitor threats to their sovereign rights over resources and to protect and preserve the marine environment under LOSC Article 56 subject to due regard to other States' rights in these maritime spaces (**Nicaragua v. Colombia 2022**)
- LOSC Article 79 (2): “reasonable measures for...the prevention, reduction and control of pollution from pipelines,” provided that it does not impede the laying or maintenance of such pipelines and subject to due regard to the rights and duties of other States in these maritime spaces.

Areas under Sovereignty

- Coastal States may undertake monitoring measures in their territorial sea pursuant to their sovereignty

(IV) (2) Law of the Sea: Prevention & Enforcement Measures at Sea

- GA Resolution did not elaborate on what was meant by “preventing and responding to” threats to submarine cables and pipelines but Third Report confined its analysis to **prevention and enforcement measures at sea**
- Prevention measures:
 - Aim to prevent an act of damage before it has occurred
 - Prevention measures do not strictly fall within “enforcement measures” but are more broadly concerned with protection of a State’s legally recognized rights and interests in the relevant maritime space (***Arctic Sunrise Arbitration***, para. 306)
- Enforcement measures:
 - Can be aimed at preventing acts of damage to submarine cables and pipelines or responding to acts of damage to submarine cables and pipelines after they have occurred
 - Objective of enforcement measures to ensure compliance with its laws and regulations
- Both prevention and enforcement measures may include (1) boarding and inspection of vessels and (2) arrest of vessels or persons on board (collectively referred to as “interdiction”) and may include other necessary, reasonable and proportionate measures if they do not amount to a prohibited use of force (LOSC Article 301)

(IV) (2) Law of the Sea: Prevention & Enforcement Measures at Sea

- Unless there is specific intelligence, there are challenges in preventing or responding to suspected threatened or actual acts of damage to submarine cables and pipelines
- Only warships, government ships or other duly authorized ships clearly marked and identified as being on government service can undertake prevention and enforcement measures at sea
- Prevention and enforcement measures generally cannot be undertaken against warships, government ships, submarines and underwater vehicles as they are afforded sovereign immunity in all maritime spaces (although note debate on whether underwater vehicles are entitled to sovereign immunity)
- Generally, only coastal states can take prevention and enforcement measures in areas under their sovereignty
- Prevention and other enforcement measures are subject to requirements that the use of force must be avoided as far as possible, and where unavoidable, must not go beyond what is reasonable, proportionate and necessary in the circumstances

(IV) (2) Law of the Sea: Prevention & Enforcement Measures at Sea

Flag States of vessels suspected of threatened or actual acts of damage

Areas Beyond Sovereignty

- Flag States of vessels can interdict (or authorize such interdiction) of vessels suspected of threatened or actual acts of intentional damage (LOSC Article 92)
- A question arises as to whether it is the only State which may interdict vessels suspected of threatened or actual damage to submarine cables and pipelines
 - LOSC Article 97 (3): No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag State in the event of a collision or “incident of navigation”
 - ILC 1956 Draft Articles on the Law of the Sea observed that damage to “submarine telegraph, telephone or high-voltage power cable or to a pipeline” *may* be regarded as an “incident of navigation”
 - Arguments can be made that “incidents of navigation” only apply to damage to submarine cables and pipelines by the movement or manoeuvring in the normal navigation of the ship
 - “Incidents of navigation” were not intended to cover situations where ships’ anchors are intentionally used to damage submarine cables and pipelines or where ships are used indirectly, for example, by launching submarines or underwater vehicles to cut cables and pipelines or placement of explosives to damage cables and pipelines

(IV) (2) Law of the Sea: Prevention & Enforcement Measures at Sea

States connected to submarine cables and pipelines

States of nationality of the owner/operator of submarine cables and pipelines

Flag States of vessels laying submarine cables and pipelines

**1884
Convention**

Cable

- Article X allows warships to **board** foreign ships if it has reason to believe that the vessel has broken or injured a submarine cable willfully or by culpable negligence and requires the master to provide documentation to show the ship's nationality and to make a report to the flag State

