

ARTICLE 40

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TEXT OF 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.

INTRODUCTORY NOTE

1. During the period under review, the only instances of Council action involving the taking of measures by the parties or referring to the possible adoption by the Council of further measures under the Charter in order to maintain or restore the peace, were

concerned with the Palestine question. No express mention was made of Article 40 in these decisions, which, however, recalled directly or by way of reference the resolutions of 15 July 1948 and of 11 August 1949 which mentioned specifically Article 40.

2. The General Survey contains a brief account of the circumstances in which the decisions referred to in paragraph 1 were adopted, as well as of their content.

3. The only material dealt with in the Analytical Summary is included for its possible bearing on the final provision of Article 40: "The Security Council shall duly take account of failure to comply with such provisional measures". No discussion has however arisen in connexion with the interpretation of that provision or with the question of the nature of the further action the Council may take in the event of its finding that one or the other of the parties concerned has failed to comply with the measures instituted by it.

I. GENERAL SURVEY

4. On a number of occasions subsequent to its decision of 11 August 1949 ^{1/} concerning the Palestine question, the Council adopted resolutions or discussed draft resolutions ^{2/} reaffirming or recalling directly or by way of reference its decision of 15 July 1948 or its decision of 11 August 1949, when its attention was drawn to a serious violation of the armistice agreements or when hostilities broke out between the parties. In those instances, the Council called for a cessation of hostilities and the taking of measures obligatory under the provisions of the armistice agreements, its previous decisions, and the Charter, or discussed draft resolutions to that effect.

^{1/} As stated in the Repertory, under Article 40 (see vol. II, p. 364, paras. 14 d and e), the Council, by its resolution of 11 August 1949 (S C, 4th yr., No. 38, 437th mtg., p. 13), noted with satisfaction the several Armistice Agreements concluded between the parties involved in the conflict in Palestine and reaffirmed, "pending the final peace settlement, the order contained in its resolution of 15 July 1948 to the Governments and authorities concerned, pursuant to Article 40 of the Charter of the United Nations, to observe an unconditional cease-fire and, bearing in mind that the several armistice agreements include firm pledges against any further acts of hostility between the Parties and also provide for their supervision by the Parties themselves, relies upon the Parties to ensure the continued application and observance of these Agreements".

^{2/} Besides the resolutions mentioned in the Repertory, vol. II, under Article 40, p. 364, footnote 23, the Council adopted the following decisions:

- (a) 29 March 1955 (S C, 10th yr., Suppl. for Jan., Feb. and March 1955, pp. 95 and 96, S/3378);
- (b) 30 March 1955 (*ibid.*, p. 96, S/3379);
- (c) 8 September 1955 (S C, 10th yr., 700th mtg.; Suppl. for July, Aug. and Sept. 1955, p. 18, S/3435);
- (d) 19 January 1956 (S C, 11th yr., 715th mtg.; Suppl. for Jan., Feb. and March 1956, p. 6, S/3538);
- (e) 4 April 1956 (S C, 11th yr., 722nd mtg.; Suppl. for April, May and June 1956, p. 1, S/3575);
- (f) 4 June 1956 (S C, 11th yr., 728th mtg.; Suppl. for April, May and June 1956, p. 72, S/3605).

5. Summary of decisions subsequent to 11 August 1949:

(a) By its resolution 3/ of 29 March 1955 concerning the complaint by Egypt of aggression committed on 28 February 1955 by Israel armed forces against Egyptian forces inside Egyptian controlled territory near Gaza and the complaint by Israel of continuous violations by Egypt of the General Armistice Agreement and of resolutions of the Security Council, the latter recalled its resolutions of 15 July 1948, 11 August 1949, 17 November 1950, 18 May 1951 and 25 November 1953; condemned the "prearranged and planned attack ordered by Israel authorities ... as a violation of the cease-fire provisions of the Security Council resolution of 15 July 1948 and as inconsistent with the obligations of the parties under the General Armistice Agreement between Egypt and Israel and under the Charter" and called "... again upon Israel to take all necessary measures to prevent such actions".

