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Attention: Colonel Richard Park, Jr.

Gentlemen:

I am transmitting herewith one copy of R & A No. 1830, "Legal Problems Concerning the Status of Japanese Mandated Islands", prepared in the Research and Analysis Branch of this office and classified as confidential.

Sincerely yours,

William L. Langer

William L. Langer
Director, Branch of
Research & Analysis

Enclosure

010 Japan

OFFICE OF STRATEGIC SERVICES

Research and Analysis Branch

R. & A. No. 1830

LEGAL PROBLEMS CONCERNING THE STATUS OF JAPANESE MANDATED ISLANDS

7 February 1944

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LEGAL PROBLEMS CONCERNING THE STATUS OF
JAPANESE MANDATED ISLANDS

THE PROBLEM

1. Question has been raised as to the legal status of the Japanese mandated islands, in view of the fact that Japan has withdrawn from the League of Nations and also in view of the fact that the United States has negotiated the treaty of February 11, 1922 with Japan concerning these mandated islands.

FACTS BEARING ON THE PROBLEM

2. Japan received less than complete sovereignty over the mandated islands by the terms of the mandate granted by the League of Nations (See Appendix, pp. 2-7).

3. Japan and the other mandatories in fact acted as if completely sovereign, and were not curbed therein by the League. (See Appendix, pp. 7-9).

4. There has been no clear-cut ruling as to the effect of Japan's withdrawal from the League upon her status as mandatory (See Appendix, pp. 9-10).

5. As the League continued to accept Japan's mandatory reports after 1935 and her support of non-political League work, the League is not now in a position to take the initiative and to challenge Japan's status as mandatory (See Appendix, pp. 11-14).

6. On the other hand, the United States has a traditional defense interest in these islands, as demonstrated in the State Department memorandum of December 19, 1918 (See Appendix, pp. 14-15).

7. At the peace conference, the United States never assented to the Japanese mandate (See Appendix p. 15).

8. Since that time, the United States has never abandoned either its

attack on the Japanese mandate or its claim of a right to be heard on mandate issues, even though it negotiated independent treaties as to each mandated area (See Appendix, pp. 15-22).

LEGAL PROPOSITIONS

9. The position taken by the United States as to the treaty of April 4, 1924, with France as to Syria and Lebanon is not conclusive for the present problem, because it involves a different type of fact situation (See Appendix, pp. 23-25).

10. If the premise becomes a desire to be free of the obligations of the treaty of February 11, 1922 with Japan on these islands, - outside the League system, - that result might be achieved as a result of the application of the rules as to the effect of war on political treaties (See Appendix, pp. 25-27).

11. Suspension of this treaty secured by invocation of the doctrine of rebus sic stantibus, and ultimate disposition by international conference will cure the difficulties implicit in any claim by the League that it holds the residue of sovereignty or the allegation that the 1922 treaty is commercial (See Appendix, pp. 27-33).

12. If, on the other hand, it is desired to attack the continuing existence of the mandate treaties and the mandate system, within the League framework, it may be done by appeal to the procedure available under Article 19 of the Covenant of the League. This result would approximate that reached under Paragraph 11. (See Appendix, pp. 33-34).

13. Paragraphs 11 and 12 posit an international conference on the subject, with the United States holding as military occupant in the interim (See Appendix, pp. 31-32).

LEGAL PROBLEMS CONCERNING THE STATUS OF [redacted]

JAPANESE MANDATED ISLANDS

As the armed forces of the United Nations take over the Japanese mandated islands in the Pacific Ocean, it is essential that their status be reviewed, so that the United States policy may pivot accurately from the regime existing under the League of Nations to the new conditions. The legal status of the Japanese mandated islands is a bitter question, because it involves the impersonal issue of Japan's continuing title as mandatory, and because it calls directly for a review of the entire American policy toward mandates established by the League of Nations. This dual aspect of the problem is the inevitable result of the fact that Japan's right to hold them was derived through the League system, of which the United States was never a formal part, and that the United States has already made certain policy commitments in its relations with mandated territory.

While the form of the decision of the problem will be legal in nature, its motivation will be political. As the United States did not become a member of the League, it was forced to take other political steps and to enter into treaty relations with each mandatory to protect American interests in each mandate. The disintegration of the League operations and finally, war, have brought the United States an opportunity to re-examine the wisdom of its original policy as to mandates and the desirability of its continuance. The opportunity is a mixed blessing, because, while one mandatory is an enemy, five are military allies. Thus, to challenge the mandate system in order to extirpate our obligations as

to the Japanese mandate is in effect to challenge the system under which some of our allies hold valuable assets. There are instruments of legal argument, as will be developed in the following pages, which may be used to support either continuance or abandonment of the present policy as deduced from treaties and the practice thereunder. For purposes of prospective claim to the islands, all of them are futile in the absence of a foundation of unassailable possession in the United States, whether the United States desires to assert that it has taken Japan's place as de facto mandatory, or whether it asserts that it rejects the mandate system and holds the islands by conquest.

I. DIPLOMATIC HISTORY OF THE ISSUES AS TO THE JAPANESE MANDATE AND RELATED ISSUES AND THEIR LEGAL IMPLICATIONS

Japan's Title to the Islands. The full implication of the problem of the legal status of the Japanese mandated islands appears only after careful examination of the sovereignty or title which Japan received under the League system, and the respect which other nations, and especially the United States, have accorded that title.

1. Nature of the Title. Like national or domestic law, international law is concerned with such issues of sovereignty as the means by which a state may acquire or transfer territory and the title under which it may hold such territory. While there is no general agreement among theorists as to the method of acquiring territory, at least five are generally accepted: cession, occupation, accretion, subjugation and prescription.[1] The title so acquired is thought to mean the acquisition

1) Lauterpacht's Oppenheim (London 1937), I, 429 et seq.
Cession is considered a bilateral transfer of land by treaty from one state to another; occupation, the occupation of land not hitherto under sovereign control of another state; accretion, increase of land by new formations; prescription, title through continuous possession.

of complete sovereignty.

Of these five, subjugation, which is defined as, first, the taking of possession of enemy territory by military forces in time of war followed by, second, annexation, most closely approximates the Japanese pattern because Japan's chain of title to the mandated islands is traced through her occupation of the islands during the last war and the secret treaty of 1917.[2] However, this classical definition cannot clearly and unequivocally settle Japan's title, because of the treaty pattern used at the Paris peace conference. Although at the conference Japan spoke in terms of occupation and possession,[3] there had then been no formal action which could be held the equivalent of the second step of annexation. Normally the peace treaty would have recognized Japan's occupation and served as a conduit of title directly to her, thus formally perfecting title by subjugation. This was not done at Versailles for Germany renounced her title to her overseas colonies, not in favor of specific powers,

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2) In a memorandum of Feb. 16, 1917, the British ambassador at Tokio gave assurance that Britain would "support Japan's claims in regard to the disposal of Germany's rights in Shantung and possessions in islands north of the Equator on the occasion of the peace conference." (1929) Int. Law Situations (U.S. Naval War College) 33.

3) Baron Makino's statement of Jan. 27, 1919 to the Council of Ten was couched in such terms, 3 Paris Peace Conference 738-740, as were his statement of Jan. 28, 1919 to the Council of Ten, id. 755 and his statement of April 30, 1919 in the council of foreign ministers to Lansing's proposition as to Yap, 4 Paris Peace Conference 653-654.

It is particularly significant that in the discussion of Jan. 28, 1919, Baron Makino pointed to Japanese possession through conquest and held that she could not then transfer to a third party until she had obtained a right of free disposal from Germany, 3 Paris Peace Conference 755. This would seem to admit an imperfect title at that time.

such as Japan, but in favor of the Allied and Associated Powers.[4] Furthermore, Article 22 of the Covenant of the League of Nations, which was made part of the Treaty of Versailles, and to which Japan was a party, established the mandate system.[5] There is lacking, therefore, the second formal step required by the classical definition of title by subjugation, because it was the Allied and Associated Powers who, having received the German renunciation, created the mandate system and nominated the mandatories.[6] The series of documents written to implement the transfer and the practice thereunder become the measure of Japanese title to the islands so far as the signatories are concerned.

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4) Art. 119. "Germany renounces in favor of the Allied and Associated Powers all her rights and titles over her overseas possessions."

5) In addition to Art. 119, Art. 118, para. 2, carried the German agreement "to recognize and to conform to the measures which may be taken now or in the future by the Principal Allied and Associated Powers, in agreement where necessary with third Powers, in order to carry the above stipulation into effect." These, in addition to Art. 22 of the Covenant, make the treaty recognition of this diversion of title clear.

6) This was admitted by Balfour in the House of Commons debate of June 17, 1920, quoted in (1929) Int. Law Situations (U.S.Naval War College) 39-40 and by Lloyd George in the debate of June 20, 1920, id. 40-41. It was the Japanese thesis in the statement of Oct. 28, 1935, C.439.M.228.1935. 184-185; 1935.VI.A.2.184-185.

It was also admitted by the League of Nations. In a memorandum of July 30, 1920, the Secretary General informed the Council that the Principal Allied and Associated Powers had to confer legal title on the mandatory, quoted in (1929) Int. Law Situations (U.S. Naval War College) 41-42. Rappard made a similar statement in the Permanent Mandates Commission in October, 1921, id. 61-62. See also the note of Feb. 21, 1921 from the President of the Council to the American ambassador in France, 1921 For. Rel. 2.92-93, in which it was pointed out that the allocation of the mandates was the function of the Supreme Council and the administration of the mandates, that of the League, and that any misunderstanding as to the allocation of the Japanese mandates was between the United States and the Principal Allied and Associated Powers.

The title which the Allied and Associated Powers were prepared to deliver to the mandatory was not the complete title, such as would have been received under traditional procedures, or even one of the specialized divisions of sovereignty, such as vassal and suzerain or protectorate and protecting state. The Powers sought rather to create a new relationship and called it "a trusteeship under defined conditions," with the League intervening only in case of abuse of authority, as the Powers had previously done by diplomatic correspondence.[7] An examination of the debates of the Council of Ten leaves no doubt that the mandate provisions were drafted on this theory.[8]

The theoretical limitations on the control of the mandatory over the mandate cut deeply into the field of action normally reserved for sovereign power. In the first place, the mandatory agreed to exercise the mandate on behalf of the League, to make annual reports to the League, and to submit to supervision by the Council of the League advised and assisted by the Permanent Mandates Commission. There was an explicit ban on cession or other disposition of territory without the consent of the Council and also on the establishment of military and naval bases within the territory.[9]

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7) Lloyd George in the Council of Ten. Jan. 28, 1919. 3 Paris Peace Conference 770.

8) See especially Lloyd George, Jan. 24, 1919. id. 719; Wilson. Jan. 27, 1919, id. 742-43 and Jan. 28, 1919, id. 765-766. Clemenceau feared the supervision which went with the trust theory, id. 768-769.

