

International Law Studies – Volume 2
International Law Situations with Solutions and Notes
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SITUATION I.

While a state of war exists between the United States and foreign state X, it is found that a submarine telegraphic cable owned by a neutral company and connecting hostile state X with neutral state Y is used for the transmission of dispatches hostile to the United States.

The United States naval officer in command of the fleet cruising near protests to neutral state Y against such use of the cable.

The authorities of state Y claim that they have no responsibility.

It is not possible for the United States vessel to interrupt the cable within the three-mile limit of hostile state X. The cable is, however, grappled beyond the three-mile limit in the high sea, and by order of the commanding officer is cut.

The neutral owners claim damages from the United States for injury to the cable and for interruption of service, alleging among other reasons in support of the claim that the act of the commanding officer in cutting the cable was contrary to Article V of the Naval War Code of the United States.

Was the action of the officer proper ?

SOLUTION.

1. The action of the officer in protesting against the hostile use of the cable connecting enemy state X and neutral state Y was proper action. Such action is desirable whenever possible without undue risk, of which risk the officer himself must judge. This does not imply an obligation to give such official protest or responsibility in case such protest is not made.

2. The authorities of a neutral state may assume or decline to assume responsibility for a cable connecting the neutral with a belligerent state.

3. The cable service is to be considered, when hostile, in the category of unneutral service and the penalties should be determined accordingly.

4. The neutral owners have no ground for claim for damages for injury to the cable or for interruption to service.

5. The Naval War Code of the United States makes no provision for such a case, but practice and general principles justify the action of the officer in cutting the cable anywhere outside of neutral jurisdiction.

NOTES ON SITUATION I.

SUBMARINE CABLES IN TIME OF WAR.

The protest.--The propriety of the first act of the commanding officer in entering a protest against the use of the cable can be affirmed; the question of his obligation to do so must depend upon the policy of the United States and the urgency of cutting off the communication. It is sufficient to say that at the present time neither international law nor national policy makes such a protest obligatory.

The action of Brazil in 1898¹ and the occasional action of other neutral countries show a drift toward the assumption of governmental authority over such cable service as in time of war may involve violation of the strict neutrality of neutral territory. The development of this tendency to assume authority would give a basis for judgment of the obligation to give notification before cutting a cable.

The rule in regard to obligation might be stated as follows: In proportion as the neutral government assumes responsibility for the communication by cable between its territory and belligerent territory, in that proportion is it the obligation of the belligerent to notify the neutral (whenever possible without serious danger to the belligerent himself) that the belligerent proposes to interrupt freedom of communication by cable. The cable should then be used only under such restrictions as may be

¹Neutrality Regulations, Brazil, April 29, 1898, Art. V: "It is prohibited citizens or aliens residing in Brazil to announce by telegraph the departure or near arrival of any ship, merchant or war, of the belligerents, or to give to them any orders, instructions, or warnings, with the purpose of prejudicing the enemy." (Proclamations and decrees during the war with Spain, p. 14.)

agreed upon by the belligerent and the neutral. In all such cases the action may lead to cutting in case the belligerent is not satisfied with the restrictions proposed, or to the sealing and absolute prohibition of the service in case the neutral is not satisfied with the conditions proposed.

The development of a policy of national responsible control is advocated as the best method for securing the end advocated by all, "the complete submission of the enemy at the earliest possible period with the least expenditure of life and property."¹ National control and guarantee of neutrality in time of war would be for the advantage of owners during war and for the world at large on return of peace, provided always a satisfactory means for assuring neutrality can be found.

The responsibility of state Y.—The general principles of jurisdiction or the right to exercise state authority undoubtedly carries with it the right to control cables so far as is necessary for the protection of state Y or the maintenance of its sovereignty, particularly so far as those cables are within the limits of the jurisdiction of the state.

From the relation of a state to a cable, state Y is doubtless at liberty to disclaim responsibility for a cable already constructed so far as its international relations are concerned. It may, however, as in the case of Brazil, by Article V of the proclamation of neutrality in 1898, prohibit the use of a cable or other means of telegraphic communication for the aid of either belligerent by a domestic regulation.² Brazil would thus assume a moral obligation to enforce its proclamation. This would not carry international responsibility, but merely shows that a state may assume of its own accord some supervision of its cable service. It is not, however, a violation of neutrality not to assume any control or responsibility for private lines.

