

International Law Studies – Volume 4  
International Law Situations with Solutions and Notes  
U.S. Naval War College (Editor)

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## SITUATION VI.

(a) During the war between the United States and State X a commander of a United States war vessel enters a port of State Y, a neutral, and sends a cipher message to the regular telegraph office for transmission to his home government. Under orders from the authorities of State Y the message is refused at the office. The commander protests.

(b) The commander then sends an openly worded message, which is also refused unless the authorities are permitted to reword the message without materially changing its apparent meaning. The authorities also claim the right to refuse to transmit any portions of the message which they deem fit, provided they give notice to the commander that such portions will not be transmitted. The commander again protests against all these claims.

How far is the position of State Y correct in each case?

### SOLUTION.

(a) The position of neutral State Y in refusing to allow the transmission of the telegram in cipher is correct. It is entirely proper for a neutral state to forbid such use of a line or cable.

(b) State Y has full right to prohibit the transmission of any or all such messages. The authorities of State Y would have no right to mutilate a dispatch already accepted for transmission, but could prescribe such restrictions as seemed necessary in regard to the form in which messages should be accepted.

### NOTES ON SITUATION VI.

(a) *Right to control the telegraph.*—The first situation involves the right of a neutral to prohibit the sending of cipher messages by a belligerent from a neutral point to his home government.

In this case, as stated, the message is submitted in cipher by the commander of a United States war vessel for transmission to his home government.

The inference would without reasonable question be that such message would be military in its nature, because sent by a military commander to his home government, and further because embodied in cipher.

The situation then further reduces to that of the right of a neutral to regulate or control the sending of official military dispatches from points within his territory to a belligerent government.

The general right of control of the telegraphic communication by a government has been repeatedly claimed and exercised by various governments, particularly in case of such lines as pass from one state to another. In general this control extends to the right to demand priority in the transmission of government dispatches or to absolute control in case of necessity.

The character of the act would be the same should the message be submitted for transmission as in the situation given whether the line of transmission were by land or submarine telegraph. The possibilities of interruption of the transmission by the other belligerent would, however, be very different in the two cases.

*Control by the United States.*—The right of control of cables has been asserted in very definite form by the United States. A somewhat full discussion elsewhere presented before this Naval War College indicates that—

The right to legislate for this form of property is therefore in the power of the state, or in case no legislation has been enacted the legal control is in the proper department of the Government. This position was affirmed by Secretary Fish as early as July 10, 1869, as follows:

“It is not doubted by this Government that the complete control of the whole subject, both of the permission and the regulation of foreign intercourse, is with the Government of the United States, and that however suitable certain legislation on the part of a State of the Union may become, in respect to proprietary rights in aid of such enterprises, the entire question of allowance or prohibition of such means of foreign intercourse, commercial or political, and of the terms and the conditions of its allowance, is under the control of the Government of the United States.” (Wilson, *Submarine Telegraphic Cables in their International Relations*, p. 10.)

President Grant took practically the same position in his message of December, 1875, and since that time the position has often been reaffirmed. All foreign sub-

marine cables having a terminus in the United States have been landed under a distinct condition that the "Executive permission is to be accepted and understood by the company as being subject to any future action of Congress in relation to the whole subject of submarine telegraphy." A late opinion of the Attorney-General, in accordance with which the President was entitled to act and to order all the departments of executive character to act, sums up the matter as follows:

The preservation of our territorial integrity and the protection of our foreign interests is intrusted, in the first instance, to the President. \* \* \* The President has charge of our relations with foreign powers. It is his duty to see that in the exchange of comities among nations we get as much as we give. He ought not to stand by and permit a cable to land on our shores under concessions from a foreign power which does not permit our cables to land on its shores and enjoy there facilities equal to those accorded its cable here. \* \* \* The President is not only the head of the diplomatic service, but commander in chief of the Army and Navy. A submarine cable is of inestimable service to the Government in communicating with its officers in the diplomatic and consular service, and in the Army and Navy when abroad. The President should therefore demand that the Government have precedence in the use of the line, and this was done by President Grant in the third point of his message. \* \* \* The Executive permission to land a cable is of course subject to subsequent Congressional action. The President's authority to control the landing of a foreign cable does not flow from his right to permit it in the sense of granting a franchise, but from his power to prohibit it should he deem it an encroachment on our rights or prejudicial to our interests. The unconditional landing of a foreign cable might be both, and therefore to be prohibited, but a landing under judicious restrictions and conditions might be neither, and therefore to be permitted in the promotion of international intercourse. (22 Opins. Atty. Gen., p. 25.)

*Hongkong-Manila cable in 1898.*—Certain correspondence carried on during the Spanish-American war of 1898 shows that a new cable between a point occupied by a belligerent and a neutral point could not properly be laid in time of war without laying the neutral open to the suspicion of violation of neutrality.

