

International Law Studies—Volume 12

International Law Situations

The thoughts and opinions expressed are those of the authors and not necessarily of the U.S. Government,  
the U.S. Department of the Navy or the Naval War College.

### SITUATION III.

#### CUBA NEUTRAL.

[It is granted that the Declaration of London is binding.]

There is war between the United States and State X. Other States are neutral. Supplies of the nature of conditional contraband are being carried by merchant vessels of State Y to Habana, whence they are sent by rail to Guantanamo. Cruisers of State X threaten to capture these merchant vessels. They request protection of the fleet of the United States. The commanding officer replies that he has no authority to afford protection and that any interference by the cruisers of State X would be an offense against State Y. State X maintains that Habana is essentially a hostile destination.

What position is correct?

#### SOLUTION.

Habana is not a hostile destination when the United States and State X are at war and other States are neutral.

The position taken by the commanding officer of the fleet of the United States is correct.

#### NOTES.

*Acquisition of jurisdiction.*—Prior to 1884 the acquisition of territorial jurisdiction was usually based on discovery, occupation, conquest, prescription, gift, exchange, or on some fact which implied the possession of sovereignty over the territory. There was also prior to 1884 a fairly well established system of protectorates, with rights of the protector and protected defined in agreements. With the expansion of the political interests of the leading States of the world into remote regions, particularly characteristic of the last 20 years of the nineteenth century, the claim to the right to exercise

jurisdiction came to be based on other grounds. Such attenuated rights as those claimed under the doctrine of the "sphere of influence" or the "sphere of interest" began to be maintained. Other methods of obtaining actual or prospective jurisdiction in smaller or weaker States were devised. The practice of leasing territory became common from the late years of the nineteenth century. Some of these leases involve absolute exclusion of the lessor State from any rights within the leased area. Other leases only confer certain specified rights upon the leaseholder. Some of the leases provide that the jurisdiction over the territory shall pass back to the lessor State in case the lessee for any reason withdraws from the territory.

*Degree of protection.*—The protection given a political unity by a State which owes it protection varies widely. In some instances the protected community almost loses its own identity, while in other cases the protected community is in nearly every respect equal to other States. The protection exercised may be for the good of all States and may make the development of the protected State possible. Many States are bound by treaties which limit their freedom of action in certain respects. This does not destroy their statehood. The action of the State is limited by its own will and only to the extent specified in the treaty.

*Congo lease.*—One of the early leases of territory was on the part of the Congo Free State to Great Britain. By an agreement of 1894 a strip of territory running along the German frontier for a considerable distance was leased to Great Britain and to be subject to British administration for a period corresponding to that during which Belgium should have control over the Congo territory. Germany maintained that an indefinite lease of this character was equivalent to a cession of the territory, and would injure her political position and interrupt her trade. The agreement with the neutralized Congo Free State was terminated by Great Britain, but apparently rather from diplomatic than from legal reasons.

In a note to Hall's *International Law*, appearing in the fourth edition, about this time, in 1895, the legal aspects of the Congo lease are considered:

Great Britain could only receive a lease of the territory subject to the provisions of antecedent treaties made between the Congo State and Germany, and notwithstanding a slight ambiguity in the language of the treaty made in 1884 between the two States, there can be no doubt that she would have been precluded from levying duties upon goods imported from German sources. As regards the general "political position," the Congo State is neutral, and the treaty provides that in the event of cession of any part of its territory "the obligations contracted by the association" (i. e., the Congo State) "toward the German Empire shall be transferred to the occupier." Assuming, then, for a moment that a lease of indefinite duration is equivalent to a cession, the territory leased to Great Britain would have remained affected by the duties of neutrality, and could not have been used to prejudice the position of Germany. The treaty, it should be added, contains no stipulation, express or implied, that transfer of territory in any form should be dependent on German consent. It is difficult, therefore, to understand the conventional basis of the objection taken, and of legal basis in a wider sense it is evidently destitute. The Congo State has all rights of a neutral State, of which it has not been deprived by express compact. Those rights beyond question include the right to do all State acts which neither compromise nor tend to compromise neutrality. In the particular case the Congo State was clearly competent to grant a lease, because the lease carried with it, of necessity, the obligations of neutrality. Although a lease for an indefinite time may in certain aspects be the equivalent of a cession, in law it is not so; a State may be able to make a cession of territory freed from its own obligations, but in granting a lease it can not give wider powers than it possesses itself, and consequently, altogether apart from the treaty with Germany, the Congo State could not disengage territory from neutral obligations by letting it out upon a subordinate title.

