

## EDITORIAL COMMENT

### CLOSURE OF PORTS BY THE CHINESE NATIONALIST GOVERNMENT

By a note of June 20, 1949, the Chinese Nationalist Government advised the United States that certain specified regions and ports on the Chinese coast, including the port of Shanghai, in the hands of Communists, "shall be temporarily closed and entry therein of foreign vessels shall be strictly forbidden"; and beginning at midnight, June 25, "prompt action shall be taken to prevent violation of this decision by foreign vessels," which shall bear responsibility for violations (Department of State Press Release 483, June 23, 1949). On June 28, the Secretary of State replied:

The United States Government cannot admit the legality of any action on the part of the Chinese government in declaring such ports and the territorial waters adjacent thereto, closed to foreign vessels unless the Chinese government declares and maintains an effective blockade of them. In taking this position the United States government has been guided by numerous precedents in international law with which the Chinese government is doubtless familiar and has noted that the ports referred to are not under the actual control of the Chinese government. (Press Release 499, June 29, 1949.)

The Chinese Government rejoined on June 30, that it

deems it within the sovereign right of a state to declare open or closed any part of its territory whenever conditions necessitate. In fact the Chinese government has exercised in the past on more than one occasion the right to close some of its ports, and no question of legality has been raised by any government, including that of the United States. Port Dairen, for instance, was declared closed at a time when it was not under the actual control of the Chinese government.

This closure is of a "similar nature and is therefore enforceable independent of a declaration of blockade, which has never been and is not under the contemplation of the Chinese government."

American shipping circles were immediately notified of the port closure order and warned that any American ships would enter on their own responsibility.

The Isbrandtsen Company, owner of the ships mentioned below, reports that the *Flying Clipper* and the *Flying Independence* on September 18, 1949, entered Shanghai after exchanging signals with a Nationalist warship, but on leaving were detained on the high seas for several days under threat of gunfire. The *Flying Cloud* likewise entered Shanghai on October 30, 1949, and on leaving was fired on without warning. On November 29,

the *Sir John Franklin* was fired on without warning on entering<sup>1</sup> but left without incident. The *Flying Arrow* on January 9, 1950, was likewise fired on before entering while some twenty miles at sea. "The attacks all took place outside territorial waters." (Company statement, *New York Times*, Jan. 24, 1950. See also opinions of James Ryan, Company's counsel, *New York Times*, Nov. 25, Dec. 30, 1949.)

These attacks brought forth diplomatic protests by the United States. The Secretary of State in a press conference on November 30, 1949, reiterated that the United States from the outset had refused to accept the port closure as a legal blockade and that American shipping had been notified that it would enter on its own responsibility. He added that press reports of Nationalist naval and air activity made the Shanghai approaches a hazardous area, that a shipping company (Isbrandtsen Company) had requested naval escort, which was refused, as it was "not this Government's policy to convoy American shipping through the so-called blockade." The Department immediately dispatched a note to the Nationalist Government (delivered December 2) expressing "serious concern" with regard to the attack on the *Sir John Franklin* which was described in some detail. The note continued:

As informed on June 29 last, "in the absence of a declaration and mention of an effective blockade, the United States government cannot admit the legality of the action on the part of the Chinese government in declaring certain Chinese ports and territorial waters adjacent thereto, not actually under control of the Chinese government, closed to foreign vessels." Indiscriminately and wantonly firing on American ships and thus endangering American lives "was unjustifiable and contrary to the law and practice of nations. Accordingly the United States government holds the Chinese Nationalist government fully responsible for any losses sustained by American nationals as a result of these reckless acts."

The note closed with a request that orders be issued to "preclude the possibility of any further incident of this nature." (Press Release 948, December 3, 1949.)

It appears that some of the firing occurred outside territorial waters, that firing began without warning, although the vessel had agreed to be boarded and that when she stopped, firing was continued. This was apparently the basis for holding the Chinese Government responsible for the losses sustained.

Apparently no direct answer was given to this note. It was said to have been rejected orally by the Chinese Foreign Minister to the United States Chargé with the remark that the Isbrandtsen ships must suffer the consequences if they violate the closure order (*New York Times*, Dec. 7, 1949).

