The tragedy of the Congo continues. In this article a contributor analyses the crisis from a new angle.

CONGO: THE LEGAL ASPECT

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So MUCH HAS been written about the Congo crisis that it requires courage and some apology to add yet another contribution to the literature on the Congo. The Congo crisis is a political problem—a political tragedy which has many aspects. It can be looked at almost entirely from the aspect of the economic interests of the imperialists in the Congo and hence their attempts and manoeuvres to protect these interests as well as to retain their positions at all costs. It can be looked at as a pure and simple political problem—with the Belgian political aggression, disunity among the Congolese, the disunity among the African States and the inter-imperialist conflict as the main characteristics of this political problem. Some look at the Congo crisis as almost entirely attributable to the manifestation of tribalism and make a simple conclusion that were it not for tribalism, the Congo crisis would not have existed. These various approaches to the problem of the Congo crisis, are in fact, mainly a question of emphasis. The emphasis is laid by some on one aspect, and by others on another aspect and so forth. The only way of getting an insight into the problem, is to examine all the different aspects as parts of one whole and to look at the different approaches as windowlets, so to say, which all together enable us to have a complete or as nearly complete a view as possible of the object of our observation.

In this article, I have devoted attention only to some legal problems connected with the Congo crisis. I have not attempted to embrace the problems in all their complexities. Let us limit our discussion and confine our examination to only three legal problems:

(*a*) The basis, if any, of U.N. neutrality in the Congo, in relation to both the Central Government of Lumumba and the Secessionist Governments of Katanga and Kasai. That means, we shall inquire whether or not, this

neutrality had any justification in International Law or according to the Charter of the United Nations;

(*b*) The legal basis, if any, of the allegation that in the attempt to depose of Lumumba, Kasavubu was exercising his constitutional right as provided for in the fundamental Law;

(*c*) Whether or not it was constitutional for Kasavubu to disolve parliament, to suspend it, to replace it with people of his choice such as Illeo and Co.

We should discuss these problems for two main reasons: they show how acts which were dictated wholly by political considerations have been given some semblance of legality in order to lend them acceptance; they show how the Central Intelligence Agency led President Kasavubu by the nose to commit acts which were not only contrary to the constitution but which in fact constituted high treason.

U.N. NEUTRALITY

We shall first look at the evolution of the principle of U.N. neutrality in the Congo crisis. On July 14, 1960, the Secretary-General declared that the United Nations was to guarantee democracy in the Congo, by protecting the spokesmen of all different political views—that means, by protecting both Tshombe and his clique, as well as the Central Government.[1] Dr. Ralph Bunche addressing the UNO Command in the Congo declared:

> You are here in the Congo, to pacify the Congo and then to administer it.[2]

Here Bunche was looking at the Congo crisis from long-term American interests, namely, that the U.N. Command was to be some kind of umpire who would neutralize the different contestants and then administer the Congo, such an umpire was of course to be neutral. In the first addendum to the first report, the Secretary-General elaborated this principle of U.N. neutrality.[3] On August 8-9, 1960, the third Security Council resolution sponsored by the Afro-Asian group, included this principle in paragraph 4. Dayal in his letter to Kasavubu dated January 17, 1961, stated, among other things:

The Charter of the United Nations itself has established the guiding principle that the U.N. must not, reserving the special authority of the Security Council, intervene in matters which are essentially within the domestic jurisdiction of any state. The U.N. force cannot be placed at the disposal of one faction against another.[4]

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[1] *L'Humanite* July 14, 1960, *London Times* July 15, 1960.

[2] New York *Times*, July 31, 1960.

[3] U.N. Document S/PV 873, July 13-14, 1960.

[4] Notes et études documentaires, No. 283, 1961, p. 20.

On February 15, 1961, the Secretary-General declared at the Security Council:

> '*Lumumba wanted the UNO forces on his behalf to fight down the secessionist group in Katanga. In keeping with the stand taken by the Security Council, unanimously on the* 8-9 *August*, 1960, *I was obliged to turn down this request as contrary to the status and function of the UNO forces. In the light of the principle applied by the UNO as regards domestic conflicts, the instructions to the UNO Command and the representatives were that they should stand aside from the conflict that had developed and avoid any action, which could make them party to the conflict or involve supporting any one side in it.*'[5]

Nehru stated in the General Assembly:

> The role of the U.N. is a mediatory one, to reconcile.[6]