**Piracy
(LOSC Arts 101, 103,
105, 110)**

- Right to **board** and **arrest** for any illegal acts of violence, or detention, or any act of depredation, or attempted acts, committed for private ends by the crew or passengers of a private ship or a private aircraft, and directed...(ii) against a ship, aircraft, persons *or property in a place outside the jurisdiction of any State?*

**Freedom to lay
submarine cables and
pipelines
(LOSC Arts 58, 79, 87
(1) (c) and 112)**

- Right to take **prevention measures** to prevent acts of damage to submarine cables and pipelines to prevent interference with the freedom to operate submarine cables and pipelines?
- **Arctic Sunrise Arbitration:** coastal States may take prevention measures if it had a reasonable belief that the vessel is involved in conduct that may constitute an interference with its sovereign rights

Necessity

- Right to take **prevention measures** to prevent acts of damage to submarine cables and pipelines on the basis that these acts pose a "grave and imminent peril" to "its' essential interests"?

(IV) (2) Law of the Sea: Prevention & Enforcement Measures at Sea

States connected to submarine cables and pipelines

States of nationality of the owner/operator of submarine cables and pipelines

Flag States of vessels laying submarine cables and pipelines

Protection & Preservation of the Marine Environment

- Depending on the means used, acts of damage to submarine cables and pipelines may result in **pollution of the marine environment** under LOSC Article 1 (1) (4)
 - Use of explosives is an introduction of substances or energy into the environment which will result or is likely to result in deleterious effects including damage to the surrounding biodiversity and resources, as well as a hindrance to marine activities.
 - Use of cutting devices on *submarines cables* may not result in an introduction of a substance or energy into the marine environment that has deleterious effects
 - Use of cutting devices on *submarines pipelines* more likely to result in an introduction of a substance or energy into the marine environment that has deleterious effects
- LOSC Article 192: States have the obligation to protect and preserve the marine environment
- LOSC Article 194 (1): States shall take “all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities...”
- Prevention and enforcement measures based on obligations relating to the protection and preservation of the marine environment of the high seas and the Area are *erga omnes (partes)*?

(IV) (2) Law of the Sea: Prevention and Enforcement at Sea

Coastal States

Areas beyond national jurisdiction

Measures to Avoid pollution from maritime casualties (LOSC Article 221)

- Coastal States *may* rely on LOSC Article 221 to take and enforce measures against vessels suspected of actual damage to submarine cables & pipelines that occur in ABNJ if:
 - Acts of damage to submarine cables and pipelines are considered a “maritime casualty” which includes “incidents of navigation” or “other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo”
 - Acts of damage to submarine cables and pipelines which may be reasonably be expected to result in major harmful consequences
 - Measures are proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution

Necessity

- Right to take **prevention measures** to prevent acts of damage to submarine cables and pipelines on the basis that these acts pose a “grave and imminent peril” to “its’ essential interests”

(IV) (2) Law of the Sea: Prevention and Enforcement at Sea

Coastal States

Areas beyond sovereignty within national jurisdiction

Coastal State Sovereign Rights over Resources

(LOSC Arts 56;
73, 111)

- Coastal States have the right to take **measures to prevent acts of damage to submarine cables and pipelines** that they reasonably believe will result in **interference with its sovereign rights** for the exploration and exploitation of its EEZ (*Arctic Sunrise Arbitration*)
- Coastal States have the right to take **enforcement measures**, including the right of hot pursuit, for **violations of their laws and regulations adopted by it in accordance with the LOSC**
 - Coastal States can only take enforcement measures against vessels in their EEZ and continental shelf for breaches of laws and regulations related to its sovereign rights over resources, or jurisdiction over the marine environment, marine scientific research or artificial islands, installations and structures
 - Such laws may not not cover intentional damage to submarine cables and pipelines unless it can be established that the ancillary harm entails a violation of laws adopted in conformity with the LOSC

Coastal State Jurisdiction over the Marine Environment

- LOSC Article 220 only applicable to vessel source pollution
- LOSC Article 79 (2): coastal State may subject the laying (and operation) of pipelines (only) to reasonable measures for the prevention, reduction and control of pollution from pipelines
- LOSC Article 221 may also be applicable