9) Lauterpacht's Oppenheim (1935), I. 185-188; Wright, Mandates under the League of Nations (1930). 471-472.

Experience in administration has developed further evidence that there is a significant difference between complete title of the sovereign and the title held by a mandatory. The inhabitants of the mandated territory did not ipso facto become nationals of the mandatory,[10] as they would have, had the mandatory been completely sovereign. A right of petition to the League has also been recognized.[11] Normally the inhabitant registers his grievances via the ballot box.

The limitations upon the mandatory's title has been recognized by theorists and by courts.[12]

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10) (1923) Official Journal 406; Lauterpacht's Oppenheim, op. cit. n. 1, 193-195; Wright, op. cit. n. 8a, 461-462.

11) Lauterpacht's Oppenheim, op. cit. n. 1, 137-183; Wright, op. cit. n. 8a, 119, 169 et seq.

12) See, for example, Lauterpacht's Oppenheim, op. cit. n. 1, 184-188; (1929) Int. Law Situations (U.S. Naval War College). 45-46.

13) See, for example, Ffrost V. Commonwealth, (1937) 58 C. L. R. 528, 1935-1937 Ann. Digest 98; In re Tamese, 1933-1934 Ann. Digest. 42 (New Zealand, 1929); Winter V. Minister of Defense, (1940) So. Af. App. Div. 194, 1938-1940 Ann. Dig. 44. See also Jerusalem - Jaffa Dist. Governor v. Suloiman Murra, (1926) A. C. 321, 1925-1926 Ann. Dig. No. 32.

The effect of this Versailles pattern of detours and reservations was without doubt to oust German title in the former German possessions. Its division of sovereign rights between the League, the mandatory and the inhabitants of the mandate is not so clear-cut, and has never been definitively clarified. It left the military occupant in physical possession of conquered territory - but theoretically holding as trustee and not as conquerer. In theory this did not crown the occupant's campaign with sovereignty or title. This last proposition seems generally accepted by the theorists. The difficulty arises in tracing the residue of title which was not given to the mandatory. Lauterpacht summarizes the various possible solutions with their supporting authorities.[14] He cites as the minimum possible answers: that the residue of sovereign powers is (1) in the mandatory; (2) in the mandatory, acting with the consent of the League; (3) in the Principal Allied and Associated Powers; (4) in the League; (5) in the inhabitants of the mandate; (6) in the inhabitants of the mandate but presently in suspense.

League Practice. Whatever may be the theoretical resting place of this residue of sovereignty, - for all practical purposes, the mandatory has exercised sovereign rights and run the territory to suit itself. This was probably predictable from the fact that the mandates were restricted to territory "which had been actually conquered"[15] and that non-occupied

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14) Lauterpacht's Oppenheim (London, 1937), I, 197-198.

15) See Lloyd George at the meeting of the Council of Ten on Jan. 30, 1919, explaining the exclusion of Smyrna, Adalia and Northern Anatolia, 3 Paris Peace Conference 786.

countries were excluded. It could likewise have been foreseen as to "C" Mandates because they were assigned to countries which had been loudest in their demands for annexation,[16] and described as territories which for various specified reasons could "be best administered under the laws of the Mandatory as integral portions of its territory," and because it had even been suggested at the peace conference that successful administration of a "C" mandate would lead to a request for union with the mandatory.[17] It was strongly demonstrated in the difficulties experienced by the Permanate Mandates Commission in securing information.[18]

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16) Union of South Africa (South West Africa), New Zealand (Samoa), Australia (Pacific islands south of the equator), Japan (Pacific islands north of the equator). Nauru was assigned to the British Empire and administered jointly by Great Britain, Australia and New Zealand.

17) At the meeting of the Council of Ten, of Jan. 27, 1919, Wilson suggested that it was up to South Africa to make it so attractive that South West Africa would "come into the Union of their own free will." 3 Paris Peace Conference 741-742.

18) At the meeting of July 28, 1923, Matsuda refused to answer some questions on economic equality, merely asserting that Japan did not desire to establish monopolies. A.19.1923.VII.83; 1923 VI.A.1.83. Wright admits that the Commission asked Japan about naval establishments and, on being denied information, did not press the question. Some legal aspects of the Far Eastern situations, (1922) 27 A.J.I.L. 515-516. The fact that Japan was not encouraging tourists, and was treating some of them in a ruthless manner became apparent in the petition of Richard Voigt, a German national, who had visited the islands. See C. 439.M.228. 1935.VI.127-128, 143-144, 177, 196-197; 1935. VI. A. 2. 127-128, 143-144, 177, 196-197.

While yielding on the theoretical point of sovereignty, the mandatories never failed to maintain their factual control, which had all the color of full sovereignty. The League never forced the issue by making a direct and commanding assertion of its supervisory prerogatives, consistent with a virile remainder interest in sovereignty. In the light of the march of events, therefore, debate on the theoretical resting place of the residue of sovereignty is without practical importance.

Effect of Withdrawal from the League. The intransigent attitude of the mandatories began its final manifestation in the Japanese withdrawal from the League. This issue was Janus-faced, as it touched not only the division of sovereign rights but also the question of revision, or even termination, of the mandates.

The trusts envisaged in the mandate had been drawn in different terms as to the period for which the trust was to continue. The "A" mandates, which included Iraq, Palestine and Transjordan, Syria and Lebanon, by their very terms looked to the termination of the mandate in the not too distant future. The tests and procedures set up in the case of Iraq were carefully restricted to the case in hand and it was made plain that in the future there might be variations on the pattern.[19]

The "B" mandates, which cover the former German possessions in Africa except South West Africa, made no reference whatsoever to possible termination; nor did the "C" mandates.[20] Both required the Council's

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19) See summary in Hales, L'aspect juridique de la terminaison des mandats internationaux, (1938) 19 Rev. D.I. et Legis. comp. (3e ser.) 558 et seq.

20) Hales, op. cit. n. 16, 553.

consent to any change in terms. It has been argued by the theorists that the mandatory must be a League member,[21] and that the Council has at least the right to remove a mandatory delinquent in its mandate duties.[22] These theoretical issues as to revision for cause or termination have received answers in practice which do not correspond to the experts' patterns. This may well be explained by the fact that the mandatory successfully asserted a strong position based on possession and could be dislodged only by coercive action which the League was unwilling to take.[23]

The unwillingness of the League and its agencies to give forceful expression to its claimed supervisory powers was completely demonstrated in the Japanese withdrawal from the League. By notice of March 27, 1933, Japan announced her intention to withdraw from the League.[24] Neither the notice nor the League's acknowledgement thereof referred to the mandate. However, in a public statement, the League announced that Japan

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21) Wright, op. cit. n. 15, 515; contra, Evans, Would Japanese withdrawal from the League affect the Japanese mandate, (1932) 27 A.J.I.L. 140. See also Rousseau, La sortie de la Societe des Nations, (1934) 41 Rev. Gen. D.I.P. 312.

22) Wright, op. cit. n. 15, 515; Males, op. cit. n. 16.

23) The fact that none of the naval powers would be willing to implement a League decision to oust Japan was pointed out at once. Williams, Japan's mandate in the Pacific, (1933) 27 A.J.I.L. 438-439.

24) 14 Official Journal 657-658; C. 211. M. 103. 1933. VII.

would continue to sit on all non-political boards.[25] Subsequently in public statements by Japanese officials[26] and ultimately in an official Japanese statement to the Permanent Mandates Commission on October 28, 1935,[27] Japan argued that as the Allied and Associated Powers, and not the League, had given title and fixed the terms of the mandate, Japan's status as mandatory was not affected by withdrawal from the League. This last statement was provoked by a comment made by the member of the Commission in the course of a debate on economic equality. A member having had the personal courage to raise the dangerous issue and Japan having answered, the Commission failed to grasp the nettle. It merely reported the Japanese statement to the Council and stated that it would not discuss the issue in the absence of a direction from the Council. Such direction was not forthcoming. The following year, the chairman of the Permanent Mandates Commission "noted with satisfaction ... that Japan--whose status as a member of the League of Nations ended on March 25, 1935--considered rightly, that she is still bound by the obligations of the mandate."[29] Thereafter the League accepted reports on the Japanese mandate

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25) See report by Streit, New York Times, March 27, 1935, p. 15.

26) See Rousseau, op. cit. n. 13, 312; v. Tabouillot, Zur frage der rechtlichen beziehungen Japans zu den mandatsgebieten, (1936) 6 Zeit. für ausländ. öffent. Recht und Völkerrecht 365-369.

27) C.349.M.228.1935.125, 183-184; 1935.VI.A.2.125, 183-184.

28) Id. 135-137.

29) C.259.M.153.1936.VI.12; 1936.VI.A.1.12.

and financial support from Japan in technical activities of the League.[30]

Nor is this result applicable to Japan alone. It applies also to other mandatories, who were equally reluctant to yield to supervision and equally assertive of sovereign rights. Encouraged by the arrant incapacity of the League to control actions of the mandatory, France transferred the Sanjak of Alexandretta to Turkey under the agreements of June 23, 1939,[31] while announcing that she would not renounce in favor of third parties her mission in Syria and Lebanon.[32] Before the Permanent Mandates Commission, France further took the position that the transfer could not be considered within the framework of the mandate but had to be considered "as a question of international politics."[33] Turkey did not take the territory subject to any of the burdens imposed on the mandatory.[34] This French position likewise provoked no corrective

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30) See, for example, 18 Official Journal 285 (May 25, 1937) and 887 (Sept. 14, 1937).

31) Text found in 20 Official Journal 356-361; C.229.M.156.1939.

32) 20 Official Journal 362;C.230.M.157.1939.

33) De Caix, the French representative made this statement in answer to the charge by Rappard of the Commission that the transfer was a violation of the ban of territorial transfers contained in art. 4 of the mandate. C.170.M.100.1939.VI.222-223; 1939.VI.A.1.222-223.

He also countered the charge that France had acted in her own interests as follows: "The mandatory Power had undoubtedly an interest in a certain international order, and shared that interest with other Powers which had never been opposed - far from it - to any measures which might be taken to associate Turkey with their policy; but the interests of Syria herself were closely involved in that policy... He would confine himself to observing that, if the present established order in the Mediterranean were to be seriously threatened, Syrian independence would certainly be faced with infinitely greater dangers than any that might result from action on the part of the mandatory Power. In these circumstances, the policy that had been followed must be regarded as having been necessary for Syria's own independence." Id. 223.

34) Chairman Ort referred to the Sanjak as "no longer under Mandatory." Id.223.

action from the League, although in theory breach of mandatory obligation should have been grounds for removal of the mandatory.

In this state of the record, it would seem that the members of the League are not now in a position effectively to challenge Japan's status as a mandatory, so long as they operate on the basis of the Covenant as announced in the Treaty of Versailles. They have lost their power to do so by their long acquiescence in Japan's assertion of complete control, their continuous failure to press their claims for supervisory control against both Japan and France, and finally their refusal to settle the issue of status when it was raised clearly in the Permanent Mandates Commission. No other consequence can result as the doctrine of estoppel[35] is well established in international law.[36]

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35) Definition - a bar to one's alleging or denying a fact because of one's own previous action, by which the contrary has been admitted, implied or determined.