We know what a disastrous consequence this principle of U.N. neutrality had in the Congo crisis. What it meant in essence was that the changes which had been brought about in the Republic of the Congo by force, were to be respected—the *status quo* after the illegal changes. Lumumba wanted a restoration of the *status quo* before these changes. We can just point out here that this principle operated for as long as the balance of forces were in favour of the enemies of the Central Government. When the Central Government crushed secession in Kasai and was on the eve of putting an end to the secession movement in Katanga, U.N. ceased to be neutral and occupied the territory between Kasai and Katanga as a no-man's-land. But when Lumumba was arrested by Kasavubu's bandits under Mobutu, U.N. again became 'neutral'. These inconsistencies serve to indicate that this neutrality was in fact a political manoeuvre, but since justification for this political manoeuvre is sought by invocation of the Charter of the United Nations, we shall have to examine the relevant Chapters and Articles of the Charter.

The relevant section of the Charter which is supposed to provide a legal basis for U.N. neutrality in the Congo, is Section 7, Article 2, which reads:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter—but this chapter does not prejudice the application of enforcement measures under Chapter VII.

Let us look at Chapter VII. Articles 39, 41 and 42, although they are mentioned in Chapter 7, Article 2, are not relevant in the discussion on

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[5] Vital Speeches of the Day, March 15, 1961, p. 327.

[6] UNO General Assembly Document A/PV. 887, October 3, 1960.

U.N. neutrality—it is only Chapter 7, Article 2 then, which will attract our attention. First we must note that peace, the maintenance of which or the restoration of which is the purpose of the United Nations, is international peace. International peace is a condition of the absence of force in the relation among states. International peace is thus to be distinguished from internal peace or peace within one and the same state. Chapter 7, Article 2 is made up of two rules:

> (*a*) prohibition of intervention on the part of the United Nations in matters which are essentially within the domestic jurisdiction of any state;
>
> (*b*) release of member states from the obligation to submit such matters to settlement under the Charter.

Thus while (*a*) imposes a restriction on the competence of the organization, (*b*) restricts the obligation of members from submitting matters of a domestic nature for settlement under the Charter. (*a*) Refers to the organization as a whole, while (*b*) refers to members as separate entities. The significance of Chapter 7, Article 2 is that the Charter of the United Nations seems to give this organization powers which seem to place the organization above sovereign states, powers which seem to infringe state sovereignty—see Chapters IX and X—and Chapter 7, Article 2 modifies these apparently unlimited powers in favour of state sovereignty. In dealing with Chapter 7, Article 2, we are really concerned with the problem of statutory interpretation—the problem of arriving at the meaning of this Article. Here we cannot do better than apply the usual methods of statutory interpretation. We have to ask the following questions: (*a*) What did the authors of this Article intend it to mean? (*b*) Has the Article ever been interpreted by the Court of International Justice and if it has been interpreted, what interpretation did the Court give? (*c*) What does the Article mean as it stands without reference to what the authors might have intended it to mean? Or to vary this, we have to ask the question—what is the one and only reasonable interpretation that can be given to the Article under consideration in the circumstances of the point at issue?

In the Congo, it was not civil war, but war between the Congo and a foreign aggressor state, which had established its military regime in the Katanga province.

Chapter 7, Article 2 is in fact taken with slight modifications from paragraph 8, Article 15 of the Covenant of the League of Nations, which ran:

> If the dispute between the parties is claimed by one of them and is found by the Council to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall report and shall make no recommendation as to its settlement.

In the report of the reporter of Committee 11/3 of the San Francisco Conference, we find: There were some misgivings that the statement of purposes now recommended implied that the organization might interfere in the domestic affairs of the member countries. To remove all these possible doubts the Committee agreed to include in its records the following statement:

> The members of Committee 3 of Commission 11 are in full agreement that nothing contained in Chapters IX and X of the Charter, can be construed as giving authority to the organization to intervene in the domestic affairs of member states.[7]

The point here is that the provisions of Chapters 9 and 10 of the Charter of the United Nations, are to be interpreted as restricted by Article 2 paragraph 7. The authors of the Article, we can see, intended it to protect state sovereignty against the far-reaching powers of the United Nations as provided for in Chapters IX and X of the Charter. At hearings on the meaning of Article 2, paragraph 7, a representative of the State Department explained:

> The language of Chapter IX of the Dumbarton Oaks proposals is very strong and very far reaching and questions were raised in the discussion as to whether or not the language used could in any way be interpreted as meaning interference in the domestic affairs of the member states. It was quite clear that the principle regarding domestic jurisdiction would be governing[8].