Nevertheless, in a note of December 12, 1949, the Chinese Government

<sup>1</sup> Reported by United States Consul as hit twelve times (*New York Times*, Nov. 28, 1949).

again repeated its closure notice of June 20, and said, in order to avoid incidents which have occurred to vessels ignoring this order,

the Chinese government has now decided that any American registered vessels now remaining in the above mentioned territorial waters and ports . . . shall be instructed promptly to leave . . . within a week of grace beginning December 12, 1949.

Safe conduct outward will be afforded. In order to tighten this order,

the Chinese government will take such effective orders as may be deemed necessary. Any foreign vessels which in violation of this order shall hit any mine, sustain any damage or losses, or encounter any risk, obviously must assume responsibility themselves.

The note asks that the above be promptly notified to American shipping circles (Press Release 990, December 19, 1949).

Thereupon the Department of State on December 17, 1949, warned all shipping:

that the port of Shanghai and its approaches constitute a zone of danger and the conditions in it are such as to render this area extremely hazardous to shipping. In view of this situation it is obvious that American lives and property should not be exposed to such risks and all masters of American flag ships are warned accordingly. (Press Release 986, December 17, 1949.)

This warning was also handed directly to the *Flying Arrow* at Okinawa on December 18 and again in Korea on December 20. It also contained a further notice that "the Coast-Guard has advised that violation of the warning will render licenses of masters of United States flag vessels liable to action under R.S. 4450." (Press Release 1001, Dec. 23, 1949.) This law refers to suspension or revocation of licenses for masters' misbehavior, negligence or other causes set forth in the law. On December 29, the Department warned American shipping and shipmasters that it was "informed by the Chinese government that the approaches to the Yangtze River and Shanghai had been mined within Chinese territorial waters," without any channel left open for ingress or egress (Press Release 1016, December 29).

Despite these warnings, it was reported that the *Flying Arrow* sailed from Hong Kong for Shanghai and on approaching the mouth of the Yangtze River on January 9, 1950, was halted outside territorial waters by gunfire of a Chinese naval vessel. She was badly damaged, set on fire and rendered unseaworthy by thirty to forty shells. The Chinese Navy alleged she was fired on to prevent her entry into the mine-field at the mouth of the Yangtze River, after she had ignored orders and warning shots to halt. The United States Navy Department ordered two destroyers to aid the disabled ship and "assist her to reach any port except Shanghai which is considered by this government to be a dangerous zone." The master estimated they were 22 miles offshore when the attack began.

After repairing her wounds United States destroyers escorted her en route to Tsingtao (*New York Times*, Jan. 10, 11, 13, 1950). The United States held the "Chinese Government fully responsible" for this "violation of American rights on the high seas" and demanded that "such lawless attacks" be not repeated (Press Release 182, Feb. 27, 1950).

From this summary of the pertinent facts it is clear that the port closure order was not and was not intended to be a "declaration of blockade, which has never been and is not under the contemplation of the Chinese government." The situation, therefore, is that of the legitimate Government of China (now a refugee government on the Island of Formosa) attempting to close by decree certain ports in the possession of Communist rebels who were in control of most of the mainland. This situation presents in sharp focus the not unfamiliar difficulties and problems which arise when insurgency intervenes to disturb the normal relations of states. Insurgency is said to denote "the existence of a state of domestic hostilities without recognition of belligerency."<sup>2</sup>

The legitimate government has a conceded right and duty as a matter of self-defense and preservation to put down an uprising in its territory. At the same time the insurgents have an inherent right to resort to revolution for political purposes with a view to changing undesirable conditions alleged to flow from the administration of the existing government. If they succeed they become the responsible government of the nation liable for damages due to many of their acts from the beginning. If they fail, the legitimate government remains the responsible government and is presumptively liable only for the acts of the insurgents which it neglected to use diligence to prevent. Third nations are bystanders to the conflict and their attitude is largely one of policy accordingly as their interests may be more or less interfered with in the course of the contest. The legitimate government has a right to use all proper means to restore order and peace within its territory, and it is difficult in principle to see why it should not by decree prevent trade with the rebels in order to suppress the rebellion against its authority and very existence, without granting them equality of status with itself by recognizing them as a belligerent, and proclaiming a blockade of their ports. Such a blockade, if effectively maintained, is usually though not always recognized by third Powers under the penalties and safeguards of the law of blockade.

