

**Chapter XI**

**CONSIDERATION OF THE PROVISIONS OF CHAPTER VII OF THE CHARTER**

---

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTORY NOTE .....	265
PART I. CONSIDERATION OF THE PROVISIONS OF ARTICLES 39-40 OF THE CHARTER	
Note. ....	266
PART II. CONSIDERATION OF THE PROVISIONS OF ARTICLE 41 OF THE CHARTER	
Note. ....	270
PART III. CONSIDERATION OF THE PROVISIONS OF ARTICLES 42-47 OF THE CHARTER	
Note. ....	270
PART IV. CONSIDERATION OF THE PROVISIONS OF ARTICLES 48-51 OF THE CHARTER	
Note. ....	271
PART V. CONSIDERATION OF THE PROVISIONS OF CHAPTER VII OF THE CHARTER IN GENERAL	
Note. ....	271

## INTRODUCTORY NOTE

Chapter XI does not constitute a review of the action of the Security Council under Chapter VII of the Charter. In principle it presents the instances in the proceedings of the Council in which proposals placed before the Council have evoked discussion regarding the application of Chapter VII. Appropriate cross references are given to chapter VIII to facilitate the consultation of the material in conjunction with the record of decisions contained in that chapter.

A new part V dealing with the "Consideration of the Provisions of Chapter VII of the Charter in General" has been included in the present Supplement.

### CHAPTER VII OF THE CHARTER: ACTION WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE, AND ACTS OF AGGRESSION

#### *Article 39*

"The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

#### *Article 40*

"In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures."

#### *Article 41*

"The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

#### *Article 42*

"Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."

#### *Article 43*

"1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

"2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

"3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes."

#### *Article 44*

"When the Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfillment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces."

#### *Article 45*

"In order to enable the United Nations to take urgent military measures, Members shall hold immediately available national air-force contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action shall be determined, within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Staff Committee."

#### *Article 46*

"Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee."

#### *Article 47*

"1. There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.

"2. The Military Staff Committee shall consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives. Any Member of the United Nations not permanently represented on the Committee shall be invited by the Committee to be associated with it when the efficient discharge of the Committee's responsibilities requires the participation of that Member in its work.

"3. The Military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council. Questions relating to the command of such forces shall be worked out subsequently.

"4. The Military Staff Committee, with the authorization of the Security Council and after consultation with appropriate regional agencies, may establish regional subcommittees."

#### Article 48

"1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.

"2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members."

#### Article 49

"The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council."

#### Article 50

"If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems."

#### Article 51

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

### Part I

## CONSIDERATION OF THE PROVISIONS OF ARTICLES 39-40 OF THE CHARTER

#### NOTE

As the previous volumes of the *Repertoire* indicate, decisions explicitly under Article 39 of the Charter have been exceptional. On one occasion<sup>1/</sup> during the period under review two draft resolutions were submitted which recalled previous resolutions containing direct or indirect references to Article 39. One of the draft resolutions was adopted. However, the invocation of this Article in letters of submission and the employment of language derived from it both in these letters<sup>2/</sup> and in draft resolutions have given rise to discussions<sup>3/</sup> whether the situations under consideration by the Council corresponded to circumstances envisaged in Article 39 and whether in consequence the proposed action would merely serve to increase tensions. Consequently, in connexion with certain questions before it, the Council found it necessary to address itself to the problem of cessation of activities that might aggravate an existing situation and to encourage contending parties to settle their disputes by peaceful means. As a guide to the decisions of the Council in this regard, reference should be made to the Analytical Table of Measures adopted by the Security Council in chapter VIII and to chapter X of the present volume.

<sup>1/</sup> Case 3.

<sup>2/</sup> The Tabulation in part III of chapter X lists instances of submission of questions in which Article 39 was explicitly invoked or in which the language derived from that Article was employed. See above, pp. 253, 255.

<sup>3/</sup> See Cases 1, 2. See also chapter VIII, pp. 157, 199.

During the discussion of the question of race conflict in South Africa, certain members of the Council made a distinction between a situation considered to be "seriously endangering international peace and security" and "actual threats to the peace, breaches of the peace or acts of aggression", within the meaning of Chapter VII of the Charter and the kind of action which the latter would necessitate under that Chapter.<sup>4/</sup>

Reference to Article 40 of the Charter has been made in the course of discussion on proposals to adopt provisional measures. On one occasion,<sup>5/</sup> an invited representative requested that, as a provisional measure under Article 40, certain decisions of a regional organization be suspended pending an advisory opinion from the International Court of Justice on the legality of these decisions. On another occasion,<sup>6/</sup> a permanent member proposed that certain interim measures within the meaning of Article 40 be adopted pending certain other actions by the Council. Neither of these proposals was put to the vote. In a third instance,<sup>7/</sup> Article 40 was invoked by the President in a statement made after a motion for the adjournment of the meeting was adopted, interpreting the consensus of the Council by reiterating an appeal that no action should be taken in the Republic of the Congo

<sup>4/</sup> See chapter X, Case 12.