(IV) (2) Law of the Sea: Prevention and Enforcement at Sea

Coastal States

Areas under Sovereignty

Innocent Passage (LOSC Art 19 and 25)

- Article 19 (2) (f): the launching, landing or taking on board of any military device
- Article 19 (2) (h): any act of wilful and serious pollution contrary to this Convention
- Article 19 (2) (k): any act aimed at interfering with any systems of communication or other facilities or installations of the coastal State
- Article 19 (2) (l): any activity not having a direct bearing on passage
- Article 20: Submarines and other underwater vehicles are required to navigate on the surface and show their flag
- Article 25: Coastal States can take necessary steps in its territorial sea to prevent passage which is not innocent

Coastal State Laws and Regulations Relating to Innocent passage

- Article 21 (1) (c): the protection of cables and pipelines
- Article 21 (1) (f): the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof
- Article 111: right of hot pursuit when coastal State believes that the ship has violated the laws and regulations of the coastal State in the territorial sea
- Article 30: Coastal States can require non-compliant warships to leave

(IV) (3) Law of the Sea: Prosecution of Offences

- The legal basis for prosecution of offences related to intentional damage to submarine cables and pipelines in national law is determined by whether States have prescriptive jurisdiction over such acts based on principles of criminal jurisdiction
 - Territorial criminal jurisdiction (subjective and objective territoriality)
 - Extraterritorial jurisdiction based on the nationality principle, passive personality principle, the protective principle and the universality principle

Flag States of vessels laying submarine cables and pipelines

Areas beyond sovereignty

- **LOSC Article 113:** flag States of the vessel which has engaged in wilful or culpably negligent conduct that has resulted or is likely to result in breaking or injury of submarine cables and pipelines on the high seas and EEZ are obliged to adopt laws and regulations to provide that such breaking or injury is a punishable offence

States of Nationality of the Perpetrator

Areas beyond sovereignty

- **LOSC Article 113:** States of nationality of persons "subject to its jurisdiction" who have engaged in wilful or culpably negligent conduct that has resulted or is likely to result in breaking or injury of submarine cables and pipelines on the high seas and EEZ are obliged to adopt laws and regulations to provide that such breaking or injury is a punishable offence

- New Zealand Submarine Cables and Pipelines Act 1996 & Australia's Submarine Cables and Pipelines Act 1963

- General critique that LOSC Article 113 has not been implemented by States or punishments are insufficient

(IV) (3) Law of the Sea: Prosecution of Offences

States connected to Submarine Cable or Pipeline

Areas Beyond Sovereignty

Objective Territoriality Principle: the State in which a criminal result occurs has jurisdiction to prescribe and to adjudicate concerning the event

Effects Doctrine: jurisdiction is asserted over the conduct of a foreign national occurring outside the territory of a State which has a substantial effect within that territory

Protective Principle: jurisdiction that a State may exercise with respect to persons, property or acts abroad which constitute a threat to the fundamental national interests of a State, such as a foreign threat to the national interests of a State

States of Nationality of Owner/ Operator of Submarine Cable and Pipeline

Areas beyond sovereignty

Passive personality principle in that damage to submarine cables and pipelines is a crime related to the property of their nationals?

(IV) (3) Law of the Sea: Prosecution of Offences

Coastal States (submarine cables and pipelines transit without making landfall)

Areas Beyond Sovereignty

- LOSC Article 58 (3) obliges States to have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.
- Not clear whether coastal States can extend their criminal laws to intentional damage to submarine cables and pipelines which merely transit the EEZ or continental shelf
- Note that both Sweden and Denmark closed investigations on the attacks against the Nord Stream pipelines on the basis that their nationals were not involved and/or their territory was not used
- Arguably, coastal States can only exercise criminal jurisdiction over acts of damage to transit submarine cables and pipelines that take place in its EEZ and continental shelf that infringe its sovereign rights or jurisdiction recognized in these zones in the LOSC, including its jurisdiction over the marine environment
- For acts of damage to *submarine pipelines*, the coastal State has been conferred the competence to adopt reasonable measures for the prevention, reduction and control of pollution from pipelines under LOSC Article 79 (2), and this conceivably includes the prosecution of offences relating to acts of damage to submarine pipelines