*Mr. Hay to Mr. Day.*

AMERICAN EMBASSY,  
London, May 11, 1898.

The Marquis of Tweeddale, president of Hongkong and Manila Telegraph, informs me that they hold their concessions from Spanish Government,

on condition that they shall not send telegrams when forbidden by Spain. This formal order has been given by Spain. They are therefore compelled to cease working for the present. He professed friendly feelings and desire that we should establish ourselves permanently in Philippine Islands, but declared inability to act otherwise in view of his concessions.

HAY.

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*Mr. Day to Mr. Hay.*

DEPARTMENT OF STATE,  
Washington, May 22, 1898.

Spanish control by special franchise cable from Manila to Hongkong. Admiral Dewey has possession of the end of the cable at Manila, but can not control end at Hongkong. British ambassador has telegraphed British minister for foreign affairs for permission to land new cable at Hongkong, to be constructed by American company; he also advises British minister for foreign affairs that you will see him on the subject. See him at once and ascertain if concession can be had for American company.

DAY.

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*Mr. Day to Mr. Hay.*

DEPARTMENT OF STATE,  
Washington, May 31, 1898.

SIR: I have received your telegram of the 26th instant, which, deciphered, reads as follows:

British minister for foreign affairs is taking opinion of the law officers of the Crown regarding Manila cable. Answer not yet received, but I have reason to think it will be negative. Concessions regarded as violation of neutrality.

Respectfully, yours,

WILLIAM R. DAY.

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*Mr. Hay to Mr. Day.*

AMERICAN EMBASSY,  
London, June 1, 1898.

British Government regret not at liberty to comply with our request to land cable at Hongkong.

HAY.

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*Mr. Hay to Mr. Day.*

AMERICAN EMBASSY,  
London, June 1, 1898.

SIR: Referring to my dispatch No. 407, of the 24th of May, and to my cabled dispatch of the 26th of May, I now have the honor to transmit a copy of a note just received from the Marquis of Salisbury, in which he informs me

that he has consulted the lord chancellor and the attorney and the solicitor general in regard to our request that landing facilities at Hongkong should be granted to an American cable from Manila, and expresses his regret that as he is advised by Her Majesty's Government is not at liberty to comply with the proposal of the Government of the United States.

As you will have learned by my cable dispatch, I had anticipated this decision. My conversation with high diplomatic and legal authorities had convinced me that they could not authorize us to land a cable at Hongkong without a breach of neutrality.

I am, etc.,

JOHN HAY.

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*Lord Salisbury to Mr. Hay.*

FOREIGN OFFICE, *May 27, 1898.*

YOUR EXCELLENCY: You expressed to me on Monday last the desire of the United States Government that a cable should be laid from Manila to Hongkong, and requested that Her Majesty's Government would grant landing facilities at Hongkong for that purpose. You informed me that the United States Government has been desirous of employing the agency of the Eastern Telegraph Company for the conveyance of their messages, but that the company had been compelled to refuse their application by an intimation from the Spanish Government that the concessions of the company would be forfeited if they assented to it. I have consulted the lord chancellor and the attorney and solicitor general in respect to your excellency's communication, and regret to inform you that, as I am advised, Her Majesty's Government is not at liberty to comply with the proposal of the Government of the United States.

I have, etc.,

SALISBURY.

(Foreign Relations U. S., 1898, p. 976.)

If consent by the neutral in time of war to the laying of a new cable between belligerent and neutral territory would be regarded as contrary to neutrality, the use for warlike purposes of one already laid would be open to question.

*Carriage of military dispatches.*—It may be said that the general character of the telegraphic service must be such as to give the neutral some reasonable ground for refusing to receive the dispatch in question or any other dispatch for transmission.

There has been much discussion in regard to the carriage of military dispatches by neutral ships, and it is generally held an act which renders the ship liable to penalty.

Speaking of the general subject of carriage of dispatches by neutral ships Hall says:

Despatches not being necessarily noxious, a neutral carrier is not necessarily exposed to a penalty for having made a specific bargain to carry them. He renders himself liable to it only when there is reasonable ground for belief that he is aware of their connection with purposes of war. As the bearer of letters can not be assumed to be acquainted with their contents, the broad external fact of their destination is taken as the test of their character, and consequently as the main ground for fixing him with or exonerating him from responsibility. Two classes of despatches are in this manner distinctly marked. Those which are sent from accredited diplomatic or consular agents residing in a neutral country to their government at home, or inversely, are not presumably written with a belligerent object, the proper function of such agents being to keep up relations between their own and the neutral state. The despatches are themselves exempt from seizure, on the ground that their transmission is as important in the interests of the neutral as of the belligerent country; and to carry them therefore is an innocent act. Those on the other hand which are addressed to persons in the military service of the belligerent, or to his unaccredited agents in a neutral state, may be presumed to have reference to the war, and the neutral is bound to act on the presumption. If therefore they are found, when discovered in his custody, to be written with a belligerent purpose, it is not open to him to plead ignorance of their precise contents; he is exonerated by nothing less than ignorance of the fact that they are in his possession or of the quality of the person to whom they are addressed. (Hall, *International Law*, 5th ed., p. 675.)