<sup>5/</sup> See Case 2 below.

<sup>6/</sup> Chapter VIII, p. 201.

<sup>7/</sup> Chapter VIII, pp. 167-168.

that would aggravate the situation until the resumption of the debate on the item.

Article 40 was further referred to by the Secretary-General in his statement and communications<sup>8/</sup> defining the temporary administration by the United Nations of the Kamina and Kitona bases in the Republic of the Congo as a provisional measure under Article 40.

For the statements bearing upon Article 40 in connexion with the question of the Charter authority concerning the United Nations action in the Republic of the Congo, see in this chapter, part V: Consideration of the provisions of Chapter VII of the Charter in general.

CASE 1.<sup>9/</sup> COMPLAINT BY THE USSR (U-2 INCIDENT): In connexion with the USSR draft resolution: voted upon and rejected on 26 May 1960

[Note: The letter of submission referred to the question of "aggressive acts by the Air Force of the United States of America against the Soviet Union, creating a threat to universal peace". A draft resolution was submitted by a permanent member of the Council to condemn the incursions by United States aircraft into the territory of other States, and to regard them "as aggressive acts". Another permanent member asserted that the acts in question did not constitute acts of aggression within the meaning of Article 39 of the Charter. It was also maintained that the evidence produced had not established that a threat to universal peace had occurred. The draft resolution was not adopted.]

At the 857th meeting on 23 May 1960, the representative of the USSR stated that in submitting the question to the Council the Soviet Government started from the premise that one of the most dangerous aspects of the invasion of the airspace of a sovereign State was that it flouted the principle of State sovereignty and territorial inviolability, a principle which constituted the very foundation of peaceful relations among States and the violation of which led, as a rule, to war.<sup>10/</sup> Besides, given the nature of the international situation and the existence of weapons of unprecedented destructive power, there was the added danger that if a United States aircraft invaded Soviet territory, the Soviet Union would have every reason to view it as an act of aggression and to deal the aggressor a retaliatory blow.

The USSR representative introduced a draft resolution<sup>11/</sup> under which:

"The Security Council,

"...

<sup>8/</sup> 887th meeting: para. 31; S/4475, O.R., 15th year, Suppl. for July-Sept. 1960, pp. 126-127, paras. 3, 4; S/4599, document II, O.R., 15th year, Suppl. for Oct.-Dec. 1960, pp. 102-103; S/4651, O.R., 16th year, Suppl. for Jan.-March 1961, pp. 71-73; S/4779, O.R., 16th year, Suppl. for April-June 1961, pp. 4-6.

<sup>9/</sup> For texts of relevant statements, see: 857th meeting: USSR, paras. 53, 65-68; United States, paras. 101-102; 858th meeting: Argentina, paras. 44-50, 55, 56; France, paras. 7-11; Poland, para. 118.

<sup>10/</sup> See also chapter XII, Case 3.

<sup>11/</sup> S/4321, 857th meeting: para. 99.

"1. Condemns the incursions by United States aircraft into the territory of other States and regards them as aggressive acts;

"2. Requests the Government of the United States of America to adopt immediate measures to halt such actions and to prevent their recurrence."

The representative of the United States denied that the United States had committed any aggressive acts against the Soviet Union or any other country and asserted that the activities protested by the Government of the USSR had no aggressive intent but were designed to assure the safety of the United States and the "free world" against surprise attack by a Power which prided itself on its ability to devastate the United States and other countries by missiles equipped with atomic warheads.

At the 858th meeting on 24 May 1960, the representative of France observed that the USSR complaint of 18 May seemed to have been made on the basis of the provisions of Chapter VII of the Charter, and in particular of Article 39. His delegation, however, had serious doubts about the "aggressive nature" of the acts complained of. The overflights denounced by the USSR Government came, in his view, within the category of intelligence activities, and there were no rules of international law concerning the gathering of intelligence in peace-time. "That being so, the French delegation cannot agree that the facts protested against represent acts of aggression within the meaning of Article 39 of the Charter or under the rules of international law", nor had the evidence produced established that a threat to universal peace had occurred.

The representative of Argentina maintained that it was not for the Council to decide on the legality or illegality of the acts in question, but to decide whether they constituted aggression and should be condemned as such. He stated further that, since it had not yet been possible to draw up a specific international rule defining the cases which constituted aggression, resort would have to be made to generally accepted doctrine and to draft agreements which had been prepared on the subject. Using as a guide a USSR draft of 1956,<sup>12/</sup> he pointed out that the United States overflights did not come within any of the cases of aggression envisaged in the draft. Furthermore, if the Soviet Union had thought that the flights constituted a threat to the peace for other reasons than because it was an act of aggression, then it should have submitted its complaint in a different form. Noting that the Security Council was not a judicial tribunal but a high executive body of a political character, charged with the maintenance of international peace and security, the representative of Argentina further asserted that its first duty "... is to ensure that its acts, instead of making the situation worse, will serve to improve it by creating, as far as possible, an atmosphere of relaxation and harmony".

