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of Sec. Council Resolution of 21 Feb. 1961
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AUTHORITY OF THE UNITED NATIONS UNDER PARAGRAPH A(1) OF
SECURITY COUNCIL RESOLUTION OF 21 FEBRUARY 1961 TO USE
FORCE FOR THE PREVENTION OF CIVIL WAR IN THE CONGO

In response to a wish expressed by members of the Advisory Committee, the following comments of a legal character are submitted regarding the scope of the authority of the United Nations Command in the Congo to use force, in the last resort, to prevent the occurrence of civil war in the Congo.

At its 942nd meeting, on 20-21 February 1961, the Security Council adopted a resolution expressing its deep concern at "the danger of widespread civil war and bloodshed in the Congo and the threat to international peace and security," and noting "the development of a serious civil war situation and preparations therefor". In paragraph A(1) of the resolution the Council then:

"Urges that the United Nations take immediately all appropriate measures to prevent the occurrence of civil war in the Congo, including arrangements for cease-fires, the halting of all military operations, the prevention of clashes, and the use of force, if necessary, in the last resort".

Paragraph 5 of the resolution:

"Reaffirms the Security Council resolutions of 14 July, 22 July and 9 August 1960 and the General Assembly resolution 1474 (ES-IV) of 20 September 1960 and reminds all States of their obligation under these resolutions."

The basic mandate

In examining the scope of the authority conferred upon the United Nations Command for the use of force in the prevention of civil war in the Congo it will therefore first be necessary to review the basic mandate of the Command under the resolutions thus expressly reaffirmed - both in terms of the aims intended to be attained by the Organization and in terms of the legal means, including the use of force, available to the Command for these purposes as stated in the mandate.

The resolution of 13 July was adopted in response to the initial statement of the Secretary-General to the Security Council which, together with his first Report to the Council on the implementation of the resolution, has been regarded as a basic document in the interpretation of the mandate.

The basic aims of the Organization, once the withdrawal of the Belgian troops had been achieved, were the maintenance of law and order and the protection of civilian life. In its resolution 1474 (ES-IV) the General Assembly included among the aims of the United Nations assistance with a view to preserving the unity, territorial integrity and political independence of the Congo in the interests of international peace and security.

The main instrument of the United Nations created for attaining these ends was the United Nations Force, acting within the legal authority conferred upon it by the mandate. The limits of its original authorization for the use of force, established in the manner indicated, were stated in precise terms. It was thus specified that the military units in the United Nations operation would be entitled to act only in self-defence; that they

may never take the initiative in the use of armed force, but are entitled to respond with force to an armed attack, including attempts to use force to make them withdraw from positions which they occupy under orders of the Commander, acting under the mandate; and that the basic element involved is clearly the prohibition against any initiative in the use of armed force. It was also expressly laid down that, in application of the rule that United Nations units must not become parties in internal conflicts, they could not be used to enforce any specific political solution of pending problems or to influence the political balance decisive to such a solution. (S/4389, page 5.) The Secretary-General's Report containing the detailed statement of the mandate was considered by the Security Council and noted in its resolution of 22 July 1960. In its resolution of 9 August 1960 the Council then reaffirmed the basic principle:

"that the United Nations force in the Congo will not be a party to or in any way intervene in or be used to influence the outcome of any internal conflict, constitutional or otherwise".

The terms of paragraph A(1)

Paragraph A(1) of the resolution of 21 February 1961 urges the United Nations to take "all appropriate measures" to prevent civil war in the Congo. The individual measures which follow, in a clause beginning with the word "including", while not exhaustive, constitute the main types of action that could be taken to prevent civil war. The use of force is listed as one of these measures; it is qualified by the language of the paragraph in the sense that it must be "necessary", and may be resorted to only "in the last resort". Beyond these qualifications, however, the resolution does not indicate in what circumstances or in what manner

recourse may be had to force. The question is thus raised as to whether "force" may be employed as one of the measures to prevent civil war, without regard to the previous limitation that it may be used in defence of existing positions and not in a military initiative.