It may be remarked that the Congo State is equally competent to acquire by way of lease, because the territory so acquired can at least be invested with a neutral character at the will of the Congo State, and probably must of necessity be considered, for such time as the connection lasts, to be a temporary extension of the neutral territory (p. 96, n.)

From this discussion of the Congo lease, it is evidently the opinion that the lease can not be held to create rights which did not appertain to the territory before it was



leased, nor confer rights beyond those specified in the agreement and within the competence of the lessor State. The idea that the lease was in fact an actual alienation of the territory seems to be contrary to law and contrary to fact, though it may be that such leased territory may, at some future time, more easily pass under the actual ownership and sovereignty of the lessee. Undoubtedly it was the intention of some lessees to follow the lease by actual acquisition of sovereignty over the leased territory, but on the other hand many leases specifically state that sovereignty is not transferred, and within the last few years there has been a growing tendency, in part, perhaps, due to international jealousy, to insist that the terms of such agreements be observed strictly. While Port Arthur had been leased by China to Russia, yet after the area came within the military occupation of Japan as a result of the Russo-Japanese War, the lease did not pass in a formal manner until the consent of China was given in the treaty of Peking in 1905.

*Establishing coaling stations.*—Since the importance of fuel has made necessary stations from which a convenient supply can be obtained, the States of the world possessing navies have established stations at available points. The character of these stations sometimes involves the actual cession of sovereignty over the area acquired for a fuel or naval station, or at times involves simply a right to keep a supply ship in the territorial waters of a foreign State.

In certain cases, in Asia and Africa, these coaling stations have become the centers of spheres of influence which have developed into actual territorial possessions.

In establishing these coaling or naval stations the terms of cession usually maintain that the sovereignty remains in the State which grants the station to the foreign State. It is evident that for purposes of war the responsibility for acts committed within the area must be either in the granting or in the holding State. If the responsibility is in the granting State, and that State is neutral, then the use of the area for a naval or coaling station would involve a failure to observe neutral obliga-

tions. If the responsibility is in the holding State, and that State is at war, the use of the station would be an act in the ordinary course of war, and the station would be liable to attack or to other treatment to which enemy territory might be liable. It is also evident that such treatment will be logical, as the agreements by which stations are granted look specially to a condition of war. The territory which is leased for a coaling or naval station gains no immunity from the consequences of war in which the lessee is engaged from the fact that the terms of the lease may specify that the sovereignty over the leased territory remains in the lessor. Practice in recent years has shown that, as in the case of Port Arthur leased by China, the lessor's neutrality may be recognized even when the leased territory may be the scene of hostilities.

The treatment of areas leased before the outbreak of hostilities and regularly occupied by the lease-holding State should be distinguished from a neutral port which is used as a base. As Kleen says, there are at the present time many incentives which would lead a belligerent to take advantage of a weak neutral :

Ce n'est que de notre époque que les aides de guerre de cette catégorie ont gagné une grande importance. Après l'énorme développement des moyens d'attaque et de leurs accessoires en suite des progrès techniques, les munitions de guerre ont reçu une augmentation telle, que l'organisation de dépôts de ces objets sur divers points en pays étrangers mais voisins ou situés sur le chemin pour le théâtre de la guerre peut acquérir une signification décisive pour le succès d'une armée. Et depuis que la vapeur est devenue la force motrice des flottes, la permission accordée à une grande marine militaire d'entretenir des dépôts de houille à des stations neutres intermédiaires, serait, surtout sur la route qui conduirait à un ennemi éloigné, d'une valeur inestimable, en facilitant le renouvellement des moyens de locomotion et en épargnant les longs transports. Il devient d'autant plus nécessaire de maintenir le droit et le devoir des neutres de ne point accorder des permissions semblables. Sans l'interdiction, les États neutres plus faibles et possédant des ports d'escale commodes, seront exposés aux pressions des puissances maritimes en guerre prétendant aux faveurs des dépôts, au détriment de la tranquillité et de la neutralité de l'État souverain des côtes.

