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The Implementation of ECOWAS' New Protocol and Security Council Resolution 1270 in Sierra Leone: New Developments in Regional Intervention

Ademola Abass*

Abstract

In October 1999, the Security Council adopted Resolution 1270 concerning the armed conflict in Sierra Leone shortly before the Economic Community of West African States (ECOWAS) adopted a new protocol in November 1999. The implementation of this Resolution by the United Nations Mission in Sierra Leone (UNAMSIL), first, side by side, and later, in conjunction with the ECOWAS Monitoring Group (ECOMOG) proved to be a telling moment in the history of joint peacekeeping operations between the United Nations and regional organizations. Three key ECOMOG contingents—Nigeria, Ghana, and Guinea—withdrew from Sierra Leone as a result of a deepening crisis between the leaderships of ECOWAS, dominated by Nigerians, and UNAMSIL, substantially composed of Indians. A later effort by the U.N. to fashion a cohesive mission under a unified command only brought more woes. The leadership of UNAMSIL under Major-General Vijay Jetley collapsed, leading to the withdrawal of the 3,000 strong Indian contingent from Sierra Leone. The purpose of this article is to examine Resolution 1270 and the new ECOWAS protocol, analyze the relationship between UNAMSIL and ECOWAS, and then consider the impact of ECOWAS' new protocol on the law of peacekeeping.

Introduction

The years 1990-2000 constituted a moment of truth for the hitherto little known sub regional organization, the Economic Community of West African States (hereinafter ECOWAS).¹ From being

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an economic community at its inception in 1975, ECOWAS literally reinvented its will in August 1990 to become, not only a collective security organization, but also a pacesetter in the development of regional collective security systems ingrained in the Chapter VIII of the United Nations Charter.²

In 1993, ECOWAS became the first regional alliance to undertake a joint 'peacekeeping' operation with the UN in the entire history of collective security.³ It matched this record in 1997 when it forcefully restored a democratically elected government in Sierra Leone, becoming the first regional organization to reinstate an overthrown government in Africa. It could be said that the alliance closed a decade of momentous events in its evolutionary history in December 1999 when it adopted a new protocol (hereinafter Protocol), which not only codified the controversial rights of humanitarian intervention and the use of force to restore democratic governments, but also empowered it to undertake enforcement action without the authorization of the Security Council.⁴

The concurrent application of the Protocol to the Sierra Leone conflict as the U.N. was implementing the mandate contained in its Security Council Resolution 1270 was fraught with telling legal and practical consequences. To wit, certain provisions of the Protocol depart from the decentralized enforcement regime of Chapter VIII of the U.N. Charter, which empowers regional arrangements to undertake enforcement action only with the authorization of the Security Council.⁵ Furthermore, the position of certain rules, widely believed to have

1 ECOWAS was formed on May 28, 1975, by the Treaty of the Economic Community of West African States (ECOWAS) and was amended in 1993. The Member States of ECOWAS are: The Republics of Benin, Burkina Faso, Cape Verde, Cote D'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, the (Islamic Republic of) Mauritania, Niger, Nigeria, Senegal, Sierra Leone, and Togo. 35 I.L.M. 660 (1996).

2 On August 7, 1990, the ECOWAS Standing Mediation Committee on the Liberia conflict established the ECOWAS Monitoring Group (ECOMOG) in Banjul, Republic of Gambia. See *United Nations, Security Council, Letter Dated 9 August 1990 From The Permanent Representative Of Nigeria To The United Nations Addressed To The Secretary-General*, U.N. Doc. S/21485 (1990) (annex); REGIONAL PEACE-KEEPING AND INTERNATIONAL ENFORCEMENT: THE LIBERIAN CRISIS, 6 CAMBRIDGE INT'L L. SERIES VI. 67 (Marc Weller ed., Cambridge Univ. Press, 1994) [hereinafter M. Weller].

3 Resolution 866 expressly states that this "would be the first peace-keeping mission undertaken by the United Nations in cooperation with a peace-keeping mission already set up by another organization, in this case ECOWAS." U.N. SCOR, 3281st mtg. at 1, U.N. Doc. S/RES.866 (1993).

4 *Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security*, 5 J. CONFLICT & SECURITY LAW 231 (2000)

5 U.N. CHARTER art. 53, para. 1.

evolved into the corpus of the law of peacekeeping over time, would appear to have become greatly undermined.⁶

For purpose of this article, the intervention by ECOWAS in Sierra Leone is broadly divided into two phases. The first phase is designated as beginning with the overthrow of the democratic government of Tejan Kabbah and concluding with the restoration of that government by ECOMOG forces, and the eventual withdrawal of certain ECOMOG contingents from Sierra Leone. This article shall not be concerned with the legal analysis of this phase except insofar as references to it are necessary. The second phase of the intervention—the main focal point of this effort—commences with the deployment of U.N. peacekeepers under the aegis of UNAMSIL and the re-entry of the Nigerian contingent into Sierra Leone. The need to make this thematic delineation at the outset is informed by the fact that at least one legal commentary on the first phase of the intervention already exists.⁷ Moreover, the activities of ECOWAS under the first phase of its intervention in Sierra Leone were conducted under the auspices of its old legal regime, as represented by its Protocol on Non-Aggression⁸ and the Protocol on Mutual Assistance and Defense (PMAD).⁹ Although the specific decisions of ECOWAS concerning its actions on the Sierra Leone conflict are contained in the numerous Final Communiqués issued at the end of its myriad summits on the matter, ECOWAS substantively complied with the provisions of the U.N. Charter and performed obligations imposed on it by the Charter during this phase.¹⁰ It follows that a legal analysis of the first phase of ECOWAS' intervention under its old regime and in accordance with the U.N. Charter was in order.¹¹

6 Although there is no direct provision of the U.N. Charter on the law of peacekeeping, it is believed by commentators that certain features of peacekeeping operations such as consent, impartiality, limited force, and so on, have evolved into the customary law of peacekeeping.

7 See generally Karsten Nowrot and Emily Schabacker, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone*, 14 AM. U. INT'L L. REV. 321 (1998).

8 *Report of the Secretary-General on the Question of Liberia*, U.N. Doc. S/25402, at 6 (1993). The Protocol on Non-Aggression was adopted on April 22, 1978. See M. WELLER, *supra* note 2, at 18.

9 *Report of the Secretary-General on the Question of Liberia*, *supra* note 8, at 6. The Protocol on Mutual Assistance and Defence was adopted on May 29, 1981. See also 3 OFFICIAL J. ECOWAS 9 (1981); M. WELLER, *supra* note 2, at 19.

10 As early as July 10 1997, ECOWAS had reported to the U.N. its decision to impose sanctions on the rebel forces in Sierra Leone. Sierra Leone News Archives, (July 10, 1997), available at <http://www.sierra-leone.org/slnews0797.html> [hereinafter slnews].

11 Nowrot's and Schabacker's analysis was very comprehensive on the first phase insofar as this analysis was an inquiry into the legality of ECOWAS' use of force to restore a democratic

By contrast, ECOWAS conducts the second phase of its intervention under a totally different legal regime, which, as will be discussed below, does not conform to the provisions of, or perform the obligations imposed by, the Chapter VIII of the U.N. Charter.¹² The application of this new legal instrument demonstrably engenders different legal consideration, and since there has not been an inquiry into this matter, to the best of this writer's knowledge, it is appropriate to focus more specifically on that issue.

The remaining part of this article is divided into two parts. In the first part, I briefly recount the background to the armed conflict in Sierra Leone. I will then examine the implementation of the mandate issued to the United Nations Mission in Sierra Leone by Resolution 1270, and analyze the various factors that led to the breakdown in the relationship between UNAMSIL and the ECOWAS Monitoring Group, ECOMOG. In the second part, the article examines the effect of the Protocol on the 'law' of peacekeeping. Particular attention shall be devoted to the following issues: (1) whether the Protocol abrogated the 'customary' requirement of consent, and (2) whether the Protocol has caused member states to permanently cede their right to reject or terminate an intervention proposed by ECOWAS.

I. PART ONE

*A Brief Background to the Armed Conflict in Sierra Leone*¹³

The armed conflict that has engulfed Sierra Leone for nearly four years, with its accompanying brutality, was ignited on May 25, 1997, when a group of the country's armed forces toppled the democratically elected government of Alhaji Tejan Kabbah in a military coup d'état.¹⁴ The election of Tejan Kabbah brought to an end the 19 year one party stronghold of Joseph Momoh after a brief military regime led by Captain Valentine Strasser, who himself was ousted in yet another coup by his deputy, Julius Maada Bio.¹⁵ It then fell to the latter head of junta to transfer the reins of government in Sierra Leone to a democratically

government, a *casu foederis* that was neither included in its old legal regime or expressly permitted by the U.N. Charter.

¹² See Ademola Abass, *supra* note 4.

¹³ For a legal-historical explanation of Sierra Leone from the 15th century to the period before the conflict, see the article that follows.—Eds.

¹⁴ James Rupert, *Civilian Rule Overturned in Sierra Leone: Soldiers Seize Power, Loot W. African Capital*, WASH. POST, May 26, 1997, at A21. See the condemnation of the coup by the Organization of African Unity (OAU) in Andrew Meldrum, *Annan and OAU Leaders Endorse Intervention against "Usurpers"*, GUARDIAN (London), June 3, 1997, at 14.