The representative of Poland stated that there was convincing and irrefutable evidence in favour of the Soviet complaint of aggressive acts by the United

<sup>12/</sup> This draft agreement on the definition of aggression was submitted by the Soviet Union in 1956 to the Special Committee on the Question of Defining Aggression. GAOR, 12th Session, Suppl. No. 16, Annex II.

States Air Force against the Soviet Union which were a threat to the peace of the world. The real danger lay not only in the threat of military incidents, but mainly in the undermining of the rules of international law and the breach of the principle of sovereignty of all States, as well as in the violation of treaties and obligations. The consequences of such a state of affairs were distrust, international tension and a threat to peace. The task of the Council, therefore, was to reinstate the rule of law and respect for obligations and proper conduct in international relations.

At the 860th meeting on 26 May 1960, the USSR draft resolution was rejected by 2 votes in favour and 7 against, with 2 abstentions.<sup>13/</sup>

CASE 2,<sup>14/</sup> COMPLAINT BY CUBA (LETTER OF 8 MARCH 1962 FROM THE REPRESENTATIVE OF CUBA CONCERNING THE PUNTA DEL ESTE DECISIONS): In connexion with a request of Cuba for the adoption of certain provisional measures; the Council adjourned without taking any action on the request

[Note: During the consideration of the question, it was suggested that the proposal concerning the adoption of provisional measures under Article 40 not only conformed to the spirit and letter of the Charter, but also was the only one possible in the circumstances. On the other hand, it was argued that the Council had previously considered that aspect of the Cuban complaint and found it to be unjustified. If the Council were then to accede to the Cuban request it would be going back on its own decision when there were no new factors to justify fresh consideration.]

At the 992nd meeting on 14 March 1962, the Council considered the letter of 8 March 1962 from the representative of Cuba (S/5086). The letter<sup>15/</sup> requested the Council

"under the terms of Article 40 of the Charter of the United Nations ... to inform the Council of the Organization of American States and the other organs of the Inter-American system that, as a provisional measure, it is calling for the suspension of the agreements adopted at the Eighth Meeting of Consultation of the Ministers of Foreign Affairs of the American States, held at Punta del Este, Uruguay, and of such measures as may have been ordered in pursuance of those agreements, because the adoption and execution of those agreements constitute illegal acts and because they involve a threat to international peace and security."

At the same meeting, the representative of Cuba, after noting that he had requested the Council to

<sup>13/</sup> 860th meeting: para. 87. (In a telegram (S/4384) dated 13 July 1960, the USSR again requested an urgent meeting of the Council to examine the question of "new aggressive acts by the Air Force of the United States of America against the Soviet Union, creating a threat to universal peace". A USSR draft resolution (S/4406) submitted at the 880th meeting on 22 July 1960, calling for a condemnation of these provocative activities and their cessation was rejected by the Council at the 883rd meeting on 26 July 1960. For the developments concerning this question, see chapter VIII, pp. 185-186, and chapter X, Case 3.)

<sup>14/</sup> For texts of relevant statements, see:

992nd meeting: Cuba, paras. 118-119;

993rd meeting: USSR, paras. 65-70; United States, paras. 124-125;

995th meeting: China, para. 27; France, paras. 55-57.

<sup>15/</sup> S/5086, O.R., 17th year, Suppl. for Jan.-March 1962, pp. 88-90.

refer certain questions to the International Court of Justice for an advisory opinion,<sup>16/</sup> urged that, pending the opinion of the Court, the Council decide to suspend the "illegal agreements" of Punta del Este together with any measures that might have been taken under those agreements, and that the regional organization should be notified of that decision.

At the 993rd meeting on 15 March 1962, the representative of the USSR, speaking in support of the Cuban proposal "that the Council should undertake a number of supplementary actions and measures on the basis of Article 40 of the United Nations Charter", suggested that such a proposal deserved the most serious attention and ought to be approved by the Council. He recalled that Article 40 envisaged such provisional measures as might be taken by the Security Council to prevent the aggravation of the situation.

"Applying this to what we are now discussing, namely to the request to the International Court of Justice for an advisory opinion on the important questions of international law formulated in the letter from the representative of Cuba, we believe that the Security Council has a right and a duty to suspend implementation of the decisions taken at the Punta del Este meeting and of any decisions developing or supplementing them which may be taken until such time as the Security Council has received and considered the advisory opinion of the Court."

