

International Law Studies – Volume 7  
International Law Situations with Solutions and Notes  
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# International Law Situations,

WITH SOLUTIONS AND NOTES.

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## SITUATION I.

While a United States war vessel is at anchor within the area of the coaling station leased from Cuba at Guantanamo a fugitive from Cuban justice comes on board. The properly authorized Cuban officers demand that the fugitive be immediately surrendered to them.

How should the request of the Cuban officers be treated?

## SOLUTION.

An alleged fugitive from Cuban justice coming on board of a war vessel of the United States within the area of the coaling station leased from Cuba at Guantanamo should under ordinary circumstances be turned over by the commander of the United States war vessel to the commandant of the station.

The subsequent treatment of the alleged fugitive, by the commandant should be governed by the terms of the lease (article 4) and by such general or special instructions as may have been issued by the United States Government.

## NOTES ON SITUATION I.

*General.*—This Situation I is proposed in order to illustrate the complicated relationships introduced by the recent practice of transfer of jurisdiction, or the transfer of the right to exercise state authority, without the transfer of sovereignty.

*Jurisdiction in general.*—The jurisdiction over territory may be based on sovereignty, lease, or other ground.

The jurisdiction based on sovereignty is in general exclusive, though exceptions are sanctioned by international law and international practice. The jurisdiction based upon lease is naturally dependent upon the conditions of lease. The leases vary.

*Chinese lease to Germany.*—The lease of the Kiaochow region by China to Germany March 6, 1898, provides that—

His Majesty the Emperor of China is willing that German troops should take possession of the above-mentioned territory at any time the Emperor of Germany chooses. China retains her sovereignty over this territory, and should she at any time wish to enact laws or carry out plans within the leased area she shall be at liberty to enter into negotiations with Germany with reference thereto: *Provided always*, That such laws or plans shall not be prejudicial to the German interests. Germany may engage in works for the public benefit, such as waterworks, within the territory covered by the lease without reference to China. Should China wish to march troops or to establish garrisons therein, she can only do so after negotiating with and obtaining the express permission of Germany.

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III. During the continuation of the lease China shall have no voice in the government or administration of the leased territory. It will be governed and administered during the whole term of ninety-nine years solely by Germany, so that the possibility of friction between the two powers may be reduced to the smallest magnitude. The lease covers the following districts: \* \* \* Chinese ships of war and merchant ships and the ships of war and merchant ships of countries having treaties and in a state of amity with China shall receive equal treatment with German ships of war and merchant ships in Kiaochow Bay during the continuance of the lease. Germany is at liberty to enact any regulation she desires for the government of the territory and harbor, provided such regulations apply impartially to the ships of all nations, Germany and China included.

IV. Germany shall be at liberty to erect whatever light-houses, beacons, and other aids to navigation she chooses within the territory leased and along the islands, and coasts approaching the entrance to the harbor. Vessels of China and vessels of other countries entering the harbor shall be liable to special duties for the repair and maintenance of all light-houses, beacons, and other aids to navigation which Germany may erect and establish. Chinese vessels shall be exempt from other special duties. (U. S. Foreign Relations, 1900, 384.)

*Chinese lease to Russia.*—In the treaty leasing Port Arthur to Russia March, 27, 1898, there were the following articles:

ART. I. It being necessary for the due protection of her navy in the waters of north China that Russia should possess a station she can defend, the Emperor of China agrees to lease to Russia Port Arthur and Talienwan, together with the adjacent seas, but on the understanding that such lease shall not prejudice China's sovereignty over this territory.

ART. IV. The control of all military forces in the territory leased by Russia and of all the naval forces in the adjacent seas, as well as of the civil officials in it, shall be vested in one high Russian official, who shall, however, be designated by some title other than governor-general (tsungtu) or governor (hsunfu). All Chinese military forces shall without exception be withdrawn from the territory, but it shall remain optional with the ordinary Chinese inhabitants to remain or to go, and no coercion shall be used toward them in this matter. Should they remain, any Chinese charged with a criminal offense shall be handed over to the nearest Chinese official to be dealt with according to Article VIII of the Russo-Chinese treaty of 1860.

ART. VI. The two nations agree that Port Arthur shall be a naval port for the sole use of Russian and Chinese men-of-war, and be considered as an unopened port so far as the naval and mercantile vessels of other nations are concerned. As regards Talienwan, one portion of the harbor shall be reserved exclusively for Russian and Chinese men-of-war, just like Port Arthur, but the remainder shall be a commercial port, freely open to the merchant vessels of all countries.

*Chinese lease to Great Britain.*—The provisions of the convention for the lease of Wei-hai-wei to Great Britain, July 1, 1898, are somewhat different.