It has been held, however, that the state does control absolutely the landing of cables upon its shores, and that it would therefore be a violation of neutrality to permit,

¹ Naval War Code of the United States.

² Proclamations and decrees during the war with Spain, p. 14.

during the continuance of the war, a new cable to be laid within its jurisdiction for military purposes which should connect its shores with one of the belligerents.¹

Another phase of cable control is seen in the action of the company in sealing the cable at Hongkong to avoid all complications. This opens the question of responsible sealing as a means of avoiding injury to cable property, which in itself is of the greatest benefit to the world. If actually sealed by a responsible party the cable has nothing in its nature to render it necessarily confiscable. All that a belligerent wishes in regard to hostile cables is that they shall not be used at all or shall not be used for hostile purposes after the belligerent has once been in position to prevent such use. Outside of neutral jurisdiction a belligerent might of course with propriety cut a cable connecting a blockaded port of the enemy.

There is equally no question that the belligerent has no right to demand that all cables connecting the enemy state with neutrals shall be sealed or otherwise controlled, provided he is in no position to enforce his demands by himself interrupting the cable.

The grounds for cutting the cable.—In the case submitted the neutral state Y, as it is competent to do, declines to assume any responsibility. This places the cable upon the basis of private property.

(a) *Cables in time of blockade.*—In this case there is no statement that a blockade exists and that the service of the cable is interrupted on that account. In regard to such interruption there would be no question. Fauchille² maintains that when a port is blockaded so that a neutral can not communicate with it, there is no doubt that the blockading belligerent can interrupt the cable as he would a dispatch boat. This position is generally admitted.

(b) *Cables as contraband.*—To bring such use of submarine telegraphic cable under the category of contraband is inconvenient and in many respects unfortunate. The tendency is to limit contraband to goods and

¹See Wilson, *Submarine Telegraphic Cables*, p. 18, Naval War College Lectures, 1901. Also, *For. Rel.* 1898, p. 976; 22 *Opin. Attys. Gen.*, pp. 13, 315.

²*Du Blocus Maritime*, p. 248.

to determine their category as contraband or noncontraband by their nature and destination. To regard a cable between an enemy and a neutral as contraband because of its possible hostile use is to resort to a position making needful a course of reasoning unnecessarily complex and confusing. The action of the officer, if justifiable at all, may rather be justifiable on other grounds than that of violation of blockade or of seizure as contraband.

(c) *Cables and unneutral service.*—The difference between the carriage of contraband and the aid afforded by the transmission of information was early recognized. Lord Stowell, in the case of the *Atalanta* in 1808, said:

“If a war intervenes and the other belligerent prevails to interrupt that communication (between mother country and colony), any person stepping in to lend himself to effect the same purpose, under the privilege of an ostensible neutral character, does in fact place himself in the service of the enemy state, and is justly to be considered in that character. Nor let it be supposed that it is an act of light and casual importance. The consequence of such a service is indefinite, infinitely beyond the effect of any contraband that can be conveyed. The carrying of two or three cargoes of stores is necessarily an assistance of limited nature; but in the transmission of dispatches may be conveyed the entire plan of the campaign that may defeat all the projects of the other belligerent in that quarter of the world. * * * The practice has been, accordingly, that it is in considerable quantities only that the offense of contraband is contemplated. The case of dispatches is very different; it is impossible to limit a letter to so small a size as not to be capable of producing the most important consequences in the operations of the enemy. It is a service, therefore, which, in whatever degree it exists, can only be considered in one character, as an act of the most noxious and hostile nature.”¹

This opinion of the great English jurist, rendered early in the nineteenth century, shows that the transmission of dispatches of varying character can not properly be

¹ 6 C. Rob., 440, 454.

put in the same category with contraband because so different in nature and results.