¹⁵ Key Events in Sierra Leone's Conflict, available at <http://www.nytimes.com/library/world/africa/sierra-leone-chrono.html> [hereinafter Key Events].

elected government led by Kabbah.¹⁶ Upon his overthrow, President Kabbah had fled to the neighboring Guinea from where he allegedly invited ECOWAS to help reinstate him to the governance of Sierra Leone.¹⁷

On May 28, the leader of the military junta, Major Paul Koromah abolished the constitution of Sierra Leone and installed the Armed Forces Ruling Council (AFRC).¹⁸ Following a massive military campaign inaugurated by the Nigerians—albeit ostensibly operating under the auspices of ECOWAS—the ECOWAS Monitoring Group (ECOMOG), in a ground-breaking episode of regional peacekeeping in Africa, reinstated the deposed Tejan Kabbah to the governance of Sierra Leone on March 10, 1998.¹⁹

The defeat of the coupists at this time, however, soon turned out to be a temporary affair. The rebels loyal to Fodah Sankoh, the leader of the rebel group known as the Revolutionary United Front (RUF), acting in conjunction with the surviving ‘mutineers,’²⁰ launched fresh attacks against government positions. The RUF had mounted a guerrilla war against successive military and civilian governments of Sierra Leone on the ground that both connived with foreign countries to “milk the country’s diamond riches and impoverish its people.”²¹

ECOMOG troops had been stationed in Sierra Leone, under a Status of Force Agreement (SOFA) since the days of the Liberian crisis with the purpose of preventing a spillage of that crisis into Sierra Leone and to curb trans-border infiltration from Liberia into Sierra Leone.²² During its twentieth session held at Abuja, Nigeria, on August 28-29,

16 See <http://www.un.org/Depts/DPKO/missions/unomsil> (last visited Oct. 27, 2001)

17 *Id.* However, in reality, ECOWAS had already perfected plans to intervene in the crisis even before the supposed invitation came from the exiled president. The so-called invitation did not emanate from Kabbah until the ECOWAS summit August 27-28, 1997, (*slnews*, *supra* note 7) whereas ECOWAS had concluded deliberation on the actions to be taken a month earlier. *Meeting of the ECOWAS Committee of Four on Sierra Leone*, Abidjan, Cote d’Ivoire, July 17-18, 1997 (unpublished material, on file with author).

18 *Id.*

19 U.N. SCOR, 3861st mtg., U.N. Doc. S/RES.1156 (1998).

20 Although the events of May 25, 1997 constituted a *coup d’état*, President Tejan Kabbah had called it a mutiny. In one of his addresses to the nation shortly after his overthrow, he instructed the members of the Sierra Leone Army in similar terms; As your commander I hereby order you to report to the nearest ECOMOG base without arms in your possession and declare your loyalty. By doing so you will avoid being treated as a mutineer. See *slnews*, *supra* note 13.

21 Key Events, *supra* note 14.

22 *Final Communiqué, Meeting of Chiefs of Defence Staff of Contributing States of ECOMOG in Sierra Leone, Abuja*, (April 15, 1999), para. 9(a) (on file with author).

1997,²³ the Authority of Heads of State and Government of ECOWAS, having convinced itself of the need to extend the scope of activity of ECOMOG to Sierra Leone and to modify its mandate, approved a new mandate for ECOMOG.²⁴ Under the new mandate, Nigeria sent 700 troops to Sierra Leone, bringing the total number of that country's troops in Freetown, the Sierra Leone capital city, to 1,600.

From 1997 onward, ECOWAS, which had officially affirmed that "it is the only Force in the Sub-region capable of prompt response to any requests in this regard [intervention]"²⁵ became largely responsible for seeking a resolution of the Sierra Leone crisis. In May 2000, Nigeria, which has been, by far, the largest provider of both human and material resources for ECOWAS missions in the sub-region, withdrew from Sierra Leone.²⁶ The rebels capitalized on what the Security Council described as "a dangerous vacuum" created by the exit of the Nigerians to unleash on the civilian populace of Sierra Leone, an outrageous orgy of violence the proportions of which were widely reported to surpass any violence in history.²⁷ It was these circumstances that compelled the U.N. to deploy its peacekeepers to Sierra Leone, in order to implement the various resolutions its Security Council had adopted concerning the conflict, and also to supervise the implementation of the Lomé Peace Accord already agreed to by the conflicting parties.²⁸

B. Legal analysis of Resolution 1270

1. The UNAMSIL Mandate in Sierra Leone

²³*Final Communiqué of the Summit of the Economic Community of West African States, held at Abuja on 28 and 29 August 1997*, U.N. Doc. S/1997.695 (1997) [hereinafter Decision].

²⁴*Id.* at Art. 1.

²⁵ Decision A/DEC.7/8/97 (1997) (on file with author).

²⁶ BBC NEWS, *Nigeria Sets Intervention Terms*, (May 10, 2000), available at <http://news.bbc.co.uk/hi/english/world/africa>. Not only did Nigeria provide the largest contingent to Sierra Leone, it actually undertook to pay the salaries of the Sierra Leone contingent in ECOMOG when the Sierra Leone government failed to pay its troops beginning in September 1996.

²⁷ *Second Progress Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone*, U.N. Doc. S/1998.960, at 2-5 (1998), noting in parts that the rebel attacks were "accompanied by a resurgence of atrocities of the nature and scale last observed during the period from April to June, including the complete destruction of villages, and the torture, mutilation and execution of large numbers of civilians."

²⁸ *Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone*, U.N. Doc. S/1999.777 (1999). This Accord recalled two earlier Peace initiatives, the Abidjan Peace Agreement of November 30, 1996 and the ECOWAS Peace Plan, October 23 1997, at <http://www.Sierraleone.org/lomeaccord.html>.

The first official response by the U.N. to the Sierra Leone conflict came in the form of Resolution 1132,²⁹ which had, at first, prohibited the sale and supply of arms and related materials to Sierra Leone as a whole.³⁰ The coverage of this resolution was later reduced by Resolution 1171 so that its operation targeted only the non-governmental forces.³¹ Notably, Resolution 1132 was adopted both under Chapter VII and Chapter VIII of the U.N. Charter. Acting under the latter, the resolution specifically authorized ECOWAS to ensure "strict implementation of the provisions of this resolution relating to the supply of petroleum and petroleum products, and arms and related materiel of all types, including, where necessary and in conformity with applicable international standards, by halting inward maritime shipping in order to inspect and verify their cargoes and destinations..."³²

This directive of the U.N. would seem to be superficial in light of the fact that the resolution was in response to ECOWAS' request that the U.N. mandate all its members to respect the sanctions ECOWAS had already imposed on the junta.³³ However, with media reports and rumors mounting that certain member states of ECOWAS were aiding the 'mutineers', such a directive was quite necessary if the expected results were to be achieved.³⁴

Shortly after this embargo, the Security Council adopted Resolution 1181 which established the United Nations Observer Mission

29 U.N. SCOR, 3822d mtg., S/RES.1132 (1997).

30 *Id.* at 2.

31 U.N. SCOR, 3889th mtg., para. 2, U.N. Doc. S/RES.1171 (1998).

32 *Id.* at 3, para. 8. This resolution is analogous to Resolution 676 concerning the crisis in former Yugoslavia. However, whereas the latter had been silent on the specific organisations invited to act by the U.N., Resolution 1132 had mentioned ECOWAS specifically. It would appear that 1132 intended that ECOWAS could undertake enforcement action to achieve the stated objective. However, such an interpretation is difficult to arrive at without taking a closer look at the wording of the resolution. It avoided the usual euphemistic phrase 'to use all necessary means', but instead, expressly determined the kind of action ECOWAS might take: interdiction of ships. One query that arises is whether ECOWAS was authorized to use force to achieve this objective where a ship did not concur with its directives.

33 Art. 2 of Decision, *supra* note 23, at 5, stating that "Member States shall place immediately a general and total embargo on all supplies of petroleum products, arms and military equipment to Sierra Leone and abstain from transacting any business with that country."

34 Although Cote d'Ivoire and Libya were prominently featured in the media reports as violating the sanction regime, the ECOWAS Ministerial Committee of Five on Sierra Leone noted that "certain individuals were contravening the embargo." See *Communiqué, Fifth Meeting of the Ministers of Foreign Affairs of the Committee of Five on Sierra Leone*, Abuja, October 10-11, 1997 (on file with author).

in Sierra Leone (UNOMSIL).³⁵ The Resolution mandated UNOMSIL to, inter alia, "monitor the military and security situation in the country as a whole...", "...and to monitor the disarmament and demobilization of former combatants."³⁶ It was to function for an initial period of six months until January 13, 1999³⁷ but had its mandate severally extended in the following months.³⁸

Resolution 1181 is analogous to Resolution 866 concerning the Liberian conflict.³⁹ Resolution 866 established the United Nations Observer Mission in Liberia (UNOMIL) which was mandated to perform functions virtually similar to those entrusted upon UNOMSIL. Both resolutions were adopted after ECOWAS had been acting in the concerned countries. Resolution 1181 also welcomed the commitment of ECOMOG to protect UNOMSIL personnel just as the U.N. had requested ECOMOG to protect UNOMIL personnel in Liberia. Therefore, the relationship between ECOWAS and the U.N. under Resolution 1181 was that of co-operation with ECOWAS providing military coverage for the U.N.

Following a series of violations of the terms of the ceasefire established under the Lomé Peace Accord by the RUF, which led to fresh hostilities between the government and RUF rebels, the Security Council adopted Resolution 1270. This resolution affirmed that the situation in Sierra Leone constituted a threat to international peace and security in the region, in accordance with Article 39 of the U.N. Charter.⁴⁰ This resolution then established the United Nations Mission in Sierra Leone (UNAMSIL).⁴¹ UNAMSIL was given the mandate to "co-operate with the government of Sierra Leone and other parties to the Peace Agreement in the implementation of the Agreement [and] to assist in the implementation of disarmament, monitor adherence to the ceasefire [and] to facilitate delivery of humanitarian assistance" among other things.⁴² The initial mandate of UNAMSIL was for six months.⁴³ The resolution

35 U.N. SCOR, 3902d mtg., at 2, U.N. Doc. S/RES.1181 (1999).

36 *Id.* at 2, para. 6.