The territory leased shall comprise the island of Liu Kung and all the islands in the bay of Wei-hai-wei and a belt of land ten English miles wide along the entire coast line of the bay of Wei-hai-wei. Within the above-mentioned territory leased Great Britain shall have sole jurisdiction.

It is also agreed that within the walled city of Wei-hai-wei Chinese officials shall continue to exercise jurisdiction, except so far as may be inconsistent with naval and military requirements for the defense of the territory leased.

*Chinese lease to France.*—A convention for the lease of Kuang Chau Wan by China to France was made on May 27, 1898, and ratified January 5, 1900.

## ARTICLE I.

The Chinese Government, in consideration of its friendship for France, has given by a lease for 99 years Kuang Chau Wan to the French Government to establish there a naval station with coaling depot, but it is understood that this shall not offset the sovereign rights of China over the territory ceded.

## ARTICLE III.

The territory shall be governed and administered during the 99 years of the lease by France alone, so that all possible misunderstanding between the two countries may be obviated.

The inhabitants shall continue to enjoy their property; they may continue to inhabit the leased territory and pursue their labors and occupations, under the protection of France, so long as they respect its laws and regulations. France shall pay an equitable price to the native property owners for the land which it may wish to acquire.

## ARTICLE V.

Steamers of China as well as the ships of the powers having diplomatic and commercial relations with her shall be treated within the leased territory in the same manner as in the opened part of China.

France may issue all the regulations she may wish for the administration of the territory and of the ports and particularly levy light-house and tonnage dues destined to cover the expense of erecting and keeping up lights, beacons, and signals, but such regulations and dues shall be impartially used for ships of all nationalities.

## ARTICLE VI.

If cases of extradition should occur, they shall be dealt with according to the provisions of existing conventions between France and China, particularly those regulating the neighboring relations between China and Tongking.

*Hongkong convention.*—The convention with Great Britain for the extension of the Hongkong territory signed June 9, 1898, provided as to jurisdiction that "If cases of extradition of criminals occur, they shall be dealt with in accordance with the existing treaties between Great Britain and China and the Hongkong regulations."

*General character of leases.*—Such provisions show differences in the terms and conditions of leases, the general

idea being that the jurisdiction in whole or in part may pass to the lessee, while the lessor retains the sovereignty. By the terms of some of these conventions leasing territories, the rights ordinarily attributed to sovereignty are passed to the lessee, as the right to construct fortifications, establish naval stations, levy taxes, etc. Such rights, however, must be specific, as otherwise the right to exercise state authority resides exclusively in the state possessing sovereignty over a given area. Chief Justice Marshall, in the *Schooner Exchange v. M'Faddon*, in 1812, stated the matter clearly.

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its own sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restrictions.

All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory. (7 Cranch, U. S. Supreme Court Reports, 116.)

*Creation of a Servitude.*—The effect of these conventions leasing territory of one state to another state for coaling stations, etc., is to create a restriction upon the exercise of territorial jurisdiction by the lessor state in favor of a lessee state. This permits within the territory of the lessor state the exercise of powers ordinarily exclusively in the state having sovereignty and thus creates a positive servitude which implies that “a state is under obligation to permit within its territory another state to exercise certain powers.” (Wilson and Tucker, *International Law*, 146.)

Hall says of servitudes in general,

It is usual in works on international law to enumerate a list of servitudes to which the territory of a state may be subjected. Among them are the reception of foreign garrisons in fortresses,

fishery rights in territorial waters, telegraphic and railway privileges, the use of a port by a foreign power as a coaling station, an obligation not to maintain fortifications in particular places, and other derogations of like kind from the full enforcement of sovereignty over parts of the national territory. These and such like privileges or disabilities must, however, be set up by treaty or equivalent agreement; they are the creatures not of law but of compact. The only servitudes which have a general or particular customary basis are, the above-mentioned right of innocent use of territorial seas, customary rights over forests, pastures, and waters for the benefit of persons living near a frontier, which seem to exist in some places, and possibly a right to military passage through a foreign state to outlying territory. In their legal aspects there is only one point upon which international servitudes call for notice. They conform to the universal rule applicable to "jura in re aliena." Whether they be customary or contractual in their origin, they must be construed strictly. If, therefore, a dispute occurs between a territorial sovereign and a foreign power as to the extent or nature of rights enjoyed by the latter within the territory of the former, the presumption is against the foreign state, and upon it the burden lies of proving its claim beyond doubt or question. (International Law, 5th ed., p. 159.)