Le *droit* des neutres d'interdire tout dépôt par un belligérant chez eux n'a guère été révoqué en doute. Il fut déjà reconnu par les premiers auteurs du droit des gens, dans le principe établi par eux de ne tolérer sur le territoire neutre aucune démarche qui soit de nature à seconder les opérations de guerre. Mais en outre, depuis qu'une attention plus grande a été fixée sur les questions y relatives, parce qu'il y a plus de causes qu'autrefois pour la supposition qu'elles surgissent dans la pratique, la dite interdiction par les neutres leur est imposée comme un *devoir*. En effet, l'abus de leurs territoires en vue de quelque dépôt pour la guerre ferait du pays neutre un point d'appui des opérations. (Kleen, *Lois et usages de la Neutralité*, I, p. 487.)

*United States, coaling and naval stations.*—With the development of what is called world politics the acquisition of strategic positions for naval purposes has become important. To the United States this is no new idea, and the necessity for the acquisition of naval bases has been pressed home upon the United States.

President Johnson said, in his third annual message, December 3, 1867:

In our Revolutionary War ports and harbors in the West India islands were used by our enemy, to the great injury and embarrassment of the United States. We had the same experience in our second War with Great Britain. The same European policy for a long time excluded us even from trade with the West Indies, while we were at peace with all nations. In our recent Civil War the rebels and their piratical and blockade-breaking allies found facilities in the same ports for the work, which they too successfully accomplished, of injuring and devastating the commerce which we are now engaged in rebuilding. We labored especially under this disadvantage, that European steam vessels employed by our enemies found friendly shelter, protection, and supplies in West Indian ports, while our naval operations were necessarily carried on from our own distant shores. There was then a universal feeling of the want of an advanced naval outpost between the Atlantic coast and Europe. The duty of obtaining such an outpost peacefully and lawfully, while neither doing nor menacing injury to other States, earnestly engaged the attention of the executive department before the close of the war, and it has not been lost sight of since that time. A not entirely dissimilar naval want revealed itself during the same period on the Pacific coast. The required foothold there was fortunately secured by our late treaty with the Emperor of Russia, and it now seems imperative that the more obvious necessities of the Atlantic coast should not be less carefully provided for. A good and convenient port and



harbor, capable of easy defense, will supply that want. With the possession of such a station by the United States neither we nor any other American nation need longer apprehend injury or offense from any transatlantic enemy. (Richardson's Messages and Papers of the Presidents, Vol. VI, p. 579.)

Johnson's message was written at a time when events had emphasized the need of "naval outposts." In the times of quiet the same need was mentioned in the message of President Hayes, of December 6, 1880. By the treaty of 1884 with Hawaii the United States obtained the right in Pearl River Harbor "to establish and maintain there a coaling and repair station for the use of vessels of the United States."

With the upbuilding of the Navy of the United States the need of coaling and other stations became clear, and these have from time to time been acquired.

*Relation of Cuba to the United States, in consequence of Spanish-American War.*—In this situation the fundamental question which must be first considered is that of the relation of the Republic of Cuba to the United States.

By the treaty of December 10, 1898, "Spain relinquishes all claim of sovereignty over and title to Cuba." (Art. I.)

This provision is unlike that in regard to Porto Rico, Guam, and the Philippines which is, "Spain cedes to the United States the island of Porto Rico," etc.

Before invading Cuba the United States had formally resolved, by act of April 20, 1898—

That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said island except for the pacification thereof, and asserts its determination when that is accomplished, to leave the government and control of the island to its people. (30 U. S. Stat., p. 738.)

The first resolution in this act is—

That the people of the island of Cuba are, and of right ought to be, free and independent.

