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Authority and Responsibility of the U.N. Force
under paragraph A(2) relating to the withdrawal
and evacuation of certain personnel.

4 March 1961
(31st Meeting)

AUTHORITY AND RESPONSIBILITY OF THE UN FORCE UNDER PARAGRAPH A(2)
RELATING TO THE WITHDRAWAL AND EVACUATION OF CERTAIN PERSONNEL

Memorandum Submitted by the Secretary-General

The following comments of a legal character are submitted in response to questions by members of the Advisory Committee regarding the authority and responsibility of the UN Force in the Congo to use force to effectuate the evacuation of certain foreign nationals who fall within the terms of paragraph A(2) of the Security Council resolution of 21 February 1961.

Analysis of the Text

Paragraph A(2) reads as follows:

"Urges that measures be taken for the immediate withdrawal and evacuation from the Congo of all Belgian and other foreign military and para-military personnel and political advisers not under the United Nations Command, and mercenaries;"

The first point to note is that the text of this paragraph is entirely silent on the question of whether force may be used to carry out the measures which are urged. The omission of any reference to the use of force in this paragraph cannot be regarded as irrelevant, especially in view of the explicit authorization in paragraph A(1) that the United Nations may use force for the purposes stated in that paragraph. In these circumstances, it is difficult to read into the paragraph an authorization which is not expressed on a point recognized as having crucial importance.

Secondly, it may be noted that the terms "withdrawal and evacuation" are used without any indication as to the authority that might take such action. While the words themselves imply that such measures need not require the consent of the individuals concerned, they clearly do not, in themselves, vest in the UN Force the right to employ force to remove the individuals concerned. It will be recalled that a draft resolution (S/4706) which would have

"enjoined" the UN Command to "ensure ... removal" of all Belgian personnel was rejected by the Council at its meeting on 20-21 February.

The Debates in the Security Council

The discussion in the Security Council relating to the adoption of paragraph A(2) contain no suggestion that the paragraph was intended to bestow upon the United Nations the right to seize forcibly the individuals mentioned. Again it is relevant to contrast this with the many explicit references to the authorized use of force for the objectives stated in paragraph A(1).

Some guidance to the intended meaning of the paragraph may be found in the statements indicating that its implementation requires "co-operation" and that, in the event that such co-operation is not given, it will be necessary to return to the Security Council and request that organ to adopt further measures in the nature of "sanctions" to effectuate the objective of paragraph A(2). A significant statement in this regard was made by the representative of the United Arab Republic, one of the sponsors of the resolution.

"The second question with which I want to deal in this statement today is the question of Belgian and foreign military and para-military forces that are not in the United Nations force. We feel that these forces must be evacuated as soon as possible if we wish peace to return to that country. It is imperative that these forces be evacuated immediately. We clearly ask for this in the draft resolution which will be distributed soon. If the measures required to ensure this immediate evacuation are not taken and if the necessary co-operation is not given in this field to the United Nations, we will be forced to come back to the Security Council once again and ask that measures falling within the framework of chapter VII of the Charter be taken in order to attain this objective. I am speaking of sanctions." (S/PV. 938, p. 26.)

Consideration should also be given to statements of other representatives which, while expressing the desire for vigorous action to implement the provision of paragraph A(2), refer to the use of persuasion and influence by States to obtain the desired result and do not in any instance suggest that the forcible seizure of the individuals by the UN Command would be authorized. (See, for example, Nigeria, S/PV. 941, pp. 36-37, Sudan, S/PV. 937, p. 76, the United States, S/PV. 934, p. 46.)

The Application of the Authority to Resort to Force Contained in
Paragraph A(1) for the Implementation of Paragraph A(2)

It has been suggested that, even if paragraph A(2) does not in itself confer the right on the UN Command to use force to evacuate individuals, the authorization granted in paragraph A(1) to use force "if necessary in the last resort" applies to the action called for under paragraph A(2). In support of this, it is said that the evacuation of Belgian and other foreign military personnel etc. is, in the intent of the Council resolution, a measure required to prevent the occurrence of civil war, and consequently covered by the terms of paragraph A(1) relating to the "last resort" use of force.

This argument requires a consideration of the circumstances in which force may be used under paragraph A(1), as related to the problem of evacuation under paragraph A(2). In order to analyse this point adequately it is useful to consider certain factual situations.

