

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 Security Council did not adopt any decision invoking Article 40.
2. Proceedings connected with two negative decisions by the Security Council during which constitutional questions bearing on Article 40 arose are briefly received in the General Survey. Decisions of the Security Council containing provisions instituting measures of a provisional nature taken by the Council under other Articles of the Charter than those in Chapter VII are also surveyed. Note is also taken in the General Survey of an instance in which Article 40 was referred to in a letter of submission and in the course of proceedings in the Security Council.
3. In the Analytical Summary of Practice, the following two questions are dealt with: "The question whether the Security Council could take action under Article 40 without first making a determination under Article 39", which arose in connexion with the Palestine question; and "The question whether provisional measures provided for in Article 40 could be applied by analogy to questions considered by the Security Council under Chapter VI of the Charter", which arose in connexion with the Suez Canal question.

I. GENERAL SURVEY

4. In connexion with the item, "The Palestine question: steps for the immediate cessation of the military action of Israel in Egypt", the Security Council had before it a draft resolution calling upon Israel and Egypt to cease fire; calling upon Israel to withdraw its armed forces behind the established armistice lines; and calling upon all Member States to adopt certain measures of a provisional nature. During the discussion, the views were expressed that the Israel military action was a breach of the peace within the meaning of Article 39, and that the draft resolution had a bearing on Article 40. The draft resolution was not adopted because the negative votes were those of two permanent members of the Security Council. 1/
5. A draft resolution submitted in connexion with the Suez Canal question contained a proposal for a provisional measure. In this connexion, the question arose whether the Security Council, when acting under Chapter VI, could apply the provisional measures of Article 40. The paragraph in question failed of adoption because of a negative vote by a permanent member. 2/
6. The decisions of the Security Council in connexion with the Palestine question did not recall its resolutions of 15 July 1948 and 11 August 1949 directly or by reference, as they had during the period covered by previous Repertory studies. 3/ In connexion with the India-Pakistan question, 4/ the Council again called upon the parties concerned to comply with certain provisional measures without, however, making an explicit or implicit reference to Article 40.

1/ See below, paras. 11-17.

2/ See below, paras. 18-20.

3/ See Supplement No. 1, vol. 1, under Article 40, paras. 4 and 5; see also Repertory, vol. II, under Article 40, para. 14.

4/ See para. 9 below.

7. By its decision 5/ of 22 January 1958 in connexion with a complaint 6/ by Jordan concerning activities conducted by Israel in the zone between the armistice demarcation lines in Jerusalem, the Security Council, having considered the report 7/ of the Acting Chief of Staff of the United Nations Truce Supervision Organization (UNTSO) in Palestine, endorsed the recommendations of the Acting Chief of Staff to the end that:

"(a) The parties should discuss through the Mixed Armistice Commission civilian activities in the zone;

"(b) In order to create an atmosphere which would be more conducive to fruitful discussion, activities in the zone, such as those initiated by Israelis on 21 July 1957, should be suspended until such time as the survey will have been completed and provisions made for the regulation of activities in the zone;

"(c) Such discussions should be completed within a period of two months;

"(d) The Security Council should be advised of the result of the discussions."

8. The Council further called upon the parties to the Israel-Jordan General Armistice Agreement 8/ to co-operate with the Chief of Staff and in the Mixed Armistice Commission in carrying out the recommendations of the Acting Chief of Staff. It called upon them to observe article 3 of the General Armistice Agreement and to prevent all forces referred to in article 3 of the General Armistice Agreement from passing over the armistice demarcation lines and to remove or destroy all their military facilities and installations in the zone. It also called upon them to use the machinery provided for in the General Armistice Agreement to implement its provisions and requested the Chief of Staff to report on the implementation of the resolution. 9/

9. In its further consideration 10/ of the India-Pakistan question, the Security Council continued to call upon the parties to comply with certain provisional measures or to reaffirm its previous decisions related to such measures, without referring to Article 40. By its decision 11/ of 24 January 1957, the Security Council, reminding the Governments and authorities concerned of the principle embodied in its previous resolutions, and those of the United Nations Commission for India and Pakistan, that the final disposition of the State of Jammu and Kashmir would be made in accordance with the will of the people expressed through the democratic method of a free and impartial plebiscite conducted under the auspices of the United Nations, reaffirmed the affirmation in its resolution of 30 March 1951 and declared that the convening of a Constituent Assembly as recommended by the General Council of the "All Jammu and Kashmir National Conference" and any past or future action by the Constituent Assembly to determine the future shape and affiliation of the entire State or any part thereof, or action by the parties concerned in support of any such action by the Constituent Assembly, would not constitute a disposition of the State in accordance with the above

5/ S C, 13th yr., Suppl. for Jan.-Mar., p. 4, S/3942.