Few principles have received more complete sanction in repeated decisions than that stated by the United



States Supreme Court in the case of *Jones v. United States* in 1890:

Who is the sovereign, de jure or de facto, of a territory is not a judicial but a political question, the determination of which, by the legislative and executive departments of any government, conclusively binds the judges as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court and has been affirmed under a great variety of circumstances. (137 U. S. Sup. Ct. Rpts., p. 202.)

By the act of April 20, 1898, the United States had declared "that the people of the island of Cuba are, and of right ought to be, free and independent." By the treaty of December 10, 1898, Spain relinquished the claim to sovereignty over Cuba. The United States also disclaimed any disposition or intention to exercise "sovereignty, jurisdiction, or control" over Cuba except for its pacification.

As the courts are bound by the action of the legislative and executive departments, the United States did not legally obtain by the treaty that which had been formally denounced, though the Government did declare its purpose to exercise its authority for the pacification of Cuba. The Government can accordingly exercise its own judgment in deciding when pacification is accomplished. Such a state of peace and tranquillity as was sought by the United States would be advantageous to other States as well as to the United States.

Article XVI of the treaty between the United States and Spain of December 10, 1898, provides that—

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.

It is thus declared that the rights of the United States under this treaty come to an end with the termination of the occupancy.

*Relations of the United States and Cuba by conventional agreements.*—The United States have acquired rights as regards Cuba by virtue of treaties and other

conventional agreements. Certain aspects of the relations under conventional agreements were considered in the Naval War College International Law Situations of 1907. Situation I.

*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 follow:”

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. Stat. L. 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 exercise sovereignty.

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

By the terms of the lease between the United States and the Republic of Cuba, signed July 2, 1903:

ARTICLE I. The United States of America agrees and covenants to pay to the Republic of Cuba the annual sum of two thousand dollars, in gold coin of the United States, as long as the former shall occupy and use said areas of land by virtue of said agreement.

ART. V. Materials of all kinds, merchandise, stores and munitions of war imported into said areas for exclusive use and consumption therein shall not be subject to payment of customs duties nor any other fees or charges, and the vessels which may carry same shall not be subject to payment of port, tonnage, anchorage, or other fees, except in case said vessels shall be discharged without the limits of said areas; and said vessels shall not be discharged without the limits of said areas otherwise than through a regular port of entry of the Republic of Cuba, when both cargo and vessel shall be subject to all Cuban customs laws and regulations and payment of corresponding duties and fees.

It is further agreed that such materials, merchandise, stores and munitions of war shall not be transported from said areas into Cuban territory.

ART. VI. Except as provided in the preceding article, vessels entering into or departing from the Bays of Guantanamo and



Bahia Hondo, within the limits of Cuban territory, shall be subject exclusively to Cuban laws and authorities, and orders emanating from the latter in all that respects port police, customs or health, and authorities of the United States shall place no obstacle in the way of entrance and departure of said vessels, except in case of a state of war. (Treaties and Conventions between the United States and Other Powers, 1776-1909, Vol. I, p. 360.)

By the convention of May 22, 1903, which was proclaimed July 2, 1904, the relations of the United States and Cuba were defined according to the terms of the Platt amendment of March 2, 1901, as follows:

I. That the Government of Cuba shall never enter into any treaty or other compact with any foreign power or powers which will impair or tend to impair the independence of Cuba, nor in any manner authorize or permit any foreign power or powers to obtain by colonization or for military or naval purposes or otherwise lodgment in or control over any portion of said island.

II. That said Government shall not assume or contract any public debt, to pay the interest upon which, and to make reasonable sinking fund provision for the ultimate discharge of which, the ordinary revenues of the island, after defraying the current expenses of government, shall be inadequate.

III. That the Government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty, and for discharging the obligations with respect to Cuba imposed by the treaty of Paris on the United States, now to be assumed and undertaken by the Government of Cuba.

IV. That all acts of the United States in Cuba during its military occupancy thereof are ratified and validated, and all lawful rights acquired thereunder shall be maintained and protected.