*State Department opinion of Chinese leases.*—A memorandum for the office of the Solicitor of the Department of State by Mr. Van Dyne on January 27, 1900, summarizes the Chinese leases.

By the leases made by the Chinese Government of Weihaiwei, Kiaochow, and Port Arthur to Great Britain, Germany, and Russia, respectively, the *jurisdiction* of China over the territories leased is relinquished during the terms of the leases. In the case of Weihaiwei, leased to Great Britain, it is expressly provided that "within the territory leased Great Britain shall have *sole jurisdiction*."

In the lease of Kiaochow to Germany, it is provided that China shall have no voice in the government or administration of the leased territory, but that *it shall be governed and administered during the whole term of the lease by Germany*; that Germany is at liberty to enact any regulation she desires for the government of the territory. Chinese subjects are allowed to live in the territory leased, under the protection of the German authorities, and there carry on their business as long as they conduct themselves as law-abiding citizens. Provision is made for the surrender to the Chinese authorities of fugitive Chinese criminals taking refuge in the leased territory. The Chinese authorities are not at liberty

to send agents into the leased territory to make arrests. The lease declares that China "*retains her sovereignty over this territory.*"

In the lease of Port Arthur to Russia it is provided that the control of all military forces, as well as the *civil officials* in the territory, shall be vested in one high Russian official; that all Chinese military forces shall be withdrawn; that the Chinese inhabitants may remain or go, as they choose; that if they remain, any Chinese charged with a criminal offense shall be handed over to the nearest Chinese official to be dealt with. [Mr. Conger says that the Russian legation informs him that this last provision is not correctly translated, and that, construing it in connection with article 8 of the treaty of 1860, the Russian Government has the right and does try Chinese for crimes committed against Russians.] This lease is expressly declared on the understanding that it "*shall not prejudice China's sovereignty over this territory.*"

As it is expressly stipulated in the leases that China retains *sovereignty* over the territory leased, it could doubtless be asserted that such territory is still *Chinese territory* and that the provisions of our treaties with China granting consular jurisdiction are still applicable therein. But, in view of the express relinquishment of jurisdiction by China, I infer that the reservation of the sovereignty is merely intended to cut off possible future claims of the lessees that the sovereignty of the territory is *permanently* vested in them. The intention and the effect of these leases appear to me to have been the relinquishment by China, *during the term of the leases*, and the conferring upon the foreign power in each case of *all jurisdiction over the territory*. (U. S. Foreign Relations, 1900, 388.)

*Practice under Chinese leases.*—This summary of the nature of jurisdiction in the areas held under lease from China shows a considerable difference in extent of jurisdiction. Since these leases were negotiated practice has shown that Chinese authority was for the most part at an end within the leased areas. The states holding the leases have not established uniform regulations for the government of the leased territories. There have been frequent conflicts and differences of opinion on the subject of the exercise of jurisdiction. The general result has been favorable to the exercise of full power in the leased territory by the lessee as against third states. The principle upon which decisions have been made is that the grant of a specific right carries with it the privilege



of such action as is necessary for the exercise of the right. Wherever definite reservations or agreements occur in the treaty or convention granting the lease, such reservations or agreements are considered to have full force and validity as against any general grant.

*United States and territory relinquished or ceded by Spain in 1898.*—By Article I of the treaty of December 10, 1898, between the United States and Spain (30 U. S. Statutes at Large, 1754) as a result of the Spanish-American war, it is provided:

ARTICLE I. Spain relinquishes all claim of sovereignty over and title to Cuba: and as the island is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation for the protection of life and property.

It is to be observed that by this promise Spain merely “relinquishes all claim of sovereignty over and title to Cuba.” The following article goes further than merely to relinquish sovereignty:

ARTICLE II. Spain cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies and the island of Guam in the Marianas or Ladrones.

While sovereignty and title to Cuba was relinquished, Spain's claim to the other islands mentioned in the second article was ceded to the United States. The status of the areas mentioned in the two articles would therefore be unlike. Porto Rico and the other islands mentioned in the second article would come immediately under the sovereignty of the United States. That the act of Spain is unlike in character in the two instances is fully recognized in the subsequent articles of the treaty which uniformly refer to “the sovereignty relinquished or ceded” “as the case may be.”

By a later article of the treaty it is provided:

ARTICLE XI. The Spaniards residing in the territories over which Spain by this treaty cedes or relinquishes her sovereignty shall be subject in matters civil as well as matters criminal to the jurisdiction of the courts of the country wherein they reside, pur-

suant to the ordinary laws governing the same; and they shall have a right to appear before such courts and to pursue the same course as citizens of the country to which the courts belong.