(b) In connexion with the item described in subparagraph (a) above, the Council adopted on 30 March 1955 a resolution 4/ in which it stated:

"Anxious that all possible steps shall be taken to preserve security in this area...

"...

"3. Calls upon the Governments of Egypt and Israel to co-operate with the Chief of Staff with regard to his proposals, bearing in mind that, in the opinion of the Chief of Staff, infiltration could be reduced to an occasional nuisance if an agreement were effected between the parties on the lines he has proposed..."

(c) By its resolution 5/ of 8 September 1955, the Council after having recalled its resolution of 30 March 1955 and having noted with grave concern the discontinuance of the talks initiated by the Chief of Staff in accordance with the above-mentioned resolution, deplored the recent outbreak of violence in the area along the Armistice Demarcation Line established between Egypt and Israel on 24 February 1949, and stated:

"1. Notes with approval the acceptance by both parties of the appeal of the Chief of Staff for an unconditional cease-fire;

"2. Calls upon both parties forthwith to take all steps necessary to bring about order and tranquillity in the area, and in particular to desist from further acts of violence and to continue the cease-fire in full force and effect."

The Council further expressed its endorsement of a number of measures proposed by the Chief of Staff concerning a clear and effective separation of the armed forces of both parties; declared that freedom of movement must be accorded United Nations observers in the area; and called upon both parties to appoint representatives to meet with the Chief of Staff.

(d) In its decision 6/ of 19 January 1956, respecting the complaint by Syria against Israel concerning incidents in the area east of Lake Tiberias, the Council

3/ See footnote 2 (a).

4/ See footnote 2 (b).

5/ See footnote 2 (c).

6/ See footnote 2 (d).

recalled its resolutions of 15 July 1948, 11 August 1949, 18 May 1951, 24 November 1953 and 29 March 1955 and, after noting "... without prejudice to the ultimate rights, claims and positions of the parties that ... there has been interference by the Syrian authorities with Israeli activities on Lake Tiberias, ..." held that this interference did not justify the Israeli action and condemned "the attack of 11 December as a flagrant violation of the cease-fire provisions of its resolution of 15 July 1948, of the terms of the General Armistice Agreement between Israel and Syria, and of Israel's obligations under the Charter", and warned the Government of Israel that, if it failed in the future to comply with its obligations, "the Council will have to consider what further measures under the Charter are required to maintain or restore the peace;" .

(e) By its decision 7/ of 4 April 1956, the Council recalled its resolutions of 30 March 1955, 8 September 1955, and 19 January 1956, and after considering "that the situation now prevailing between the parties concerning the enforcement of the armistice agreements and the compliance given to the above-mentioned resolutions of the Council is such that its continuance is likely to endanger the maintenance of international peace and security;" requested "... the Secretary-General to undertake, as a matter of urgent concern, a survey of the various aspects of enforcement of and compliance with the four general armistice agreements and the Council's resolutions under reference;" and further requested "... the Secretary-General to arrange with the parties for the adoption of any measures which, after discussion with the parties and with the Chief of Staff, he considers would reduce existing tensions along the armistice demarcation lines ...". Finally, the Council intimated that after examining the report of the Secretary-General, it would consider "what further action may be required".

(f) By its decision 8/ of 4 June 1956, the Council, after recalling its resolutions of 4 April 1956 and 11 August 1949 and having received the report of the Secretary-General on his recent mission on behalf of the Security Council, commended the Secretary-General and the parties on the progress already achieved and declared "... that the parties to the armistice agreements should speedily carry out the measures already agreed upon with the Secretary-General, and should co-operate with the Secretary-General and the Chief of Staff of the United Nations Truce Supervision Organization to put into effect their further practical proposals, pursuant to the resolution of 4 April 1956 with a view to full implementation of that resolution and full compliance with the armistice agreements;" called "... upon the parties to the armistice agreements to take the steps necessary to carry out this resolution ... "; and requested" ... the Secretary-General to continue his good offices with the parties, with a view to full implementation of the Council's resolution of 4 April 1956 and full compliance with the armistice agreements, and to report to the Security Council as appropriate".