V. That the Government of Cuba will execute, and as far as necessary extend, the plans already devised, or other plans to be mutually agreed upon, for the sanitation of the cities of the island, to the end that a recurrence of epidemic and infectious diseases may be prevented, thereby assuring protection to the people and commerce of Cuba, as well as to the commerce of the southern ports of the United States and the people residing therein.

VI. That the Isle of Pines shall be omitted from the proposed constitutional boundaries of Cuba, the title thereto being left to future adjustment by treaty.

VII. 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.

VIII. That by way of further assurance the Government of Cuba will embody the foregoing provisions in a permanent treaty with the United States. (31 U. S. Stat. L., p. 895; Treaties and Conventions, 1776-1909, Vol. I, p. 362.)

The above provisions were also embodied in the Cuban constitution of 1901, which was promulgated May 20, 1902, on which date the United States withdrew "as an intervening power." The articles contain the provisions bearing on the relations of the United States and Cuba so far as concern the international conditions under consideration.

The first article limits the right of Cuba to make compacts with foreign powers which will impair Cuban independence or to alienate control of territory.

The second article limits the power to incur indebtedness.

The third article gives the United States right to intervene to preserve Cuban independence and maintain orderly government.

Articles 4, 5, 6, and 8 have no particular bearing on the situation under consideration.

Article 7 provides for the sale or lease to the United States of lands for coaling or naval stations.

Undoubtedly the United States has by this and other agreements acquired a certain control over Cuba. The intention of the Republic of Cuba was to confine the grant of privileges and rights to the United States by a strict and narrow interpretation. The message of the President of Cuba of November 2, 1903, says—

of two formulas of grant, "sale or lease"—of portions of territory to which the United States had the right for the establishment of naval and coaling stations—the one that would least wound Cuban sentiment was accepted. Of such stations we granted the least number possible, and the conditions inserted in the convention regulating the lease of the same are so many more limitations of that grant, all favorable to the Republic of Cuba. (U. S. Foreign Relations, 1903, p. 365.)

*Importation of war materials.*—Article 5 of the lease of 1903 provides that supplies and munitions of war shall not be subject to customs and other dues if destined for exclusive use in the leased area and discharged therein. Discharge at other points makes such goods liable to regular customs laws.

The United States is therefore specifically prohibited the enjoyment of exceptional advantages in respect to other ports than those held under lease and has no exceptional advantages elsewhere for importation of supplies for the leased areas.

*Interpretation of lease.*—The legal consequences which flow from a lease are not such as follow the transfer of sovereignty. If a State, the neutrality of which is guaranteed or whose jurisdiction over a certain area is in any way qualified as a State, should lease a part of the area, the lease would carry with it only such rights as the lessor was competent to grant according to the maxim “*nemo plus juris in alterum transferre potest, quam ipse habet.*” Such leases are, therefore, strictly construed. It is conceivable that a State which has made a lease of a part of its territory to a foreign State might go to war with the State which held the lease or it might remain neutral. In the event of neutrality, however, the leased territory under the jurisdiction of the belligerent would, according to its character, be liable to the consequences of war. If the leased territory was merely for the purpose of a scientific experiment station, a hospital, or lighthouse, it would be liable to treatment as such; if a naval base or fortification, its liability would correspond. If the lease was made in good faith and not during a war, with the purpose of furnishing the belligerent with a base, the lessor State would not be violating any obligation.

The United States in its leased territory is entitled to the privileges and bound by the obligations of the leases. In the case of Cuba certain international negotiations may be carried on by the Cuban Government without consideration of the United States. The Cuban Army may be organized in accord with Cuban desires. Cer-

tain acts which might imperil the existence of Cuba as a State may not be undertaken because prohibited by the treaty with the United States.

*The Ionian Islands.*—Article I of the treaty of Paris of November 5, 1815, between “Great Britain and Austria, Prussia, and Russia, respecting the Ionian Islands,” provides that certain named islands “shall form a single, free, and independent State, under the denomination of the United States of the Ionian Islands.”

Article II provides that—

This State shall be placed under the mandate and exclusive protection of His Majesty the King of the United Kingdom of Great Britain and Ireland, his heirs and successors.