6/ S C, 12th yr., Suppl. for July-Sept., p. 33, S/3878.

7/ Ibid., p. 38, S/3892.

8/ For General Armistice Agreement between Israel and Jordan, see United Nations, Treaty Series, vol. 42, I, No. 656, p. 303.

9/ Operative paras. 3-7.

10/ For previous decisions of the Security Council, see Repertory, vol. II, under Article 40, para. 17.

11/ S C, 12th yr., Suppl. for Jan.-Mar., p. 4, S/3779.

principle. 12/ By its decision 13/ of 2 December 1957 the Council requested the Government of India and the Government of Pakistan to refrain from making any statements and from doing or causing to be done or permitting any acts which might aggravate the situation and to appeal to their respective peoples to assist in creating and maintaining an atmosphere favourable to the promotion of further negotiations.

10. Article 40 was invoked in a letter 14/ dated 29 May 1958 from the representative of Tunisia to the President of the Security Council concerning the "Complaint by Tunisia in respect of acts of armed aggression committed against it since 19 May 1958 by the French military forces stationed in its territory and in Algeria". The Council was requested to take such measures as it might deem necessary, in accordance with Article 40 and subsequent Articles of the Charter, in order to put an end to the situation which threatened not only the security of Tunisia but also international peace and security in that part of the world. 15/ When this question, together with a complaint 16/ submitted by France, was considered, the representative of Tunisia referred 17/ to Articles 40, 41 and subsequent Charter Articles in connexion with Article 39. No decision was taken by the Council, since the parties agreed to settle the question by direct negotiations.

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

Decision of 30 October 1956 in connexion with the Palestine question: steps for the immediate cessation of the military action of Israel in Egypt

11. In the proceedings related to a draft resolution submitted in connexion with the item, "Letter dated 29 October 1956 from the representative of the United States of America, addressed to the President of the Security Council concerning 'The Palestine question: steps for the immediate cessation of the military action of Israel in Egypt'", 18/ which invoked neither Article 39 nor Article 40, explicit and implicit references were made to these two Articles. The views were expressed that the Security Council should determine that a breach of the peace had occurred, and that the situation called for a resolution within the scope of Article 40. It was also indicated that the measures provided for in the draft resolution were within the meaning of Article 40.

12. At the 749th meeting, on 30 October 1956, the Security Council had before it a draft resolution 19/ submitted by the United States, in which the Council, noting that the armed forces of Israel had penetrated deeply into Egyptian territory in violation

12/ S C, 12th yr., Suppl. for Jan.-Mar., p. 4, S/3779, second preambular para. and operative para. 1.

13/ S C, 12th yr., Suppl. for Oct.-Dec., p. 21, S/3922, operative para. 1.

14/ S C, 13th yr., Suppl. for Apr.-June, p. 37, S/4013.

15/ *Ibid.*, Explanatory Memorandum, para. 10.

16/ *Ibid.*, p. 42, S/4015.

17/ S C, 13th yr., 819th mtg., paras. 54, 66 and 67.

18/ S C, 11th yr., Suppl. for Oct.-Dec., p. 108, S/3706.

19/ *Ibid.*, p. 110, S/3710.

of the General Armistice Agreement between Egypt and Israel 20/ and expressing its grave concern at this violation of the General Armistice Agreement, would (a) call upon Israel immediately to withdraw its armed forces behind the established armistice lines; (b) call upon all Members:

- (i) to refrain from the use of force or threat of force in the area in any manner inconsistent with the purposes of the United Nations;
 - (ii) to assist the United Nations in ensuring the integrity of the armistice agreements;
 - (iii) to refrain from giving any military, economic or financial assistance to Israel so long as it had not complied with the resolution; and
- (c) request the Secretary-General to keep the Security Council informed concerning compliance with this resolution and to make whatever recommendations he might deem appropriate for the maintenance of international peace and security in the area, by the implementation of this and prior resolutions.

13. At the same meeting, the representative of the United States accepted 21/ a suggestion by several members to insert a new operative paragraph 1 in his draft resolution, calling upon Israel and Egypt immediately to cease fire.

14. During consideration of the question, the representative of the United States said that it was imperative that the Council should act in the promptest manner to determine that a breach of the peace had occurred, to order that the military action undertaken by Israel should cease immediately and to make clear its view that the Israel armed forces should immediately be withdrawn behind the established armistice lines. Introducing his draft resolution, he pointed out that its sub-paragraph (c) of paragraph 2, as a minimum sanction, called for the suspension of military, economic and financial assistance so long as Israel had not withdrawn its armed forces behind the armistice lines.

15. The representative of Egypt contended that the attack by Israel forces in Egyptian territory constituted a breach of the peace and an act of aggression and that the Council should therefore apply the appropriate provisions of Chapter VII of the Charter.