The practice has grown up among nations, however, and has been confirmed by international tribunals as a rule of international law, that the closure by decree of ports in the possession of insurgents is illegal and not binding on third nations. An often-quoted statement of the rule is the following from the opinion of the umpire in the case of *Compagnie Générale des Asphaltes de France*:

<sup>2</sup> Moore, *Digest of International Law*, Vol. II, p. 1119.

To close ports which are in the hands of revolutionists by government decree or order is impossible under international law. It [Venezuelan Government] may in a proper way and under proper circumstances and conditions in time of peace declare what of its ports shall be open and what of them shall be closed. But when these ports or any of them are in the hands of foreign belligerents or of insurgents it has no power to close or to open them for the palpable reason that it is no longer in control of them. It has then the right of blockade alone which can only be declared to the extent that it has the naval power to make it effective in fact. (Ralston's *Report, Venezuelan Arbitrations*, 1903, p. 336.)

This was the stand of the United States in the Spanish Civil War of 1936 when the "neutral" states consistently refused to recognize the belligerency of the contending parties. The United States then phrased its position in almost the same language as in the present instance.<sup>3</sup>

The position of the United States in the China case as set forth in the note of June 28, 1949, appears to comport with the practice and authority above mentioned.

For obvious political reasons neither the Chinese Government nor the United States Government desires to concede to the Communist insurgents the prestige and status of a belligerent engaged in a quasi-international war, which would have resulted from a regularly imposed blockade.<sup>4</sup>

A further question is involved: To what extent may the Nationalist Government enforce the order of port closure? It seems clear that it cannot use force on the high seas to prevent ingress and egress of foreign vessels, since this is a measure only accorded to belligerents in time of war according to the traditional view. The Chinese Government has a perfect right to proclaim a blockade (in the technical sense) of the insurgent port and thereby automatically concede the existence of a full-fledged war and acquire the accompanying belligerent rights of visit, search and capture subject to prize court proceedings. But probably for the reasons already mentioned the Chinese Government did not do this, as it expressly admits

<sup>3</sup> Hackworth, *Digest of International Law*, Vol. II, p. 316; Vol. VII, § 629. See also the *Three Friends*, 166 U. S. 1; Briggs, *Law of Nations*, pp. 743-749; Dickinson "The Closure of Ports in Control of Insurgents," this *JOURNAL*, Vol. 24 (1930), p. 69; Wilson, "Insurgency and International Maritime Law," *ibid.*, Vol. 1 (1907), p. 46; Padelford, "International Law and the Spanish Civil War," *ibid.*, Vol. 31 (1937) p. 226; Moore, *Digest*, Vol. II, pp. 1076-1123.

By the recognition of belligerency the recognizing state must treat both belligerents alike. It can no longer render aid to the former insurgents or the parent state without violating the law of neutrality, nor, before recognition of belligerency, render aid to the insurgents without violating the law of non-intervention (Garner, "Questions of International Law in the Spanish Civil War," this *JOURNAL*, Vol. 31 (1937), p. 66) though it could render aid to the parent state.

<sup>4</sup> It may be noted that some writers believe that a right of quasi-blockade inheres in the parent state, which does not connote recognition of belligerency or necessarily have that effect.

and therefore is excluded by its own choice from enforcement activities on the high seas as described above.

It would seem, therefore, in this view that the right of the Nationalist Government to enforce port closure would be limited to action within Chinese domain including territorial waters, provided it does not try to exact the penalties allowed a regular belligerent. If it could maintain cruisers there, which is open to doubt, it might, on the authority of the *Oriental Navigation Company* case (United States—Mexico Claims Commission, *Opinions of Commissioners*, 1929, p. 29), legally prevent trade with the insurgent force. Padelford concludes that within the limits of territorial waters unrecognized belligerents enjoy the right to prevent access of supplies to their domestic enemies (*loc. cit.*, p. 233).