First, there may be a situation in which the prohibited personnel have been engaged in acts with respect to which the UN Force is clearly entitled to use force under paragraph A(1) and other grants of authority by the Security Council. An obvious case would be that in which a Belgian or other foreign military officer engaged in an attack against UN Forces maintaining a position or in violation of the terms of a neutralized zone. In such circumstances, the UN Forces would, as a corollary of its right to employ arms, be considered to have the right to apprehend and detain opposing personnel and to arrange for

their evacuation if they fall within the classes mentioned in paragraph A(2). The authority of the UN Force to take such forcible measures in such a circumstance is thus a consequence of the right of the Force to take self-defense measures in the broad sense in which that term has been construed by the Secretary-General and by the members of the Advisory Committee.

A second situation which presents a rather different issue may arise in respect of foreign personnel, military or otherwise, who are serving with the military forces of a de facto or de jure governmental authority or who otherwise have the protection of such military forces. In a case of this type, the issue is presented by the fact that the UN Force would have to undertake military initiative, - in short, to stage an attack on the interposed troops of the governmental authority concerned. This is an aspect of the problem which has been considered in some detail by the Advisory Committee and by the States which have contributed troops; reference is made on this point to the statements contained in the message dated 24 February 1961 from the Secretary-General to certain African States concerning the need for troops and the function of the Force. This message, which received the approval of the Advisory Committee, contains the following paragraph:

"The latest resolution, adopted by the Security Council, does not seem to me to derogate from the position that United Nations troops should not become parties to armed conflict in the Congo. The basic intention of the resolution is, in my opinion, the taking of all appropriate measures for the purposes mentioned, resort being had to force only when all other efforts such as negotiation, persuasion or conciliation were to fail.

"If following such efforts, or measures taken in support of their result, United Nations troops engage in defensive action, when attacked while holding positions occupied in prevention of a civil war risk, this would not, in my opinion, mean that they become a party to a conflict, while the possibility of becoming such a party would be open were troops to take the initiative in an armed attack on an organized army group in the Congo." (S/4752, Annex 7, p. 3).

There is a third situation which remains to be considered, namely that in which the conditions stated in the previous paragraphs do not obtain. This would include cases in which personnel covered by paragraph A(2) were simply carrying out their functions in Leopoldville, Stanleyville or other localities where UN Forces are situated. The issue then is presented as to whether the UN troops could, by the threat or use of force, seize these "prohibited" personnel and forcibly bring about their evacuation. On this problem, too, further analysis is required.

Stated in the form of questions, the points are:

- (1) May the United Nations Forces forcibly seize an individual and effectuate his evacuation in accordance with agreement of the territorial authorities?
- (2) Lacking agreement of the territorial authorities, may the United Nations Forces seize and forcibly evacuate an individual on the basis of a request from the government of which he is a national?
- (3) In the absence of both the agreement of the territorial authorities and a request from the government of nationality, may the United Nations, acting simply on the basis of the Security Council resolution, forcibly seize and evacuate an individual?

With respect to the first question, the essential legal point is that the governmental authorities of an area may be considered to have the right to expel persons, particularly when this is called for by a legally binding decision of the Security Council. It is true that questions may be raised as to the de jure status of a particular territorial government, but in the circumstances

of the present Congo situation it would seem necessary to conclude that the agreement of the authorities exercising de facto control in the area would constitute a sufficient legal basis for United Nations forcible action to evacuate the prohibited personnel.

The second and third questions are more difficult. They are based on the hypothesis that the territorial government or authorities would not agree even after pressure has been brought on them to the removal of particular foreign officials serving with their governments. A likely ground that would be advanced is that the individuals in question are not in their view covered by paragraph A(2) either because they do not perform the prohibited functions or possibly that they are not of foreign nationality. The issue would thus be presented as to whether UN troops may exercise initiative by employing force against the individuals in question in order to effectuate their evacuation when it has been made clear that this is contrary to the will of the authorities of the area. The fact that the government of nationality may have sought to withdraw its national (analogous to an attempt at extradition) would not in itself be a decisive legal element although it would in many cases have considerable political importance. In other words, in both cases covered by questions 2 and 3 stated above the legal issue may be put briefly as to whether force may be used in such individual seizures without any authority or agreement granted by the territorial authorities.