Since the terms of the resolution do not settle the question which the language of the paragraph poses, it is necessary to look to the background of the resolution.

The discussion in the Security Council

What is significant in the discussion in the Council on this point is that the proposed application of force was closely related to negotiation, cease-fire arrangements and associated peaceful measures. A statement on the draft resolution by the representative of a State contributing to the Force, who termed the proposal one for a "mutual truce and military disengagement", was cited as entering into the interpretation of the resolution. (Chile, S/PV. 942, pp. 14, 15; China, id., at p. 26; Turkey, S/PV. 941, p. 47; United Kingdom, S/PV. 942, p. 8; United States, S/PV. 934, p. 47, S/PV. 941, p. 42; Nigeria, S/PV. 941, p. 37.) Several statements emphasized that the Council had not adopted enforcement measures under Articles 41 or 42 of the Charter and that force was therefore not available for coercive military action against the host State or governmental authorities. It could be used to prevent a clash between hostile Congolese troops but not to impose a political settlement. (United Kingdom, S/PV. 942, p. 9; United States, S/PV. 941, p. 42; Secretary-General S/PV. 942, p. 138.)

It is also useful to note that the phraseology of paragraph A(1), indeed the very examples listed, link the paragraph to a suggestion placed before the Council by the Secretary-General prior to the introduction of the draft resolution. He stated that instructions had already been given that, "in case a clash between armed units is threatening, the United Nations should use all means, short of force, to forestall such clashes through negotiations, through the establishment of neutralized zones, through cease-fire arrangements and through similar measures. Negotiations to those ends can be conducted on the basis of the military force at the disposal of the United Nations." He referred to this procedure as a "method of preventing civil-war risks by peaceful means". He once again acknowledged a basic limitation on the use of force inherent in the mandate: "were clashes between armed units to develop, the United Nations could not permit itself to become a third party to such a conflict." But he specifically mentioned the possibility of the use of force "in support of cease-fire arrangements". Finally, on this point among others, he stated that no new legal mandate was required but rather moral and political support. (S/PV. 935, pp. 23, 26.)

The comparison between the original suggestion of the Secretary-General and the terms embodied in the paragraph is reinforced by his final remarks after the adoption of the resolution, which he welcomed "as giving a stronger and more clear framework for United Nations action although, as so often before, not providing a wider legal basis or new means for implementation The resolution adds to the duties of the United Nations Force I understand the reaffirmation of the earlier

resolutions as clearly indicating that those additions to the troops would be on the same legal basis as previous contributions." (S/PV. 942, p. 133.)

General conclusion as to the effect of A(1) on the mandate

What therefore emerges from the discussion is the intention to enlarge the aims of the United Nations operation in the Congo for the urgent purpose of countering "the development of a serious civil war situation." The Council now establishes the prevention of civil war as a major objective in the same way as the maintenance of law and order and the protection of life were the aims under the previous resolutions. The functions of the United Nations Command may be said to have been enlarged in order to include express authority to deal with civil war situations, but the Organization's basic means remain the same: negotiation and non-violent interposition, with force to be used only when necessary to maintain and defend its positions. Since the resolution does not express, and in fact the record specifically refutes, any intention to authorize the military enforcement against the authorities of United Nations solutions to the civil war situation, it follows that no justification could be found in the resolution for assuming the creation of any new authority to take the initiative in employing military coercion as a means of bringing about a desired situation as between civil war factions.

On the other hand, it is evident that the resolution, while not revoking the prohibition of a military initiative, now introduces the concept of preventive action. The "halting of all military operations", for example, does connote preventive action; it implies authority on the part of the Force to act in a theatre of operations. It indicates that the

Command cannot be restricted to guarding individual posts, of the type held by a police force maintaining law and order among civilian populations, but that its authority will now extend to the pre-emptive occupation of key points and areas which might otherwise become the theatre of civil war offensives. No right to initiate the use of force is created, but the scope of the areas to which the right of self-defence applies has been widened.