The remaining articles provide for the exercise of this right of protection, Article V stating:

In order to insure, without restriction, to the inhabitants of the United States of the Ionian Islands the advantages resulting from the high protection under which these States are placed, as well as for the exercise of the rights inherent in the said protection, His Britannic Majesty shall have the right to occupy fortresses and places of those States and to maintain garrisons in the same. The military force of the said United States shall also be under orders of the commander in chief of the troops of His Britannic Majesty.

And in Article VII:

The trading flag of the United States of the Ionian Islands shall be acknowledged by all the contracting parties as the flag of a free and independent State. (I Hertslet, *Map of Europe by Treaty*, pp. 337-341.)

In 1854, during the Crimean War, while the above treaty was still in effect and Great Britain at war with Russia, certain Ionian ships were captured by British cruisers on the ground that “being British subjects they were illegally trading with the enemy.” This raised the question “whether the inhabitants of the Ionian Islands were to be considered as British subjects or not.” The question was elaborately argued and came before Dr. Lushington for judgment.

For the purposes of decision the vessel proceeded against was an Ionian vessel under the Ionian flag bound



for a Russian port and captured by a British cruiser. It was claimed "that as regards a power hostile to Great Britain the Ionian islanders stand in the same position as British subjects." As the Ionian Islands had not declared war, the further question arose "whether, Great Britain being at war with Russia, it follows as an inevitable consequence that the Ionian States are placed at war with Russia also. \* \* \* Whether, Great Britain being at war with Russia, the Ionian States are ex necessitate at war also, exactly in the same way as Jersey, Guernsey, Jamaica, and Canada would be placed in hostility by a declaration of war against Great Britain by any other power." (2 Spinks, Ecclesiastical and Admiralty Reports, pp. 212, 216.) Dr. Lushington maintained that while Great Britain, as a result of her conquests in 1815, might have made a different disposition of the Ionian Islands, she did actually determine their status by the treaty of 1815, and Dr. Lushington adds that he is of the opinion that no right remained to Great Britain other than "can be found within the four corners of that treaty. \* \* \* From this document must be derived all the rights of the contracting parties and all the rights and obligations of her Ionian States."

Dr. Lushington maintains that Great Britain by the treaty had extreme rights over the Ionian Islands. He says:

I will now make a short summary of this treaty; it will show some of the anomalies. A single, free, and independent State, having the flag of a free and independent State—the military, naval, and diplomatic power all vested in the protecting State—the protected, not the subjects of the protector, nor British subjects, for that is perfectly clear. (Ibid., p. 220.)

*Application of Dr. Lushington's reasoning.*—The case of the Ionian ships offers certain parallels which make it possible to apply Dr. Lushington's reasoning to the relations between the United States and Cuba. The relations between the United States and Cuba are far less close than were those between Great Britain and the Ionian States; therefore Dr. Lushington's conclusions would in general apply more emphatically to the rela-



tions of the United States and Cuba. He maintains that war between a protecting and a foreign State does not necessarily involve the protected State in war. He further concludes that if Great Britain had a right to make a declaration of war involving the Ionian States, this could not be done without express statement; and that hostile character could not be imposed upon the protected State in absence of an agreement whose terms were not open to doubt. Dr. Lushington restored the captured property as not concerned in the war. Cuba and Cuban property in time of war between the United States and a foreign power would, according to the treaty between the United States and Cuba, be less closely related to the war than was the Ionian property in 1854.

*Application of Declaration of London.*—In this situation it is granted that the Declaration of London is binding. While the Declaration had not been proclaimed up to July, 1912, the principles of the Declaration were accepted by Italy as binding in the Turco-Italian War of 1911-12. The Italian attitude is shown as follows:

By a royal decree of October 13 the following instructions were approved in conformity with the principles of the Declaration of Paris, April 16, 1856, which belligerent countries are bound to respect, with the rules of The Hague Conventions of October 18, 1907, and of the Declaration of London of February 26, 1909, which the Government of the King desires to be respected as well, so far as the provisions of the laws in force in the Kingdom allow, although they have not yet been ratified by Italy; and they will serve to regulate the conduct of naval commanders in the operations of capture and prize during the war. (Dispatch to U. S. State Dept., Oct. 19, 1911.)