37 *Id.*

38 U.N. SCOR, 3986th mtg., para 1., U.N. Doc. S/RES.1231 (1999); U.N. SCOR, 4012d mtg., para. 1, U.N. Doc. S/RES.1245 (1999).

39 Resolution 866, *supra* note 3, at 2.

40 U.N. SCOR, 4054th mtg., U.N. Doc. S/RES.1270 (1999). The first determination by the Security Council that the situation in Sierra Leone constituted a threat to international peace and security in the region was made in Resolution 1132; *supra* note 29.

41 Resolution 1270, *supra* note 39, at para. 8.

42 *Id.* at para. 8 (a),(b),(c),and (g) respectively.

43 *Id.* at para. 8.

urges co-operation and co-ordination between ECOMOG and UNAMSIL.⁴⁴

Like many previous resolutions on the Sierra Leone crisis, Resolution 1270 was adopted under Chapter VII of the U.N. Charter. However, Resolution 1270 expressly approves a new mandate for ECOMOG, which had been formulated by ECOWAS and had not been adopted under any U.N. provision.⁴⁵ Furthermore, Resolution 1270 states that in the discharge of its mandate, UNAMSIL may take necessary action to ensure the security and freedom of its personnel and, within its capabilities and areas of deployment, to afford protection to civilians under imminent threat of physical violence, taking into account the responsibilities of the Government of Sierra Leone and ECOMOG.⁴⁶

Insofar as Resolution 1270 was adopted under Chapter VII, it presupposes that UNAMSIL mandate would be an enforcement operation. This assertion is enhanced by a literal construction of the wording of the mandate of that Resolution, which enjoins the peacekeepers, not only to take necessary action to ensure the security and freedom of its personnel, but also to afford protection to civilians under imminent threat of physical violence. Unlike 1132 authorizing ECOWAS action against ships, actions under 1270 clearly targeted rebel forces who might act in any manner as to prevent UNAMSIL soldiers from performing the task assigned to them by their mandate, or endanger their safety.

Analytically, the wording of Resolution 1270, in the manner stated above, is fraught with many ambiguities. In practice, the U.N. rarely explicitly authorizes its peacekeepers to use force. Instead, it subsumes such authorizations under liberal phrases as “all necessary means.”⁴⁷ Often, the U.N. encourages states co-operating with a troubled state to render “all assistance necessary” to mitigate particular problem. Nevertheless, these types of phrases are commonly construed by states and commentators as indeed empowering U.N. troops to use force beyond the threshold of self-defense.⁴⁸

44 *Id.* at para. 12.

45 *Decision Redefining The Mandate of ECOMOG in Sierra Leone*, U.N. Doc. S/1999.1073 (1999) [hereinafter *Decision 1999*].

46 Resolution 1270, *id.* note 39, at 3, para. 14 (emphasis added).

47 *See, e.g.*, U.N. SCOR, 2963d mtg., U.N. Doc. S/RES.678 (1990), which authorises Member States co-operating with the Government of Kuwait...to use “all necessary means” to uphold and implement resolution 660.

48 U.N. SCOR, 2963d mtg., U.N. Doc. S/PV.2963 (1990). In this Security Council debate leading to the adoption of Resolution 678, the Council members variously expressed their understanding of the phrase. Mr. Al-Ashtal, representing Yemen, argued that the statement is “in effect authorizing States to use force”; Mr. Qian Qichen of China was of the opinion that the phrase, “in essence, permits the

Nevertheless, such mandates are usually contained in resolutions adopted within the framework of two types of operations. The first is where a U.N. operation is conceived as an enforcement action *ab initio*, as was Resolution 678 concerning the invasion of Kuwait by Iraq. The second is where an original peacekeeping operation is being transformed into an enforcement action, as was the case with Resolution 794 concerning Somalia.⁴⁹ The formula for signaling a change in the mandate of a peacekeeping mission is mostly by adopting a resolution that almost invariably empowers peacekeepers to take necessary actions for safe delivery of humanitarian assistance or relief.⁵⁰ Where a U.N. mission is conceived originally as a peacekeeping operation, and remains essentially so despite the changing circumstances of the conflict, the U.N. will not normally, as a matter of practice, imbue pure peacekeeping missions with such ambivalent mandates.

Issuing a peacekeeping mission with enforcement mandates, without a corresponding transformation of the operation into an enforcement action, would appear to be what the U.N. did with Resolution 1270. In providing, as it were, that UNAMSIL may, within its capabilities and areas of deployment, afford protection to civilians, UNAMSIL appears to have a mandate that is much wider in scope than a usual peacekeeping one, but still short of express authorization of an enforcement action. By contrast, during the Congo crisis, Security Council Resolution 169 had strengthened ONUC's mandate in order to maintain the territorial integrity and political independence of the Republic of Congo.

Although Resolution 169, like Resolution 794, did not expressly indicate that the U.N. mission was undergoing a metamorphosis, its real

use of military action." Mr. Abu Hassan of Malaysia noted the "force authorized by the Council." Mr. Hurd of the U.K. also noted that according to the resolution, Member States "are authorized to use force as may be necessary to compel compliance." The United States representative was even more explicit: "[t]oday's resolution is very clear. The words authorize the use of force." *See also* John Quigley, *The United States and the United Nations in the Persian Gulf War: New Order or Disorder?* 25 CORNELL INT'L L. J., 1 (1992).

49 U.N. SCOR, 3145th mtg., U.N. Doc. S/RES.794 (1992). The Security Council adopted this resolution after the failure of Security Council Resolution 732 of 1992 to make any significant impact on the warring factions. Resolution 794 authorised the U.S. to lead a mission using "all necessary means." It must be noted that whereas UNOSOM I had been an Observer Mission, with a mandate to monitor a ceasefire brokered between the factions, hence a peacekeeping operation, the U.S.-led United Task Force (UNITAF) established pursuant to Resolution 794 was construed as an enforcement action. *See also* H. MCCOUBREY & J MORRIS, *REGIONAL PEACEKEEPING IN THE POST COLD WAR ERA*, 130 (The Hague: Kluwer Int'l. L.) (2000).

50 Resolution 794, *supra* note 48. The mandate was to use "all necessary means to secure humanitarian relief."

import was not lost on anyone. Derek Bowett observed that although Resolution 169 did not amount to outright enforcement action, it authorized a robust peacekeeping—a hybrid position between classical peacekeeping and enforcement action.⁵¹ Nigel White argued, perhaps more persuasively, that “it would be best to summarize ONUC’s actions having as their constitutional base the enforcement of provisional measures under Article 40, but since these measures were increasingly widely drawn so as to cope with an ever-deteriorating crisis, they amounted to de facto enforcement action.”⁵²

Thus, when Resolution 1270 read, in part, that the peacekeepers should facilitate delivery of humanitarian assistance, the impression is created that the operation, though conceived originally as a peacekeeping one, would, in reality, be implemented in an enforcement mode. This indeed was ECOWAS’ assumption upon the adoption of Resolution 1270.

Notwithstanding the ambiguous nature of Resolution 1270 as revised by 1289,⁵³ it is clear from the explicit utterances of member states of the U.N. that the mandate was intended to be a peacekeeping one. During the Security Council’s emergency meeting to discuss the situation in Sierra Leone,⁵⁴ the Secretary-General reminded the Council that, “our mission was configured as a peacekeeping force. It was neither designed nor equipped to be an enforcement operation.”⁵⁵ He added “it was attacked by one of the parties that pledged to cooperate with it, before it had been properly deployed. Given that situation, we have to consolidate and reinforce our troops so that they can defend themselves and their mandates effectively.” Notably, the Secretary-General’s statement had fallen short of requesting an authorization of enforcement action for UNAMSIL.

The reactions of the states taking part in the meeting, to the request by African states for a revision of the UNAMSIL mandate referred to by the Secretary-General in his speech, is instructive on how the mandate should be construed. The Algerian delegate to the emergency meeting, Mr. Bali, impressed on the Council that “this test of UNAMSIL shows very clearly that the mandate and resources available to it are not and never were adequate to the situation.”⁵⁶ The delegate of the United Kingdom, Mr. Eldon, however, cautioned against

51 D. W. BOWETT, *UNITED NATIONS FORCES: A LEGAL STUDY*, 180 (Stevens, 1964).

52 HILAIRE MCCOUBREY & NIGEL D. WHITE, *THE BLUE HELMETS: LEGAL REGULATIONS OF UN OPERATIONS*, 53 (Dartmouth: 1996).

53 U.N. SCOR, 4099th mtg., U.N. Doc. S/RES.1289 (2000).

54 U.N. SCOR, 55th Sess., 4139th mtg., U.N. Doc. S/PV.4139 (2000).

55 *Id.* at 2-3.