He was of the opinion that a provisional measure of the kind proposed not only conformed to the spirit and letter of Article 40 of the Charter, but also was "the only one possible in existing conditions", when there was no unanimity among the members of the Security Council about the nature of the final decision on the legal and political problems which the Security Council could take in connexion with the question raised by the Cuban Government. Moreover, a provisional measure of the sort proposed, and as envisaged in Article 40 of the Charter, would be without prejudice to "the rights, claims, or position of the parties concerned", because it would not prejudice the nature of the Security Council's final consideration on the question submitted by Cuba, but would prevent actions which could be irrevocable at a time when their legality was questioned by many Members of the United Nations, including members of the Council.

The representative of the United States observed that, viewed in the context of the resolutions adopted at Punta del Este and the precedent of the Dominican case, the questions raised in the letter from the representative of Cuba should be dismissed for lack of substantiality; "moreover, the insubstantiality of the questions demonstrates that there is even less reason for the Council to consider the Cuban demand that provisional measures be adopted, under Article 40, to suspend the implementation of the resolutions of Punta del Este."

At the 995th meeting on 20 March 1962, the representative of China expressed the view that the charge made by Cuba concerning the legality of the Punta del Este decisions was unfounded. Consequently, the

<sup>16/</sup> See chapter VIII, p. 200, and chapter XII, Case 25.

action which Cuba was requesting the Council to take on those resolutions was unwarranted and undesirable.

The representative of France, after recalling Cuba's request for referral of certain questions relating to the Punta del Este decisions to the International Court of Justice, noted that the representative of Cuba was also asking the Security Council under the terms of Article 40 to call upon the Council of the Organization of American States and the organs of the Inter-American system provisionally to suspend those decisions and any measures which might have been ordered in pursuance of those decisions on the grounds that the measures adopted were illegal and threatened international peace and security. Then, calling attention to the fact that during the previous month both the General Assembly and the Security Council had considered that aspect of the Cuban complaint and that neither of them had found the charges justified, he asserted that if the Council were to accede to Cuba's request it would be going back on its own decision when there were no new factors to justify a fresh consideration of the matter.

At the 998th meeting on 23 March 1962, the meeting adjourned without taking any action on the Cuban request.<sup>17/</sup>

CASE 3.<sup>18/</sup> THE PALESTINE QUESTION: In connexion with the decision of 9 April 1962 determining that the Israel attack of 16-17 March 1962 constituted a violation of the Council resolution of 19 January 1956

[Note: During the discussion a draft resolution was submitted under which Israel would be warned that sanctions would be invoked against it in the event of further aggression. It was not voted upon. A second draft resolution calling upon both parties to abide by the cease-fire arrangements was adopted by the Council. Both draft resolutions recalled the Security Council decision of 15 July 1948, which determined the situation in Palestine to be a threat to the peace within the meaning of Article 39 of the Charter.]

At the 1000th meeting on 3 April 1962, the representative of Syria submitted a draft resolution<sup>19/</sup> in the preamble of which the Council would have recalled its resolutions of 24 November 1953, 29 March 1955 and 19 January 1956, concerning the Qibya, Gaza and Lake Tiberias incidents, respectively. After noting that the Council had called upon Israel to take effective

measures to prevent the recurrence of such military actions, the resolution would condemn

"Israel for the wanton attack which was carried out against Syrian territory on the night of 16-17 March 1962, in violation of its resolution of 15 July 1948, of the terms of the General Armistice Agreement between Syria and Israel and of Israel's obligations under the Charter of the United Nations."

Further, it would "again" warn Israel "of the Security Council's resolve to call for appropriate sanctions against Israel, should it resort once more in the future to such aggressive acts".

At the 1005th meeting on 6 April 1962, the Council also had before it a joint draft resolution<sup>20/</sup> submitted by the United Kingdom and the United States, which, after deploring the hostile exchanges between the Syrian Arab Republic and Israel, would reaffirm the Security Council resolution of 19 January 1956, which condemned Israeli military action in breach of the General Armistice Agreement, whether or not undertaken by way of retaliation, and would determine that the Israeli attack of 16-17 March 1962 constituted a flagrant violation of that resolution, and call upon Israel scrupulously to refrain from such action in the future.

At the same meeting, the representative of Ghana, speaking on the incidents of 16-17 March, stated:

"it was a deliberately planned military operation. . . It is not the first incident of this kind and, besides, the Security Council has clearly laid down on previous similar occasions that military action in breach of the Israel-Syrian General Armistice Agreement is not permissible, whether or not undertaken by way of retaliation."

He urged Israel to have fuller respect for, and to place greater reliance on the United Nations machinery and arrangements for maintenance of peace in the area than on the use of force.

The representative of the USSR, commenting on the Syrian draft resolution, observed:

"... I fail to understand why certain delegations. . . although agreeing with us on what happened on the night of 16-17 March, are not prepared to support this extremely modest draft resolution, which is directly based on the facts of the case and represents . . . a minimum programme of what the Council can and should do."