As far as the authors of the Article are concerned, we are left with no doubts at all that they sought by this Article to protect state sovereignty. It is necessary here to add an observation that whereas in the Covenant of the League of Nations, it was the Council which had to decide whether or not a matter was solely within the domestic jurisdiction of a state, in the Charter of the United Nations, the Council is not given this duty—that means, the country whose interests are affected has itself to decide whether or not a matter is essentially in its domestic sphere —and if this is disputed by another state, the Court of International Justice can give an advisory opinion.

The permanent court of International Justice interpreted Article 15, paragraph 8 of the Covenant of the League of Nations to mean in matters which are not regulated by international Law, and that as regards such matters, each state is the sole judge.[9] This Article has

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[7] Report of Reporteur of Committee 11/3 of the San Francisco Conference U.N.C. I.O., Document 861, March 11, 1955, p. 3 (F).

[8] Kelsen. The law of the United Nations, p. 774.

[9] Publications of the Court. Series B. Advisory opinion, No. 4.
Discussions on Article 2, paragraph 7, Seventeenth Meeting of the Committee, 1/1/U.N.C. I.O., Document 1019/1/1/45, p. 5 (F).

always been invoked by South Africa both in connection with the question of the treatment of people of Indian origin and in connection with the question of South West Africa. In all these cases, it was invoked to protect state sovereignty against supposed U.N. intervention.

In the General Assembly, this Article has often been discussed too. At the fourth meeting of the first and sixth Committees of the General Assembly, in discussions arising from the treatment of people of Indian origin, in South Africa, the delegate from Peru summarized the feelings of the members in the following words: "Article 2, paragraph 7 was intended as a guarantee of the independence and sovereignty of member states."[10] The delegate from Mexico pointed out:

> Article 2, paragraph 7 is an active principle of incalculable value to the relations of States with each other, whose sovereignty and juridical equality is consecrated by the Charter in Article 2, paragraph 1.[11]

In discussions on the international control of atomic energy, it was also stated that Article 2, paragraph 7 protects state sovereignty.[12] In all these interpretations, we are left with no doubt that the essence of the Charter of the United Nations especially the effect of Chapters IX and X are such that the Charter impinges upon state sovereignty, and Article 2, paragraph 7 is intended to protect state sovereignty against this incursion. In the words of the Australian delegate at the San Francisco Conference, the feeling is that:

> An organization that is genuinely international in character should not be permitted to intervene in those domestic matters in which, by definition, international law permits each state entire liberty of action.[13]

The words of the Article without reference to the intention of the authors of the Article give no doubt that it seeks to protect state sovereignty. It denies other states the right to intervene in the internal affairs of another state either singly or collectively, as the United Nations. In the context of the Congo, Article 2, paragraph 7 could mean no more than the protection of the sovereignty of the Republic of the Congo. Since the Article has as its purpose, the protection of sovereignty in relation to the United Nations as well as in relation to other state members of the U.N., then it is obvious that the Article cannot be invoked where the state in question has, exercising its sovereignty, invited the United Nations organization. This means,

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[10] Journal of the United Nations, No. 46, Supplement No. 1 and 6. A/C.1 and 6.1 and 6/13, p. 36.

[11] Journal of the United Nations, No. 54, Supplement A-/PV/51, p. 366.

[12] Official Records of Security Council, Second Year, No. 22, p. 452.

[13] U.N.C. I.O. Document 969, January 1, 1939, p. 2.

the Article cannot be used against the Republic of Congo, which invited the United Nations to the Congo. The invocation of this Article against a state which invited the United Nations, is tantamount to saying that the United Nations has the duty to protect the sovereignty of such a state against the action of the state itself which is an absurdity. The question which arises in connection with this supposed neutrality of the U.N. in the Congo, is, if the U.N. did not have as its goal in the Congo, the prevention or stopping of the secession of Katanga, if the conflicts in the Congo were not the concern of the United Nations, what then was the relation of the U.N. operation to the Central Government? Was the U.N. operation an arm of the Central Government in accordance with the stipulations of the appeal which brought U.N. to the Congo? The Secretary-General said that the U.N. operation was not an arm of the Central Government, the Third Security Council resolution which was sponsored by African states also, as we have seen above, stated in paragraph 4, that the U.N. operation was not an arm of the Central Government. These it is submitted, were all mistaken views. The U.N. operation in the Congo was not a collective security operation under Article 42 of the Charter and consequently, the presence of U.N. in the Congo required the consent of the host Government. This consent of the host Government, means that the U.N. had to recognize the Central Government and not only recognize this Government, but obtain permission from this Government in order to be present at all in the Congo. The U.N. did obtain permission from the Central Government and in fact the U.N. entered into a contract with the Central Government and it was this contract signed between the U.N. and the host Government, which gave the U.N. operation legal justification for its presence in the Congo.