The argument may be advanced that such agreement is not required for two reasons: first, that paragraph A(1) envisages the use of force as a last resort failing agreement to prevent civil war and that the presence of such foreign officials is an element conducive to civil war; secondly, that the force of the resolution of 20-21 February is obligatory and

consequently it should be presumed that the territorial governments have accepted the decision of the Security Council, and consequently that their actual agreement is unnecessary.

The implications of this argument are obviously far-reaching. Its acceptance would mean that the United Nations Force would have an overriding authority (after attempts at persuasion had failed) to reach into the officialdom of a territorial government and to remove by force individual officials of that government which the UN --- but not the government --- deems to be covered by the resolution. It cannot be ignored that in a case of this kind the territorial government would, whenever possible, attempt to resist such forcible action against its officials by counter-force.

In order to evaluate whether this comes within the intent of the Security Council resolution, the following considerations must certainly be given weight. First, as we have already shown, it is clear that the Council did not authorize the exercise of force by the United Nations under paragraph A(2). This in itself must give rise to doubt as to whether A(1) could be so interpreted as providing a basis for the use of force to carry out the objectives of A(2) without any independent justification under A(1).

A second significant consideration is the fact that the use of force in the circumstances envisaged would involve a type of military initiative against the authorities of the area with the probability of armed resistance. With regard to this, reference must be had again to the basic position, quoted above, expressed in the letter to certain African States regarding troops (which letter received the endorsement of the Advisory Committee) to the effect that the UN troops should not become parties to armed conflict in the Congo. It has already been made sufficiently clear that this position is regarded by Members as a special case of the principle embodied in or underlying the

Security Council resolutions of 14 July and 9 August and affirmed in the resolution of 20-21 February, to wit, that the United Nations forces were not authorized to take military initiative against governmental authorities and that they were not to seek to influence the outcome of the political conflict in the country. These considerations are relevant to the case under discussion on the assumption that the attempts at forcible seizure of individual officials of the territorial government would almost inevitably bring UN troops into armed conflict with the authorities of that government.

Finally, it may be observed that an interpretation which permits and indeed requires such forcible seizures of individuals would appear to be inconsistent with what have been generally regarded as fundamental limitations on the right of the United Nations to take military action against a government save where the Security Council has expressly adopted an enforcement measure under Article 42 of Chapter VII. The text of the resolution of 20-21 February contains no explicit reference to such enforcement measure and the statements in the Council which are relevant confirm (as indicated above) that Article 42 was not intended to be applied. It is difficult to avoid the conclusion that any such novel and far-reaching construction of the resolution may be adopted by the Secretary-General only if the Security Council itself has stated that position with the necessary clarity.

Question as to the Applicability of Article 104 of the Charter

The question has also been raised whether the authority to exercise legal powers of government, such as arrest and deportation, may not be supplied by Article 104 of the Charter. The Article states:

"The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes."

The history of the article makes clear that the term "legal capacity" is used in the usual and narrow sense of conferring authority on a fictitious or juridical person to perform legal acts otherwise performed only by natural persons.

The General Assembly has given an authoritative interpretation of Article 104 in this narrow sense. In adopting the Convention on Privileges and Immunities of the United Nations, it cited Article 104 in the preamble, and then in Section 1 of the Convention determined that the United Nations "shall have the capacity:

- "(a) to contract;
- "(b) to acquire and dispose of immovable and movable property;
- "(c) to institute legal proceedings."

This determination is in strict conformity with the explanation of the drafters of Article 104, as stated in the Report of Committee IV/2 at the United Nations Conference on International Organization in San Francisco. (UNCIO Documents, Vol. 13, p. 710).

The International Court of Justice, in its Advisory Opinion of 11 April 1949 on Reparation for Injuries Suffered in the Service of the United Nations, held that the Organization had the "capacity" to bring an international claim:

"Accordingly, the Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State." (ICJ Reports 1949, p. 179.)

Insofar as concerns Article 104 of the Charter, therefore, it is apparent that the authority of ONUC to carry out any acts normally performed by a government must be found not in the Charter reference to its "legal capacity" but rather in the terms of the mandate.