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FAR EASTERN DEPARTMENT

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OM F.O. Minute
Mr Murray

Bellamy in the Famosa Strait.

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ceived in
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submits a memorandum on the
legal aspects of the recognition of
bellamy.

ferences to former relevant papers
40)

MINUTES

- A) Mr. Allingham, Admiralty. M. 558, 2/56 11/2
- B) Mr. Dickinson, Ministry of Transport. FSR 4/5/001 Pt. 4

20/2.

(Print)

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M E 27.

(How disposed of)

to... Howard...
from... Mr Murray...
to... Allingham...
to... F.O. Minute...

to F.O. Minute, Mr. Cave 22/2.

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FO 371/120939

(Action completed) (Index)

24/2
25/18/57

CONFIDENTIAL

1092/2

The Legal Adviser has now approved our draft memorandum on belligerency in the Formosa Strait. We shall have to obtain the comments of Colonial Office, the Admiralty and the ~~Board of Trade~~, but we might do this at the same time as the draft is submitted for approval here. I accordingly attach:

- (a) the draft memorandum;
- (b) a draft minute under cover of which it might be submitted here;
- (c) a draft to Colonial Office, ^{Admiralty} ~~Board of Trade~~ and Admiralty which might issue now.

2. The arrangements for keeping the Law Officers' Legal Secretary informed are at the request of the Legal Adviser.

James Murray

James Murray.
February 15, 1956.

Alhazell
15/2

Rec'd you. Let us get this paper off to the C.O. & their dept. I think we had better get their clearance before putting this up to the office as we may cause confusion.

C.O.C
15/2

NOTHING TO BE WRITTEN IN THIS MARGIN

1144

RECOGNITION OF A STATE OF BELLIGERENCY
IN THE FORMOSA STRAIT

Problem

In discussion with his colleagues on the recent incident in Hong Kong involving a Chinese Nationalist military aircraft the Colonial Secretary said that he felt strongly that we should consider whether it would not be to our advantage to recognise a state of belligerency between the Chinese Communists and the Chinese Nationalists, so that Hong Kong might be enabled to maintain a strictly neutral position between the two parties and to prevent in future combatants on either side from using Hong Kong as a haven of refuge. It was agreed that the Foreign Office should circulate for consideration by the Cabinet a memorandum setting out the pros and cons of recognising a state of belligerency.

Discussion

2. Our view has hitherto been that the disadvantages of recognising a state of belligerency in the Formosa Strait heavily outweighed the advantages. These views have been confirmed by the re-examination which we have now carried out of both the legal and practical aspects. I attach a draft paper for the Cabinet which has been approved by the Legal Adviser, and has the agreement of the Colonial Office, the Admiralty and the Ministry of Transport and Civil Aviation.

3. Although recognition of a state of belligerency would seem to be out of the question, it does not affect the desirability /

desirability of our ensuring that the Governor of Hong Kong is in a position to prevent the use of Hong Kong as a refuge for aircraft or ships or in furtherance of military operations. This however is a different problem and will no doubt be decided by Ministers in the context of the present incident of the Nationalist aircraft. It will in any case be pursued separately.

Recommendation

4. It is recommended that the attached draft memorandum should be sent to the Cabinet Office as an expression of our views and, at the request of the Legal Advisor, to the Law Officers' Legal Secretary (Mr. A. MacDonald, Law Officers' Department, Royal Courts of Justice, W.C.2) for information.

C. T. Crowe

C. T. Crowe.

February 22, 1956

P. Allen

Lord Reading

Secretary of State
been

*copy sent to
Cabinet 24/2
1956*

Allen 22/2

J. Macpherson
22.2.

*I think this recommendation
is quite right.*

Reading 23/2

Memorandum by the Foreign Office

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Cabinet Paper

In connexion with the recent incident involving a Chinese Nationalist military aircraft in Hong Kong the Colonial Secretary has asked his colleagues to consider whether it would not be to our advantage to recognise a state of belligerency between the Peking Government and the Chinese Nationalists, to enable Hong Kong to maintain a strictly neutral position between the two parties and to enable us in future to prevent combatants from either side from using Hong Kong as a haven of refuge.