16. It was also stated that the action by Israel was an act of aggression within the meaning of Article 39. Any failure by Israel to comply with the order to cease immediately its military action in Egypt and to withdraw its forces behind the armistice line would entail the application of measures under Chapter VII.

17. One representative expressed the view that the situation called for a resolution within the scope of Article 40, and the provisions of this Article should therefore be applied. The United States draft resolution avoided extraneous aspects of the question; it wisely did not enter upon consideration of the application of other Articles of Chapter VII and still less did it seek to apply Article 39. It was confined to advance measures which the Security Council was obliged to take. 22/

20/ United Nations, *Treaty Series*, vol. 42, I, No. 654, p. 251.

21/ S C, 11th yr., 749th mtg., para. 125; the other paragraphs of the draft resolution were renumbered accordingly.

22/ For texts of relevant statements, see S C, 11th yr., 748th mtg.: Egypt, paras. 68 and 69; Peru, paras. 5 and 52; United States, para. 8; Yugoslavia, paras. 21 and 22; 749th mtg.: Peru, paras. 114-116; United States, para. 19.

Decision

At the 749th meeting of the Security Council, on 30 October 1956, the United Nations draft resolution, as amended, was not adopted. ^{23/} There were 7 votes in favour and 2 against, with 2 abstentions; the negative votes were those of permanent members of the Council.

- ** 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"
- E. The question whether provisional measures provided for in Article 40 could be applied by analogy to questions considered by the Security Council under Chapter VI of the Charter

Decision of 13 October 1956 in connexion with the Suez Canal question

18. A draft resolution relating to the Suez Canal question contained a proposal for a provisional measure. The Security Council considered the question before it under Chapter VI of the Charter. Subsequently, a question arose as to whether the Council could apply the provisional measures in Chapter VII of the Charter in case a matter before it fell under Chapter VI. The view was expressed that since the Charter did not declare that provisional measures were to be applied exclusively under Chapter VII, the Council could order them, by analogy, in connexion with questions considered under Chapter VI.

19. At the 742nd meeting of the Security Council, on 13 October 1956, the representatives of France and the United Kingdom submitted a joint draft resolution ^{24/} which provided that the Security Council would consider that, pending the conclusion of an agreement for the definitive settlement of the régime of the Suez Canal on the basis of requirements which were set out, the Suez Canal Users' Association, which had been qualified to receive the dues payable by ships belonging to its members, and the competent Egyptian authorities, should co-operate to ensure the satisfactory operation of the Canal, and free and open transit through the Canal, in accordance with the Convention signed in Constantinople on 29 October 1888 intended to guarantee the free use of the Suez Maritime Canal.

20. In connexion with this proposal, it was contended that the Charter, in Article 40, contemplated that provisional measures might be called for by the Council in relation to matters that were before it. These provisional measures should have the purpose and the effect of preventing the occurrence of incidents and the deterioration of a situation. The joint draft resolution offered a formula for the provisional measures to be adopted. Though Chapter VI of the Charter, which related to the type of question the Security Council was considering, did not specifically mention such provisional measures, there was no legal problem in applying the principle from Chapter VII to the matters referred to in Chapter VI. The view was further expressed that although before

^{23/} S C, 11th yr., 749th mtg., para. 186.

^{24/} S C, 11th yr., Suppl. for Oct.-Dec., p. 19, S/3671, operative para. 5.

provisional measures could be taken, the Council must first determine the existence of a threat to the peace, breach of the peace or act of aggression, it was obvious that, by analogy, provisional measures might be taken under Chapter VI. They were not specifically provided for in Chapter VI, but, in empowering the Security Council in Articles 34, 36 and 37 ex officio to investigate any situation which was likely to endanger peace and, more particularly, in empowering it under Article 37 to recommend "terms of settlement", the Charter did not exclude provisional measures from those terms of settlement, precisely in order that such measures could be put into effect. There was a legal axiom according to which principles which were not directly relevant might be applied to similar cases by analogy. If the provisional measures to prevent "an aggravation of the situation" -- in the terms of Article 40 -- were put into effect in the case of aggression or of a threat to the peace, why should they not be put into effect in cases in which it might be said that there was probably a threat to the peace? 25/

Decision

At the 743rd meeting of the Security Council, on 13 October 1956, the joint draft resolution submitted by France and the United Kingdom was voted upon in two parts. The first part was operative paragraph 1; the second part contained operative paragraphs 2 to 5. The second part of the joint draft resolution was not adopted. 26/ There were 9 votes in favour and 2 against, one of the negative votes being that of a permanent member.

25/ For texts of relevant statements, see S C, 11th yr., 743rd mtg.: Belgium, paras. 62, 63 and 65; Peru, paras. 87 and 88; United States, para. 12.

26/ S C, 11th yr., 743rd mtg., para. 106.