The service rendered by the means of the telegraph may be vastly more important for the issue of the war than any service through the transmission of dispatches by ships or messengers. The element of time, so vital in military operations, is practically eliminated by the use of the telegraph in communication.

In the general operations of war the present network of cable and telegraph lines furnishes, if allowed to be used freely for military purposes, means of information far more effective than any system of scouts in making known hostile movements and in anticipating the enemy.

*Use of cables during Spanish-American war of 1898.*—The cables from neutral points during the Spanish-American war in 1898 both furnished information and transmitted military dispatches to the United States, indeed the cables did much in the way of furnishing information which the scouting vessels were unable to obtain. The

telegraph also furnished the general information in regard to movements of the forces.

There were but few instances in which any objection was offered by neutral authorities to entire freedom of use of cable and telegraph lines.

That the consular and other representatives will be expected to take advantage of telegraphic communication for warlike purposes is evident from such instructions as were issued by the United States in 1898:

DEPARTMENT OF STATE,  
Washington, April 15, 1898.

*To the consular officers of the United States:*

GENTLEMEN: You are hereby instructed to keep a sharp lookout for the arrival and departure of Spanish war ships or other suspicious vessels that may possibly be fitting out as privateers, and to telegraph at once to the Department full information in the matter when in your discretion it seems of sufficient importance. In the case of suspected privateers you will also inform the diplomatic representative of the United States, if there be one in your country, in order that he can make proper representations to the Government, with a view of preventing the vessel's departure, if possible.

If there be no diplomatic representative in the country where you are stationed or if you be in a colonial dependency, like representations should at once be made through the consul-general, if there be one, or if not, by you directly to the local authority. You will also be alert to catch anything that will be of interest or value in case hostilities begin, and keep the Department fully advised.

All consuls will be expected to remain at their posts during the continuance of the present conditions, and leaves of absence will only be granted in very exceptional cases and for reasons of the greatest urgency.

Respectfully, yours,

WILLIAM R. DAY,  
*Assistant Secretary.*

(Foreign Relations, U. S., 1898, p. 1169.)

*Attitude of foreign governments.*—Apparently, as telegraphic communication was not closed, the sending of telegrams in regard to the war was not regarded as the use of a port "for any warlike purpose."

The government notice issued from the office of the colonial secretary in Jamaica, April 23, 1898, regarding the Spanish-American war states that—

During the continuance of the present state of war, all ships of war of either belligerent are prohibited from making use of any port or roadstead in the United Kingdom, the Isle of Man, or the Channel Islands, or in any of



Her Majesty's colonies or foreign possessions or dependencies, or of any waters subject to the territorial jurisdiction of the British Crown, as a station or place of resort for any warlike purpose, or for the purpose of obtaining any facilities for warlike equipment.

The Spanish Red Book of 1898, containing the diplomatic negotiations of that State during the Spanish-American war, contains many references to the matter of regulation of telegraphic communication, particularly by means of submarine cables. The Spanish authorities demanded that the use of the cable between Mole St. Nicholas and Santiago be suspended so soon as Santiago should be occupied by American troops. The company claimed that it could not do otherwise than affirm that its continued action was under *vis major* (communications No. 59 and 65). Other protests were entered in regard to the use of cables touching neutral points, but few definite conclusions were reached.

It is evident that the general opinion in 1898 was that messages in regard to the war could be received and transmitted from neutral points in the absence of express prohibition. The representative of one of the belligerents was forbidden to telegraph the arrival of the *Oregon* at the Barbadoes. The authorities, however, learning that the representative of the other belligerent had informed his Government of the arrival, allowed like privileges to both.

At other points telegrams were subjected to delay. In other cases more specific action was taken.

Portugal took definite action to secure the telegraphic service of that country against violation of neutrality in 1898 by discontinuing a portion of the service. The following is the announcement

DIRECTION OF THE TELEGRAPHIC AND POSTAL SERVICES,  
DEPARTMENT OF TELEGRAPHS.