(IV) (3) Law of the Sea: Prosecution of Offences

Coastal States

Areas under Sovereignty

- Coastal states can criminalize acts of damage to submarine cables and pipelines that transit or make landfall pursuant to their sovereignty over the territorial sea
- Also have explicit prescriptive jurisdiction to adopt laws and regulations on innocent passage to protect submarine cables and pipelines & the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof

(IV) (4) Law of the Sea: State Responsibility for intentional damage attributable to States

	Bilateral Obligations	Obligations Erga Omnes Partes?	
Breach of Primary Obligation	Injured State	Specially Affected State	Non-Injured State?
Areas beyond sovereignty			
Breach of obligation not to interfere with the freedom to operate submarine cables and pipelines in LOSC Arts 58, 79, 87 (1) (c), 112:	States connected to submarine cable & pipeline	All LOSC States Parties even if not directly injured or specially affected on the basis of <i>erga omnes partes</i> obligation?	
	States of nationality of owner/operator of submarine cable & pipeline?		
	States of nationality of shareholder of owner/operator of submarine cable & pipeline?		
Breach of obligations to protect and preserve the marine environment and take all necessary measures to prevent, reduce and control pollution in LOSC Arts 1 (1) (4), 192, 194 & 235:	Coastal States may be individually injured or specially affected if established that damage to submarine cables and pipelines results in pollution to the marine environment in areas under the jurisdiction of the coastal State	All LOSC States Parties even if not directly injured or specially affected on the basis of <i>erga omnes partes</i> obligation?	
Breach of obligation not to interfere with the sovereign rights of the coastal State in its EEZ & continental shelf in LOSC Art 56 & 77	Coastal States may be individually injured if established that damage to submarine cables and pipelines results in interference with its sovereign rights		

(IV) (4) Law of the Sea: State Responsibility for intentional damage attributable to States

	Bilateral Obligations	Obligations Erga Omnes Partes?	
Breach of Primary Obligation	Injured State	Specially Affected State	Non-Injured State?
Areas under sovereignty			
Breach of obligation to exercise innocent passage in LOSC 19 (2) (f) (h) (k) and (l)	Coastal State		
Breach of coastal State sovereignty in LOSC Art 2	Coastal State <ul style="list-style-type: none"> • Nicaragua v. USA 1986: • Blowing up of underwater pipelines, and attacks against ports and oil installations not only amount to an unlawful use of force, but also constitute infringements of the territorial sovereignty of Nicaragua and incursions into its territorial and internal waters. • Laying of mines within the internal waters and territorial sea not only constitute breaches of the non-use of force, but also affect Nicaragua's sovereignty over certain maritime expanses" and hence constitute a violation of Nicaragua's sovereignty 		

(IV) (4) Law of the Sea: State Responsibility for intentional damage attributable to States

- There are challenges in establishing that acts of damage to submarine cables and pipelines are factually and legally attributable to States
- **Factual Attribution**
 - Challenges in identifying the cause of damage to submarine cables and pipelines
 - Damage to cables and pipelines can occur for a variety of reasons
 - Difficult to identify the vessel responsible as AIS and other vessel tracking systems may be turned off
- **Legal Attribution:**
 - Scenario 1: States use their own warships, government ships, submarines and underwater vehicles
 - Will be considered an “act of State” attributable to the flag State
 - An exception for breaches of obligations to protect and preserve the marine environment which do not apply to any warship, naval auxiliary, other vessels owned or operated by a State under LOSC Article 236?
 - Scenario 2: States use privately-owned merchant vessels, submarines or underwater vehicles flagged in their own State or other States:
 - Must be established that the privately-owned merchant vessel and associated apparatus was (1) empowered by that State’s law to exercise elements of “governmental authority”; or (2) acting on the “instructions of, or under the direction or control” of that State in carrying out the conduct; or (3) if the State acknowledges and adopts the conduct in question as its own