Inasmuch as the existing mandate was reaffirmed, it may prove useful to review briefly the rules on the use of force, and the methods for effecting military disengagement, as they existed at the time of the new resolution. This review can then provide a basis for an examination of the effect of paragraph A(1) on the operations of the Force, as well as for testing the foregoing interpretation in terms of a certain number of the practical situations, which have arisen or may reasonably be expected to arise in the area of operations, to which the terms of the paragraph will apply.

Situations justifying force under previous resolutions

As noted in the section above on the basic mandate, United Nations units have from the beginning been entitled to respond with force to an armed attack, including forcible attempts to make them withdraw from positions they occupy under orders of the Commander. In application of this rule the troops have long been under standing instructions that they are entitled to use the minimum necessary force in self-defence when responding to attempts by force to compel them to withdraw from a position which they occupy under orders from their commanders, or to infiltrate and envelop such positions as are deemed necessary by their commanders for them to

hold, thus jeopardizing their safety; attempts by force to disarm them; attempts by force to prevent them from carrying out their responsibilities, as ordered by their commanders; and violation by force of United Nations premises or attempts to arrest or abduct United Nations personnel, civil or military.

There is likewise a well-established application of the self-defence rule where a member or unit of the Force, on patrol for the maintenance of law and order and protection of life, is in a position to interpose against an act of violence; the actual use of arms is then required only if the lawless act is continued and so directed against the United Nations troops. The same principle governs, though the numbers involved may be greater, in cases of intervention to protect the lives of civilians when threatened by armed bands.

It would also be a logical application of the right of self-defence for force to be used in the early re-taking of any position defended by a United Nations unit from which it had been forcibly ejected; a counter-attack, if the fighting is reasonably related to the ejection in point of time and place, could not be considered to be an initiative. For this reason it has not been deemed to constitute an initiative when force is used to liberate members of the Force who have been unlawfully seized and are detained by force of arms after their United Nations guard has been overwhelmed. (Report on Bukavu, A/4682, 21 December 1960.) It is obvious that the right to use arms in self-defence refers to the defence of the unit of the Force concerned and not only to the right of each individual soldier bearing a weapon to employ it in the personal defence of his own body.

Development of measures of military disengagement leading up to the resolution

As stated to the Security Council by the Secretary-General on 15 February 1961, prior to the introduction of the draft of the new resolution, instructions had already been given that, in case a clash between armed units is threatening, the United Nations should use all means, short of force, to forestall such clashes through negotiations, through an establishment of neutralized zones, through cease-fire arrangements and similar measures. As early as September and October 1960 broad pacification measures had been negotiated by the United Nations Command in Kasai and Katanga, involving efforts to put an end to civil strife by establishing cease-fire lines and an extensive "no-man's land", obtaining troop withdrawals, and creating neutral zones under the protection of the United Nations Force in which other military operations would cease. (Second Progress Report, S/4557, paras. 70-74, 79.) In some instances towns not in neutral zones have been placed under United Nations protection; in North Katanga, as a means of putting a stop to the invasion and looting of cities by armed bands, the Force has placed road-blocks at all strategic points of entry to a threatened city, simultaneously proclaiming that any attempt of lawless groups to break through the perimeter so declared would be treated as an overrunning of United Nations positions. In periods of widespread threats to civilian life and liberty in circumstances in which units of the Force are not numerically sufficient to patrol in strength the extensive areas involved, the Organization has established protected areas to which persons seriously threatened may repair for safety.

Principles in application of paragraph A(1)

In view of this gradual development of procedures of the cease-fire type, it seems proper to conclude that the Security Council conceived of the new instruction as an extension, consistent with the mandate as developed under the previous resolutions, of an authority to take preventive action. Not only were cease-fire arrangements of the foregoing type in effect endorsed but express approval was given to the halting of all military operations and the prevention of clashes.