It follows that, according to the traditional view, any interference with vessels of third states outside of territorial waters is unwarranted and that efforts to prevent ingress and egress by threat or use of force on the high seas such as occurred in the case of some of the Isbrandtsen ships are violations of international law for which the Chinese Government is responsible for damages and losses sustained thereby. The Department's demands in these respects would appear to be proper and justified.

There remains a final question to be considered: How far may a third state go in protecting its merchant vessels in their attempts to trade with insurgent ports closed by order of the parent government? The Isbrandtsen Company, relying on standing naval regulations to the effect that commanders should protect merchantmen in their lawful pursuits,<sup>5</sup> requested the protection of the United States Navy in its trade with Shanghai. This request was denied, even though the port closure was held to be invalid.

It must be conceded that the Naval Regulations are, as they state, to be carried out in harmony with the law and practice of nations. They clearly were not promulgated with a view to violating international law or infringing national sovereignty which is sacrosanct in international law. Third Powers must respect the national jurisdiction and not oppose the exercise by either party of the rights of war within the national domain. Insurgents and Nationalists are conceded to have the right to carry on hostilities between themselves as may seem necessary, foreign shipping taking the onus of venturing into dangerous zones. Third Powers acquire no superior rights of their own and are not to force their commerce with the insurgents against the physical opposition of the parent state in territorial waters, lest they be charged by the latter with intervention in the conflict. This is true at least of trade in military supplies destined to the insurgents. Thus American cruisers would not be justified in convoying the Isbrandtsen

<sup>5</sup> Naval Regulation 0320 reads: "So far as lies within his power, acting in conformity with international law and treaty obligations, the senior officer present shall protect all commercial vessels and aircraft of the United States in their lawful occupation and shall advance the commercial interests of the United States."



ships through territorial waters to Shanghai, since this would be a violation of the law of non-intervention in internal affairs. As declared by Secretary Seward in 1862 at the time of the New Granada insurrection, the United States

regards the government of each state as its head until that government is effectually displaced by the substitution of another. It abstains from interference with its domestic affairs in foreign countries, and it holds no unnecessary communications, secret or otherwise, with revolutionary parties or factions therein.<sup>6</sup>

Such strict impartiality, however, does not mean that United States cruisers must stand idly by while American lives and property engaged in innocent trade are endangered by wanton and reckless action of the contestants contrary to the rules of civilized hostilities. On the other hand, American ships, on their part, cannot expect protection when they invite disaster by crossing the line of fire or taking other provocative action. But within those limits it would seem that they should see that American shipping is guarded in lives and property from promiscuous and illegal firing of either party whether on the high seas or in territorial waters.

Although the Isbrandtsen ships apparently attempted to breach the closure order contrary to the warnings of the Department of State and thereby contributed to the damage suffered, yet the fire of the Chinese gunboat, if outside territorial waters, was none the less wrongful. Perfectly lawful means of preventing trade were open to the Chinese Government. One method was laying a mine-field within territorial waters, as it appears was finally accomplished and widely notified. The facts relating to the attack of January 9th on the *Flying Arrow* as she approached the mouth of the Yangtze are not clearly established. It is somewhat incredulous, as alleged by the Chinese, that signals and warning shots to halt were ignored and that the devastating gunfire some twenty miles offshore was necessary to prevent her entering the mine-field. In view of past attacks by the Chinese and notice of a mine-field in the Shanghai approaches, it would seem to have been the part of prudence to halt on warning and ascertain the situation. The contrary would be asking too much of fortune. If this attack occurred on the high seas, it would seem the American destroyers should have given protection.

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#### SOME THOUGHTS ON THE RECOGNITION OF NEW GOVERNMENTS AND RÉGIMES

The general furore attending the Soviet challenge to continued representation of Nationalist China on the Security Council and other bodies of the United Nations has served to bring to a focus, and direct public attention to, the changing criteria as to the legality or the "legitimacy"

<sup>6</sup> Moore, *Digest*, Vol. VI, p. 20.