56 *Id.* at 5. The ‘test’ referred to here is the capture of 500 UNAMSIL personnel by the RUF forces.

transforming UNAMSIL mandate into enforcement one. He noted that "for the moment, UNAMSIL's mandate is sufficient for it to carry out its tasks," and suggested that the U.N. Security Council should "be wary of adopting an over-hasty approach," a veiled reference to Algeria's position.⁵⁷

The position of the United Kingdom found strong support from the Americans. Mr. Cunningham, representing the United States, observed that United Nations peacekeepers "were organized and sent to Sierra Leone not to impose a settlement, not to enforce the peace, but to assist in the implementation of the Lomé Agreement."⁵⁸ Russia followed this line when it argued that "the mandate given UNAMSIL in Security Council Resolution 1289 (2000) allows sufficiently strong measures to be taken to ensure the safety of international personnel in the country and of the Government of Sierra Leone."⁵⁹

An official explanation of the ambiguous nature of the mandate contained in Resolution 1270 as amended, and the *raison d'être* underlining states' support for this mandate at the relevant time, came from the delegates of Malaysia and Bangladesh to that meeting. In his opinion, Mr. Hasmy contended that Malaysia supported the "limited Chapter VII mandate then because there was an agreement on the table and because the cooperation of the parties was assured to be forthcoming. Clearly, many of us have been proven wrong and we will have to recalibrate our response appropriately."⁶⁰ Mr. Chowdhury, representing Bangladesh agreed with Malaysia, affirming that "we placed our trust in Lomé, believing that it would work, and acted accordingly in mandating the United Nations Mission in Sierra Leone (UNAMSIL). With recent developments in Sierra Leone, we have to take a fresh look at the peace structure and the peacekeeping mandate we had approved."⁶¹

From the foregoing statements, it is clear that, although there was disagreement at the meeting on whether or not to revise UNAMSIL mandate to enable it meet the changing circumstances in Sierra Leone, all participants agreed that the mandate was a peacekeeping one. No state argued that the mandate justified an inference of authorization of enforcement action by the Security Council. Hence, it is contended here that notwithstanding the wording of the mandate and the adoption of Resolution 1270 under Chapter VII, UNAMSIL mission was a peacekeeping operation, with limited power to use force under specified circumstances.

⁵⁷ *Id.* at 6-8.

⁵⁸ *Id.* at 11.

⁵⁹ *Id.* at 16.

⁶⁰ *Id.* at 11. The Agreement referred to by My Hasmy is the Lomé Peace Accord, *supra* note 27.

⁶¹ *Id.* at 12.

It is instructive to note that Resolution 1289, which revised the UNAMSIL mandate, removed from it any words that might give rise to an inference of authorization of enforcement action. It solely authorized UNAMSIL to “facilitate the free flow of people, goods and humanitarian assistance along specified thoroughfares.”⁶² The wording of this provision is remarkably different from that in Resolution 1270. In the latter, the UNAMSIL mandate had included the use of necessary means to “facilitate the delivery of humanitarian assistance.”⁶³ This phrase, it is contended, is much broader than the one contained in Resolution 1289 in that it does not define the limit beyond which UNAMSIL may not render humanitarian assistance. The effect of this alteration is that, under Resolution 1289, UNAMSIL has no authority to deliver humanitarian assistance beyond the specified thoroughfares.

Undoubtedly, the ambiguous nature of UNAMSIL’s mandate adversely affected its implementation. It is not clear what circumstances would qualify as threats of physical violence.⁶⁴ Nor is the phrase responsibilities of the Government of Sierra Leone and ECOMOG free from ambiguities. Although there was some co-operation between ECOMOG, which had at all times been implementing enforcement action, and protecting U.N. personnel with same, and UNOMIL troops at this stage, Resolution 1270 clearly envisaged a different mandate and command regime for UNAMSIL. Thus, there was a greater need for the Security Council to elaborate what the responsibilities of ECOMOG would be under this Resolution.

Unlike analogous resolutions adopted by the Security Council with respect to conflicts occurring elsewhere, in which the U.N. has had to act in conjunction with other international organizations,⁶⁵ Resolution 1270 does not provide for joint command of troops. Therefore, upon deployment of UNAMSIL troops to Sierra Leone, the troops had to operate alongside the ECOMOG troops but under a separate command regime. Resolutions 1289⁶⁶ and 1299,⁶⁷ which revised and increased UNAMSIL’s mandate respectively, and Resolution 1317,⁶⁸ which

62 Resolution 1289, *supra* note 52, at 3, para. 10(b).

63 *Supra* note 39.

64 Eleven British paratroopers were taken hostage by a Sierra Leone rebel faction, the “West Side Boys,” between late August and early September, an occurrence that typifies an instance that could have fallen under this provision had the Resolution already been adopted.

65 See, e.g., U.N. SCOR, 4011th mtg. at 5, U.N. Doc. S/RES.1244 (1999). Resolution 1244 provides for joint command between the Kosovo Forces (KFOR) and NATO, which the Resolution expressly requests in order to substantially participate in the mission.

66 Resolution 1289, *supra* note 53.

67 U.N. SCOR, 4145th mtg., U.N. Doc. S/RES.1299 (2000).

68 U.N. SCOR, 4193d mtg., U.N. Doc. S/RES.1317 (2000).

extended its terms, did not touch upon this crucial aspect of 'joint' military operation involving two different international organizations.

2. Need Resolution 1270 be more precise?

There exist several reasons for it to be expected that the U.N. would spell out, as clear as possible, the rules of engagement and the nature of the relationship of its mission with that of ECOWAS. Up until the adoption of Resolution 1270, there were little or no practical problems between ECOMOG troops and their U.N. counterparts, at least in terms of command and control of their respective missions. The reasons for this calm relationship between the two organizations are not far fetched.

In the first phase of its intervention in Sierra Leone, ECOWAS acted under its two Protocols—the Protocol on Non-Aggression and the Protocol on Mutual Defense and Assistance—and was constantly informing the U.N. of its activities under Article 54 of the U.N. Charter.⁶⁹ It enjoyed absolute discretion over the command of its troops and exerted total control over political decisions governing their activities. It assumed its own mandate, as it deemed fit in the circumstances, and superintended virtually all of the peace accords with conflicting parties. On the other hand, UNOMSIL was only an observer mission. It had no peacekeeping roles to perform, except, like UNOMIL did in Liberia, to monitor the implementation of the disarmament agreement and the overall military and security situation in Sierra Leone. In fact, the respective roles to be performed by ECOMOG and UNOMSIL were formally set out in a letter from the President of Sierra Leone to the Security Council⁷⁰ which somehow complemented the details of the relationship between the two missions in Resolution 1181. In fact, UNOMSIL was to be protected by ECOMOG troops.⁷¹

The above scenario was, to say the obvious, superficially conducive for a 'co-operation' to be assumed between the two organizations. In reality, however, the two organizations had little or nothing to actually co-operate about as far as their mandates were concerned. At this stage of their missions, the two organizations were performing widely divergent tasks that could not possibly collide. ECOWAS was mainly preoccupied with seeking ways to completely route out the rebels from Sierra Leone's political landscape and consolidate the reinstated Tejan Kabbah on the governance of the

69 *The Fourth Report of the Secretary-General on the Situation in Sierra Leone*, U.N. Doc. S/1998.249 (1998). See also *slnews*, *supra* note 10.

70 *Disarmament, Demobilization and Reintegration Programme*, U.N. Doc. S/1998.741 (1998).

71 Art. 1 of Decision C/AHSG/DEC.1/8/99 *Redefining the Mandate of ECOMOG in Sierra Leone* (on file with author).

country, by means and measures it decided on with unlimited freedom.⁷² UNOMSIL, on the other hand, was only monitoring the military and security situation in Sierra Leone with no real concern, whatsoever with the fate of the rebels, or indeed, the safety of the democratic government of Tejan Kabbah.⁷³

Towards the end of 1999 however, the relationship between UNOMSIL and ECOMOG turned sour on account of two immediate factors. The first was the introduction of UNAMSIL into the political equation of the Sierra Leone crisis, equipped with a “peacekeeping” mandate.⁷⁴ It must be pointed out that before the adoption of Resolution 1270, the U.N. entirely endorsed the main objective of ECOWAS, the reinstatement of the Kabbah government⁷⁵, and heartily welcomed “the return of that government” to Sierra Leone, notwithstanding that it was restored by the use of unauthorized force by ECOMOG.⁷⁶

Naturally, ECOWAS had expected that the new resolution would complement the enforcement mandate ECOMOG forces were already implementing.⁷⁷ The second reason was the adoption by ECOWAS member states of a new protocol for the regulation of its interventions within two months of adopting Resolution 1270.⁷⁸ This protocol, it must be emphasized, empowers ECOWAS to undertake enforcement action without seeking the authorization of the Security Council.⁷⁹

In these circumstances, tension soon began to grow between the two sides. On December 21, 2000, the Nigerian President, Olusegun Obasanjo, informed the U.N. Secretary-General, Kofi Annan, that Nigeria could not accept two peacekeeping forces in the same country, and that Nigeria would withdraw from the ECOMOG force by the end of February.⁸⁰ The Ghanaian and Guinean contingents also gave similar

72 For the objectives of ECOWAS in Sierra Leone, see the *Declaration of the Committee of Four on the Situation in Sierra Leone*, Abidjan, 29-30 July 1997 (on file with author).

73 This role would however be assumed later by UNAMSIL. See the Russian’s statement during the 4139th meeting of the Security Council, *supra* note 53, at 16.

74 (emphasis added).

75 Final Communiqué, *Meeting of Foreign Affairs Ministers of ECOWAS*, Conakry 26 June 1997 (on file with author).

76 Resolution 1156, *supra* note 18.

77 The ECOWAS Director of Legal Affairs, Mr. Roger Laloupo, disclosed this fact to the author during an interview in March 2000. The author had asked specifically what led to the discord between ECOMOG and UNAMSIL forces. Interview with Roger Laloupo, Director of Legal Affairs, ECOWAS, in Abuja, Nig., (Mar. 2000).

78 The Protocol on collective security was adopted in furtherance of Article 58 of the Revised Treaty, *supra* note 1.

79 See discussion *infra*.

80 See generally <http://www.sierra-leone.org/slnews0100.html>.

indications.⁸¹ President Obasanjo's position, it must be pointed out, was complementary to the hostility already going on between the UNAMSIL and ECOMOG commanders. Thus, it seems appropriate to submit that it was the introduction of UNAMSIL, without a detailed demarcation of responsibilities between it and ECOMOG troops despite their divergent mandates, and the adoption of a new legal framework by ECOWAS, that undermined the supposed cooperative relationship between the U.N. and ECOWAS in Sierra Leone.