The underlying theory of paragraph A(1), as shown above, is that of military disengagement. Each of the proposed measures is one for the separation of hostile factions; the problem of reconciliation is dealt with in Part B of the resolution. Moreover, the suggested arrangements are military in character, of a type which to date have been conducted under the leadership of officers of the United Nations Command. From this it follows that the agreement sought from either side is of a cease-fire nature; the negotiation by the Command with any faction or authority accordingly carries no implication of political recognition. It also follows that the consent sought by the United Nations negotiators is acquiescence in a truce by a party to actual or possible hostilities; it is not necessarily a sovereign's consent. In consequence the consensual element is not tied to that posited by the Security Council in its resolution of 13 July 1960 authorizing military assistance in consultation with the Government, nor can any authority denominating itself "the legal Government" withhold or revoke its consent to a cease-fire arrangement negotiated under paragraph A(1): each party to a cease-fire acts on the same basis as the opposite party and is subject to the overriding authority of the Security

Council decisions on the threat to international peace and security. Accordingly, the right of the United Nations to fall back upon the ultimate recourse to force in defence of such a cease-fire arrangement applies equally to any faction or authority with which the particular form of cessation of military operations has been arranged.

The experience of the Organization in the Congo has unfortunately demonstrated that almost any act of interposition will be interpreted politically by either side as an attempt to aid the other. On the other hand, a major purpose served by paragraph A(1) is to proclaim the intent of the Security Council that no Congolese military operation can, in the circumstances of the civil war threat, be considered justifiable, regardless of the authority seeking to carry it out. To this extent it may be considered that the Council, in view of the gravity of the threat to international peace and security stated in the preamble, has by paragraph A(1) amended its implicit determination of the extent and consequences of that threat. It will be recalled that the Council had in August 1960 tacitly endorsed the position taken by the Secretary-General (S/4417/Add.6) that the United Nations, while not providing assistance, could not stand in the way of any action which the central Government could by their own means, in accordance with the Charter, carry out in relation to Katanga. Paragraph A(1) now clearly intends that no military action of a civil war character by any governmental authority in the Congo could be in accordance with the objective of the resolution. A defensive action by United Nations troops while standing in the way of such a move could not, therefore, at the present time be deemed an intervention in an internal conflict contrary to paragraph 4 of the resolution of 9 August 1960.

A related principle governing the use of force under the paragraph is that the aim of the Command must be to prevent clashes between the parties and not the repression of any one side. Had the mandate been widened to require the Force to intervene to suppress or defeat any Congolese authority, the entire character of the mandate would have been altered, as well as the legal basis on which participating States had contributed their contingents. This was indicated in the Secretary-General's opening statement of 1 February 1961 to the Security Council in such terms as to preclude a contrary interpretation of the subsequent resolution short of its containing a clear directive to the contrary. (S/PV. 928, pp. 57-58.)

This principle has a special application to paragraph A(1). Although the taking of sides in an internal conflict has never been permitted to the United Nations, a temptation could exist for a unit seeking to halt civil war operations under A(1) to side with the weaker party in order to oblige the stronger to withdraw or, as the case might be, with the stronger in order quickly to suppress altogether the harassment by the lesser. In either case the action must be excluded as making the United Nations a party to the conflict, as contrary to the basic rule against joint operations, and as conflicting with the understanding of various Members contributing troops that they would not be used where one army group was in conflict with another. This conclusion was implicitly endorsed by the Advisory Committee in its review of the text of the letter to be addressed by the Secretary-General to African States concerning the need for troops and the function of the Force (S/4752, Annex VII).

Practical applications of A(1)

Practical questions therefore arise as to the application of the above principles in various civil war situations. Obviously, United Nations commanders will have to work within the military means available to them at a given time and within a given area. With this reservation, however, it is clear that a considerable choice of means for preventing civil conflict will be available to the United Nations Force.

In the first place, the authority of the Security Council may be invoked to call upon any authorities, de jure or de facto, to halt all military operations in conformity with the resolution. Plainly this refers not to routine military movements within an uncontested area but rather to any movements by which one authority or faction might gain a military advantage over another, not only by direct assault on the forces of the other but by any incursion into a new region or any pre-emptive occupation of key points in which a rival authority or faction may also be in a position to assert an effective interest.