(IV) (4) Law of the Sea: State Responsibility for intentional damage attributable to States

• **Legal consequences of intentional acts of damage to submarine cables & pipelines**

- Injured or specially affected States may claim cessation, assurances and guarantees of non-repetition of the internationally wrongful act and reparation
- Non-injured States may claim cessation, assurances and guarantees of non-repetition of the internationally wrongful act and reparation, but in the interest of the injured State or the beneficiaries of the obligation breached
- If reparations are claimed, the consequences of acts of intentional damage to submarine cables and pipelines may raise challenges in determining the appropriate reparation, including compensation
 - Must be a causal link between the injury and the internationally wrongful act
 - Varying standards of legal causation: “Sufficiently direct and certain causal nexus”; “Proximity”; “Reasonable foreseeability” and depending on the standard used, may exclude more indirect consequences of intentional damage to submarine cables and pipelines that do not manifest immediately

• **Avenues for implementation of State responsibility**

- LOSC Part XV dispute settlement mechanisms
- Countermeasures?

(IV) (5) Law of the Sea: State Responsibility for acts committed by non-State actors

- Flag States may be held responsible for non-State actors committing acts of damage to submarine cables and pipelines without any direct State involvement on the basis that it failed to exercise due diligence to prevent such acts of damage (*Corfu Channel Case; Activities in the Area Advisory Opinion; Sub-Regional Fisheries Commission Advisory Opinion; & South China Sea Arbitration*)
- Due diligence obligations are obligations of conduct and not result
- Content of due diligence obligations determined on a case-by-case basis but entails the adoption of appropriate rules and measures, a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators to safeguard the rights of the other party
- Exact nature of due diligence required by flag States in this context will depend on the circumstances
 - For example, non-implementation of obligations in LOSC Art 113 to adopt laws and regulations penalizing breaking or injury of submarine cables and pipelines on high seas and EEZ may be a relevant factor in determining whether due diligence obligation has been met
 - Lack of adequate enforcement mechanisms to monitor and secure compliance with laws or sufficient sanctions to deter violations may also be relevant

(V) Use of Force

- Third Report discussed whether acts of intentional damage to submarine cable and pipelines by States are
 - (1) **prohibited uses of force** under Article 2 (4) of the UN Charter and customary international law (reflected in LOSC Articles 19 (2) (a) and 301);
 - (2) an **armed attack** under Article 51 of the UN Charter
- Third Report generally took a cautious approach given the implications for maintenance of peace and security:
 - The use of force is a “contested field of law” (2018 ILA Committee on the Use of Force Report)
 - Determination of whether there has been a “use of force,” or an “armed attack” is both politically sensitive and legally complex
 - Current interpretations on the use of force are also evolving as States grapple with the legal implications of *cyber operations* for the use of force
 - Limited state practice but notable that in recent incidents relating to the Nord Stream pipelines and the Baltic connector, States did not publicly characterize the acts of damage as a use of force or armed attacks
 - Highlighted the seriousness of such acts for critical infrastructure, describing it as a “grave threat to energy security and regional stability” and emphasizing its environmental and economic consequences
 - Russia described attacks against Nord Stream pipelines as “a criminal act”

(V) Use of Force

- **Do intentional acts of damage to submarine cables and pipelines meet the definitional requirements of use of force and armed attack?**
- Means used to commit acts of intentional damage:
 - Traditional conceptions of “use of force” and “armed attack” limited to force by arms or military force or weapons that produces a kinetic effect i.e., shockwaves and heat (would apply to intentional damage caused by explosives)
 - However, the ICJ has recognized that Article 2 (4) and Article 51 of the UN Charter do not refer to specific weapons and apply to use of force regardless of the weapons employed
 - It is neither the designation of a device, nor its normal use, which make it a weapon but the intent with which it is used and its effect – encompasses damage to submarine cables caused by cutting devices
- Scale and Effects of acts of intentional damage
 - Challenges in distinguishing between the scale and effects of a use of force *not* amounting to an armed attack and scale and effects of a use of force amounting to an armed attack – only most grave uses of force will constitute an armed attack
 - Will the consequences of damage to submarine cables and pipelines meet the requisite gravity?
 - Purely economic consequences?
 - Interruptions to critical services?
 - Physical harm or injury to property and people will meet the scale and effects but may face issues of causation