It is announced by superior order that at the semaphoric stations on the Continent, the Azores, and Madeira the telegraphic sea-notice service has been discontinued (to which reference is made in articles 274, 275, 276, 277, and 278 of the regulations relative to telegraphic correspondence of December 10, 1892) as regards that portion of it which relates to the appearance, entrance, and departure of war vessels of all nationalities; but the other semaphoric services mentioned in articles 265 to 273 of the said regulations,

and in articles 62 and 63 of the international telegraphic regulations (Budapest revision), will be continued.

Direction of the telegraphic and postal services, April 27, 1898.

For the director-general of posts and telegraphs.

ALFREDO PEREIRA.

(Foreign Relations of U. S., 1898, p. 895.)

The Publication for the Danish West India Islands in the Spanish-American war of 1898 says:

Furthermore, dispatches from or to any of the governmental authorities of any of the belligerent powers are liable to be considered as contraband of war, which it is forbidden to carry.

If it is forbidden to carry such dispatches on board neutral ships, it might be even more reasonable to prohibit their transmission by the more expeditious means of the telegraph; for the neutral alone can guard against the transmission of hostile dispatches by telegraph except so far as submarine or other lines are liable to interruption by the belligerents. The belligerent can not guard against such action as effectively as in transportation of dispatches by ship.

Les particuliers, ressortissant à un État neutre, qui expédient de la contrebande de guerre, le font à l'insu de leur gouvernement, et celui-ci ne peut être responsable d'actes qu'il a ignorés. La situation n'est plus la même quand il s'agit de l'emploi des câbles. Dans la plupart des pays, le télégraphe constitue un service public et chaque État, en concédant le droit d'atterrissement à des Compagnies privées, leur impose des obligations spéciales, notamment celle de ne pouvoir transmettre de correspondances que par l'intermédiaire de ses bureaux. L'État, auquel les articles 7 et 8 de la convention de Saint-Petersbourg accordent un droit de contrôle sur le service international, a donc le devoir de surveiller les télégrammes; il doit s'abstenir de transmettre ou de délivrer les dépêches qui lui paraissent contraires à l'impartialité qui doit régir ses relations avec les belligérants. En agissant autrement, il donne une aide indirecte à l'un des belligérants et sa conduite justifie des mesures de rigueur contre le câble.

L'État neutre devrait même, pour faire connaître aux particuliers et aux autres États son intention de ne favoriser par ce moyen aucun des belligérants, insérer dans sa déclaration de neutralité des dispositions semblables à celles qui furent édictées par le Brésil en 1898.

(F. Rey in *Revue Générale de Droit International Public*, 1901, page 737.)

By the fifth section of the neutrality proclamation of Brazil in 1898:

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.

This position implies that the telegraph lines can be used only for innocent purposes. It is doubtful, however, whether this prohibition as worded would cover a message sent by the commander of a belligerent war vessel.

The inference would certainly be that a cipher message presented by a naval officer for transmission from a neutral port to his home government would be military in its nature. Even in the absence of statement by the neutral, by proclamation or otherwise, in regard to the use of the telegraph by the belligerents, it would be entirely proper for a neutral to forbid such use as being of the nature of unneutral service which would probably lay the means of the service open to interruption by the other belligerent, and this with just cause.

*Conclusion.*—The action of the neutral authorities would be correct and justly within their rights. Hence the protest of the commander in the first instance need not be entertained by the neutral.

(b) *Government censorship.*—The refusal of the neutral authorities to allow the transmission of an openly worded message unless allowed to reword the message without materially changing its apparent meaning, and the claim of the neutral authorities to the right to refuse to transmit any portions of the message, provided they give notice to the commander what portions of the message will not be transmitted, is next brought under consideration.

It has been granted that the refusal of the neutral to receive a dispatch apparently military in character and in cipher is clearly within the rights of the neutral.

It is not difficult to understand that an openly worded dispatch apparently innocent upon its face, when read in accordance with a prearranged code, may be in reality a cipher dispatch, and it is against such a contingency that the neutral authorities seem to be guarding. The protest of the commander against the rewording of the

dispatch would be in evident support of the neutral view. Under such circumstances the position of the neutral authorities is clearly within their right.

The refusal to transmit portions of the message raises the question of the right of the authorities to make changes in a message received for transmission from the representative of a state. Such action, without previous notice and consent of the commander, might make changes in the intent of the communication of such nature as to distinctly injure his cause.

As even entry to the neutral port is a privilege and not a right, and as any commercial transaction with those upon the shore is a privilege also, it is entirely within the rights of the neutral to regulate this communication.

*Conclusion.*—Accordingly, the neutral authorities have full right to prohibit the transmission of any or all messages, and unless the neutral authorities and the commander of the belligerent ship can agree upon the form of the message, the neutral authorities may even absolutely refuse to allow its transmission.

The position of State Y is in all cases correct, though State Y would have no authority to mutilate or change a message already received.