36) The examples are set forth briefly in Lauterpacht, Private law sources and analogies in international law (London, 1927), 205-206; see also McNair, Legality of the occupation of the Ruhr, (1924) British Year Book of International Law 17, 31-37.

While many of the examples of the application of the doctrine of estoppel involve private claims, certain decisions were claims purely between states. See especially the Pious Fund decision of Oct. 14, 1902, 1902 Rev. gen. D.I.P., documents, 24-26; opinion of the American members, Alaska boundary tribunal - final report of John W. Foster, agent of the United States, Senate doc. 162, 58th Cong., 2d sess (1904), 49, 64; Grisbadarna decision of Oct. 23, 1909, (1910) 17 Rev gen. DIP 177, 186-187 ("...Dans le droit des gens c'est un principe bien etabli qu'il faut s'abstenir autant que possible de modifier l'etat des choses existant de fait et depuis longtemps"); award of Nov. 11, 1912 on the Russian interest case, (1913) 7 A.J.I.L. 177, 180-181 (the tribunal stressed the source of the debt, state practice and Turkish treatment of Russia as a creditor, to reject the Turkish claim of private debt). See also the decision of Sir Herbert Sisnett, Nov. 2, 1929, U.S. Arbitration Series no. 3 (Washington, Gov't Printing Office, 1932), 860, 869-870.

The only saving factor so far as the League system is concerned is that Japan continued to give lip service to the League so far as the mandate system was concerned, thus indicating a belief in the severable nature of the League functions.

Policy of the United States toward the Japanese mandate. If, then, the initiative for correcting the situation has passed from the League, the issue remains whether or not the United States is likewise bound to the wheel of the League system, so that it cannot assert the dissolution of the Japanese mandate, if not of the entire mandate system. This possibility arises solely because the United States did not become a member of the League of Nations, and consequently for purposes of the United States, the Japanese title is tested not so much by the League system, as by the commitments made by the United States at the Paris peace conference and in its subsequent negotiations with mandated territories. The American commitments are therefore significant in that they may now constitute an impediment to free action, because constituting a recognition of Japanese title.

1. Pre-Peace Conference Position. At the outset it should be remembered that the United States went to the peace conference, prepared with suggestions, drawn December 14, 1918, as to the disposition of the ex-German islands in the Pacific.[37] The strategic importance of these islands had received clear recognition. As they were under British and

37) Memorandum by the Third Assistant Secretary of State (Long), dated Dec. 14, 1918, 2 Paris Peace Conference 512-513; see also Williams, op.cit. n. 20, 429.

Japanese occupation, - which presumably foreshadowed transfer to those powers as fruits of victory, - the problem of securing their transfer to the United States was difficult of solution. It was urged that the United States seek their return to Germany on the theory that Germany had lost her place as a great naval power and would be willing subsequently to sell them to the United States, the price being the cancellation of American financial claims. Because of the general refusal to return any colony to Germany, and because of the desire for annexation expressed by Japan and the British Dominions, this proposition was not offered in argument at the conference.

2. Peace Conference Position. The records available indicate that President Wilson insisted at the conference on the inclusion of the mandate system in the Covenant of the League of Nations. There is, however, no indication that his conduct could in any way be used to work an estoppel, general or particular, against the United States in mandate matters. On the contrary, he stated explicitly in the meeting of January 30, 1919 of the Council of Ten, the fact that the people of the United States would be reluctant to accept any mandate,[38] and is said to have opposed giving the Pacific islands to Japan,[39] yielding only for the purpose of bringing Japan into the League system.[40] Subsequently, the United States

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38) 3 Paris Peace Conference 738, 807.

39) Secretary of State (Colby) to American ambassador in France (Wallace), Feb. 21, 1919, in instructions for a protest to be presented to the League, so stated expressly. 1921 For. Rel. 2.90-91. See also Lloyd George, The truth about the peace treaties. (London, 1938), I, 191; Williams, op. cit. n. 20, 430.

40) Williams, op. cit. n. 20, 435-436.

defined its desire at this time in terms of a desire to secure equality of treatment in commerce in the colonies taken from Turkey and from Germany.[41] To that extent alone, the United States has considered that it committed itself at the peace conference.

3. Post-Peace Conference Position. The peace having been written and rejected by the United States, the tenor of American argument had to be shifted. Its first need was to establish its right to be heard in the drafting of the mandates in order to protect American interests. The United States alleged that it had a right to be heard[42] by reason

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41) This was clearly demonstrated in the 1920 controversy with Great Britain over the claims of the Standard Oil Co. of New York of discriminatory treatment in Palestine. The thesis was stated in the report of June 18, 1920 by the American ambassador in Great Britain:

> The Government of the United States desires to point out that during the Peace negotiations at Paris leading up to the Treaty of Versailles, it consistently took the position that the future Peace of the world required that as a general principle any Alien territory which would be acquired pursuant to the Treaties of Peace with the Central Powers must be held and governed in such a way as to assure equal treatment in law and in fact to the commerce of all nations. It was on account of and subject to this understanding that the United States felt itself able and willing to agree that the acquisition of certain enemy territory by the victorious powers would be consistent with the best interests of the world.
> 1920 For. Rel. 2.652.

42) See the instructions of Feb. 20, 1921, issued to the American ambassador in France (Wallace) instructing him to request the Council of the League to delay final action on the mandates until American views were known. 1921 For. Rel. 1.87-88.

of its status as one of the Allied and Associated Powers.[43] It therefore requested that the mandates be drafted in terms which recognized American interests. Its arguments in support of this thesis were briefly that:

1. the right to dispose of the German overseas colonies was derived through the Allied victory, to which the United States had contributed;
2. the participants in that victory had to be consulted in the distribution and administration of these colonies;
3. Article 440[44] of the Treaty of Versailles did not require ratification by all signatories before the treaties went into force (thus, indirectly saving the rights of non-ratifying states);
4. Article 119 of the Treaty of Versailles was not divisible.

The Franco-British position on this argument was that, having accepted the obligations of the peace treaty as the United States had not, they could not accept obligations not in accordance with its terms, and that for this reason the language of the mandates could not be drafted as the United States suggested.[45] The counter-proposition was that the same result could be effected after grant of the mandate by an exchange of notes between the mandatory and the United States. In this sugestion,

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43) See the instructions of Feb. 21, 1921, issued to the American Ambassador in France as to the note for the President of the Council of the League, 1921 For. Rel. 2.90-92; the instructions of Aug. 7, 1921 issued to the American ambassador in France, 1921 For. Rel. 1.922-925; the instructions of Oct. 21, 1924 issued the American ambassador in Great Britain on the Iraq mandates, 1925 For. Rel. 2.230-231.

44) Para. 6 provides that the first proces-verbal of deposit of ratifications was to be drawn up when the treaty had been ratified by Germany "and by three of the Principal Allied and Associated Powers.."

45) French Minister of Foreign Affairs (Briand) to the American ambassador in France (Wallace), Dec. 22, 1921, 1921 For. Rel. 1. 925-927; British Secretary of State for Foreign Affairs (Curzon) to the American ambassador in Great Britain (Harvey), Dec. 22, 1921, 1921 For. Rel. 2.111-115.

the United States acquiesced, thus yielding on her original argument. Thereafter, the United States negotiated the various treaties which govern American rights and interests in the mandated territories. The continuing existence of these treaties is direct evidence that the United States is outside the League system so far as mandates are concerned.

During this period, the United States carefully preserved the special status which it had given the problem of the Japanese mandate. On February 21, 1921, it directed the American ambassador in France to point out to the Council of the League of Nations that the United States had never consented to this mandate and concluded:[46]

> As one of the Principal Allied and Associated Powers, the United States has an equal concern and an inseparable interest with the other Principal Allied and Associated Powers in the overseas possessions of Germany, and concededly an equal voice in their disposition, which it is respectfully submitted cannot be undertaken or effectuated without its assent. The Government of the United States therefore respectfully states that it cannot regard itself as bound by the terms and provisions of said mandate and desires to record its protest against the reported decision of December 17 last, of the Council of the League of Nations in relation thereto, and at the same time to request that the Council,

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46) 1921 For. Rel. 1.91-92. This position was maintained in a statement of Jan. 24, 1922 by Mr. Hughes at the 1922 Washington armaments conference, Conference on the Limitation of armaments, Washington, Nov. 12, 1921-Feb. 6, 1922 (Washington, Gov't Printing Office, 1922), 1424 and in the proviso inserted in the declaration accompanying the treaty between the United States, the British Empire, France and Japan relating to their insular possessions and insular dominions in the region of the Pacific Ocean, id. 1617.

This position has, however, been denied by Great Britain; see note of Nov. 26, 1923 by the British Secretary of State for Foreign Affairs to the American charge in Great Britain, 1923 For. Rel. 2.231. The British argument is that, Wilson having been present at the allocation of the mandates, the United States is bound. This is not without weight, in view of the effect given a statement by the Norwegian Foreign Minister in the Eastern Greenland case before the Permanent Court of International Justice, A/B 53, 71.

having obviously acted under a misapprehension of facts, should reopen the question for further consideration, which the proper settlement of it clearly requires.

The League answer did not touch the merits of the American protest as it believed that the League had nothing to do with the allocation of the mandates, and that the difference was to be settled among the Principal Allied and Associated Powers.[47] The American protest was therefore referred to France, Great Britain, Italy and Japan. In view of the position taken by those powers, the protest was abortive. However, it leaves the record clear that the United States did not accede to the Japanese mandate but was forced into the practical necessity of dealing with Japan on the subject, because of the attitude of the other powers.

4. Treaty Pattern. Having lost the battle to have the mandates drawn in terms respecting American rights and interests, as far as possible the United States entered into treaty relations with each mandatory as to each mandated area.[48] The treaty pattern is significant. The preamble in all cases referred to the American contribution to German defeat and renunciation of colonies and the American failure to ratify the

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47) 1921 For. Rel. 2,92-93 (Feb. 22, 1921).