Lumumba, on the other hand, maintained that in accordance with the appeal of the Republic of the Congo, the objective the U.N. operation was to achieve in the Congo, was not only to cause the withdrawal of Belgian aggressors, but also to safeguard the territorial integrity of the Congo by stopping the secession of Katanga. He was right.

THE DEPOSITION OF LUMUMBA

The second problem that we want to examine is, whether or not the President Mr. Kasavubu was in fact exercising his constitutional right when he announced on the radio that he had deposed the Prime Minister Lumumba. Here, as in the question of U.N. neutrality, we shall concern ourselves only with the legal aspect of this problem. The political aspect of the attempt by Kasavubu to depose the Prime Minister is clear enough. Kasavubu was carrying out the instructions of the

United States Central Intelligence Agency. Tully in his book *The Central Intelligence Agency Inside Story* gives details of how these instructions were given to Kasavubu to depose Lumumba.[14]

Kasavubu was already the product of the Central Intelligence Agency, as declared Edward Kennedy in a radio broadcast to the American nation.[15] We deal with the legal basis of this action, among other things, because the Central Intelligence Agency, the Secretary-General of the United Nations and Kasavubu himself clothed these instructions of the State Department with a semblance of legality. The Secretary-General declared in justification of this action:

> I do not want to analyse the complicated constitution of the Congo, but let me register the fact that according to the constitution, the President has the right to revoke the mandate of the Prime Minister.[16]

Kasavubu himself stated in this connection:

> Contrary to Anglo-Saxon conceptions, it is the chief of state in the Congo who, as in Belgium, effectively nominates and dismisses the Ministers or accepts their resignation. The role of the House of Parliament is to recognize or refuse to recognize the Ministers thus nominated by the Head of State. Even before approval by the House of Parliament, the Government which has been nominated, has full powers. In Belgium, after the formation of Government, the Government presents itself before the House only after three weeks, and in these three weeks, it has full powers before it is even approved by the House of Representatives.[17]

We shall examine the relevant provisions of the constitution of the Congo. Speculations about Anglo-Saxon conceptions and puerile pronouncements concerning parliamentary practice in Belgium, we shall safely leave to the amusement of Kasavubu and his friends of the Central Intelligence Agency.

The relevant Article of the fundamental law of the Congo is Article 22. It reads: 'The Chief of State appoints and dismisses the Prime Minister and the Ministers'. This Article should not be read in isolation, it should be read in conjunction with Articles 17, 19, 20 and 23. Article 17 states: 'The executive power of the Chief of State depends on the counter-signing of the responsible minister'. Article 19 reads: 'The person of the Chief of State is inviolable, while the Prime Minister and other ministers are responsible'. Article 20 reads: 'No act of the Chief of State can have effect if not countersigned by the responsible Minister'. Article 21 states: 'The Chief of State has no powers other

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[14] A. Tully, *CIA Inside Story*. New York, 1962, p. 221.
[15] *New Statesman*. March 10, 1961, p. 373.
[16] UNO Review. October 1960, p. 46.
[17] *Chronicle de politique étrangères*, p. 751.

than those assigned to him by this law'. Article 23 states: 'The Chief of State confers grades, honours, etc.'. If we read Article 22 in conjunction with the other Articles stated above, as it must be read, we find that the Central Intelligence Agency was grossly misleading Kasavubu about his constitutional powers and the Secretary-General was not basing his pronouncements on the fundamental law at all. Read in conjunction with the other relevant Articles, Article 22 means no more than that the Chief of State in the Congo is a figurehead with ceremonial powers or functions. As such, he cannot initiate an Act, he can only give his signature to an Act which has been initiated by a responsible Minister. In this case, the signature of the Head of State, is a mere formality. In legal or constitutional practice, when the Chief of State countersigns an Act which has been initiated by a responsible Minister, the Chief of State is said to proclaim such an Act. When a Minister, who has lost the confidence of the House resigns, and the Chief of State countersigns the resignation, the Chief of State is said to dismiss such a Minister. This is a legal fiction carried out from the period when the State and the King meant the same thing. Possibly, Kasavubu, the product of the Central Intelligence Agency, did not quite appreciate or understand this fiction, but then we dispute his impudence in imposing his monumental ignorance on other people.