II. ANALYTICAL SUMMARY OF PRACTICE

**** A. The question whether decisions amounted to action under Article 40 in the absence of explicit invocation of the Article**

**** B. The question whether the Security Council could take action under Article 40 without first making a determination under Article 39**

7/ See footnote 2 (e).

8/ See footnote 2 (f).

**** C. The question of action under Article 40 in cases in which it was contended that the measures proposed, if complied with, would not be "without prejudice to the rights, claims or position of the parties concerned"**

D. The question of further action under the provision that "The Security Council shall duly take account of failure to comply with such provisional measures"

6. In two of its decisions 9/ in connexion with the Palestine question, the Council has specifically mentioned possible further action on its part without, however, citing any specific Article, under which it might take action, in the event of failure by the party concerned to proceed with full compliance with the measures instituted by it.

1. Decision of 19 January 1956 in connexion with the Palestine question

7. In its resolution of 19 January 1956, concerning incidents in the area east of Lake Tiberias, the Council after noting "without prejudice to the ultimate rights, claims and positions of the parties that ... there has been interference by the Syrian authorities with Israeli activities on Lake Tiberias, in contravention of the terms of the General Armistice Agreement between Israel and Syria", held that "this interference in no way justifies the Israeli action," which the Council condemned "as a flagrant violation of the cease-fire provisions of its resolution of 15 July 1948, of the terms of the General Armistice Agreement between Israel and Syria, and of Israel's obligations under the Charter," and expressed its grave concern at the failure of the Government of Israel to comply with its obligations calling "upon the Government of Israel to do so in the future, in default of which the Council will have to consider what further measures under the Charter are required to maintain or restore the peace".

2. Decision of 4 April 1956 in connexion with the Palestine question

8. At its 722nd meeting on 4 April 1956, the Security Council adopted unanimously a resolution 10/ in which it recalled among other matters its decision of 19 January 1956 and requested "the Secretary-General to undertake, as a matter of urgent concern, a survey of the various aspects of enforcement of and compliance with the four General Armistice Agreements and the Council's resolutions under reference" and "to report to the Council in his discretion ... in order to assist the Council in considering what further action may be required".

9. In his report, the Secretary-General stated 11/ that he had devoted all his attention to the limited task of re-establishing first of all a cease-fire and, based on the cease-fire, a state of full compliance with the Armistice Agreements. 12/

He did not, however, indicate in his report whether the Council should consider further action to enforce compliance with the Armistice Agreements and its own resolutions.

9/ (a) Decision of 19 January 1956 (S C, 11th yr., 715th mtg.: provisional record, pp. 53-54, S/3538).

(b) Decision of 4 April 1956 (S C, 11th yr., 722nd mtg.: provisional record, pp. 23-25, S/3575).

10/ See footnote 9 (b).

11/ S C, 11th yr., Suppl. for April, May and June 1956, p. 30, S/3596, para. 102.

12/ See in this connexion in the study of Article 36 in this Supplement, footnote 10.

10. On 4 June 1956 at its 728th meeting, the Security Council unanimously adopted a resolution 13/ in which it recalled its decisions of 4 April 1956 and 11 August 1949, and noted the assurances given to the Secretary-General by all the parties to the Armistice Agreements unconditionally to observe the cease-fire, and after noting that full compliance with the General Armistice Agreements and with the Security Council's resolutions of 30 March 1955, 8 September 1955 and 19 January 1956 was not yet effected, requested the Secretary-General to continue his good offices with the parties with a view to full implementation of the Council's resolution of 4 April 1956 and full compliance with the Armistice Agreements. 14/

13/ S C, 11th yr., Suppl. for April, May and June 1956, p. 72, S/3605.

14/ On 26 September 1956, the Secretary-General called the attention of the Council to the latest development along the Jordan-Israel Armistice Demarcation Line. He mentioned that, if the situation was not brought rapidly under control, "the Council should take the matter up in order to reaffirm its policy, as established in previous resolutions, and, were the Council to find the continued deterioration to constitute a threat to the peace, to decide on what further measures may be indicated" (S/3658).