2. A note on the legal aspects of recognition of a state of belligerency is at Annex A. The salient points are:-

- (a) Before recognition of belligerency is justifiable, such as was eventually given in the American Civil War, there must exist a civil war involving an armed conflict of a general (as distinguished from a purely local) character.
- (b) It is not necessary that both contesting parties should be recognized governments, but the contesting party which is not the legitimate government must occupy and administer a substantial portion of the national territory.
- (c) Outside states affording such recognition must adopt an attitude of neutrality towards the contesting parties as if the war were an international conflict. The essence of this is impartiality of

troasment and acquiescence in the same measures of interference by the "belligerent" factions as are permitted in international war, e.g. in particular acquiescence in the right of blockade and contraband control, and visit and search of vessels.

(d) The attitude of neutrality imposes the duty to prevent contesting parties from making use of neutral territory and neutral resources for their military and naval purposes, and in particular to intern belligerent aircraft which enter neutral air space, and to detain and if necessary to intern members of the armed forces of the contesting party which come within their territory.

3. In this particular situation the anomalous status of the Nationalist authorities in Formosa need not be a bar to the recognition of belligerency if it seemed in our interest. We already recognise the right of the Nationalists to be in Formosa on a basis of military occupancy. If we recognised a state of belligerency we should merely be saying that the hostilities waged were of such a character and scope as to entitle the parties to be treated as belligerents engaged in a war in a sense ordinarily attached to the term in international law. Our action would not involve recognising the Nationalists as a Government.

4. On the other hand the present hostilities could hardly be described as an armed conflict of a general character. Since the Communist capture of the coastal island of Ichiangshan early last year, military action has been

largely limited to Nationalist reconnaissance flights over the mainland, artillery duels in the area of Quemoy and Matsu, and attacks by both sides on coastal shipping. It is very doubtful therefore whether the scale and scope of these hostilities are sufficient to justify recognition of belligerency. Moreover, apart from Formosa, the status of which is in our view undetermined, the only Chinese territories which the Nationalists control are a few small islands. They have no visible prospect of reasserting their position as the Government of China. On strictly legal grounds, therefore, there is no very good case, on the facts as they exist to-day, for awarding belligerent rights to the Nationalists.

5. Apart from the strictly legal arguments, however, there are serious practical objections. Although a decision to recognise a state of belligerency would not involve recognition of the Nationalists as a Government, nevertheless, taken at this late stage, it would be widely interpreted as meaning that we were ready to adopt a "two-Chinas" policy by recognising the Nationalists as the Government of Formosa. It is not desirable to commit ourselves now to any step of this kind. It could not fail to increase our difficulties with the Chinese Government, which would regard it as an unfriendly act.

6. We should, moreover, greatly increase the difficulties for our shipping operating in and out of the ports of mainland China. Since the Nationalists withdrew to Formosa in 1949 British ships engaged in trade on the China

These have been mostly caused by the Nationalists as the ships have been largely trading with the mainland ports ~~and~~ since the Nationalists have exercised control of the seas in the Formosa Strait. During the past two years, with one or two serious exceptions, their interference has been mainly confined to stopping our ships for identification and sometimes examination, and allowing them to proceed shortly afterwards. We have, however, regularly protested to the Nationalist authorities in Formosa. If we now recognise a state of belligerency, we should have to recognise that the Nationalists had belligerent rights which would entitle them to stop and search our ships and perhaps to capture them and condemn them in prize.

7. On the other hand we should acquire the advantage of the undoubted right to intern military aircraft of either side which had infringed Hong Kong airspace, and to intern warships of either side remaining in Hong Kong longer than the period (which would normally be 24 hours) which they might be permitted to remain to take on fuel and provisions for immediate use. The Governor of Hong Kong would therefore be able to take more effective action to prevent Hong Kong from becoming involved in incidents likely to damage our interests and to forestall accusations from one side or the other that Hong Kong territory was being used for unfriendly purposes. But even this might not be entirely to our advantage. It might well be embarrassing for us if, in pursuance of the duties vesting on a neutral power, we had to

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to return one of their aircraft which had landed in genuine distress in Hong Kong during operations in defence of Canton.