The failure of the U.N. to take these developments on board at the implementation stage of Resolution 1270's mandate led to serious consequences, such as the virtual erosion of U.N. command and control in Sierra Leone, leading to the withdrawal of the Indian contingent from UNAMSIL. The Nigerian, Ghanaian and Guinean ECOMOG contingent also withdrew from Sierra Leone, a situation that prompted the U.N. to increase UNAMSIL from 6,000 to 11,000 troops.

The next issue to examine is the practical effect of ECOWAS' new protocol on the implementation of Resolution 1270. The focus here shall be on the adoption of a peacekeeping mandate by UNAMSIL and the lack of clarity as to the command regime between UNAMSIL and ECOMOG forces. An outline of relevant provisions of the new protocol is included, but before embarking on a detailed examination of them, it is worthwhile to say a few words about the circumstances in which ECOWAS agreed to return to Sierra Leone. It is the combined effects of these occurrences that set the stage for the events that led to the collapse of the UNAMSIL command.

C. ECOWAS' New Protocol: A Brief Outline of its Objectives

The legal regime upon which ECOWAS premised the first phase of its intervention in Sierra Leone consisted of the provisions of the Protocol on Non-Aggression⁸² and the Protocol on the Mutual Defense and Assistance (PMAD)⁸³ as well as the principles of general international law governing peacekeeping. The adoption of the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security [hereinafter Protocol] by ECOWAS member states on December 10, 1999,⁸⁴ provided a catalyst to

81 Resolution 1289, *supra* note 52, at 2, para. 7, "takes note of the decision of the Governments of Nigeria, Guinea and Ghana to withdraw their remaining ECOMOG contingents from Sierra Leone, as reported in the letter to the Secretary-general of 23 December 1999."

82 Adopted on April 22 1978; See *Report of the Secretary-General on the Question of Liberia*, U.N. Doc. S/25402, at 6 (1993); See also M. Weller, *supra* note 2, at 18.

83 Adopted May 29, 1981. See also M. Weller, *supra* note 2, at 19-20.

84 The Protocol was adopted at Lomé, Togo, on December 10, 1999. Although it is yet to be ratified, it entered into force provisionally (Article 57 (1)) upon signature by all Heads of State and

the ensuing discord between the ECOMOG troops and their UNAMSIL counterparts. The Protocol not only recast the role of ECOWAS in the collective security of its hemisphere, it indeed controverted the very foundation upon which the initial co-operation between UNOMSIL and ECOMOG had been based: the legal framework of Chapter VIII of the U.N. Charter.⁸⁵

To be sure, Article 10(c) of the Protocol empowers ECOWAS to dispense with the Security Council authorization as *sine qua non* to its enforcement actions in West African conflicts.⁸⁶ In addition, Article 34 contains comprehensive provisions that will enable ECOWAS to retain the command of its troops and the control of political decisions affecting their operation in the field of deployment.⁸⁷

It must be emphasized at this juncture that ECOWAS had manifested unequivocally, right from the days of its intervention in Liberia, a predilection for being in charge of its troops in terms of command and control.⁸⁸ The fact that an outright conflict did not arise between the ECOMOG forces and those of the United Nations Observer Mission in Liberia, UNOMIL, owes more to the docile nature of the task the latter had to perform than it being a manifestation of cordiality between the two groups.⁸⁹

With Sierra Leone, the ECOWAS quest for an unquestionable authority over the command of its troops and the political control of decisions concerning implementation of their mandate became ever more pronounced. At the meeting of chiefs of defense staff of contributing States to ECOMOG, held in Abuja, Nigeria, on April 15, 1999,⁹⁰ the organization "reiterated that the general [c]ommand and [c]ontrol of the

Governments of ECOWAS. The author obtained a copy from ECOWAS Headquarters in Nigeria while on an internship between March 25 and April 5, 2000. *See also* 5 J. CONFLICT & SECURITY LAW 231 (2000). For a commentary on the Protocol, *see* Ademola Abass, *supra* note 4.

85 In a personal interview with the Director of Legal Affairs, the author was informed that it would not be in the best interest of ECOWAS to wait for the authorisation of the Security Council at the outbreak of violence in West Africa. Interview with Roger Laloupo, Director of Legal Affairs, ECOWAS, in Abuja, Nig. (Mar. 28, 2000).

86 This Article empowers the Mediation and Security Council (MSC) to, *inter alia*, "authorise all forms of intervention and decide particularly on the deployment of political and military missions." 5 J. CONFLICT & SECURITY LAW 231, 237 (2000).

87 *Id.* at 248.

88 *First Session of the Community Standing Mediation Committee*, Banjul, 1990, Article II (2) (on file with author).

89 For an analysis of the joint action in Liberia, *see* Funmi Olonisakin, *UN Co-operation with Regional Organisations in Peacekeeping: The Experience of ECOMOG and UNOMIL in Liberia*, 3 INT'L PEACEKEEPING 33 (1996).

90 *Final Communiqué* (on file with author).

participating troops are vested on the Force Commander [sic]." Thus, it is contended that Article 10, outlining the enormous powers the new Mediation and Security Council possesses, especially subsection (2)(c), which empowers it to authorize all forms of actions, and Article 34, which sets out the chain of command, culminated from ECOWAS practice since it launched its intervention in the Liberian conflicts.

In effect, through its Protocol, ECOWAS signaled a radical departure, not only from the legal regime under which its first experience of intervention was perfected, but also from the classical relationship that existed between its own collective security regime and that of the U.N. In regards to the latter, ECOWAS did deliberately decide to do away with the provisions of Article 53(1) of the U.N. Charter mandating regional arrangements to first seek the authorization of the Security Council before embarking on an enforcement action. In response to the concern raised by Professor Margaret Vogt, one of the resource persons consulted when drafting the Protocol, about the potential impact of Article 10(2)(c) on Article 53(1) of the U.N. Charter, the ECOWAS Director of Legal Affairs responded that:

The meeting [of experts] considered these observations made by Prof. Vogt and was of the view that whilst the sub region appreciates the importance of its obligations under the United Nations Charter, its recent experience has shown that the cost of waiting for the United Nations authorization Could be very high in terms of life and resources.⁹¹

Noteworthy in the above quoted statement is that, right from the conception of its new legal regime, ECOWAS had decided not to contingent its legal ability to intervene in conflicts occurring within the region to a prior authorization by the Security Council. Indeed, in the meeting preceding its return to Sierra Leone, as discussed below, ECOWAS made this new position quite obvious.

1. ECOWAS' Conditions for Participating in Sierra Leone (Phase Two)

Shortly after the deployment of UNAMSIL in Sierra Leone, the rebel movement in Sierra Leone captured 500 hundred U.N. personnel.⁹² This development impelled the U.N. to request the re-entry of the Nigerian contingent—which, in substance, means ECOWAS—into the Sierra Leone crisis.⁹³ At a meeting held in Abuja, the capital city of Nigeria, ECOWAS accepted the U.N. invitation, but then laid down three vital conditions that would govern its action if it were to return to Sierra Leone.⁹⁴

⁹¹ Passage taken from Ademola Abass, *supra* note 4, at 223-4.

⁹² U.N. Doc. S/PV.4139, *supra* note 53, at 9.

⁹³ *Id.* at 5.

⁹⁴ <http://www.ngrguardiannews.com/news2/nn785902.html> (last visited May 22, 2000).

Under its first condition, the alliance presented to the U.N. three different modalities for participating in any operation directed toward the resolution of the conflict.⁹⁵ The first of these was for ECOWAS to contribute its own troops as part of the UNAMSIL soldiers.⁹⁶ Under this arrangement, soldiers of the ECOWAS monitoring group, ECOMOG, would operate under the United Nations command. As for the second alternative, ECOMOG would operate under the Lomé Peace Accord as partners with the U.N. However, the alliance did not specify what the arrangement would be as per the regime of command and control of forces under this option. Nevertheless, since the situation under the second option would have obliged the two organizations to work side by side as they did before ECOWAS withdrew from Sierra Leone, it is to be assumed that each organization would have retained the command of its troops. As to the last option, ECOMOG troops would completely supplant the U.N., forcing the U.N. to revert to the observer role it played during the operation in Liberia, or during the UNOMSIL period in Sierra Leone.⁹⁷

Irrespective of which of these three options ECOWAS might elect, the organization stated explicitly through its Director of Information, Dr. Adrienne Diop, that "the West African component under ECOMOG in Sierra Leone will have its own command."⁹⁸ It follows from this assertion that, whatever might emerge from the three options proposed by ECOWAS, it will not, in the final analysis, affect the fundamental question of who commands and controls ECOMOG forces that might be deployed. ECOWAS indeed made good on the threat not to subjugate its troops to the U.N. command when, following a rift between its commander and its U.N. counterpart, ECOMOG forces obstinately refused to take orders from the latter.

The second condition laid down by ECOWAS at the Abuja meeting was that no matter what relationship might exist between ECOWAS and U.N. troops, ECOWAS would implement its own mandate.⁹⁹ This, it declared in advance, would be enforcement action

95 The Security Council recognised these modalities during its 4139th meeting, *supra* note 53, at 11; See also BBC NEWS, *Nigeria Sets Intervention Terms* (May 10, 2000), at http://www.bbc.co.uk/hi/english/world/africa/newsid_743000/743219.stm.

96 <http://www.ngrguardiannews.com/news2/nm785902.html> (last visited May 22, 2000).

97 See Madu Onuorah, Segun Ayeoyenikan and Tunji Oketunbi, *ECOWAS to Deploy 3,000 Troops to Sierra Leone*, <http://www.ngrguardiannews.com>.