48) Japan - former German islands north of the equator, signed Feb. 11, 1922, U.S. Treaty Ser. no. 664, 3 Malloy 2723.
France - Cameroons, signed Feb. 13, 1923, U.S. Treaty Ser. no. 690,43 Stat. 1778,4 Malloy 4163; Togoland, signed Feb. 13, 1923. U.S. Treaty Ser. 691;43 Stat. 1790, 4 Malloy 4160; Syria and Lebanon, signed April 4, 1924, U.S. Treaty Ser. no. 695,43 Stat. 1821,4 Malloy 4169. Great Britain - Palestine, signed Dec. 2, 1924, U.S. Treaty Ser. 728,44 Stat. 2184,4 Malloy 4227; Cameroons, signed Feb. 10, 1925, U.S. Treaty Ser. 743,44 Stat. 4235, 4 Malloy 4235; East Africa, signed Feb. 10, 1925, U.S. Treaty Ser. 744,44 Stat. 2427,4 Malloy 4239.
Treaties were not, apparently, negotiated concerning South West Africa, New Guinea, Western Samoa or Nauru. See 1925 For. Rel. 2,214-216.

peace treaty. It is noto-worthy that the preamble in the Japanese treaty refers to the peace settlement between the United States and Germany, the agreement of Britain, France, Italy and Japan to confer the mandate on Japan, and to the desire of the American and Japanese Governments to reach a definite understanding as to their rights and those of their nationals in the islands. While there is no indication in the record that Japan disputed the wording of the preamble, France and Great Britain did.[49] The preamble also always quoted the full text of the mandate granted in each case. The body of the treaty was more or less similar in all cases. Article 1 opened by the United States consenting "subject to the conditions of the present convention...to the administration by (name of the mandatory) pursuant to the aforesaid mandate, of the former German territory described in Article 1 of the mandate." Thereafter the treaty made it explicit what were the provisions of the mandate, the benefit of which was to be extended to the United States and its nationals. The United States insisted upon receiving a copy of the report submitted to the League, and upon its right to express assent to changes in the mandate before being bound by them. The latter clause represented an American triumph because both France and Great Britain were originally unwilling to consent to more than consultation.[50] Nor was this right

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49) For example, see the point as raised on the East African mandates by the British Secretary of State for Foreign Affairs (Curzon), dated Nov. 26, 1923, to the American charge in Great Britain, 1923 For. Rel. 2.230, and the answering instruction of the Secretary of State, dated Feb. 16, 1924, to the American ambassador in Great Britain, 1924 For. Rel. 2.193. Great Britain yielded the point, id. 196

50) In the instructions of Aug. 7, 1921, sent the American ambassador in France, Secretary of State Hughes held that American consent was "necessary to any modification of a mandate after it had been agreed to." 1921 For. Rel. 1.924. In his answer of Dec. 22, 1921, Briand offered consultation only id. 929.

acquired to be a museum piece. It was given force and substance by American insistence on disclosure of facts thought to prejudice the equality of situation established by the treaties.[51]

The fact that the United States elected to negotiate individual treaties for each mandated area would seem to indicate independent treatment of each territory and recognition of the need to protect American interests in that area rather than the adoption of the mandate system as a separable part of the League system. This argument is

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51) While the French treaty was in draft, as a result of Franco-Italian negotiations as to Syria, the Secretary of State instructed the American ambassador in France to inform the French Government that it desired information as to treaties made by France with third powers as to Syria and reserved the right to suggest modifications in the draft "which was submitted on the assumption that the Mandate as approved by the League of Nations fully defined the position in Syria of all members of the League." This forced the freezing of capitulation changes and the disclosure of the economic nature of the Franco-Italian terms. 1923 For. Rel. 2.3-6. The United States also asked for, and received, information as to the 1936 treaties with Syria and Lebanon. 1 Hackworth's Digest 113.

The same position was taken with Great Britain. See the protest as to the failure to consult with the United States as to changes in Iraqui capitulations, 1925 For. Rel. 2.230-231, and the August 1932 position that the United States would not consider itself bound by the boundary variations fixed for Syria and Jebel Druse and Transjordan by the treaty of Oct. 31, 1931, and approved by the Council on Jan. 3, 1932. The British took the position - to which the United States assented, - that it would ask assent, provided that this would not prejudice the question whether there had been any modification of mandate terms, within the terms of the treaty with the United States. 1 Hackworth's Digest 112-113. The United States also pressed for information as to changes pending in Palestine after the 1937 Royal Commission report, recommending termination of the mandate. Id. 116-117. The United States also was careful to preserve this right to assent in the case of the termination of the Iraq mandate, Id. 121-122.

supported by the fact that, while the treaties conformed to a general purpose, they were particularized to meet local problems. They were independent, not interdependent. It is further supported by the fact that, when the United States has officially adopted a separable part of the League system, there has been positive evidence of such an intent. Thus, when the United States decided to participate in the International Labor Office, that decision was embodied in a joint resolution.[52] No such evidence exists as to the mandates system. On the contrary, the resolution on the International Labor Office expressly stated that it should not be construed as an adhesion to the Covenant. Furthermore, the note of February 2, 1939, addressed to the League in answer to an inquiry, offered merely collaboration in non-political matters ("humanitarian and scientific endeavor"),[53] and failed to refer to the Permanent Mandates Commission, although it mentioned other agencies. That being the case, upon the outbreak of this war, the United States had a system of individual treaties, designed purely to protect American interests and had them only because it had lost the diplomatic battle on the drafting of the mandate terms. This system of treaties was the only thread which bound the United States to the mandate system, and treaties are sensitive to changes in international temperature. The initiative has then in fact passed to the United States which alone has not acceded to the Japanese mandate and preserved a position outside the League system, from which to criticize and even to challenge the sufficiency of the mandate system.

52) Joint resolution approved June 19, 1934.

53) 20 Official Journal 216-217; C. 77. M. 37. 1939 VII

II. LEGAL EFFECT OF THESE PREVIOUS DIPLOMATIC COMMITMENTS ON AMERICAN FREEDOM OF ACTION

This then was the background on December 7, 1941. As the United States has never denounced the 1922 treaty because of breach by Japan,[54] the narrow issue for the United States became the effect of war upon the treaty of February 11, 1922 with Japan and the wider, the effect of our entrance into war upon the American attitude toward the mandate system.

French Problem Distinguished. The problem as to the Japanese mandated islands should at the outset be considered free of any commitments which the United States has made as to the treaty of April 4, 1924 with France as to Syria and Lebanon.

In the first place, as has been pointed out, the treaties which the United States negotiated as to mandated territory were not interdependent, so that the fate of one does not settle the fate of another.

In the second place, the fact situations are different. The United States is not, and has not been, at war with France. When Syria and Lebanon communicated their declarations of independence to the United States, their action was received with sympathy, but the United States announced that it considered its hands tied by the treaty of April 4, 1924

54) There is no reference to it in Secretary Hull's on the Japanese denunciation of the 1922 Washington Naval Treaty, although it would have been both relevant and timely. 12 Press Releases 2-4 (Dec. 30, 1934)

with France, which was to continue "until new instruments of mutually satisfactory nature can be similarly negotiated and ratified."[55] This attitude was legally correct at the time because there had been no interruption of diplomatic relations between France and the United States. It remains so, even though France severed diplomatic relations with the United States on November 8, 1942, because under international law the severance of diplomatic relations suspends the execution of treaties only if execution requires the uninterrupted maintenance of diplomatic relations between the signatories.[56] This result is furthermore in keeping with the President's statement of November 9, 1942, in which he disclaimed any desire to sever relations,[57] and in line with the American policy, previously announced, of dealing with French units in control of each parcel of French territory.[58] France has not taken the further

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55) 5 Bull. Dept. State 440 (April 29, 1941).

56) 5 Hackworth's Digest 359; Harvard Research in International Law, Law of Treaties, art. 25, (1935) 29 A.J.I.L., Sp. Supp. 1055 et seq.

57) 7 Bull. Dept. State 903.

58) See, for example, the statement of the American vice consul at Noumea, Feb. 23, 1942, on the French islands in the Pacific, 6 Bull. Dept. State 208; note of April 13, 1942 to Ambassador Henry-Haye on the establishment of a consulate general at Brazzaville, id. 335-336. The note to Henry-Haye refers specifically to the Cameroons, a mandated territory, in connection with this policy.

step of declaration of war and, in view of the American attitude on the French notification of November 8, 1942, it cannot be held that there is a state of war with France and a situation analagous to that existing with Japan. The attitude on the French treaty cannot, therefore, be held to foreshadow the attitude on the Japanese treaty.

Avoidance of the Japanese treaty. If the premise becomes a straight desire on the part of the United States to be freed of the obligations of the treaty of February 11, 1922, the issue then becomes the legal instruments available for the amputation. There are two: the legal rules as to the effect of war on treaties, and the doctrine of rebus sic stantibus.

It may be thought that the United States might refuse further execution of the treaty, on the ground that Japan had, before the war, violated the treaty in that she fortified the islands, in breach of Article 4 of the mandate, to the benefit of which the United States was entitled. The argument is not developed, because it does not free the United States, unilateral revocation of treaties not being permissable under international law, whereas the legal rules on the effect of war on treaties may be invoked to secure complete freedom. Further it does not place the United States in an advantageous bargaining position with its confreres among the United Nations, because it would raise the issue only as to a single mandate, whereas the doctrine of rebus sic stantibus may be used to open up the whole problem of mandates.

1. Abrogation as a Result of War. There is no hard and fast rule on the effect of war upon treaties. It is generally said that

purely political treaties are abrogated on the outbreak of war between the signatories, unless written to regulate conduct in war, and that commercial treaties are at least suspended for the duration of hostilities.[59] The treaty with Japan has both political and commercial aspects. It is submitted, however, that the primary factor was political - a desire to secure certain of the fruits of the mandate system without incurring any of the obligations of the Covenant, and that the continuance of the Japanese mandate and of the mandate system were obvious and inevitable conditions precedent to its existence. It is further submitted that the commercial aspects of the treaty were purely incidental, as is indicated by the great stress placed on communications problems, particularly as to Yap. The declaration of war, crowning the march of events set out above, marked the collapse of the fiction of the Japanese mandate and the demise of the treaty.

While the result of this line of reasoning is to free the United States of these treaty obligations as to Japan, it also places the United States in the anomolous position of repudiating a mandatory treaty in one region, while respecting them in another. The fact that the United States used the existence of war with Japan to rid itself of treaty obligations as to the mandate whose creation it most attacked cannot fail to arouse anxiety in Australia and New Zealand, that the United

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59) 5 Moore's Digest 385; 5 Hackworth's Digest 377 et seq.; Lauterpacht's Oppenheim, op. cit. n. 1, II, sec. 99; Harvard Research in International Law, Law of Treaties, art. 23, op. cit. n. 49, p. 118.

States now seeks what it refused them in 1919. These countries had talked in terms of annexation but accepted a lesser title because of American pressure. The United States has been unable to negotiate mandate treaties with them.[60] Failure now to integrate this result with the over-all policy toward other mandate treaties, whose existence has not been affected by war, cannot fail to produce friction.

It may also cause unease in France and Great Britain as to their A and B mandates in the Near East and Africa.

Further, if it is desired now to accomplish the purpose of the memorandum of December 14, 1918, the poker game of the peace conference has yet to be played, because all that the application of this rule accomplishes is to free the United States of its treaty obligations, allow it to continue its attack upon the Japanese mandate and to take a position to establish conquest which may serve as the first step in title by subjugation.