From the action of Italy it may be inferred that even if not ratified the Declaration of London will be regarded as the most satisfactory available statement of the principles of international law relating to maritime capture. It is admitted in this situation that supplies of the contraband are being carried by merchant vessels of a neutral State to Habana, when they may be sent by rail to Guantanamo, which is a naval station of the United States. Under the rules prevailing in regard to continuous voyage before the Declaration of London, such a

cargo might be regarded, according to the practice of the United States, as conditional contraband, but the opposition of other States to the position of the United States led to the abandonment of this position in 1909, provided the Declaration of London should be ratified.

Article 35 of the Declaration of London and the general report upon the same shows that conditional contraband is not liable to capture under the declaration if destined for discharge in a neutral port.

ARTICLE 35.—*Conditional contraband is not liable to capture, except on board a vessel which is bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and which is not to discharge it at an intervening neutral port.*

*The ship's papers are conclusive proof both as to the voyage on which the vessel is engaged and as to the port of discharge of the goods, unless she is met with clearly out of the course indicated by her papers, and unable to give adequate reasons to justify such deviation.*

As has been said above, the doctrine of continuous voyage is excluded for conditional contraband. This then is liable to capture only if it is to be discharged in an enemy port. As soon as the goods are documented to be discharged in a neutral port they can not be contraband, and there is no examination as to whether they are to be forwarded to the enemy by sea or land from that neutral port. This is the essential difference from absolute contraband.

The ship's papers furnish complete proof as to the voyage of the vessel and as to the place of discharge of the cargo; it would be otherwise if the vessel were encountered having manifestly deviated from the route which she should follow according to her papers, and unable to give sufficient reasons to justify such deviation.

This rule as to the proof furnished by the ship's papers aims to prevent claims lightly raised by a cruiser and giving rise to unjustifiable captures. It must not be understood in a manner too absolute which would make all frauds easy. Thus it does not hold good when the vessel is encountered at sea having manifestly deviated from the route which she ought to have followed, and unable to justify such deviation. The ship's papers are then contradicted by the actual facts and lose all value as evidence; the cruiser will be free to decide according to the case. In the same way, the visit and search of the vessel may reveal facts which prove in an irrefutable manner that the destination of the vessel or the place of discharge of the goods is incorrectly entered in the ship's papers. The commander of the cruiser is

then free to judge of the circumstances and captures or does not capture the vessel according to his judgment. To resume, the ship's papers are proof, unless the facts show their evidence to be false. This limitation of the value of the ship's papers as proof seems self-evident and not to need special mention. It has not been the aim to appear to weaken the force of the general rule, which forms a safeguard for neutral trade.

Because a single entry is shown to be false, it does not follow that the force of the ship's papers as evidence is nullified as a whole. The entries against which no allegation of fraud can be proved retain their value. (International Law Topics—Naval War College—1909, p. 85.)

*British opinion.*—Norman Bentwich, discussing the operation of article 35 from its application particularly to Great Britain, says:

But when the enemy country has ports of its own the exclusion of the doctrine of continuous voyage from the subject of conditional contraband is justified by reason of the nature of the traffic.

One might judge from the comments of some critics of the declaration that this limitation of the right to capture conditional contraband was an outrageous curtailment of our belligerent rights. Yet, in fact, we have never effectually exercised the right to capture cargoes on their way to the enemy country via neutral ports, even when they were absolute contraband; and Lord Stowell explicitly and emphatically repudiated the practice. The declaration now entitles us to do so in that contingency, but rejects the claim which has been advanced by others to capture cargoes of conditional contraband which are destined to neutral ports. It is submitted that the limitation of the right of capture is both reasonable and to our benefit. Conditional contraband cargoes are *ex hypothesi* such as might be regularly required by the neutral population, and it would always be possible for the consignor to direct them in the first place to a neutral consignee in the neutral country, who might forward them at a favorable opportunity to the belligerent country. And to allow capture upon suspicion that an eventual belligerent destination was intended would be an excessive interference with neutral trade, which would inevitably cause friction. Cargoes of absolute contraband, on the other hand, being of such things as are exclusively valuable in war, would probably find their way, in nine out of ten cases, from a neighboring neutral to a belligerent country; and therefore capture is allowed, though their immediate destination is seemingly innocent, when there is evidence that this is not the final destination. The effect of the restriction of capture in cases of conditional contraband would be, if we were