Dana, in note 228 to Wheaton, speaking of the carrying of hostile persons or papers in contrast to contraband, says:

“But the subject now under consideration is of a different character. It does not present cases of property or trade, in which such interests are involved, and to which such considerations apply, but simply cases of personal overt acts done by a neutral in aid of a belligerent. Suppose a neutral vessel to transmit signals between two portions of a fleet engaged in hostile combined operations, and not in sight of each other. She is doubtless liable to condemnation. It is immaterial whether these squadrons are at sea or in ports of their own country or in neutral ports, or how far they are apart or how important the signals actually transmitted may be to the general results of the war, or whether the neutral transmits them directly or through a repeating neutral vessel. The nature of the communication establishes its final destination and it is immaterial how far the delinquent carries it on its way. The reason of the condemnation is the nature of the service in which the neutral is engaged.”

Hall¹ says:

“With the transport of contraband merchandise is usually classed analogically that of dispatches bearing on the conduct of the war, and of persons in the service of a belligerent. It is, however, more correct and not less convenient to place adventures of this kind under a distinct head, the analogy which they possess of the carriage of articles contraband of war being always remote. They differ from it in some cases by involving an intimacy of connection with the belligerent which cannot be inferred from the mere transport of contraband of war, and in others by implying a purely accidental and almost involuntary association with him. They are invariably something distinctly more or something distinctly less than the transport of contraband amounts to.

¹ Int. Law, 4th ed., p. 697.

When they are of the former character they may be undertaken for profit alone, but they are not in the way of mere trade. The neutral individual is not only taking his goods for sale to the best market, irrespectively of the effect which their sale to a particular customer may have on the issue of the war, but he makes a specific bargain to carry dispatches or persons in the service of the belligerent for belligerent purposes; he thus personally enters the service of the belligerent, he contracts to perform acts intended to affect the issue of the war, and he makes himself in effect the enemy of the other belligerent."

Lawrence, in his third edition,¹ says:

"In truth, between the carrying of contraband and the performance of what we may term unneutral service there is a great gulf fixed."

And again, after further discussion—

"We are now in a position to distinguish clearly between the offense of carrying contraband and the offense of engaging in unneutral service. They are unlike in nature, unlike in proof, and unlike in penalty. To carry contraband is to engage in an ordinary trading transaction which is directed toward a belligerent community simply because a better market is likely to be found there than elsewhere. To perform unneutral service is to interfere in the struggle by doing in aid of a belligerent acts which are in themselves not mercantile but warlike."²

The acts generally regarded as in the category of unneutral service have been enumerated as:

- (1) The carriage of enemy dispatches.
- (2) The carriage of certain belligerent persons.
- (3) Aid by auxiliary coal, repair, supply, or transport ships.
- (4) Knowing cooperation in the transmission of certain messages and information to the belligerent.

Knowing cooperation in the transmission of certain messages for the belligerent renders the ship liable to penalty. Such an act as the repetition of signals would fall in this class.

¹ Int. Law, p. 624.

² P. 633.

In cases where vessels are engaged in unneutral service the ordinary penalty is the forfeiture of the vessel so engaged. It is held that—

“Submarine telegraphic cables between a belligerent and a neutral state may become liable to censorship or to interruption beyond neutral jurisdiction if used for hostile purposes. A neutral vessel engaged in laying, cutting, or repair of war telegraph cables is held to be performing unneutral service.”¹

Capt. C. H. Stockton, U. S. N., says: “Besides the contraband character of the material of a telegraph cable, in use or en route, as an essential element of belligerent communication which renders it liable to seizure anywhere out of neutral territory, there is another phase of this question, and that is in regard to the nature of the service afforded by such a communication by a neutral proprietor to a belligerent.

“This service is in the nature of both an evasion of a blockade, and, what has been termed of late years, of unneutral service. It does not matter in this phase whether the cable be privately or state owned so far as the technical offense is concerned, though the gravity and consequences are naturally much more serious in the latter case. Let us take, as an instance, the case of a blockaded or besieged port, as Havana and Santiago were during the late hostilities. The communication of information, or of dispatches, or of means of assistance which can be made by such means, is an unneutral service, and would resemble also the violation of blockade by a neutral vessel carrying dispatches, the capture of which on the high seas outside of territorial jurisdiction would be a justifiable and indisputable act of war.