98 *Id.*

99 *Id.* In fact, the Vice-President of Nigeria, Atiku Abubakar, expressed the view, with respect to the first phase of the ECOWAS mission that "the command ought to have gone to Nigeria, because Nigeria - having been in Sierra Leone for quite some time, and quite familiar with the terrain - would have made a better job of it." See generally <http://news.bbc.co.uk/hi/english/world/africa>.

contrary to a peacekeeping mandate UNAMSIL was already implementing.¹⁰⁰ The third and final condition given by ECOWAS was that the U.N. would meet all expenses incurred by the organization in the course of discharging its mandate.¹⁰¹

Several aspects of these conditions merit consideration. However, we shall only focus our attention on two vital issues: first, the proposal by ECOWAS to retain the command of troops; second, the proposal to implement the enforcement mandate as against the U.N. peacekeeping alternative. Two factors would appear to have motivated these conditions. Firstly, ECOWAS was clearly unwilling to return to a conflict where it would not be in charge of its own troops. The events leading to its withdrawal during the first phase of its mission apparently informed the decision to set this matter straight well in advance of its return to Sierra Leone. Secondly, ECOWAS had adopted a new protocol, following the withdrawal of its key contingents from Sierra Leone, and was ready to commence the regulation of its collective security activities in West Africa, in accordance with its own law.¹⁰²

Obviously, it is strategically more rewarding for ECOWAS to return to Sierra Leone under its own legal regime which not only frees up its actions from the Security Council authorization but also relieves it of the obligation to report such activities under Article 54 of the Charter. Article 52(3) of its Protocol only obligates ECOWAS to "inform the United Nations of any military intervention undertaken in pursuit of the objectives of this Mechanism."¹⁰³ As this writer has partly argued elsewhere, the insertion of the phrases 'military intervention' and 'undertaken' in this article, as against the requirement of Article 54 of the U.N. Charter that regional arrangements report actions "undertaken"

100 *Id.*

101 *Id.*

102 In a private interview with the ECOWAS Director of Legal Affairs in April 2000, the Director confirmed to the author that the real motivation behind the Protocol was the need to free ECOWAS from the many restrictions of the U.N. Charter. He explained that while the Charter has imposed many obligations on regional organisations, it has not imposed similar obligations on the U.N. to intervene in crises. He cited the tragedy in Rwanda as an example in which the U.N. Security Council had not been willing to do much. Thus, he put a question to the author: 'Should the circumstances of Rwanda erupt in an ECOWAS State in the future and the U.N. adopt the approach it did in Rwanda, what do you think ECOWAS should do?'. Interview with Roger Laloupo, Director of Legal Affairs, ECOWAS, in Abuja, Nig. (Apr. 2000); For an official version of ECOWAS' justification for designing a treaty that dispenses with the U.N. authorisation, *see also Meeting of Experts on the Draft Protocol Relating to the Mechanism on Conflict Prevention, Management, Resolution, Peace-keeping and Security*, 17-19 Nov. 1999, Lomé, Togo, at 6 (on file with author).

103 *See Ademola Abass, supra* note 4, at 220.

or in “contemplation,” provides a leeway for ECOWAS to circumvent this obligation in two ways.

It is contended that the rationale for Article 54 of the U.N. Charter requiring regional arrangements to report not only actions already “undertaken” but also those in “contemplation” is to enable the Security Council to exercise some control on the measures a regional arrangement proposes to undertake. ECOWAS will almost always present the U.N. with a *fait accompli*, since under its Protocol, it is only obligated to report actions it has already taken.

Moreover, under its Protocol the actions ECOWAS is obligated to report to the U.N. are more tightly defined than the ones under Article 54. The actions to be reported under the Protocol must be of military nature, and must constitute an intervention. Thus, where ECOWAS decides to use overwhelming non-military force, as economic sanction or oil embargo—its two potent sanctions in Liberia and Sierra Leone—to compel obedience with its own decisions, it has no duty to report that to the U.N.¹⁰⁴ Additionally, where ECOWAS applies a disproportionate military force within a peacekeeping operation, such that will normally bring the action within enforcement action under the U.N. Charter, it is not obligated to report to the U.N., for such actions are not ‘military interventions’ as such. At most, such usage of preponderant military force in the context of a peacekeeping operation might only impugn the legality of the action under the law of peacekeeping and compromise the integrity of the mandate.

Article 10(2)(c) of the Protocol empowers the Mediation and Security Council (MSC) to “authorize all forms of intervention and

104 It is a common view among legal scholars that since states may, as a matter of course, impose economic sanctions individually, they may, as part of their privileges as states, pull such sanctions together and impose them collectively without recourse to the U.N. Security Council’s authorisation under Article 53(1). The crux of this contention is that economic sanctions do not constitute enforcement action in the language of the U.N. Charter. Thus, the enforcement action referred to by that Article must be assumed to be military action. This argument is faulty. There is a remarkable difference between a single state imposing an economic sanction against another state and a collection of states doing so. Where a collection of states impose sanction with the desire to hurt the target state and forcefully induce or coerce it to comply with certain obligations, there is no logical reason why that should not constitute enforcement action. Furthermore, in the light of the prohibition of use of force by Article 2(4) of the U.N. Charter, very few states find attraction in military force. Indeed, superpowers like the United States may actually cause as much harm, even if not as drastic, through economic sanctions rather than through military action, better still without legal repercussions under the U.N. Charter. Since such states are encouraged by the Charter’s non-penalisation of economic sanctions, it is predicted that the consequences for the worst future violations of Article 2(4) may consist of economic sanctions directed at undermining the political integrity of these states.

decide particularly on the deployment of political missions.”¹⁰⁵ The Protocol further provides for a Commander¹⁰⁶ and a Special Representative.¹⁰⁷ The whole structure of this Protocol is to make ECOWAS exert total control over whatever troops it may deploy, and to retain the command of its mission. This indeed is the underlying factor for the adoption of the Protocol.

The next question that arises therefore is, despite a background of distrust and crisis between UNAMSIL and ECOWAS in the first phase of the intervention, and the adoption of the ECOWAS Protocol, why did the U.N. not address the situation in the resolutions emerging after 1270? How did this contribute to the problem experienced by the UNAMSIL command in the second phase?

2. The Crisis of Command and Control in Sierra Leone: UNAMSIL vs. ECOMOG

At the close of the Abuja meeting, ECOWAS agreed to contribute troops to UNAMSIL.¹⁰⁸ This was an endorsement of its first condition, having jettisoned the idea of operating under the Lomé Peace Accord, which had been frequently breached by the rebels, or supplanting the U.N. altogether, a proposal that was, in the real sense of the matter, not a very realistic one. In effect, this means that ECOWAS agreed to become part of UNAMSIL and subordinate its troops to the UNAMSIL command. Yet, despite ECOWAS' adoption of the most credible and pragmatic of its three proposals under the circumstances, the participation of its troops in UNAMSIL was marked by mutual distrust between the two sides from the very start.

While the issues that catalyzed the rift between the UNAMSIL commander, Major-General Vifah Jetley and his ECOMOG counterpart, Major-General Victor Malu, were traceable to certain reports allegedly emanating from the former, it is believed that these issues only masked a deep-seated hostility between the two parties, dating back to the first phase of their mission.¹⁰⁹ A few months after the Nigerian contingent returned to Sierra Leone and formally joined forces with UNAMSIL, the ECOMOG commander, Major-General Malu, declared that “We [Nigerians] are not going to serve under the man [Jetley] in whatever

¹⁰⁵ See Ademola Abass, *supra* note 4, at 220.

¹⁰⁶ Protocol, *supra* note 4, Article 33.

¹⁰⁷ Protocol, *supra* note 4, Article 34(1).

¹⁰⁸ <http://www.nguardiannews.com>.

¹⁰⁹ See Jetley's Report on the Crisis in Sierra Leone (saying that “When General Kpamber went to the U.N. HQ., New York, he was very disappointed to learn that he was not going to be the Force Commander and that Nigeria would have three battalions out of this they had to concede one battalion to the Guineans.”) <http://www.Siera-Leone.org/jetley>.

circumstances. And if he is not removed he will not get our cooperation, and we are the largest contingent in the force.”¹¹⁰ In a more telling episode, General Malu had later alleged that General Jetley’s problem with the Nigerian contingent arose from the latter’s strident opposition to what they perceived as Jetley’s lack of consultation and the “dominance of Indian Generals” at UNAMSIL headquarters. In addition, Malu asserted that the Nigerian contingent stressed to the UNAMSIL commander, at a meeting attended by the U.N. Secretary-General, that “in a multinational force you do not exert the kind of control you apply over your national army.”¹¹¹

Whatever might be the real cause of the rift in the leadership of UNAMSIL may as well remain mysterious for our purpose. What is not controverted, however, is that there has been series of problems in the command of troops and the control of their mission. In an interview with a BBC correspondent concerning the withdrawal of the Indian UNAMSIL contingent,¹¹² the spokesman for the U.N. Secretary-General, Fred Eckhard, admitted, “I can’t exclude that the decision had something to do with the leadership problems that we’ve had with this mission.”¹¹³ The U.N. Secretary-General himself, Kofi Annan, had noted in an assessment report that there were “serious shortfalls in capability encountered by UNAMSIL in the recent past with regard to the command and control.”¹¹⁴ In a more categorical reference to the looming crisis, Mr. Fowler, the Canadian delegate to the Security Council’s 4139th meeting, after advocating the creation of “a strong, united and cohesive force” in Sierra Leone, noted that the proposed force “should take the form of an expanded UNAMSIL and should respect the fundamental military principle of unity of command, in this case the command of Major-General Jetley.”¹¹⁵

The reference to “unity of command” in that quoted statement perhaps answers the question why Resolution 1270 did not specify the

110 Sierra Leone Web, News Archives, (Sept. 10, 2000), at <http://www.sierra-leone.org/slnews0900.html>.

111 *Id.* (emphasis added).