He pointed out further that the draft resolution did not even call for the immediate application of sanctions, although there would be every ground for such a demand, in view of the situation which the Council was obliged to examine and investigate.

He went on to say that not only were certain provisions of the draft resolution submitted by the United Kingdom and the United States in absolute contradiction with the factual side of the question, but also an attempt was made to place the victim of aggression and the aggressor on an equal footing.

<sup>20/</sup> S/5110 and Corr.1. The text of this draft resolution, following its adoption, was circulated as S/5111, O.R., 17th year, Suppl. for April-June 1962, pp. 95-96.

<sup>17/</sup> 998th meeting: para. 158. The draft resolution requesting an advisory opinion from the International Court of Justice was rejected by 2 votes in favour to 7 against, with 1 abstention; Ghana did not participate in the voting.

<sup>18/</sup> For the texts of relevant statements, see:

999th meeting: Israel\*, para. 84; Syria\*, paras. 24, 37, 49, 52-55; USSR, paras. 143, 150-153; United States, paras. 100, 101;

1000th meeting: Israel, para. 90; Syria, paras. 56, 58;

1002nd meeting: France, para. 14;

1003rd meeting: China, paras. 10, 16; United Kingdom, paras. 26, 31, 34, 36;

1004th meeting: Venezuela, para. 14;

1005th meeting: Ghana, paras. 10-15; USSR, paras. 55, 57, 62; United States, paras. 26-27, 29-30, 35-36;

1006th meeting: USSR, paras. 93, 95; United Arab Republic, para. 78; United Kingdom, para. 82.

<sup>19/</sup> S/5107/Rev.1, O.R., 17th year, Suppl. for April-June 1962, pp. 93-94.

At the 1006th meeting on 9 April 1962, the representative of the USSR, further commenting on the draft resolution submitted by the United Kingdom and the United States, stated:

"I think that the adoption of this draft resolution will serve as a serious warning and as an intimation that the Security Council as a whole, performing its functions under the Charter of the United Nations, demands that the Government of Israel should desist from acts of aggression and should strictly observe the Armistice Agreement, and that the Security Council will keep a close watch for any violation by Israel of the Armistice Agreement and will take action if such violations are committed. . .

"This categorical warning should be the last. If hereafter Israel should be guilty of violations of the

Armistice Agreement or should commit other aggressive acts, the Security Council will, if this threat to international peace and security resulting from the incessant aggressive actions of Israel in the Middle East again comes before it, be obliged to apply the coercive measures which are contemplated in the Charter."

The representative of the United Arab Republic stated that if his request for a separate vote on certain paragraphs of the draft resolution submitted by the United Kingdom and the United States were accepted, he would not press for a vote on the Syrian draft resolution. Following the refusal by the representative of the United Kingdom to accede to this request, the joint draft resolution was voted upon as a whole and adopted by 10 votes in favour and 1 abstention,<sup>21/</sup>

<sup>21/</sup> 1006th meeting: para. 106.

## Part II

### CONSIDERATION OF THE PROVISIONS OF ARTICLE 41 OF THE CHARTER

#### NOTE

During the period under review, references to Articles 41 and 42 were made in connexion with three questions before the Council when the issue as to whether certain decisions of a regional agency constituted or did not constitute an "enforcement action", within the meaning of Article 53, was considered. References were made to the nature of the measures provided for in the two Articles and to their relationship to the concept of "enforcement action" in Article 53. The three case histories dealing with the matter are included in chapter XII, part IV, of the present volume. Other references to Article 41 made in connexion with Article 42 are mentioned in part III of the present chapter.

## Part III

### CONSIDERATION OF THE PROVISIONS OF ARTICLES 42-47 OF THE CHARTER

#### NOTE

During the consideration by the Council of the mandate of the United Nations Force in the Congo, it was maintained that the Security Council had made no explicit or implicit findings under Articles 41 and 42 for the adoption of enforcement measures to be carried out by the United Nations Force in the Congo. The statements bearing on the relevance of these Articles to the mandate of the Force are to be found in chapter V of the present volume.

As indicated in the note to part II of this chapter, references to Article 42 were made on three occasions which are included in chapter XII, part IV, of this volume.



## Part IV

CONSIDERATION OF THE PROVISIONS OF ARTICLES 48-51  
OF THE CHARTER

## NOTE

During the period under review Article 49 was invoked, together with Article 25, in a draft resolution submitted and adopted in connexion with the situation in the Republic of the Congo. In the course of the discussion, the peremptory character of both Articles was emphasized, and no specific constitutional references were made to Article 49. For this reason the case is included in chapter XII, part IV: Consideration of the provisions of Article 25 of the Charter. For the same reason there are to be found in chapter XII, part IV, references to Article 49, based on the resolution of 9 August 1960, made by the Secretary-General in his statement before the Council and in his communications.