2. Rebus sic stantibus. The argument for abrogation, based upon the legal rules as to the effect of war upon treaties, is not the only means of amputation. It should, however, be retained as the first point of argument and fused with the second. The second, the wider problem of revision of the mandate system, may be solved by invocation of the

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(60) See the answer of March 14, 1925, by the Secretary of State for the Dominions on "C" mandates, 1925 For. Rel. 2.214-216.

doctrine of rebus sic stantibus. The use of this rule may answer those who contend that commercial purposes were dominant in the 1922 treaty and that it therefore is merely suspended under the rule quoted above, as well as those who hold that, notwithstanding Japanese conduct as sovereign, Japan had only a limited title.

The well established but highly debated rule of rebus sic stantibus is generally defined as ruling that all treaties are concluded with the tacit understanding that if by reason of an unforeseen change in circumstances execution of the treaty obligation would imperil the existence or the vital development of one party, that party has the right to demand release from its obligations.[61] This doctrine does not flout the basic principle of pacta sunt servanda by opening the door for unilateral revocation. It rather posits a society sufficiently civilized to recognize the need to review and readjust commitments, and therefore to permit one signatory to request release from obligations. Theoretically the right to claim release comes only after refusal to confer. In practice, the invocation of the doctrine has generally produced adjustments, or release, through conference.

The American case for invoking the doctrine of rebus sic stantibus might well be based, first, upon the assertion that the 1922 Japanese

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61) See 5 Moore's Digest 335 et seq; 5 Hackworth's Digest 349 et seq.; Lauterpacht's Oppenheim, op. cit. n. 1,I, sec. 539.

treaty was predicated upon the American assumption that Japan would not receive sovereignty in fact and that the League would administer supervisory functions and, second, upon the allegation that the League had failed to live up to expectations, that as a result Japan in fact had acted as a complete sovereign, and that political execution has therefore become inconsistent with self preservation[62] as defined in the memorandum of December 14, 1918. On these grounds, it might, therefore, request reconsideration of the problem of "C" mandates, if not of all mandates.

Such a line of argument has been used successfully on many occasions.[63] Turkey and China used it to secure reconsideration of capitulations problems and by China to secure Belgian consent to a loan change.

The fact situation presented by the mandate system is a new one for solution by rebus sic stantibus, for it involves a system of independent bilateral treaties paralleling a multilateral system of obligations. Thus, challenge even to a link in the independent treaty system is in essence a challenge to the multilateral system. Further, Turkey and China claimed relief because of positive growth of society, while the United States will be requesting release because of the failure of the system. However, the present war has provoked one fairly close parallel.

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62) This is in line with Lester Woolsey's classification of situations justifying the invocation of the rule. Unilateral termination of treaties, (1926) 20 A.J.I.L. 346-353.

63) Examples are discussed and analyzed in Bullington, International Treaties and the clause "rebus sic stantibus," (1927) 76, U. Penna L.R. 153-177; Garner, The doctrine of rebus sic stantibus, (1927) 21 A.J.I.L. 509-516.

Shortly after the outbreak of this war, rebus sic stantibus was implicitly raised by France and various members of the British Empire as justification for refusal to honor obligations arising under the Optional Clause.[64] In view of the fact that the United States wishes to be freed of an obligation born of the League system, the language of these notifications is worth quoting:[65]

> It has, unfortunately, become clear to His Majesty's Government in the Union of South Africa that the conditions which prevailed at the time of their acceptance of the clause no longer exist. It was not considered necessary then to make any reservation as to disputes arising out of events occurring during a war in which they might be involved, as collective action envisaged by Article 16 of the Covenant was such as to exclude the possibility of justifiable disputes between the Union as a belligerent and another member of the League of Nations as a neutral. In the present crisis, however, a number of States Members of the League have proclaimed their neutrality and no attempt at collective action under the Covenant has been made.
>
> I am therefore directed to notify you that His Majesty's Government in the Union of South Africa will not, in view of the general collapse of the means of ensuring collective action, regard their acceptance of the Optional Clause as covering disputes arising out of events occurring during the present hostilities.

The second paragraph of this notification demonstrates the usual objection to the invocation of the doctrine of rebus sic stantibus. It pushed beyond the demand for release and announced that it would not conform.

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64) 5 Hackworth's Digest 350. Both Sweden and Switzerland made reservations as to denunciations in this form.

65) Ibid.

Doubtless the basis of the Swedish and Swiss protests was that this amounted to unilateral revision. This result could, in the present instance, be avoided by use of the arguments of the first paragraph and drafting the second to call for reconsideration by conference and to assure those interested that, pending conference, paramount American title would not be asserted.

The case of the mandate treaties may, it is submitted, be distinguished from that of much criticized denunciation of the loadline convention. This convention was denounced under the rule of rebus sic stantibus, by executive proclamation of August 19, 1941,[66] in view of the opinion of July 28, 1941 by the Attorney General.[67] The factual differences between the two problems are great. Two of the most significant are that the loadline convention was multilateral, while the mandate treaties are bilateral and, second, that the loadline convention followed the modern practice of making a provision for termination, while the mandate treaties do not. With proper draftsmanship, the criticisms leveled at the loadline convention action[68] may be avoided.

The advantages of such a use of rebus sic stantibus are many. In the first place, it permits the United States to revert to its 1918

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66) 5 Bull. Dept. State 114-115.

67) 60 Op. A.G. (U.S.) No. 40.

68) Briggs, The Attorney General invokes Rebus Sic Stantibus, (1942) 36 A.J.I.L. 89-96.

position and to assert that it holds the islands as a military occupant pending their disposition by conference. This is the status which the present mandatories claimed pending League action.[69] This would enable the United States to consolidate its possession if it desires to assert title by subjugation. On the other hand, it would not prejudice continuation of the mandate system, with the United States succeeding Japan as mandatory, if the United States elected to adhere to the mandate system. Use of this technique would, in the second place, ease any anxiety in Australia and New Zealand as to American aspirations, by opening up the whole question of "C" mandates and renewing their opportunity to assert the need for annexation of New Guinea and Samoa.[70] It would enable them to be sure that the United States did not have a superior title to that which they received under the Versailles system. Further, disposition by conference may serve to satisfy those who continue to contend that Japan had only a limited title and consequently could confer only limited title by way of the peace treaty. Such disposition might be considered in lieu of League action, should the League be considered defunct, and thus close any gap in the chain of complete title in the transferee.

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69) This was demonstrated in the British attitude on the right of the Standard Oil of New York to perfect in Palestine concession rights received from Turkey prior to the war. See report of Nov. 22, 1919 by the American ambassador in Great Britain, 1919 For. Rel. 2.260-212 and that of Aug. 11, 1920, 1920 For. Rel. 2.663-667.

70) See Kluckhorn's dispatch on territorial interests of these dominions, N.Y. Times, Jan. 19, 1943. p. 8.

Nor can it be overlooked that the invocation of the doctrine of rebus sic stantibus will force the calling of a conference in which the United States will participate directly and fully,--rather than the indirect participation possible under League procedure, and in which it may renew the demands of the memorandum of December 14, 1918. Valuable as this would be if confined to "C" mandates in the Pacific area, it would be even more so, if the whole mandate issue were reviewed, as that would involve the "A" and "B" mandates in which the United States has strong political and economic interests.

The disadvantage of the invocation of this doctrine is that it alone cannot in a single stroke liberate the United States from the obligations of the 1922 treaty. It does not more than serve as a prologue to the review of the wider problem.

Maintenance of the Japanese Treaty. On the other hand--if the decision is that the United States is so committed to the League system, that it cannot now raise the serious challenge to the virility of that system implicit in this reasoning,--there are possibilities within League procedures by which a fairly similar result might be had. Article 19 of the Covenant of the League provides:

> The Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world.

This article has been thought not to cover the doctrine of rebus sic stantibus but to have "a legislative power to modify not merely existing international contractual obligations, but international conditions generally in the interests, not merely of the parties to a treaty, but of the whole international community."[71] Strongly asserted claims by the United States and requests for revision of the mandate treaties might well provoke such a review. However, even assuming that the procedural point of citing in the United States could be cured,--in view of the past history of this article,[72] unless a new phoenix rises from the ashes, it can hardly be hoped that the League would initiate vigorous action and would in fact assist in curing the dissonance. Like Article 22, Article 19 embodies a concept which was not given force and substance and must be judged accordingly. Its sole merit for the purposes of the present problem is that it offers a hope of securing treaty review, which may be desirable as to mandates, even if the United States fully adheres to the League philosophy.

Conclusion. The problem, therefore, resolves itself, forpresent purposes, into two alternative propositions, pivoting on the policy decision taken as to the League of Nations. In either case, the position of the United States now is that of a military occupant. Both propositions involve final disposition of the islands by international conference, a method in keeping with traditional American policy and practice.

71) Fischer Williams, The permanence of treaties: the doctrine of rebus sic stantibus and Article 19 of the Covenant of the League, (1928) 22 A.J.I.L. 103.

72) Peru, Chile and China received no relief by their petitions to the League under this clause. See Lauterpacht's Oppenheim, op. cit.n.1,I, 329-331; Tenekides, Le principe rebus sic stantibus, ses limites rationnelles, et sa recente evolution, (1934) 41 Rev. gen. D.I.P. 287-288.

NAVAL MESSAGE — NAVY DEPARTMENT

DRAFTER	EXTENSION NUMBER	ADDRESSEES	PRECEDENCE
FROM: COMNAVEU		ASTERISK (*) MAILGRAM ADDRESSEES	
RELEASED BY:	FOR ACTION	SECNAV	PRIORITY / ROUTINE / [illegible]
DATE: 160924 SEPT 16, 1943			
TOR CODEROOM: 160924			
DECODED BY: BECKMAN/WILLIAMS	INFORMATION	[illegible] E.O. 11652, Sec. 3(E) and 5(D) or (E) OSD letter, May 3, 1972 By RHP, NARS Date DEC 12 1973	PRIORITY / ROUTINE / DEFERRED
PARAPHRASED BY: BRUCE			
ROUTED BY: VAN GROOS/ REEGAN			

UNLESS OTHERWISE INDICATED THIS DISPATCH WILL BE TRANSMITTED WITH DEFERRED PRECEDENCE

PAGE 1 OF 5 — 151624 — NCR 5530

ORIGINATOR FILL IN DATE AND TIME — DATE — TIME — GCT

ON OUTGOING DISPATCHES PLEASE LEAVE ABOUT ONE INCH CLEAR SPACE BEFORE BEGINNING TEXT

ACTION

PART I	151536	NCR 5518	F-0
PART II	151538	NCR 5552	F-01
PART III	151622	NCR 5534	F-02
PART IV	151624	NCR 5530	F-05
			F-07
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			F-4
			FX01
			FX30
			FX37
			FX40
			IG-00
			VCNO

(FROM COMNAVEU) Re discipline of Merchant Seamen - Jurisdiction

REFER SECNAV SERIAL 180413 AUGUST 27. CONCURRENT JURISDICTION OVER MANY US MERCHANT SEAMEN EXISTS BETWEEN ARMY AND NAVY IN THE MAJORITY OF OFFENSES ABOARD SHIP AND ASHORE. THE COMMANDING GENERAL EUROPEAN THEATRE HAS HERETOFORE MADE STRONG REPRESENTATIONS TO THE WAR DEPARTMENT AS TO THE IMPERATIVE NECESSITY FOR PRESERVING SUCH JURISDICTION UNIMPAIRED OR UNHAMPERED IN WHICH I CONCURRED AND OF WHICH YOU WERE ADVISED BY WYDIS 171344 OF AUGUST. RESPONSIVELY THE WAR DEPARTMENT CONCURRED IN FULL AND ADVISED IT WAS NOT DEEMED EXPEDIENT TO REQUEST OPINION OF ATTORNEY GENERAL AS SUGGESTED BY AMBASSADOR WINANT.