112 On the Indians’ withdrawal from UNAMSIL, see the transcript of the UNAMSIL Press Briefing. *Press Briefing, United Nations: Daily Press Briefing of Office of Spokesman for Secretary-General*, available at http://www.un.org/News/briefings/docs/2000/20000922_db092200.doc.html (last visited Sept. 22, 2000).

113 *Press Briefing, United Nations: Daily Press Briefing of Office of Spokesman for Secretary-General*, available at http://www.un.org/News/briefings/docs/2000/20000922_db092200.doc.html (last visited Sept. 21, 2000).

114 Sierra Leone Web, News Archives, (Sept. 20, 2000), at <http://www.sierraleone.org/slnews0900.html>.

115 S/PV.4139, *supra* note 53, at 8.

command regime envisaged for an expanded UNAMSIL in Resolution 1289. Clearly, the Security Council had expected (or assumed) that insofar as ECOMOG forces would form part of UNAMSIL, a 'unified' command structure would become applicable. It seems plausible to observe that leaving such an inference to be drawn by ECOMOG forces seemed ill advised under the circumstances. With this unclear approach in Resolution 1270, the Security Council would appear to have charted a course of 'joint' action that, for all intent and purposes, was bound to founder during implementation.

4. Factors that Militated Against UNAMSIL Command in Sierra Leone

The difficulty experienced by UNAMSIL, in the area of command and control of its mission, would appear to have stemmed from two competing scenarios. On the one hand, the U.N. would appear to be reluctant to discountenance the predilection of the largest provider of ECOMOG, Nigeria, which would rather have things done in its own way.¹¹⁶ To antagonize the Nigerians would be to risk another exit of their ECOMOG contingent (and most probably) the Guineans and the Ghanaians contingents as well, from Sierra Leone.

On the other hand, the U.N. did not want to be seen as succumbing to the pressure mounted by the Nigerians to substitute the UNAMSIL commander Jetley with a Nigerian, an option that must be expected to have attracted unpleasant consequences under the circumstances. The current leader of UNAMSIL, Oluyemi Adeniji, is a Nigerian, and so is the deputy force commander, Brigadier General Mohammed who is, at the time of this writing, was acting in the stead of the departed Indian commander, General Jetley. To have consented to a substitution of Major General Jetley with yet another Nigerian would be to completely subordinate the UNAMSIL force to ECOWAS command, and, thus, subserve the collective will of the international community in Sierra Leone to the dictates of a regional hegemon. In short, such a decision would have made the UNAMSIL mission a regional action with international imprimatur.

The conflict between ECOWAS and the U.N. in the area of command and control succinctly exemplify the complications that characterize joint peacekeeping operations by the U.N. and regional organizations. It is to be expected that contributing countries, which are in charge of the command of troops, would almost certainly want to be in control of political decisions, especially those affecting their mandate. This problem is likely to feature more strongly in missions dominated by

¹¹⁶ The Nigerians clearly wanted an enforcement action and were first prepared to infer such a mandate from Resolution 1270. However, their inability to hold UNAMSIL to this sort of action led in part to their frustration with the UNAMSIL command.

states bearing the most of the human and material cost of a crisis.¹¹⁷ It is in this context that General Malu's reference to the "dominance of Indian Generals" is quiet revealing.

In fact, in the U.N. practice, precedents indicate that there is a strong link between the command of troops and the control of political decisions relating to their actions. Nowhere is this linkage better manifested than perhaps in the 1991 Operation Desert Storm.¹¹⁸ The allied states, having the command of troops, so marginalized other participating states, and the U.N. itself, in controlling the action, that the U.N. Secretary-General of the day, Javier Perez de Cuellar, lamented that all "we know about the war" is "what we hear from the three members of the Security Council which are involved—Britain, France and the United States—which every two or three days report to the Council, after the actions have taken place. The Council, which has authorized all this, is informed only after the military actions have taken place."¹¹⁹

Concerning Sierra Leone, the problems of command and control between the UNAMSIL and ECOWAS was worsened by many factors. The prospect of this problem abating in future joint operations between the U.N. and ECOWAS, or other regional organizations for that matter, is indeed very dim. In many respects, Resolution 1270, which authorized the UNAMSIL mission, was, in effect, a dead horse by the time it came into force.¹²⁰ Although the Resolution came into existence before ECOWAS adopted its new protocol, its implementation by UNAMSIL should have, in the very least, addressed the changes that have occurred within ECOWAS' collective security framework. This did not happen. Hence vital issues, such as command and control and divergent mandate, to state the obvious, were left hanging precariously.

It would have been thought that Resolution 1270 and those that followed would take cognizance of the circumstances before their adoption. This would include recognizing the particular position of ECOWAS and its predilections: it was under its own command and implementing its own mandate. Paying particular attention to these issues would have, in the least, impressed it upon the Security Council the

117 It is generally acknowledged that Nigeria bore the substantial part of the human and materials cost of ECOWAS mission in Liberia between 1989 and 1997 and Sierra Leone between 1997 and 1999 when the U.N. decided to take over the peacekeeping mission itself. See BBC NEWS, *Nigeria Sets Intervention Terms*, May 10, 2000, available at <http://news.bbc.co.uk/1/hi/english/world/africa/newsid>

118 See John Quigley, *supra* note 47, at 1.

119 Leonard Doyle, *Crisis in the Gulf: U.N. 'Has No Role in Running War'* INDEPENDENT (London), Feb. 11, 1991, at 2 (interview with Pérez de Cuellar).

120 See statements of the representatives of Malaysia and Bangladesh at the Security Council 4139th meeting, *supra* notes 59, 60.

urgent need to spell out details about command and control, especially since UNAMSIL tasks were to be radically different from those performed by UNOMSIL. In contrast, during the Liberian crisis, Resolution 866 had noted that the deployment of UNOMIL in Liberia “would be the first mission undertaken by the United Nations in co-operation with a peace-keeping mission already set up by another organizations.”¹²¹ Remarkably, the then Secretary-General of the U.N. had issued a report which detailed the respective roles to be performed by UNOMIL and ECOMOG.¹²² This despite the fact that UNOMIL was only an observer mission with no real possibility of running into any problems with ECOWAS which had been in Liberia three years before the U.N. moved in. A similar step was particularly more desirable in Sierra Leone where UNAMSIL had a peacekeeping mandate.

Furthermore, Resolution 1270 was all but clear in its few specifications, especially as to the distribution of roles between ECOWAS, which naturally assumed the right to take decisions regarding Sierra Leone,¹²³ and the U.N., which arrived late on the scene and consistently shunned the robust mandate favored by ECOWAS.¹²⁴ Unfortunately, the Security Council missed an opportunity to arrest the problem when Resolution 1289, which revised Resolution 1270, failed to address this perennial problem. Coming, as it did, in the aftermath of the withdrawal of three ECOMOG contingents from Sierra Leone, and after the declaration by Nigeria that it could not accept two peacekeeping forces in the same country, the Security Council had reasons to anticipate the future of a joint operation between UNAMSIL and ECOMOG. Thus, it was more crucial at this point for the Security Council to use its subsequent resolutions to put these matters straight. This was not to be.

In sharp contrast to the Sierra Leone scenario, Resolution 1244 concerning Kosovo was by far more succinct as to the relationship between the Kosovo Forces (KFOR), which was to operate with the full participation of the U.N. and NATO member states, and Operation Allied Force, executed only by the latter.¹²⁵ In the Security Council debate leading to the adoption of Resolution 1244, Russia and China

121 Resolution 866, *supra* note 3, at 1.

122 *Report of the Secretary General on Liberia*, U.N. Doc. S/26422, at 4 (1993).

123 For instance, in responding to General Jetley's report on Nigeria's leadership of UNAMSIL, the Nigerian president charged: “When did he (Jetley) get there? How far has he gone? What has he achieved?” Sierra Leone Web, News Archives, (Sept. 17, 2000), at <http://www.sierra-leone.org/slnews0900.html>.

124 Mark Tran and Claudia McElroy, *U.N. Failure in Sierra Leone Feeds Recriminations: Foreigners Await Rescuers as Nigeria Sends Troops to Reverse Coup*, GUARDIAN (London), May 29, 1997, at 15.

125 Resolution 1244, *supra* note 64.

maintained that the KFOR should not be seen as an *ex post* ratification of NATO's military action against FRY.¹²⁶ In recognition of a partnership between the U.N. and NATO in the new arrangement, the resolution provides for a joint command regime.¹²⁷ In practical terms, this implies that the line of command and control pursued by NATO during its intervention in Kosovo, and the regime of mandate therein, ceased upon the entering into force of Resolution 1244. This, apart from the fact that the major contributing states to KFOR, the United Kingdom, France and US, are all permanent members of the Security Council, and so is Russia. These states could expectedly resolve any crisis respecting command and control within themselves.

An indication made by Russia and China during the Council's 4011th meeting, or a categorical specification of the command regime in Resolution 1270, was highly desirable in the Sierra Leone situation. Although the Canadian representative referred to the need of all forces to respect UNAMSIL's unified command, this was not adequate due to the present circumstances. The need for a more vigorous demarcation of command structure was all the more compelling in the light of the perceived excessive use of force by ECOMOG troops against one of the parties to the Sierra Leone conflict. Unarguably, ECOWAS had used force markedly disproportionate to the type associated with peacekeeping operations during the first phase of the intervention. It is through such a use of force that it had reinstated the government of Tejan Kabbah in 1997. While the ends of that unauthorized use of force could be regarded as a laudable achievement in itself, this cannot obviate the fact that the means for accomplishing it was in total disregard of both the U.N. Charter and customary principles of peacekeeping.