8. Our view is therefore that even assuming recognition to be legally justifiable, the disadvantages of recognising a state of belligerency heavily outweigh the advantages.

9. Nevertheless it is desirable that we should take steps to ensure that the Governor of Hong Kong is in a position to prevent the use of Hong Kong in furtherance of military operations. In the state of friction which undoubtedly persists in the area, it would appear justifiable to maintain that a situation exists in which he may need to take certain measures under his emergency powers to safeguard the security of Hong Kong. He may, for instance, use these powers to detain indefinitely vessels or aircraft to ensure that they are not being used for purposes which are prejudicial to the security of territory. It is for consideration whether he should not now be directed to issue a warning that military aircraft infringing the territorial air space of Hong Kong are liable to be detained until he is satisfied that they are not being used and will not be used to commit acts prejudicial to the security of the territory. Such a warning might be extended to include military personnel also, though this would require bringing into force a part of the Hong Kong emergency regulations not yet in force. Such a warning should deter combatants from either side from using Hong Kong as a haven of refuge, while leaving the Governor ^{discretion} ~~discretion~~ to

to review the merits of each particular case.

Recommendations

10. It is recommended that:-

(a) we should not for the present recognise a state of belligerency in the Formosa Strait;

(b) the Governor of Hong Kong should be asked to consider the issue of a warning on the lines of paragraph 9 above.

The Legal Aspects of the Recognition
of Belligerency

It is not necessary for recognition of a state of belligerency that the two opposing parties should be sovereign states, but if a state of belligerency in a civil war is recognised, the contesting parties are legally entitled to be treated as if they were engaged in a war between sovereign states. Recognition of belligerency is not dependent on a request from either of the contesting parties to accord such recognition. Under existing international law there is no duty on outside states to accord recognition whatsoever the circumstances, but the conditions which are generally held to justify recognition of belligerency in a civil war are as follows:-

- (i) There must exist an armed conflict of a general (as distinguished from a purely local) character.
- (ii) The contesting party which is not the legitimate Government must occupy and administer a substantial portion of national territory.
- (iii) The above-named contesting party must conduct the hostilities in accordance with the rules of war and through organised armed forces acting under a responsible authority.
- (iv) There must exist circumstances which make it necessary for outside states to define their attitude by means of recognition of belligerency.

2. Outside states according such recognition must adopt an attitude of neutrality towards

is impartiality of treatment and submission to the same measures of interference as would be the case in a fully international war.

3. In particular the recognition of belligerency carries with it the recognition that the contesting parties are entitled to exercise belligerent rights:

- (a) the right of blockage;
- (b) the right to visit, and if need be, to search neutral merchant ships to see whether they are carrying contraband or attempting to break a blockade, or rendering unneutral service to the enemy;
- (c) the right to capture neutral vessels if any are found to be committing any of the acts mentioned in (b) above;
- (d) the right to set up Prize Courts, and to bring neutral vessels captured in accordance with (c) above before them;
- (e) the right of angary, i.e. the right to destroy or use, in the case of necessity, for the purpose of offence and defence, neutral property on their territory, or on enemy territory or on the open sea.

4. The attitude of neutrality which must be adopted by outside states which have recognised the contesting parties as belligerents imposes the following duties amongst others:-

- (a) the duty to act impartially towards the contesting parties;
- (b) the duty to acquiesce in the exercise of belligerent rights by the contesting parties;

neutral resources for their military and naval purposes, which necessarily includes the duty not to allow vessels and aircraft of the contesting parties to make use of their ports and airports for the purpose of naval and air operations:

- (d) the duty, if belligerent warships are admitted to neutral ports, not to allow them to remain there longer than is required for ordinary and legitimate purposes, such as taking on fuel or food supplies required for immediate consumption (the period is normally 24 hours);
- (e) the duty to prevent the departure from their territory of any aircraft in a condition to make a hostile attack against either of the contesting parties;
- (f) the duty, established as a customary rule of international law to intern any belligerent aircraft which either intentionally or inadvertently enter the air space over neutral territory and are compelled to land;
- (g) the duty to detain, and if necessary, to intern members of the armed forces of the contesting parties who come within their territory.