References to Article 51 of the Charter were made during consideration by the Council of the RB-47 incident, and the complaint by Cuba concerning decisions by the Organization of American States made at Punta del Este, Uruguay. These references are treated in chapter XII, parts II and V, respectively.

## Part V

## CONSIDERATION OF THE PROVISIONS OF CHAPTER VII OF THE CHARTER IN GENERAL

## NOTE

In none of its five resolutions<sup>22/</sup> adopted in connexion with the consideration of the situation in the Republic of the Congo, did the Security Council indicate which Article or Articles of the Charter constituted the Charter authority on which the Council based its decisions. Neither the original resolution authorizing the Secretary-General to take the necessary steps to provide the Government of the Congo with military assistance, nor the subsequent resolutions by which the Council decided upon further measures to be undertaken by the Secretary-General or by the United Nations Force contain an explicit or implicit reference to any Article of the Charter which would make possible a conclusive judgement as to whether the Council, in exercising its primary responsibility for the maintenance of international peace and security, had adopted its decisions under the Articles of Chapter VI or especially under Chapter VII of the Charter.<sup>23/</sup>

Also, the constitutional discussions which preceded the particular decisions shed no light on the intentions of the Council with regard to the Charter provisions on which it was basing its actions.

The Council took into account limitations imposed by the Charter on its powers especially in connexion

<sup>22/</sup> Resolution S/4387 adopted on 14 July 1960 (873rd meeting); resolution S/4405 adopted on 22 July 1960 (879th meeting); resolution S/4426 adopted on 9 August 1960 (886th meeting); resolution S/4741 adopted on 21 February 1961 (942nd meeting); and resolution S/5002 adopted on 24 November 1961 (982nd meeting).

<sup>23/</sup> Only in resolution S/4426 adopted on 9 August 1960 were explicit references made to Articles 25 and 49 with regard to the obligations of Member States to accept and carry out the decisions of the Council and to afford mutual assistance in carrying out measures decided upon by the Council (oper. para. 5). This resolution was reaffirmed by resolution S/4741 adopted on 21 February 1961 (part A, oper. para. 5). In the same resolution, an implied reference was made to Article 49 (part B, oper. para. 3). In resolution S/5002 adopted on 24 November 1961 the four previous resolutions were recalled (preamble, para. 1),

with its decisions relating to the mandate of the United Nations Force in the following two instances: in connexion with the question of the limitations of the powers of the Force with regard to the principle of non-intervention in domestic matters<sup>24/</sup> and with the question of the use of force by the Force.<sup>25/</sup>

This issue was dealt with, in relation to the above-mentioned two questions, in several interventions by the Secretary-General who, while drawing attention to the fact that he was expressing his own views which had not been endorsed by the Security Council or by the General Assembly, in some instances stressed the negative aspect of the matter by referring to those Articles of the Charter on which the action of the Council could not, in his opinion, have been deemed to be based.

However, deliberations in the Council on these two and other pertinent questions are not conducive to ascertaining which of the Articles of the Charter had constituted or could have constituted the basis for the Council's decisions.

The case history presented below relates to the proceedings in the Council in which, within the framework of a discussion of the provisions of two draft resolutions submitted, the question of the Charter authority underlying the Council's decisions was dealt with in constitutional terms.

Since the statements were made in connexion with the issue as to whether the Council had been or had not been acting under the provisions of Chapter VII of the Charter, the case history is included in part V of this chapter under the heading: Consideration of the Provisions of Chapter VII in General.

<sup>24/</sup> See chapter V, Cases 2 (i-ii).

<sup>25/</sup> See chapter V, Cases 2 (iii-vii).

CASE 4.<sup>26/</sup> SITUATION IN THE REPUBLIC OF THE CONGO: In connexion with the draft resolution submitted by Poland: voted upon and rejected on 14 December 1960; and with the joint draft resolution submitted by Argentina, Italy, the United Kingdom and the United States and the USSR amendments thereto: the amendments voted upon and rejected on 14 December 1960, the joint draft resolution voted upon and not adopted on 14 December 1960

[*Note:* In connexion with the consideration of the above-mentioned draft resolutions and amendments, statements were made relating to the question as to whether the resolutions of the Security Council on the situation in the Congo were or were not adopted under the provisions of Chapter VII of the Charter. A draft resolution calling upon the Secretary-General to secure the release of Mr. Lumumba and his colleagues, to take steps to ensure the resumption of the activities of the lawful Government of the Republic of the Congo, and upon the Command of the United Nations Force to disarm "the terrorist bands of Mobutu" was rejected; a joint draft resolution requesting the Secretary-General to continue his efforts to assist the Republic of the Congo in the restoration of law and order and in adopting measures tending to safeguard civil and human rights was not adopted, while amendments thereto, corresponding to the provisions of the first draft resolution, were rejected.]