The use of negotiation to effect the cessation of hostile operations in a broad civil war situation has already been demonstrated by the discussions undertaken by the Commander with the Congolese Generals commanding both the Leopoldville and the Stanleyville army elements drawn up on either side of the Equateur-Orientale provincial border, with the ultimate aim of establishing a neutral zone. (S/4750 and Adds. 6, 7.)

The question then arises as to what measures are available to the United Nations Command if military operations are continued in the face of a demand

to comply with the terms of the resolution - in other words, if the object ceases to be the general one of halting of all military operations but the immediate one of preventing an actual clash. Warnings, conferences of the commanders, and strong patrolling by United Nations units may suffice (S/4750/Add.4), in which case any use of arms by either side singly against the international units would create no more than the classic self-defence situation. In cases of larger movements the strategic stationing of adequate United Nations forces may serve to impress the rival camps. Where simple geographical interposition is possible - i.e., where the United Nations can come literally in between, so as to separate the opposing factions altogether - it is equally clear that either an attack on the Force or an attempt of armed units to pass through its lines would create an ordinary self-defence situation. United Nations units can in this manner also stand in the way of any attempt to reinforce garrisons in danger areas (S/4750/Add.5), and can unilaterally, if necessary, establish truce lines, neutral zones or United Nations defended areas in territory lying between the parties.

A more difficult situation prevails where methods of negotiation have not prevented actual contact, or where hostile contact is established before the United Nations can act. Physical interposition may not then be possible. In such a case it is obviously the duty of the United Nations commander to continue with persuasive efforts while seeking to place his own troops in such a way as to deny strategic ground to the adversaries and also to assure the maximum security for the United Nations troops. Normally this should discourage the

outbreak of hostilities between the Congolese factions, and at no point would the right of the United Nations troops to use necessary force in self-defence be lost. On the other hand, it must be recognized that the proximity of the United Nations unit to two hostile elements already in contact with each other places an added burden on the exercise by the United Nations commander of his discretion, as the situation is one in which the United Nations unit runs the risk of becoming a third party. The United Nations commander, although he can resist with force any attack upon his own troops, cannot join in an engagement already taking place between two factions; neither can he permit his own position to be enveloped by Congolese elements already engaged in a fire-fight between themselves. In such cases (while still attempting to maintain contact with the Congolese commanders for obtaining a cease-fire and unilaterally drawing cease-fire lines), he could have little choice but to withdraw; on the one hand, the purposes of the resolution would not be served by the involvement of United Nations troops in a three-way battle; on the other hand, there would be every risk of violating the mandate by becoming a party to the internal struggle.

One arrives at a crucial test as to the availability of force when the question is reached as to whether a key point may be taken by United Nations troops. In view of the limited transport system in the Congo, movements over wide regions may be controlled by occupation of certain key road or rail centres, airfields or river ports. As shown above, it seems clear that the resolution of 21 February, without altering the mandate, widened its scope and application in the sense of authorizing the Force to defend key areas rather than local posts of the type that might be held by an ordinary

politicizing operation. It therefore cannot be considered that the non-violent occupation of a key centre by United Nations troops as a means of halting military operations would represent either an unauthorized application of armed force or an unauthorized intervention in an internal conflict, even though it amounts to denying crucial territory or facilities to national forces. It would be otherwise if the centre were already held by Congolese armed forces and the United Nations take-over could not be peaceably negotiated. In ordinary circumstances an assault upon such a centre would appear to be precluded as constituting a military initiative, as an armed attack on an organized army group contrary to the basis on which troops were contributed, and as a partisan intervention implying the selection of one opponent rather than another. Nevertheless, alternative means will frequently be available to the United Nations Command to cut off and isolate the non-complying garrison or to select another centre from which the overall interdiction can be effected.