There is absolutely nothing in the constitution of the Republic of the Congo, in the fundamental law, which besides the mental fabrications of Kasavubu and his friends, gives the Chief of State power to dismiss the Ministers, let alone to dismiss the Prime Minister. For another thing, in strict legal or constitutional theory, the fundamental law was not yet operative, because it had not yet been ratified by the Congolese Parliament and even if it had been ratified, which was not the case, it did not contain anything which would enable Kasavubu to replace a legally elected Parliament by persons of his choice like Illeo and Company. It is granted that parliament can delegate some of its powers to other bodies or organs of the State, but in all cases, the delegating authority of first instance is parliament itself. In the case of the Congo parliament, the parliament had not delegated its powers to Kasavubu. If the parliament had delegated powers to Kasavubu, which it did not do, Kasavubu would still face another constitutional problem, namely, that although parliament can in theory do everything, the one thing it cannot do both in theory and in practice is to take off all powers from itself and still remain a parliament. Kasavubu and the Central Intelligence Agency had only two ways open to them: (*a*) To appeal to the people so that they could, in a new election, withdraw the mandate from the Government of Lumumba; (*b*) To withdraw the mandate of the Government of

Lumumba by revolution or *putsch* and thus establish a new *de facto* power, but this has nothing to do with any provisions of the fundamental law of the Republic of the Congo.

In connection with the allegation that Government works even before it is presented to the House of Representatives, Kasavubu is confusing matters of procedure with matters of substance. In constitutional theory and practice, the people as the source of all power and authority invest their power or delegate their authority to their elected representatives, in actual practice, to those representatives who form a Government—to the representatives of the party which has won a majority in the elections. Once these representatives have been vested with this authority, they have the right to form a Government and they lead or mislead the people. The fact of their presenting themselves to the House of Representatives is merely procedural and not a matter of substance. It is a mere formality or merely parliamentary usage. This attempt by Kasavubu and the Secretary-General to hide behind the fundamental law is sheer political gymnastics, it is mere political judo, which had no basis in the Constitution of the Republic of the Congo. All the humbug about Anglo-Saxon conceptions was a mere cover, albeit transparent, for an act which was done at the behest of the State Department and both the Senate and the House of Representatives rightly declared the act null and void. It was when the two Houses nullified this political judo, that the Central Intelligence Agency gave instructions for and assisted in organizing a military *putsch* nominally under Mobutu.

THE SUSPENSION OF PARLIAMENT

Now let us examine the attempt of Kasavubu to suspend parliament and to dissolve it in favour of the College of Commissioners nominally under Mobutu. Here again, Tully gives the inside story that the *putsch* was directed by the Central Intelligence Agency and the *Sunday Express* characterized the *putsch* in the following terms: 'Make no mistake about this, it is a major diplomatic triumph for the United States'.[18] The *Daily Express* stated in connection with this *putsch*: 'The expulsion of the Czech and Soviet Embassies by Mobutu is due to intrigues of the United States'.[19] This is the political side of the story. For the legal covering, the relevant Articles of the fundamental law are: Articles 21 and 32. Article 21 reads: 'The Head of State has the right to dissolve the Houses in conformity with Articles 71 and 72'. Article 71 states: 'Before the final adoption of the Constitution, the dissolution of one

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[18] *Sunday Express*, September 16, 1960.

[19] *Daily Express*, September 21, 1960.

or the two Houses cannot be pronounced by the Head of State except after the deliberations in Council of the Ministers and the agreement of one of the two Houses by at least a majority of two-thirds of the members present'. Article 72 reads: 'In case of dissolution, whether of the two Houses or of one House of Representatives, the act of dissolution contains a convocation of the electors within three months and of the Houses within four months'.

The Articles stated above should be read in conjunction with the relevant Articles which we have already examined above in connection with the powers of the Chief of State. It is necessary to add again that the fundamental law had not yet been ratified and consequently the dissolution of one or the two Houses could not be promulgated by the Head of State except after the meeting of the Council of Ministers and the consent of one of the two Houses by a majority of two-thirds and such a promulgation could be made only on condition that it contained a convocation of the electors and a meeting of a new parliament within a specified time. None of these conditions had been fulfilled. In reality the promulgation by the Chief of State could take place only as a formality when the Government of Lumumba had itself decided to call new elections. The acts of Kasavubu therefore had no constitutional basis whatsoever.