This right of the Spaniards to be subject "to the jurisdiction of the courts of the country wherein they reside" would be a right which would generally extend to citizens of other states under the "most favored nation treatment."

Further, in accordance with Article XVI:

It is understood that any obligations assumed in this treaty by the United States with respect to Cuba are limited to the time of its occupancy thereof; but it will, upon the termination of such occupancy, advise any government established in the island to assume the same obligations.

The implication of this article is that a responsible government would be established in Cuba and that this government would be advised to assume the same obligations in regard to the civil and criminal jurisdiction which the United States had assumed.

*Coaling and naval stations in Cuba.*—The so-called "Platt amendment" of March 2, 1901, provided:

That in fulfillment of the declaration contained in the joint resolution approved April twentieth, eighteen hundred and ninety-eight, entitled "For the recognition of the independence of the people of Cuba, demanding that the Government of Spain relinquish its authority and government in the island of Cuba, and to withdraw its land and naval forces from Cuba and Cuban waters, and directing the President of the United States to use the land and naval forces of the United States to carry these resolutions into effect," the President is hereby authorized to "leave the government and control of the island of Cuba to its people" so soon as a government shall have been established in said island under a constitution which, either as a part thereof or in an ordinance appended thereto, shall define the future relations of the United States with Cuba, substantially as follows:

Among the promises defining the relations of the United States with Cuba the seventh is as follows:

That to enable the United States to maintain the independence of Cuba, and to protect the people thereof, as well as for its own defense, the government of Cuba will sell or lease to the United States lands necessary for coaling or naval stations at certain

specified points, to be agreed upon with the President of the United States. (31 U. S. Statutes at Large, 895.)

The articles of this amendment became an appendix to the constitution of Cuba promulgated on the 20th of May, 1902. By an agreement between the United States and Cuba, February 16-23, 1903, the Republic of Cuba leased certain areas in Guantanamo and in northern Cuba to the United States for the purposes of coaling and naval stations. In regard to Article I of this agreement, which defines the areas leased, the second and third articles of the agreement say:

#### ARTICLE II.

The grant of the foregoing article shall include the right to use and occupy the waters adjacent to said areas of land and water, and to improve and deepen the entrances thereto and the anchorages therein, and generally to do any and all things necessary to fit the premises for use as coaling or naval stations only, and for no other purpose.

Vessels engaged in the Cuban trade shall have free passage through the waters included within this grant.

#### ARTICLE III.

While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above-described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas, with the right to acquire (under conditions to be hereafter agreed upon by the two Governments) for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain, with full compensation to the owners thereof.

These areas, commonly called Guantanamo and Bahia Honda, are therefore *leased* to the United States and not *ceded*. The United States, therefore, has only a qualified jurisdiction over these regions and not sovereignty, as in Porto Rico and the Philippines, and the conditions of exercise of jurisdiction in these leased areas are accordingly unlike the conditions within the areas over which the United States exercises sovereignty.

The exercise of jurisdiction in leased areas varies according to the provisions of the lease.

*Fugitive criminals in leased area.*—The agreement of July 2, 1903, leased certain areas in Guantanamo and in Bahia Honda in Cuba to the United States for naval or coaling stations. Article IV of this lease provided that “Fugitives from justice charged with crimes or misdemeanors amenable to Cuban law, taking refuge within said areas, shall be delivered up by the United States authorities on demand by duly authorized Cuban authorities.”

Under this article of the lease a fugitive from Cuban justice taking refuge within the leased area should be delivered to the duly authorized Cuban authorities. The agreement upon the areas made February 16–23, 1903, distinctly specifies that the lease covers the described areas of land and water. Therefore under ordinary circumstances a fugitive from Cuban justice entering the leased areas would be surrendered.

By Article I of the agreement of February 16–23, 1903, “the following described areas of land and water” are leased to the United States by Cuba. The terms of the agreement specify that the lease covers certain adjacent waters within definite limits and carries also “the right to use and occupy the waters adjacent to said areas of land and water.” The United States obtained complete jurisdiction over certain waters and qualified rights in adjacent waters.

Within the area outside either of the above-mentioned waters the ordinary course in regard to fugitives from justice would be followed. The waters adjacent to the waters over which the United States is granted complete jurisdiction are subject to the use of the United States “generally to do any and all things necessary to fit the premises for use as coaling or naval stations only, and for no other purpose.” The ordinary course in regard to the fugitives from justice would therefore be followed there.