At the 914th meeting on 8 December 1960, the President, speaking as the representative of the USSR, introduced a draft resolution.<sup>27/</sup>

At the same meeting, the representative of Argentina introduced a draft resolution<sup>28/</sup> submitted jointly with Italy, the United Kingdom and the United States.

At the 915th meeting on 8/9 December 1960, the Secretary-General stated that the question of whether the mandate of the United Nations Force extended beyond the protection of life and property into the realm of enforcement of one or another political solution or constitutional rule<sup>29/</sup> had been the subject of lengthy debates in the Council and some representatives were giving to the mandate an interpretation which was not warranted by the history of the case.

<sup>26/</sup> For texts of relevant statements, see:

915th meeting: Secretary-General, paras. 155, 157;

916th meeting: Ecuador, paras. 65, 66;

917th meeting: Ceylon, paras. 28-31, 34-38; Secretary-General, para. 64;

920th meeting: Ceylon, para. 107; Poland, para. 169; Secretary-General, paras. 73-75.

<sup>27/</sup> S/4579, 914th meeting: para. 62. For the summary of the provisions of the draft resolution, see chapter VIII, p. 170.

<sup>28/</sup> S/4578, see S/4578/Rev.1, O.R., 15th year, Suppl. for Oct.-Dec. 1960, pp. 82-83, and footnote 11. For the summary of its provisions, see chapter VIII, p. 171.

<sup>29/</sup> At the 913th meeting on 7 December 1960 the Secretary-General recalled that at the initial stage there had been no United Nations concern with the constitutional issues or political institutions of the Congo and, referring to demands made after the adoption of the first two resolutions that the United Nations Force should take action against competing political groups on the basis of constitutional provisions, expressed the view that the Council had to stand by the mandate as laid down, interpreted strictly in accordance with the principles of the Charter and adjusted to the peculiar circumstances currently prevailing in the Congo (913th meeting: paras. 26-27, 60).

Assuming, however, that their interpretation of the mandate was correct, the Secretary-General asked:

"Has the Council ... ever given the Secretary-General or the Force the means—I mean now the legal means—by which we could carry out the wider mandate which you believe has been given to the Force? And if so, let me ask this last question: could the Council have given such means to the Force, through the Secretary-General, without acting against the clear injunctions of the Charter? ... it is even doubtful if the Council ever has acted under Chapter VII. The very most that can be said is that the Council's actions may have been under Article 40 of the Charter ..."<sup>30/</sup>

At the 916th meeting on 9/10 December 1960, the representative of Ecuador stated that no mandate could properly exceed the authority provided for in the Charter and it was for the Council to determine the limits within which its action must be confined.

"It would stretch legal ingenuity to regard Article 39 of the Charter as applicable to the case before us, which is a power conflict, a struggle for political leadership, a dispute over the legitimacy of governments, in short, a problem of an internal constitutional nature. And since the Congo is a free and independent sovereign State, this is unquestionably a matter within its domestic jurisdiction, which is safeguarded by Article 2 (7) of the Charter."

At the 917th meeting on 10 December 1960, the representative of Ceylon stated that the United Nations Force had applied the mandate in too restricted a manner in a fast-changing situation which, in order to justify the presence of the United Nations Force in the Congo, required a completely new approach. If the Secretary-General's interpretation that "the Security Council resolutions gave him a certain mandate, which precluded him from taking action for the maintenance of law and order in the Congo, which did not envisage the involvement in matters of internal politics or dealing with internal policies", was correct, it was the duty of the Council "to give a new mandate to the Secretary-General, for the utilization

<sup>30/</sup> On two other occasions, the Secretary-General made statements, as follows:

At the 884th meeting on 8 August 1960, the Secretary-General pointed out that the Charter stated in several Articles the obligations of Member States in relation to the Organization in a situation such as the current one in the Congo, the solution of which was a question of peace or war. Having quoted Articles 25, 40, 41 and 49, the Secretary-General said:

"The resolutions of the Security Council of 14 July [S/4387] and 22 July [S/4405] were not explicitly adopted under Chapter VII, but they were passed on the basis of an initiative under Article 99. For that reason I have felt entitled to quote three articles under Chapter VII, and I repeat what I have already said in this respect: in a perspective which may well be short rather than long, the problem facing the Congo is one of peace or war—and not only in the Congo." (884th meeting: paras. 21-26).

At the 887th meeting on 21 August 1960, the Secretary-General stated that the Council could not be deemed

"to have instructed the Secretary-General, without stating so explicitly, to act beyond the scope of his own request or contrary to the specific limitation regarding non-intervention in internal conflicts. . . Moreover, in the light of the domestic jurisdiction limitation of the Charter, it must be assumed that the Council would not authorize the Secretary-General to intervene with armed troops in an internal conflict, when the Council had not specifically adopted enforcement measures under Articles 41 and 42 of Chapter VII of the Charter." (887th meeting: para. 44).

of the forces in the Congo, to carry out the purpose for which they were sent".