(V) Use of Force

- Identifying the victim of the use of force:
 - Traditional conceptions require victim states to show that they are specifically targeted – may need to establish that the attacking States deliberately targeted the victim State
 - Use of force usually against the territory of another State - if acts are against objects outside the territory of the State, there must be a sufficient nexus between the target of the use of force and the victim State
 - Possible victim States:
 - States connected to submarine cables and pipelines?
 - States of nationality of submarine cable owner and operator?
 - Coastal States in whose EEZ and continental shelf submarine cables and pipelines transit without making landfall?
 - Coastal States in whose territorial sea and internal waters submarine cables and pipelines transit and make landfall
- Challenges of attribution to States

(V) Use of Force

- **Responses:**

- Prohibited Use of Force under Article 2 (4) of the UN Charter (and LOSC Arts 301 and 19 (2) (a)):

- Invocation of State responsibility
- Victim States can use Part XV dispute settlement mechanisms or countermeasures

- Armed attack under Article 51 of UN Charter:

- Victim State may exercise the right of self-defense subject to the obligation that any response pursuant to the exercise of the right of self-defense is necessary and proportional and that the target of its response is a legitimate military target
- Victim States have the right to halt and repel an ongoing armed attack and it may include “the need to defend the State from the continuation of attacks, and not only repel the attack of the moment:” ILC Committee on the Use of Force, “Final Report on Aggression and the Use of Force (2018)
- Anticipatory self-defense invoked by victim States to thwart an “imminent” or “ongoing” armed attack on the basis that such threats are “instant, overwhelming, leaving no choice of means, and no moment for deliberation”? (Caroline Formula)
 - But note difficulties in immediately determining the cause of damage to cables and pipelines and whether it was accidental or intentional

(VI) Terrorism

1997 Terrorist Bombing Convention

- May apply to acts of damage to submarine cables and pipelines by explosives or other lethal devices
 - Submarine cables and pipelines can be considered an “infrastructure facility” which means “any publicly or privately owned facility providing or distributing services” for the benefit of the public, such as water, sewage, energy, fuel or communications.”
 - Must have the intent to cause death or serious bodily injury or to cause extensive destruction of such an infrastructure facility where such destruction results in or is likely to result in major economic loss
- States obliged to establish jurisdiction a) the offence is committed in the territory of that State; or (b) the offence is committed on board a vessel flying the flag of that State or an aircraft which is registered under the law so the State at the time the offence is committed; or (c) the offence is committed by a national of that State

1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and its 2005 Protocol

- May apply to vessels placing explosives along submarine cables and pipelines outside the territorial sea
- 1988 SUA Convention: “places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship
- 2005 SUA Protocol:
 - intentionally “uses on a ship or discharges from a ship... any explosive material... in a manner that causes or is likely to cause serious injury or damage” or “uses a ship in a manner that causes death or serious injury or damage”
 - transport on board a ship “any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, with or without a condition, as is provided for under national law, death or serious injury or damage
 - Must be for the purpose of intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act

(VI) Terrorism

1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf and its 2005 Protocol

- Applies to a series of offences against fixed platforms on the continental shelf which are defined as “an artificial island, installation or structure permanently attached to the sea-bed for the purpose of exploration or exploitation of resources or for other economic purposes
- May not apply to cross-border submarine cables and pipelines as they are not “artificial islands, installations and structures
- Possibility of amending the 1988 SUA Fixed Platform and its 2005 Protocol to extend to cross-border submarine cables and pipelines or adopting a unified interpretation?