Defensive character of the use of force

For these reasons it is difficult to avoid the conclusion already suggested, that even after exhausting all such efforts as negotiation, conciliation and persuasion, the use of force in the last resort must retain a defensive rather than an offensive character. This was indicated in the Secretary-General's letter to African States, considered by the Advisory Committee:

"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 became 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 VII.)

The same criterion holds good not only for interposition or interdiction but also for the other measures indicated by paragraph A(1). "Arrangements" for cease-fire imply negotiation, not imposition by armed force: but the

reopening of fire, or the armed crossing of a cease-fire line once it has been established and is defended by the United Nations, would clearly bring into place so much defensive force of the United Nations as was required to maintain the cease-fire. This raises the question whether United Nations troops could assist the side complying with the cease-fire against the violator. It would seem clear that a number of considerations - the policy stated above that the paragraph does not authorize the Force to balance one side against the other, the rule against joint operations, and the probability that United Nations neutrality would be lost in its relations with the violator after the cease-fire had once again been enforced - all militate against such a practice. While in all cases the United Nations troops would throw their weight against the initiator, they can do so only defensively and as an independent agency, and not in support of the other party.

The term "prevention of clashes" equally implies the use of prestige and authority in local situations - implies, in fact, the contrary of the initiation of a clash to which United Nations troops would be a party.

A measure related to cease-fire arrangements is the establishment of neutral zones. These can either be precisely negotiated or established de facto. Once the terms and conditions of their maintenance by the United Nations and their geographic limits are clearly made known to the authorities concerned it would seem reasonable for force in defence of their neutrality to be authorized against any violator refusing to desist. As in the case of the occupation of any key centre or area, the question then arises as to the extent to which the Force can mount a counter-action either to expel an armed group from a neutral zone or to retake a major centre from which the United Nations unit had itself been expelled. The answer must reasonably depend upon all the circumstances, but the criteria do not seem to differ from those applied to the recapture of a single position as suggested above in the section on force under previous resolutions. In this connexion it may be helpful to recall that the classical doctrine of self-defence in international law requires "necessity" for the recourse to force, in the sense that the situation allows no choice of other means.

Use of force not applicable to objectives under other paragraphs

The express character of the authorization to use force in paragraph A(1) gives significance to the omission of any reference to the use of force in other paragraphs of the resolution in which it might have appeared. It would therefore seem that paragraph A(1) does not provide a basis for the use of force to carry out objectives under other paragraphs, at least in the absence of an independent justification of such use under A(1).

This point has been elaborated in a previous Opinion, of 4 March 1961, in relation to the possibility of a forcible evacuation of foreign military personnel, political advisers, or mercenaries under paragraph A(2). It should equally hold good in relation to Part B of the resolution: thus, the United Nations Command could not employ its arms to enforce the convening of Parliament in implementation of paragraph B(1), for example; not only could that measure not be reasonably connected with the prevention of civil war but it would ill consort with the purposes of Part B, the preamble of which opposes the imposition of any solution and favours a Congolese solution without outside interference.

So also, the Council has not referred to the use of force under paragraph B(2), as a means to the reorganisation of the Congolese national army, and cannot be understood to have incorporated in paragraph B(2) any of the various proposals for the forcible "disarming" of the Congolese armed forces. Not only is there no reference to force in the paragraph - as would seem essential if so far-reaching a measure were intended - but, in fact, the Council speaks of reorganizing the Congolese "armed" units, a term hardly consistent with an intent to have the United Nations command engage in a general disarming action. True, disarming may be undertaken as a defensive measure in respect to individual units which attacked the United Nations Force while the latter was carrying out its authorized tasks. But the wording of paragraph B(2) seems to exclude any inference that the mere authorization of A(1) of "the prevention of clashes" extends to a general disarming on the grounds that clashes could not then take place. This would not be an "appropriate measure" in the light of the plain contemplation of paragraph B(2) that "Congolese armed units" will continue in being so long as they do not interfere in the political life of the Congo.