UEONGTFIN ADVISED OF SUCH POSITION OF THE WAR DEPARTMENT AND AS RECOMMENDED TO HIM BY ARMY AND NAVY LOCAL

[redacted]

Make original only. Deliver to Code Room Watch Officer in person. (See Art. 76 (4) NAVREGS.)

OPNAV-NCR-16

MESSAGE

NAVY DEPARTMENT

DRAFTER	EXTENSION NUMBER	ADDRESSEES	PRECEDENCE
FROM		ASTERISK (*) MAILGRAM ADDRESSEES	PRIORITY
RELEASED BY		FOR ACTION	ROUTINE
DATE			DEFERRED
TOR CODEROOM		CLASSIFIED	
DECODED BY		E.O. 11652, Sec. ... and 5(D) or (E)	PRIORITY
PARAPHRASED BY		OSD letter, May 9, 1972	ROUTINE
ROUTED BY		By RHP, NARS Date DEC 12 1973	DEFERRED
		INFORMATION	

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PAGE 2 OF 5

151624

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ON OUTGOING DISPATCHES PLEASE LEAVE ABOUT ONE INCH CLEAR SPACE BEFORE BEGINNING TEXT

REPRESENTATIVES. AMBASSADOR WINANT WITHDREW HIS EARLIER REQUEST THAT NO COURT MARTIAL JURISDICTION BE EXERCISED OVER MERCHANT SEAMEN AND SO ADVISED CONSULAR AND WAR SHIPPING ADMINISTRATION OFFICIALS AND REPRESENTATIVES OF OTHER INTERESTED DEPARTMENTS IN THIS THEATER AND ALSO ADVISED THEM THAT MILITARY AND NAVAL AUTHORITIES WOULD RESUME AND CONTINUE TO EXERCISE COURT MARTIAL JURISDICTION OVER MERCHANT SEAMEN UNDER CIRCUMSTANCES AUTHORIZED BY LAW. RESPONSIBILITY FOR THE EXERCISE BY CONSULAR SERVICE OFFICIALS AND WAR SHIPPING ADMINISTRATION REPRESENTATIVES OF THEIR RESPECTIVE JURISDICTION AND AUTHORITY OVER MERCHANT SEAMEN REMAINS UNCHANGED AND RECOGNIZED BY MILITARY AND NAVAL AUTHORITIES. ARMY IS ACTING ACCORDINGLY.

UNITED STATES OF AMERICA VISITING FORCES ACT OF PARLIAMENT DENIES TO UK COURTS JURISDICTION OF ALL PERSONS SUBJECT TO OUR MILITARY AND NAVAL LAWS, UNLESS REPRESENTATIONS ARE MADE ON BEHALF OF THE US "WITH RESPECT TO ANY PARTICULAR CASE". IN CRIMINAL PROCEEDINGS IN UK COURTS AGAINST MERCHANT SEAMEN SHALL

CONFIDENTIAL

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Make original only. Deliver to Code Room Watch Officer in person. (See Art. 76 (4) NAVREGS.)

OPNAV-NCB-16

MESSAGE NAVY DEPARTMENT

DRAFTER | EXTENSION NUMBER | ADDRESSEES | PRECEDENCE

ASTERISK (*) MAILGRAM ADDRESSEES

FROM

RELEASED BY

DATE

TOR CODEROOM

DECODED BY

PARAPHRASED BY

ROUTED BY

FOR ACTION

INFORMATION

PRIORITY
ROUTINE
DEFERRED

PRIORITY
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UNLESS OTHERWISE INDICATED THIS DISPATCH WILL BE TRANSMITTED WITH DEFERRED PRECEDENCE

 151624 NCR 5530

ORIGINATOR FILL IN DATE AND TIME DATE TIME GCT

ON OUTGOING DISPATCHES PLEASE LEAVE ABOUT ONE INCH CLEAR SPACE BEFORE BEGINNING TEXT

JECT TO US MILITARY AND NAVAL LAW. ADVANTAGE MAY BE TAKEN OF THIS VISITING FORCES ACT AS A LEGAL RIGHT BY THE DEFENDANT. UNLESS SUCH REPRESENTATIONS HAVE BEEN MADE RESPECTING HIS "PARTICULAR CASE". IN THIS CONNECTION SEE OPINION OF THE COURT IN RE: ROSS, VOLUME 140, US SUPREME COURT REPORTS. ACCORDINGLY THERE SEEMS JUSTIFIABLE DOUBT OF THE LEGALITY OF THE SURRENDER OF MILITARY AND NAVAL JURISDICTION OVER MERCHANT SEAMEN TO UK COURTS UNLESS DONE STRICTLY IN ACCORDANCE WITH SAID VISITING FORCES ACT IN EACH PARTICULAR CASE AS IT ARISES. SUCH CUMBERSOME TIME CONSUMING PROCEDURE, INCIDENT TO A REQUEST UPON THE AMBASSADOR FOR THE MAKING OF SUCH REPRESENTATION BY HIM TO THE BRITISH AUTHORITIES AND HIS MAKING OF SUCH REPRESENTATION AND THE ISSUANCE BY A SECRETARY OF STATE OF AN ORDER VALIDATING THE EXERCISE BY UK COURT OF JURISDICTION IN THE PARTICULAR CASE, WOULD RESULT IN MUCH LOSS OF TIME OF MERCHANT SEAMEN IN PRISON AWAITING TRIAL BY UK COURTS AND ENTAIL CRITICAL IMPAIRMENT OF THE MERCHANT SEAMEN SERVICES. COMMANDING GENERAL THIS

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Make original only. Deliver to Code Room Watch Officer in person. (See Art. 76 (4) NAVREGS.)

OPNAV-SCH-16

MESSAGE NAVY DEPARTMENT

DRAFTER | EXTENSION NUMBER | ADDRESSEES | PRECEDENCE

ASTERISK (*) MAILGRAM ADDRESSEES

FROM

RELEASED BY

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TOR CODEROOM

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FOR ACTION

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CLASSIFIED
E.O. 11652, Sec. 3(E) and 5(D) or (E)
OSD letter, May 5, 1972
By RHP, NARS Date DEC 12 1973

UNLESS OTHERWISE INDICATED THIS DISPATCH WILL BE TRANSMITTED WITH DEFERRED PRECEDENCE

PAGE 4 OF 5 151624 NCR 5530

ORIGINATOR FILL IN DATE AND TIME DATE TIME GCT

ON OUTGOING DISPATCHES PLEASE LEAVE ABOUT ONE INCH CLEAR SPACE BEFORE BEGINNING TEXT

THEATER JOINS ME IN URGENTLY RECOMMENDING THAT AUTHORITY BE GRANTED FOR NAVY TO CONTINUE TO EXERCISE ITS JURISDICTION OVER MERCHANT SEAMEN. IT SEEMS PROBABLE THAT VISITING FORCES ACT WOULD HAVE TO BE AMENDED BY PARLIAMENT TO LEGALIZE EFFECT OF A SECRETARY OF STATES ORDER VALIDATING GENERAL EXERCISE BY UK COURTS OF JURISDICTION IN ALL MERCHANT SEAMEN CASES LIKELY TO ARISE. INSTEAD OF IN EACH PARTICULAR CASE AFTER IT ARISES, AS NOW PROVIDED FOR. AN OFFICER OF THIS COMMAND FAMILIAR WITH ALL ASPECTS OF THIS PROBLEM WILL ARRIVE IN WASHINGTON ON OR ABOUT OCTOBER 1 BRINGING CORRESPONDENCE AND DATA CONCERNING MERCHANT SEAMEN DISCIPLINE. IT IS REQUESTED AND URGED THAT STATE DEPARTMENT BE COMMUNICATED WITH IMMEDIATELY AND BE REQUESTED TO TAKE NO ACTION UNTIL THIS MATTER CAN BE DISCUSSED IN DETAIL WITH NAVY DEPARTMENT. NO FURTHER ACTION EXCEPT THOSE POWERS EXERCISED BY US COAST GUARD UNDER RS4450 WILL BE TAKEN WITH RESPECT TO DISCIPLINE OF MERCHANT

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Make original only. Deliver to Code Room Watch Officer in person. (See Art. 76 (4) NAVREGS.)

OPNAV-NCR-16

MESSAGE NAVY DEPARTMENT

DRAFTER | EXTENSION NUMBER | ADDRESSEES | PRECEDENCE

ASTERISK (*) MAILGRAM ADDRESSEES

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UNLESS OTHERWISE INDICATED THIS DISPATCH WILL BE TRANSMITTED WITH DEFERRED PRECEDENCE

PAGE 5 OF 5 151624 NOR 5630

ORIGINATOR FILL IN DATE AND TIME DATE TIME GCT

ON OUTGOING DISPATCHES PLEASE LEAVE ABOUT ONE INCH CLEAR SPACE BEFORE BEGINNING TEXT

SEAMEN BY THIS COMMAND UNTIL THE ABOVE CONFERENCE IS CONSUMMATED. REPLY REQUESTED.

REF IS SECRET:

13.....ACTION

COMINCH...FX37....16....JAG....COAST GUARD.....

NAVAIDE....FILE

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CLASSIFIED
E.O. 11652, Sec. 3(E) and 5(D) or (E)
OSD letter, May 8, 1972
By RHP, NARS Date DEC 12 1973

[redacted]

Make original only. Deliver to Code Room Watch Officer in person. (See Art. 76 (4) NAVREGS.)

OPNAV-NCR-16

[redacted]

WAR DEPARTMENT
CLASSIFIED MESSAGE CENTER

JD JD B 26
filed 0859B/1
LB

INCOMING MESSAGE

CCWD
Jun 1, 1943
1202Z

From: Algiers
To: WAR W-1725 BOC 621
USFOR Unnumbered

June 1, 1943.

During first discussion with Tron on revision of article 14 of Clark Darlan agreement for your information the following were the reactions to our proposals. (Action AGWAR information USFOR signed Eisenhower cite FHAEB.) BOC 621. Treasury A-24. Reference COB 349.

1. They agreed that no taxes would be levied on goods imported by Allied Governments for civilian relief.

2. They agreed that no taxes would be levied on goods purchased locally for civilian relief where Allied Governments receive no payment for goods provided.