Terrorism & Critical Infrastructure

- In 2017, the Security Council called upon Member States to address the risk of terrorist attacks against critical infrastructure and called upon States to take a variety of measures including ensuring that “they have established criminal responsibility for terrorists’ attacks intended to destroy or disable critical infrastructure, as well as the planning of, training for, and financing of and logistical support for such attacks.
- Countries have significant discretion in what is defined as critical infrastructure but should include submarine cables and pipelines
- The Protection of Critical Infrastructure against Terrorist Attacks: Compendium of Good Practices, updated in 2022, which sets out a range of good practices developing national strategies for developing critical infrastructure protection against terrorist attacks; establishing liability for terrorist offences by enhancing international cooperation and criminalizing acts against critical infrastructure; information-sharing; and ensuring inter-agency coordination

(VI) Preliminary Conclusions

- There are a range of measures that States can take in response to intentional damage to submarine cables and pipelines, subject to the caveat that the ambit of some of these measures are uncertain and require further discussion and clarity
- Monitoring Measures: Monitoring measures that involve patrols and the use of detection technology that are unilaterally undertaken by States may be subject to contestation by coastal States in whose maritime space these monitoring measures are being undertaken - States may wish to consider co-operative mechanisms on a regional basis that has the support and/or involvement of all relevant States and other stakeholders, including cable and pipeline owners and operators
- Prevention and Enforcement Measures:
 - Uncertainty on the ambit of prevention and enforcement measures that can be taken in response to suspected threatened or actual damage to submarine cables and pipelines in areas beyond sovereignty
 - Coastal States may take prevention and enforcement measures in the EEZ and continental shelf if it can establish that suspected threatened or actual damage to submarine cables and pipelines constitute an interference with its sovereign rights; are a breach of its coastal state laws and regulations adopted in conformity with the LOSC; or that such acts result or is likely to result in pollution to the marine environment
 - Coastal States have clear authority to take prevention and enforcement measures against vessels suspected of actual or threatened damage to submarine cables and pipelines in their territorial sea on the basis that such acts render passage non-innocent or are a breach of their laws and regulations on the protection of cables and pipelines or the protection of the marine environment

(VI) Preliminary Conclusions

- Prosecution of Offences: States have several grounds on which to criminalize intentional damage to submarine cables and pipelines but have generally not relied on these grounds and should focus on strengthening national legal frameworks:
 - All LOSC State Parties should implement their obligations under LOSC Article 113
 - States that are connected to submarine cables and pipelines should ensure that they have robust national legislation that criminalizes intentional acts of damage to submarine cables that occurs in areas under sovereignty, and in areas beyond sovereignty, which they can do based on the objective territoriality principle, the effects doctrine or the protective principle of criminal jurisdiction.
 - Coastal States should also adopt national legislation criminalizing intentional damage to submarine cables and pipelines that take place in areas under sovereignty
 - States may also wish to designate submarine cables and pipelines as critical infrastructure and ensure that they have suitable national frameworks to protect such infrastructure
- State Responsibility:
 - Intentional damage to submarine cables and pipelines by States may amount to breaches of LOSC obligation to not interfere with the operation of cables and pipelines; LOSC obligations on the protection and preservation of the marine environment; and LOSC obligation to exercise innocent passage and to respect the sovereignty of the coastal State
 - There may be challenges in establishing attribution to States and also in determining the relevant standard of causation in determining appropriate reparations and no political will or incentive to invoke State responsibility

(VI) Preliminary Conclusions

- Use of Force:
 - Need for further clarity on whether intentional acts of damage to submarine cables and pipelines acts fall within a prohibited use of force or armed attack
 - Uncertainties include whether the scale and effects of such acts meet the requisite gravity; identification of the victim State or States given the multi-jurisdictional nature of submarine cables and pipelines; challenges in determining whether such acts are accidental or intentional and to the extent they are intentional, whether they are acts attributable to States
- Terrorism:
 - There is no explicit mention of submarine cables and pipelines in the nineteen legal instruments dealing with terrorism, however, some conventions may be interpreted to apply to acts of damage to submarine cables and pipelines which are caused by the use of explosives or lethal devices: 1997 International Convention for the Suppression of Terrorist Bombings; the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and its 2005 Protocol
 - States may also find useful guidance from UN initiatives to combat terrorism to critical infrastructure