There were no grounds for any fears that the Council, by giving a wider mandate, would be acting against the Charter, since in this case the Head of a State had requested the United Nations to render certain assistance of a specified kind.

"Article 39 of the Charter is clear as regards the duties of the Security Council whenever there exists a threat to peace or a breach of the peace. Article 40 further elaborates the duties of the Security Council to prevent an aggravation of a situation likely to cause a breach of international peace and security. The United Nations is today in the Congo, in all its aspects, because it was invited by the legitimate and unquestioned Government, so that our action can in no way be regarded as an intervention in matters essentially within the domestic jurisdiction of the Republic of the Congo."<sup>31/</sup>

At the same meeting, the Secretary-General, referring to the statement of the representative of Ceylon, said that Articles 39 and 40 of the Charter might be considered "as the background for action taken, although that is not quite clear legally". It had also been hinted that the Council might be entitled to act, as indicated by the representative of Ceylon, on the basis of the fact that the United Nations assistance had been requested by the Central Government of the Congo. However, the Council had to face a situation where it would act against the person who had been at least one of the co-signatories of the document on which the action was based.<sup>32/</sup>

At the 920th meeting on 13/14 December 1960, the Secretary-General stated:

"In interventions in the course of this debate in the Council, I have pointed out that the Council has never explicitly referred to the Charter Article on the basis of which it took action in the Congo. In particular, it is significant that the Council did not invoke Articles 41 and 42 of Chapter VII, which provide for enforcement measures and which would override the domestic jurisdiction limitation of Article 2 (7). I mention this as one of the reasons why some far-reaching interpretations of the mandate of the Force ... are, quite frankly, difficult to understand. Those interpretations would require at least that the Security Council had clearly taken enforcement measures under Articles 41 and 42."

The Secretary-General then quoted from his statement at the 887th meeting the following:

"... in the light of the domestic jurisdiction limitation of the Charter, it must be assumed that

<sup>31/</sup> The representative of Ceylon suggested that the United Nations should ask the President of the Republic of the Congo to reconvene both Houses of Parliament; should use every persuasive measure to promote a round-table conference of political leaders of all parties in the Congo; and the United Nations Command must be directed to take all necessary measures to disarm any private armies in the Congo operating under the orders of "authorities which have no basis in the constitution of the Congo". (917th meeting: paras. 46, 50, 53).

<sup>32/</sup> For the above statement of the Secretary-General, see also chapter I, Case 34.

the Council would not authorize the Secretary-General to intervene with armed troops in an internal conflict, when the Council had not specifically adopted enforcement measures under Articles 41 and 42 of Chapter VII'."

and stated:

"Members may remember that no one in the Council raised any question about this statement.

"It is true that, in its resolution of 9 August [S/4426], the Council referred to Articles 25 and 49 as the basis for the legal obligation imposed on the States concerned by the Council's action, but this is certainly not the same as invoking enforcement measures.

"My own view, which I have expressed to the Council, is that the resolutions may be considered as implicitly taken under Article 40 and, in that sense, as based on an implicit finding under Article 39. But what I should like to emphasize is that neither the Council nor the Assembly has ever endorsed this interpretation, much less put such endorsement in a resolution. What is even more certain is that the Council in no way directed that we go beyond the legal basis of Article 40 and into the coercive action covered by Articles 41 and 42. Certainly the Organization, as represented by the Security Council and the General Assembly, must consider its responsibility as an executive organ to take carefully into account the limits on its authority as indicated by the facts which I have just recalled."

The representative of Ceylon pointed out that Articles 40 and 41 had been quoted by the Secretary-General and stated that they would have vested the Security Council's decision with a great cogency and force, but it had been unnecessary for the Security Council to have recourse to them. The Council had not referred to those Articles in its resolutions or in any other document because the strength and the authority of an invitation by the Central Government of the Congo had been sufficient to make the action taken by the Security Council lawful action and to entitle the United Nations to send its forces into the Congo. Once the United Nations was in the Congo, it should take action which should go beyond the part which the Security Council had been playing in some cases relating to law and order.

At the same meeting, the President, speaking as the representative of the USSR, submitted amendments<sup>33/</sup> to the four-Power draft resolution.

At the same meeting on 13/14 December 1960, the USSR amendments to the four-Power draft resolution were rejected;<sup>34/</sup> the four-Power draft resolution failed of adoption;<sup>35/</sup> and the USSR draft resolution was rejected.<sup>36/</sup>

<sup>33/</sup> S/4578, 920th meeting: para. 53. For the summary of the provisions of the amendments, see chapter VIII, p. 171.

<sup>34/</sup> 920th meeting: paras. 151-155.

<sup>35/</sup> 920th meeting: para. 156.

<sup>36/</sup> 920th meeting: para. 159.