(A) French Government be able to purchase godds tax free in United States for relief purposes in France and for French Prisoners of War.

(B) Such goods be distributed in this area and France only.

3. Internal taxes included in the price of merchandise should be paid on military purchases. French feel our Army should get same tax treatment as French Military in the United States.

4. They agreed that no tax will be levied on goods imported for sale to Military personnel through

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[redacted]

WAR DEPARTMENT
CLASSIFIED MESSAGE CENTER

INCOMING MESSAGE

From: Algiers
To: WAR W-1725 BOC 621
USFOR Unnumbered

June 1, 1943. Page 2

Post Exchanges and similar institutions but taxes must be collected on goods imported for distribution to Arab workers hired by Military. French suggest possible solution is to abandon the Arab stores.

5. Taxes must be collected on all stockpile purchases except those used for strictly military purposes or for relief in French territories.

6. Tron agrees that no significant changes will be made in export taxes without consulting Allied representatives but he does not want it written into agreement since it would be regarded as a violation of French sovereignity.

7. Our proposal re internal taxes and custom taxes on imported civilian goods is acceptable.

8. Further discussions being held in attempt to obtain their full acceptance of our proposals.

Clark Darlan agreement now being completely revised and it has been suggested that agreement on taxes to be reached during our discussions with French be incorporated as new tax article.

No Sig

Footnote: COB 349 is CM-OUT-980 (3 May 43) CCS
COB 349 is CM-OUT-981 (3 May 43) CCS

ACTION: CCS

INFORMATION: OPD
G-2 (COL. SANDS)
ASF
CAD

CM-IN-377 (1 June 43) 1608Z 18 mjc

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WAR DEPARTMENT
CLASSIFIED MESSAGE CENTER

OUTGOING MESSAGE

Combined Chiefs of Staff

May 1, 1943

CG FREEDOM ALGIERS Number 7162

BRITISH CHIEFS OF STAFF USFOR LONDON ENGLAND Number R 8123

Believe inadvisable seek amendment tax clauses French North and West African agreements now. Instead recommend you and French African authorities reach operating agreement governing both French North and West Africa. Agreement should include following points: 1. As used here, "Allied government" includes their agencies, representatives, and any corporations, other organizations, or persons acting on their behalf.

2. All negotiations and discussion these matters to be conducted Algiers and Dakar kept informed. This cable repeated Dakar information Saxon and Barnes.

3. Except as in 6 below, internal taxes and customs duties may be levied goods imported civilian use. Allied governments shall in no manner pay or bear such taxes. For this reason, any civilian imports bill presented by Allied governments will not be cut under what it would otherwise be to leave a margin for taxes by the French. This agrees substantially with BOC 412.

4. Tax levies for civilian consumption imports shall be considered by French and Allied representatives to determine whether reasonable and fair. This applies to any levy directly or indirectly affecting military operations of Allied Governments. To Eisenhower COB 349 signed CCS for MAEB. This Treasury 10. Re Refer BOC 141, February 24; BOC 389, April 21; BOC 412, April 23; BOC Airgram 5, March 27.

5. Under established fiscal practices, French may impose reasonable taxes on exports except re-exports of goods Allied governments have imported and exports by Allied governments for relief or military purposes. French shall consult Allied representatives regarding reasonableness and desirability any tax on goods exported for or by Allied governments. Assurance goods vital to common war effort produced in largest possible volume should be chief consideration of everyone.

CM-OUT-980 (3 May 43)

18

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WAR DEPARTMENT
CLASSIFIED MESSAGE CENTER

OUTGOING MESSAGE

6. Freedom from duties and taxes to be graned all Allied government local purchases and imports for civilian relief or other purposes where Allied governments receive no payment for goods. Stockpiles Allied governments accumulate for use locally or elsewhere also come under this provision. Follow 8 below in dealing with taxes applying to local purchases for relief purposes.

7. Allied government imports for military purposes and military personnel use to be tax and duty free.

8. All Allied military purchases, except by personnel acting as individuals, made French Africa to be exempt from sales, excise, production, and stamp taxes, and other internal levy, also interstate tariffs on goods moving from Morocco to Algeria, AOF to Morocco, etcetera. General formula for deducting taxes should be agreed upon with French officials. Avoid meticulous or involved procedure which will complicate or delay military operations or purchases. Recommend internal purchase levies be paid by Allied procurement officers and refunded at proper intervals as percentages total purchases classified in broad categories goods or percentage overall total purchase.

9. Charges or levies for direct service, as water supply and sewerage disposal, may by paid by Allied military.

10. Should operating agreement include provision for its nullification by Allied governments with notice of 60 days? This provision would make it possible for Allied governments to reinstate French West and French North African agreement tax clauses if operating agreement did not work out satisfactorily.

11. Terms of French West and French North African agreements shall remain in force where fiscal questions not covered here are concerned.

ORIGINATOR: CCS

INFORMATION: ASF INT'L (Col Wright)
OPER (Col Magruder)
OPD
G-2 (Col Sands)
CAD

CM-OUT-980 (3 May 43) 1256Z mcs

CM-OUT-981

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[redacted] COPY No.

NAVAL MESSAGE — NAVY DEPARTMENT

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FROM SECNAV	FOR ACTION	NOB ICELAND	PRIORITY / ROUTINE / DEFERRED DDDDDDDDD
RELEASED BY FORRESTAL			
DATE MARCH 15, 1943			
TOR CODEROOM 1430/16	INFORMATION	CINCLANT	PRIORITY / ROUTINE / DEFERRED
DECODED BY			
PARAPHRASED BY SANBORN			

INDICATE BY ASTERISK ADDRESSEES FOR WHICH MAIL DELIVERY IS SATISFACTORY.

LT. SHALL 151815 - NCR6681

UNLESS OTHERWISE INDICATED THIS DISPATCH WILL BE TRANSMITTED WITH DEFERRED PRECEDENCE.

ORIGINATOR FILL IN DATE AND TIME — DATE — TIME — GCT

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	VCNO

YOUR 111147 LEGISLATION AUTHORIZING TRIAL BY COURT MARTIAL OF CIVILIANS ACCOMPANYING OR SERVING WITH NAVY HAS PASSED SENATE NOW PENDING HOUSE. PENDING SUCH ENACTMENT COMINCH 031240 OCTOBER 1942 APPLICABLE TO AMERICAN SHIPS AND SEAMEN IN ICELAND ASHORE AND AFLOAT. YOU ARE AUTHORIZED TO CONVENE EXCEPTIONAL MILITARY COURTS IN SPECIFICCASES WHEN THE EXIGENCIES OF MILITARY OPERATIONS SO DEMAND.

13....OR 16.

COMINCH....COASTGUARD....16....F-37....

FILE

[redacted]

Make original only. Deliver to communication watch officer in person. (See Art. 76 (4) NAVREGS.)

U. S. GOVERNMENT PRINTING OFFICE 16—22818-2

151815 NCR 6681 010

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WAR DEPARTMENT
CLASSIFIED MESSAGE CENTER

INCOMING MESSAGE

Jan 7-90-

Cairo
Dated March 2, 1943.
Rec'd 2:47 p.m.

Secretary of State
Washington

US URGENT

442, March 2.

Foreign Office on its initiative prepared and issued this afternoon statement to foreign news agencies of which following translation "His Excellency Moustapha El Naha's Pasha, President of the Council of Ministers and Minister for Foreign Affairs and Mr. Alexander Kirk, Minister of the United States this morning signed an agreement by which the Egyptian Government concedes extensive jurisdictional immunities to the American forces in Egypt for the duration of the war.

Recognition is thereby accorded in Egypt to a judicial status equivalent to that already obtained for the United States forces in Great Britain, Australia, India and Brazil.

In the exchange of letters which took place and which embody the Government of the United States in recognizing the extent of the collaboration of the Egyptian Government expressed its great appreciation for the advantages obtained.

Egypt is today actually a most important base of supply for the forces of the United States.

Also this new manifestation of the collaboration of Egypt in the allied cause and of its good will toward the American democracy constitutes a step of particular importance". Similar but not identic statement was released to Egyptian press.

Kirk

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INFORMATION: OPD
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CM-IN-1179 (3 Mar 43) 0956Z cen

M.I.S. JOURNAL NO 102 MAR 3 1943

~~RESTRICTED~~ COPY No.

THE MAKING OF AN EXACT COPY OF THIS MESSAGE IS FORBIDDEN

9-010

[redacted]

WAR DEPARTMENT
CLASSIFIED MESSAGE CENTER

INCOMING MESSAGE

DEPARTMENT OF STATE

THE SECRETARY

March 2, 1943

PARAPHRASE

Telegram No. 441 Dated: March 2, 4 p.m.

From: Cairo Rec'd: March 2, 2:25 p.m.

The notes exchanged this morning at the Prime Minister's home in regard to military jurisdiction, and the proclamation implementing the grant will appear tomorrow in the Journal Officiel. In view of the local political consideration I am taking the position that any publicity should emanate from Egyptian sources in regard to this matter. Within the next few days, copies of the notes exchanged will be sent in the next air pouch.

The claims of the Egyptian courts for trial of Heider and the soldiers accused in the affair at Port Said will now be dropped by the courts.

Reference my 404, February 23, 10 a.m. and Department's 286, February 19, 5 p.m.

Kirk

S:FED:LEY

ACTION
ORIGINATOR: G-2 EA

INFORMATION: OPD
BPR

G-2 Distribution

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CM-IN-1180 (3 Mar 43) 0958Z bjm

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M.I.S. JOURNAL NO 106 MAR 3 1943
COPY No. 25

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WAR DEPARTMENT
CLASSIFIED MESSAGE CENTER

INCOMING MESSAGE

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CCWD
Feb. 25
0443Z

From: Algiers
To: WAR (action)
USFOR London (information)

No. 2646, February 24, 1943

Considerable discussion with French African authorities on matter of exemption from taxation of property of and transactions engaged in by the Allies (to AGWAR information USFOR from Freedom Algiers) action AGWAR Combined Boards Treasury information USFOR British Chiefs of Staff signed Eisenhower cite FHAEB Murphy and Taylor and FHFIN Sims, BOC 141, Section 2 of our BOC 35 refers to this matter. French African authorities have revised their previous proposals and on February 18 Tron Secretary of Finance formally requested that Article 14 of the Darlan Clark agreement of November 22 be modified as follows, "Article 14 of the agreement of November 22 year 1942 be modified by the following addition. The dispositions above are not applicable (1) to taxes due by individuals acting in an individual capacity (2) to taxes for services rendered (3) to customs taxes to be collected on merchandise imported for any needs other than those of the Army or official organizations and destined for their own use as well as those goods given or sold after their importation by Allied organizations it being agreed that these taxes will not exceed in any case those which would be collected on identical imported merchandise coming from any other foreign country. (4) to the production tax and internal consumption tax applicable to purchases made on the African market and included in the price of the goods". Letter to Murphy transmitting this proposal Tron states that the November agreement does not correspond to circumstances existing especially in view of Anfa conferences and that he is expressing the viewpoint of General Giraud with respect to amendment of Article 14. Tron makes the following

CM-IN-12971 (25 Feb 43)

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COPY No. 18

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WAR DEPARTMENT
CLASSIFIED MESSAGE CENTER

INCOMING MESSAGE

From: Algiers (page 2)
To: WAR (action)
USFOR London (information)
No. 2646, February 24, 1943

points: (1) A strict interpretation of article would deprive French North Africa of essential revenues at a time when expenditures are increasing enormously. (2) Nature of French North African economy is such that substitute sources of revenue for customs and indirect taxes can not be found. (3) Allied merchandise imported for French civilian use should not be free of customs and other taxes (4) Administrative difficulties arising in many cases in connection with provisions of article are insurmountable.