The terms of this lease proclaim, as in the cases of the Chinese leases, that it is jurisdiction and not sovereignty that is passed by the lease. The conditions of the lease of

Cuban territory to the United States do not fix a limit of a period of time, as in the Chinese leases, but the United States agrees to pay a fixed sum per year so long as it shall occupy and use the leased area. Further, the United States undertakes as part equivalent for this lease "to maintain the independence of Cuba and to protect the people thereof." Thus the United States assumes an additional obligation over and above the obligations usually assumed in the Far East.

The status of the leased areas therefore needs definition.

The question next raised would naturally be whether a war vessel of the United States under international law and under the terms of the treaties with Cuba should surrender a fugitive from Cuban justice.

*Jurisdiction over vessels in leased area.*—The jurisdiction over a given vessel will depend upon the character of the vessel and upon its relation to the sovereign and to the other parties concerned. If it is a private merchant vessel of a third state not party to the lease, its relations may be unlike those of a similar vessel of the parties to the lease. The relations of public vessels would be unlike those of private vessels.

The regulations for the government of the Navy of the United States, 1905, article 308, state that "The right of asylum for political or other refugees has no foundation in international law. In countries, however, where frequent insurrections occur, and constant instability of government exists, usage sanctions the granting of asylum; but even in the waters of such countries officers should refuse all applications for asylum except when required by the interests of humanity in extreme or exceptional cases, such as the pursuit of a refugee by a mob. Officers must not directly or indirectly invite refugees to accept asylum." According to this regulation asylum should not be granted to a refugee under other than exceptional circumstances.

Within both land and water areas leased to the United States fugitives from Cuban justice would under Article

IV "be delivered up by the United States authorities on demand by duly authorized Cuban authorities."

Granting that the fugitive escapes to a war vessel of the United States while the vessel is within the area which is under the complete jurisdiction of the United States, would the provisions of the treaty apply to the war vessel and should the commander "deliver up" the fugitive under the terms of the treaty? Of course, Cuba could make a law by which a political offense might be a crime or misdemeanor. Should the commander when within the leased area deliver up a political refugee whom he might retain under other circumstances?

By Article VI of the Constitution of the United States, "This Constitution and the Laws of the United States which shall be made in pursuance thereof and all treaties made or which shall be made, under the authority of the United States, shall be the supreme Law of the Land."

An agreement of the nature of this lease would become in effect law and would bind all officials within the area. Further, the agreement was made with the specific purpose of prescribing a method by which fugitives from Cuban justice escaping into the area within the military control of the United States should be recovered by the proper Cuban authorities.

To set up a claim that a war vessel of the United States would be exempt from an agreement made with special reference to the establishment of a naval base and the control of its area would be inconsistent with a reasonable interpretation of the terms of the agreement.

*Reciprocal obligations.*—There is also a reciprocal agreement which, in addition to prescribing that fugitives from Cuban justice "shall be delivered up by the United States authorities," provides that—

On the other hand, the Republic of Cuba agrees that fugitives from justice charged with crimes or misdemeanors amenable to United States law, committed within said areas, taking refuge in Cuban territory, shall, on demand, be delivered up to duly authorized United States authorities.

*Competence of commandant of naval station.*—There may sometimes be doubt as to the identity of the criminal,

the proper method of procedure, the extent of the authority of the Cuban official, the nature of the crime, or other matters with which the commander of a war vessel could hardly be expected to be familiar.

The commandant of the naval station would naturally be familiar with such matters because acting under an agreement relating thereto. It would seem safest and in the end a proceeding little open to question to turn a fugitive from Cuban justice escaping to a war vessel within the leased area at Guantanamo over to the commandant of the naval station.

The commandant would be bound to turn the fugitive from justice over to the duly authorized Cuban authorities. Of course, the commandant would be under obligation to satisfy himself of the identity of the criminal, of the proper authorization of the officials demanding that the fugitive be surrendered, and of such other facts as would secure the fulfillment of Article IV of the lease of 1903.

As the attitude of the United States is in general unfavorable to the harboring of fugitives from justice on board war vessels, as the practical inconveniences of having such a person on board a war vessel are considerable, and as Article IV of the lease provides for the giving up of fugitives within the leased areas "on demand by the proper Cuban authorities," it would seem proper to regard a war vessel of the United States as subject to the terms of the lease and as being of the nature of a floating naval station for the time being within the leased area and under provisions of the lease.

*Conclusion.*—An alleged fugitive from Cuban justice coming on board a war vessel of the United States within the naval coaling station at Guantanamo leased from Cuba should under ordinary circumstances be turned over by the commander of the United States war vessel to the commandant of the naval station.

The subsequent treatment of the alleged fugitive by the commandant should be governed by Article IV of the lease and by such general or special instructions as may have been issued by the United States Government.