“Extend this to a country or port not blockaded or besieged, and you would yet find the cable, owned, let us presume, by a neutral, the means of performing the most unneutral kind of service, of a nature which, done by a ship, would most properly cause its seizure, condemnation, or destruction by the offended belligerent. * * *

“When possible, cable communication generally should, of course, be kept open for commercial or other

¹ Wilson & Tucker Int. Law, p. 310.

innocent intercourse, and in many cases a government censorship can meet the circumstances and requirements of the war and prevent injury to a belligerent.”¹

Whatever may have been the opinion of the officer as to the ground upon which he was cutting the cable, it was certainly not an act justified by the principles governing the rules in regard to contraband unless the interpretation be forced.

After the notification by the officer no innocent trade basis could be claimed, and whatever element of contraband there may have been before notification disappeared when the official protest was made.

If ship and cargo is liable to seizure for violation of blockade after official notification, then the cable is liable to interruption by analogy, but it is far better to put the use of the cable under such circumstances under its proper category, that of unneutral service, where the intent of the act rather than accidental circumstances is the determining factor in the treatment of the cable.

There remains possible, after one of the belligerents is in position to take control of or interrupt a cable connecting a neutral and the other belligerent, the control or censorship of the cable by the neutral in a manner satisfactory to the first belligerent, the complete discontinuance of the cable service by sealing or otherwise, either by the neutral government or by the owners. None of these courses was followed.

The officer was fully justified in cutting the cable upon the ground that it was rendering an unneutral service.

The claim for damages.—The claim that the officer was acting in a manner contrary to article 5 of the Naval War Code of the United States can not be sustained. This code provides that in time of war, irrespective of their ownership, “submarine telegraphic cables between the territory of an enemy and neutral territory may be interrupted within the territorial jurisdiction of the enemy.”² While the code does not specify further what shall be the treatment of a cable connecting an enemy of

¹ Submarine Telegraphic Cables in the Time of War. Proceedings United States Naval Institute, Vol. XXIV, 3, p. 453.

² Article 5, (b).

the United States with a neutral and used to transmit hostile messages, the United States has not, in practice, regarded the cutting of such a cable outside of neutral jurisdiction as in anyway forbidden. It is taken as a matter of general acceptance that cables will be cut in the high seas. Article XV of the cable convention of 1884 provided: "It is understood that the stipulations of this convention shall in nowise affect the liberty of action of belligerents." Lord Lyons, representing the British Government, stated that "Her Majesty's Government understands Article XV in this sense, that, in time of war, a belligerent, a signatory of the convention, shall be free to act in regard to submarine cables as if the convention did not exist." The *procès verbal* of this convention shows that this was the general opinion of the representatives present. The Belgian representative interpreted the article as giving by inference the right "to cut submarine cables even though they landed on neutral territory." This same representative also maintained that "the convention has no effect upon the rights of belligerent powers. These rights would be neither more nor less extensive after the signature than they are now." There can be little doubt that in the opinion of these representatives submarine cables beyond neutral jurisdiction might be cut by a belligerent and that it was the expectation of these representatives that this would be freely done in time of war. Captain Squier, writing of "The Influence of Submarine Cables upon Military and Naval Supremacy,"¹ after reviewing the operations of the United States in the Spanish war of 1898, uses such expressions as follows: "It appears that the searching for deep-sea cables in the high seas in the time of war, without an accurate chart of the location of the cables, is a difficult and very doubtful operation; also that submarine cables must in general be interrupted near their landing places, where their exact location can be determined with certainty. * * * Since submarine cables are so important a factor in national defense, they should be protected both at their shore landings and

¹ Proceedings of the United States Naval Institute, Vol. XXVI, 4, pp. 620-622.

on the high seas by military and naval force. * * * We should be able, at the earliest date, to manufacture upon American soil deep-sea cables of the first class; be able to lay, maintain, and repair them in time of peace or war, by ships flying the American flag, and be prepared to adequately protect them upon the high seas and at their landing places, by military and naval force." This position of Captain Squier was quoted with approval in England, June 20, 1901, before the interdepartmental committee on cable communications.¹

The report of this interdepartmental committee on cable communications, appointed by Parliament on November 29, 1900, was made on March 26, 1902, and distinctly admits that a considerable proportion of the cables touching British territory would be cut in time of war between Great Britain and a foreign power. It is also admitted that this will be so even though proper precautions may protect cables within the three-mile limit. The report (p. 15) says:

"The experience of the Spanish-American war while it brings into prominence the important influence which submarine cable telegraphy exercises in maritime warfare, also shows how large a part is played by chance in cable-cutting operations. We are convinced, however, that there is no serious physical difficulty in cutting cables, and that on the outbreak of war cables may be cut either in shallow water without, or in deep water with, special appliances. While, therefore, it is generally advisable that cables should be landed at fortified positions, where such exist, in order that the instruments and operating stations may be under protection, we would point out that the importance of fortifying the shore ends may be easily exaggerated, because the attempt to break the cable will probably be made at a convenient distance from the shore, beyond the range of guns.

"10. Nevertheless, the great and increasing range of modern artillery will afford, in ordinary cases, fair security against hostile enterprises, up to the three-mile

¹ Minutes of evidence, 3335-3338.

limit of territorial waters, and thus protect the cables in shallow water where they are most vulnerable.

“11. In the second place, strategic arrangements must be made on the assumption that a considerable proportion of cables will be interrupted during war time; and a variety of alternative routes must be provided to all important British possessions and naval stations.

“13. Cables between Great Britain and British possessions may (a) touch only on British soil; (b) touch on the territory of foreign states.

“14. The latter, again, will, in time of war, further subdivide themselves into belligerents and neutrals. It will be the interest of the belligerents to interrupt or control, by censorship, the telegraphic communications of their adversaries even to the degree of occasioning detriment to neutrals, and of incurring liability to make compensation to them for arbitrary interference with their cables.

“15. On the other hand, it will be the interest of neutrals to maintain their telegraphic communications, both with one another and with the belligerents, even to the possible detriment of the latter.

“16. If we could accept the assumption that cables would not be cut in time of war, it is clear that for strategic purposes the all-British route would be for the best. * * *

“17. But, as we have already stated, we think that our strategic arrangements must be made on the supposition that a considerable proportion of cables will be cut. * * *

“We thus arrive at two principles leading to diametrically opposite conclusions. The more probable it is that cables will not be cut, the greater the value of an all-British cable. The more probable it is that they can be cut, the greater the value of a cable touching on foreign territory.”

On page 42 of this report, in the summary of recommendations, is the statement that, “In view of the probability of cable cutting a variety of alternative routes should be provided wherever it is essential to secure telegraphic communication in time of war.”

A recent English writer has correctly understood the attitude of the United States, as practice of the United States has shown. He says: "According to the Naval War Code of the United States, a cable entering a neutral's territory may not be touched. It is safe except when it is outside the three miles line or in the belligerent's territorial waters."

The cutting of the cable.—It has been shown that the United States naval officer, as an act of courtesy, made a protest against the hostile use of the cable connecting the belligerent and the neutral territory; that the neutral declined to assume any responsibility; that the service rendered by this cable was of the nature of unneutral service; that the owners of the cable are not entitled to any damages on account of the interruption of the service, or because of injury to the means of such unneutral service, and that the Naval War Code of the United States does not support this claim.

It may be said that the nature of submarine telegraphic cable service is such as to be of the greatest importance in the time of war and that the belligerent may take measures to protect himself from its improper use. These measures may be proportioned in severity to the dangers which such improper use may entail upon the belligerent.

In general, the penalty for the performance of unneutral service is the confiscation of the agency of such service. This being the case, a cable guilty of unneutral service may become liable to the penalty. Undoubtedly the liability to such a penalty is necessary in order to secure effective supervision of a cable by the owners or by state authorities, or when this supervision can not be secured to bring about the voluntary closing of the line liable to such penalties, unless the owners prefer to run the risk of injury to or confiscation of the cable property in case it comes within the power of the injured belligerent.

Practice, general principles, and opinion alike support the position that a cable connecting one belligerent and a neutral territory and rendering unneutral service is liable to interruption by the other belligerent at any point

outside of neutral jurisdiction. War will often make such interruption a reasonable necessity.

In the "situation" under consideration the United States naval officer would be fully justified in cutting the cable at any point outside neutral jurisdiction.