For your information as practical matter the Allied authorities have not thus far pressed for the deduction of the taxes referred to in clause 1 and clause 2 of the above amendment proposed by the French, I with respect to the taxes referred to in clause 4 of such proposed amendment it has been recommended that the Allied Forces should not hold up any essential purchases because of insistence of seller that such taxes be paid and that for time being Allied Army purchasing agents could make payment on such taxes under protest with full acknowledgement of future recovery if it is decided that the taxes should not have been paid. With respect to clause 3 of the proposed amendment see our BOC 35 which pointed out that any such proposed change in the Darlan Clark agreement would in large measure fail on the Allied governments under program for selling consumers goods to the French at low enough prices to permit resale to consumers at fixed prices prevailing on November 8. Also see our BOC 41 Lend Lease 42 with respect to this matter.

It should be noted that article 14 of the declaration of December 7 year 1942 by Admiral Darlan and Governor Boisson provides as follows with respect to the matter of taxation in French West Africa. "In French West Africa and in Togo the property of the United States Government Great Britain and their Allies and their representatives Civil Officials

CM-IN-12971 (25 Feb 43)

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WAR DEPARTMENT

From: Algiers CLASSIFIED MESSAGE CENTER (Page 3)
To: War (action)
[illegible]

INCOMING MESSAGE

No. 2646, February 24, 1943

Government organizations or authorized welfare organizations all transactions effected by the representatives of these governments or their organizations will be subject to the same rate of tax as that which is applicable to the property of the French Government or of the colony or transactions of the Army or of the Civil Administration of the French Government or of the colony" This provision is substantially the same as the provision previously proposed by the French authorities and referred to in section 2 of our BOC 35. We pointed out the inadequacy of the provision to Tron and example of its inadequacy is the fact that the French paid taxes on goods other than actual war material imported into French Africa even though such goods were for consumption by the French Army.

In the discussion of this matter with Tron prior to the formal submission of the French proposal Tron agreed that the following would be included in the letter to Murphy "It is understood that no increase or change of rates will be effected in the principal taxes (custom duties sales taxes export equalization taxes production taxes) without prior consultation with the Allied authorities". This sentence does not appear in the letter finally submitted and Tron stated upon inquiry that it had been taken out at insistence of Lemaigre Dubreuil who was concerned over the alleged infringement of French sovereignty. Tron added that in the reply of the Allied authorities this sentence should be included. Lemaigre Dubreuil is now Chief of the Inter Allied Section which is liaison organization of French African government.

French do not desire to levy direct taxes registration fees and stamp taxes upon Allies or persons acting in an official capacity. With respect to clause 2 of amendment taxes for services rendered such as street cleaning garbage removal sewerage are designed primarily to cover costs of maintaining these essential services. With respect to clause 3 rates of customs taxes in Algeria same as metropolitan France, pre November 8 estimate of customs revenue for Algeria this year less than 100,000,000 francs. In Morocco straight 12 1/2 percent ad valorem with pre November 8 estimate 200,000,000 francs this year. In Algeria the above

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WAR DEPARTMENT
CLASSIFIED MESSAGE CENTER

INCOMING MESSAGE

From: Algiers (page 4)
To: WAR (action)
USFOR London (information)
No. 2646, February 24, 1943

estimate is about 2 percent of total revenue, in Morocco about 10 percent. With respect to clause 4 production taxes and internal consumption wages together yield over 1,000,000,000 francs estimate for Algeria this year and are about one quarter total state income. Such taxes levied at source with different rates for different commodities. If preferential treatment accorded Allies tremendous problems in administration and tax computation inevitable. Somewhat similar situation prevails in Morocco where sales taxes monopoly taxes and production taxes together provide over 800,000,000 francs or about 40 percent of total revenue.

Due to urgent need for revenue in area and to difficulties of administration and computation if article 14 enforced in full we recommend that the question of the revision of article 14 be given careful consideration. In any such amendment we believe it essential that French agree not to increase customs duties production taxes internal consumption taxes or export equalization taxes without at least previous consultation with Allied authorities. This is deemed necessary in view of Lend Lease imports Allied purchases for export and Army purchases within area. If consultation not thus required increases in these taxes could be so arranged as to fall almost exclusively on Allied organizations.

No Sig

DECLASSIFIED
JCS memo, 1-4-74
By RHP, NLR, Date MAY 15 1974

ACTION: CCS

INFORMATION: OPD
G-2 (Col. Sands)
SOS

CM-IN-12971 (25 Feb 43) 2025Z cen

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WAR DEPARTMENT
CLASSIFIED MESSAGE CENTER

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INCOMING MESSAGE

[redacted]D
February 20, 1943
1334 Z

PRIORITY

From: Cairo
To: AGWAR

Number: AMSME 4759, February 20, 1943

Exchange of notes between United States Minister here and Egyptian Government will probably be effected Tuesday by which United States will have exclusive jurisdiction over all United States Armed Forces, leaving Egyptian Government the right to try by mixed courts those employees of the United States Government it may desire (for Marshall) approval of the Department of State for making this agreement received by Kirk.

Brereton

Action: OPD

Information: G-2 (SD)
SOS

CM-IN-10397 (20 Feb 43) 1631 Z mvs

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WAR DEPARTMENT
CLASSIFIED MESSAGE CENTER

INCOMING MESSAGE

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CCWD
Feb 10
2233Z

PRIORITY

From: Algiers
To: War

No. 91 February 10, 1943

The Commanding General North African Theater desires general courts martial jurisdiction reference our 9877 your 2018 and confirming authority. (For Operations Division for Marshall for McNeil action cite FHGAP from Eisenhower). Desire Branch Office Judge Advocate General be established in North African Theater in same manner and to same extent as in ETO.

Strongly recommend that Colonel Adam Richmond, JAGD, 08024 now JA allied force here be promoted to Brigidier General and designated to head branch office.

Request staff of branch office be furnished from United States. Suggest 3 Colonels for Board of Review, One Colonel, 2 Lieutenant Colonels and 2 Majors for Military Justice Section. One Warrant Officer chief clerk, 5 technician 4 grade stenographers, 2 technician 5 grade typists, 2 technician 5 grade file clerks. Request allotment of ranks and grades accordingly. Clerical personnel should bring typewriters and other office equipment for the branch office. Civilian clerks preferable if in accord with policy.

No Sig

Footnote: No. 9877 is CM-IN-4830 (2-10-43) OPD
No. 2018 is CM-OUT-2956 (2-9-43) SOS-JAG

Action: OPD
Information: SOS, General Deane (CC/S), Navy (Adm. Cooke), G-1, LOG

CM-IN-5418 (11 Feb 43) 0649 Z mvs

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COPY No. 34

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WAR DEPARTMENT
CLASSIFIED MESSAGE CENTER

INCOMING MESSAGE

YQV 2 Nr 27
Filed 091555Z
eva

CCWD
February 9, 1943
2242Z

From: Algiers
To: AGWAR

No. 9877, February 9, 1943

Desire confirmation that authority contained in your message 1949 February 6 (To Operations Division for Marshall action cite FHGAP signed Eisenhower) includes empowerment by the President to appoint General Courts Martial, if not, request such authority by cable.

No Sig

NOTE: 1949 is CM-OUT-2196 (6 Feb 43) OPD.

ACTION: OPD

INFORMATION: General Deane (CCS)
Navy (Admiral Cooke)
Log

CM-IN-4830 (10 Feb 43) 0321Z ems

[redacted]

COPY No. 28

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RESTRICTED

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filed 6/1430Z

WAR DEPARTMENT
CLASSIFIED MESSAGE CENTER

INCOMING MESSAGE

CSWD
August 6, 1942
2014 Z

From: London
To: War

No. 924, August 6th, 1942

Royal assent was given to-day to the United States of America visiting Forces Act of Parliament, rendering exclusive the jurisdiction of our Courts-Martial over these Forces.

Eisenhower

Action Copy: OPD

Info. Copies: G-2
A-2
CG AAF
SOS-TAG

CM-IN-2224 (8/7/42) 0225Z

27

RESTRICTED COPY No.

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THE FOLLOWING RECEIVED IN THE OFFICE OF NAVAL INTELLIGENCE
BY TELEPRINTER CIRCUIT (TWX) 1835 12 1942
FROM: DISTRICT INTELLIGENCE OFFICER
TO: DIRECTOR NAVAL INTELLIGENCE
TEXT: THE SOUTHERN MINERALS CORPORATION CORPUS CHRISTI, TEXAS, IS INVOLVED IN THE TRIAL OF AN ACTION IN FEDERAL COURT TO ENFORCE A CONTRACT TO PURCHASE CRUDE OIL, SUCH OIL TO BE DELIVERED AT PORT OF CORPUS CHRISTI AND TRANSPORTED TO HOUSTON, TEXAS, IN ORDER TO PROVE CONCLUSIVELY THAT SUCH CRUDE OIL COULD HAVE BEEN MOVED IN ACCORDANCE WITH THE CONTRACT, ONE OF THE ELEMENTS IN SUCH PROOF WILL BE THE QUANTITY OF SUCH OIL ACTUALLY LIFTED FROM THE PORT OF CORPUS CHRISTI DURING THE LAST MONTH IN WHICH THE CONTRACT WAS IN EFFECT, MARCH, 1942. THE NUECES COUNTY NAVIGATION DISTRICT HAS ADVISED SOUTHERN MINERALS CORPORATION THAT BEFORE SUCH FIGURES CAN BE RELEASED, APPROVAL OF THE NAVY DEPARTMENT OF SUCH RELEASE WILL BE NECESSARY. IT IS REQUESTED THAT DIO 8ND BE ADVISED IF THERE IS ANY OBJECTION TO THE NUECES COUNTY NAVIGATION DISTRICT GIVING SUCH INFORMATION AS TOTAL AMOUNT OF CRUDE OIL LIFTED FROM THE PORT OF CORPUS CHRISTI DURING THE MONTH OF MARCH 1942 BOUND FOR TEXAS GULF PORTS AND IF DESTINATIONS OF SUCH OIL CAN BE FURNISHED
END LJM

39 ACTION
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