at war, to give immunity to all cargoes of the kind consigned to England via neutral ports, and to render them liable to capture only during their transit of the narrow seas which separate us from our continental neighbors, some of whom are in any case likely to be neutral. Hence, while the restriction would diminish our power of capturing conditional contraband destined for a continental enemy in very exceptional circumstances only, it would regularly benefit us when at war by diminishing his power of interfering with our supplies which must be brought by sea. The present practice of nations has not hitherto definitely accepted the doctrine of continuous voyage in its relation to contraband; as has been mentioned, the American courts put it into force amid protests during the Civil War, and England claimed to enforce it during the Boer War, but did not press her claim because of German opposition to it. The declaration assures us the benefit of the doctrine as belligerents in regard to absolute contraband, which is the trading by the neutral that more seriously assists in war; and it secures us both as belligerents and neutrals against any attempt by a foreign power to apply the doctrine to other neutral cargoes. (The Declaration of London, p. 75.)

*Protection by the fleet of the United States.*—In the proposed situation the merchant vessel of State Y which is neutral requests protection from the fleet of the United States which is belligerent. The commanding officer replies that he has no authority to afford this protection. To afford such protection would usually be outside the competence of a naval officer unless instructed or acting under treaty provisions. If the United States fleet should afford protection the act would be of the nature of belligerent convoy. A neutral vessel which accepts belligerent convoy loses her neutral character according to the present general consensus of opinion.

The neutral vessel may not itself resist visit and search, but by sailing under the protection of a belligerent there is on the part of the neutral vessel a constructive resistance which would make the vessel liable to condemnation even though otherwise innocent. It is not to be inferred that any action which the United States fleet might take in pursuing the enemy in the neighborhood or in attempting to prevent interference with commerce if in the nature of the prosecution of the war and not simply an act of convoy, would necessarily involve the merchant



vessel in any liability. As the merchant vessel might become liable to more severe treatment if accorded protection by the United States fleet and as the United States fleet could attack the enemy, in any case, if deemed at the time a proper military movement there would seem to be nothing to be gained for the United States fleet or for the merchant vessel in extending the protection requested.

*Relation of State Y.*—The capture of the merchant vessel of State Y which is carrying goods of the nature of conditional contraband to Habana would, as has been shown, not be justified under the provisions of the Declaration of London, which is assumed to be binding, unless Habana is regarded as a belligerent port when the United States is at war. As Cuba is an independent State in the family of nations, and as it has not made any alliance which makes it a party to a war in which the United States is involved, Cuba's relations would be those of a neutral State and Habana would be a neutral port.

*Résumé.*—From the consideration of the nature of leased territory it is seen that the belligerency of the lease-holding State does not affect the relations of the State which grants the lease except so far as is stated in the lease.

The jurisdiction over the leased territory is determined by the terms of the lease. A protecting State may go to war without involving the State protected in hostilities. The relations between the United States and Cuba are such that Cuba may remain neutral in a war to which the United States is a party in the same manner as Mexico might remain neutral.

The mere fact of proximity to the United States would in both cases make necessary somewhat greater care in the preservation of neutrality. Conditional contraband would not, under the declaration of London, when bound for a neutral port on a neutral vessel be liable to capture. The extension of protection to a neutral merchant vessel by a belligerent war vessel would make an innocent merchant vessel liable to penalty. It would be best to allow the neutral State to protect its own merchant ves-

sels and the interest of all States not engaged in the war would tend to cause the belligerents to respect neutral rights.

## SOLUTION.

Habana is not a hostile destination when the United States and State X are at war and other States are neutral.

The position taken by the commanding officer of the fleet of the United States is correct.