Thus, whether ECOWAS viewed the first phase of its intervention in Sierra Leone as a peacekeeping operation *per se*, or an enforcement action, a huge question mark hangs over the legality of its use of force to restore Kabbah. Regional arrangements may not undertake enforcement action without the authorization of the Security Council.¹²⁸ When such arrangements are operating in a peacekeeping version, the use of force is forbidden except in self-defense. At the material time, ECOWAS' collective security activities were still governed by its previous protocols and customary rules of peacekeeping. Under both regimes, it observed its obligations under the Chapter VIII of the U.N. Charter, and its action during those times would be measured in accordance with those laws.

126 See the views of Russia and China in the debate leading to the adoption of Resolution 1244, in the 4011th of the Security Council, 10 June 1999.

127 Resolution 1244, *supra* note 64, at 6.

128 U.N. Charter art. 53, para. 1.

In these circumstances, the sub-regional alliance could not be regarded as having pursued a pure peacekeeping mandate during the first phase of its intervention, for it had compromised its impartiality. If there was any doubt about the real intention of ECOWAS as to how it wanted to pursue the resolution of the Sierra Leone crisis in the second phase, it cleared this when it openly endorsed an enforcement operation during the Abuja meeting. This could only mean one thing then: that from the start of the second phase of its intervention in Sierra Leone, the vision of ECOWAS greatly differed from that of the U.N.

D. How may the U.N. Tackle the Problem of Command and Control in Joint Operations?

It is to be expected that the problem of command of troops and the political control of their action would be more pervasive in situations where the largest providing states in a joint operation are not in command of the U.N. mission in a region where they have major influence.¹²⁹ One possible way of minimizing this problem would be for the U.N. to be more precise in its resolutions, about its relationship with a regional arrangement already mediating in a conflict prior to its involvement.

To this end, adopting Resolution 1270 under Chapter VIII, as it did under Resolution 1132, would have put ECOMOG squarely under the U.N.'s direct authority. Legally speaking though, the absence of such direct subordination of ECOWAS to the U.N. command regime by means of a resolution should not really matter, since, in any case, Article 54 of the U.N. Charter obligates regional arrangements to report all activities they undertake or contemplate.

However, by the time ECOWAS accepted to return to Sierra Leone, a huge cloud already hung over its readiness and willingness to abide by its obligation under Article 54, or any of the provisions of Chapter VIII of the U.N. Charter for that matter. Upon adopting a new protocol, ECOWAS charted an independent regime of collective security and arrogated to itself all the legal apparatuses of that institution.

Aside from a possible clarification of relationship by means of its enabling resolutions, the U.N. could have reduced the potential areas of collision between its mission and that of ECOWAS in yet another way. Where a regional arrangement stipulates a mandate different from that pursued by the U.N., as a condition for its participation in an operation, it is suggested that the U.N. should not encourage or entertain, as the case may be, the participation of such an organization. This is especially necessary where troops from the member states of the organizations are expected to form part of the U.N. mission. However,

¹²⁹ Tim Butcher & George Jones, *British Troops Face UN Threat To Shoot*, DAILY TELEGRAPH (London), May 16, 2000, at 1.

such a decision should not preclude the participation of member states of that organization as may be interested in joining the U.N. mission in their own right.

Had the U.N. rejected ECOWAS' proposal to retain the command of troops contributed to UNAMSIL by its member states as a condition for further participation in Sierra Leone, two major problems would have been averted. Firstly, there would not have been operational incoherence, which constantly resulted from ECOWAS implementing a robust mandate as against the U.N.'s peacekeeping one. Divergent mandates would necessarily elicit different implementation methods and this, inevitably, will adversely affect the coherence of the command of troops. Secondly, had there been a unified mandate, the mission in Sierra Leone would have been implemented solely in accordance with the principles of the U.N. Charter and general international law governing collective security. In the instant case, the decisions, mandate and operations of ECOWAS, concerning the second phase of its intervention in the Sierra Leone crisis, entirely originated from its Protocol.

Clear and precise mandates will undoubtedly help in securing a more concerted effort early in the mission's life. Conversely, multiple mandates will widen areas of tensions between the U.N. and other regional arrangements, on the one hand, and between all states participating in the operation, on the other. For instance, when the British first deployed to Sierra Leone they consistently maintained that they were in that country only to rescue their and other Commonwealth nationals trapped therein.¹³⁰ Soon thereafter other reasons began to emerge.¹³¹ However, the British clearly indicated that they would always remain under their own command.¹³²

Although there might be, as it was in Sierra Leone, a dovetailing of efforts at a later stage in the course of an operation with multiple mandates, it is potentially dangerous for the U.N. to permit member states to implement separate mandates alongside its own operation in the same conflict. At the very least, this development could warrant negative implications. It could discourage other states from joining the mission, and for those already participating, it might hasten a decision to withdraw. A clear example is the persistent complaint by the UNAMSIL Jordanian contingent that unless NATO member states join UNAMSIL,

¹³⁰ See the statement of Eldon, the U.K. delegate to the 4139th meeting of the Security Council, *supra* note 53, at 7.

¹³¹ *Id.*

¹³² Kim Sengupta, Colin Brown, & Alex Duval Smith, *Sierra Leone: Britain Set To Give Arms Aid*, INDEPENDENT (London), May 16, 2000, at 1, (reporting that "Secretary of State for Defence, Geoff Hoon, assured the Commons yesterday that British Forces would not be drawn into the escalating war").

they too would withdraw.¹³³ Britain is a NATO member state, but by implementing its own mandate and retaining the command of its troops and control of its mission in Sierra Leone, it operated outside the purview of the UNAMSIL. Certainly, the problem of states implementing individual mandates alongside U.N.'s presence is capable of further fragmenting whatever cohesion seems achievable in the interaction of U.N.-regional arrangements under the auspices of ambiguous resolutions like 1270.

To conclude this part, it is submitted that vague, unclear and divergent mandates are a recipe for operational chaos in the joint implementation of collective security measures. As Sierra Leone demonstrates the effects of lack of coherence, non-clarification of relationship between the U.N. and ECOWAS and divergent mandates are not only felt in the area of command and control, they have deeper impact on the overall well-being of the mission.

Having considered the difficulties experienced by the UNAMSIL in the areas of command and control, the nature of UNAMSIL mandate and its relationship with ECOMOG in the joint implementation of UNAMSIL mandate, we now turn to the effect of ECOWAS' new protocol on the customary rules of peacekeeping.

PART TWO

II. The Effects of ECOWAS' New Protocol on the 'Law' of Peacekeeping

Under its new protocol, ECOWAS no longer requires the consent of any of its member states in order to intervene in their conflicts, whether intra or inter-state. Article 27 of the Protocol dispenses with the rule requiring peacekeeping states to seek and obtain the consent of a concerned state and other parties to a conflict before they could intervene. This article states that "the Mechanism shall be applied according to any of the following procedures."¹³⁴ The procedures empower the Executive Secretary of ECOWAS to "inform Member States of the Mediation and Security Council, and in consultation with the Chairman, take all necessary and urgent measures."¹³⁵

Furthermore, Article 27(b) provides that the Mediation and Security Council (MSC) "shall consider several options and decide on the most appropriate course of action to take in terms of intervention."¹³⁶ Nothing in the entire provision of this Article makes reference to an

133 Sierra Leone Web, News Archives, (Sept. 21, 2000), at <http://www.sierra-leone.org/slnews0900.html>.

134 Protocol, *supra* note 4, at 245.

135 *Id.*

136 *Id.*

invitation by the Host State or any other conflicting party as a *sine qua non* for ECOWAS intervention. Significant too is the first part of the latter provision that the MSC shall consider several options. This could very well be interpreted to mean that the MSC is not bound on a particular course of action, for instance, such that the affected state may particularly favor. Apart from that, it appears that the MSC is the main originator of the process of intervention in contradistinction from traditional peacekeeping where the government of the Host State is expected to ask for or accept an offer of assistance from outsiders.

The legal ramification of this provision raises fundamental questions about regional interventions and the law of peacekeeping. *Prima facie*, this provision transforms ECOWAS into a super organization which is not only competent to intervene in the affairs of member states, but is entirely at liberty to decide on when to intervene, how to intervene, and in which crises it will intervene.

In contrast to Article 27 of the ECOWAS Protocol, Article 16 of the PMAD, under which ECOWAS intervention in Sierra Leone (phase one) was conducted, codified the relatively stable customary rule on invitation or consent by Host State. That provision states that "when an external armed threat or aggression is directed against a Member State of the Community, the Head of State of the country shall send a written request for assistance to the current Chairman of the Authority of ECOWAS, with copies to other Members. This request shall mean that the Authority is duly notified and that the AAFC are placed under a state of emergency. The Authority shall decide in accordance with the emergency procedure as stipulated in Article 6."¹³⁷

Although controversy has arisen about whether the invitation sent by Samuel Doe at the outbreak of the Liberian crisis, or that sent by Tejan Kabbah to ECOWAS from Guinea, met the formal requirement of this article,¹³⁸ it has been observed that the institutional structures of regional arrangements are not meant to be exclusive.¹³⁹ Hence, mere non-compliance with the strict formality of a procedure, without more, should not be regarded as invalidating the process in itself, provided, de

¹³⁷ PMAD, *supra* note 9.

¹³⁸ C. GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE*, 213 (Oxford Univ. Press) (2000) (noting that "it is clear that the normal decision-making processes of ECOWAS were not followed"); Kofi Oteng Kufor, *The Legality of the Intervention in the Liberian Civil War by the Economic Community of West African States*, 5 RADIC 525, 538 (1993) (arguing particularly that "[t]he decision making process was subverted").

¹³⁹ Georg Nolte, *Restoring Peace by Regional Action*, 23 ZAÖRV 53/3 602, 615 (1993) (Arguing that "[e]xisting precedents show that the institutional aspects of collective security arrangements are normally not meant to be exclusive").

minimis, there is conformity with the fundamental element of the requirement: that there must be an invitation.

For example, the Arab League operated the Arab Deterrent Force in Lebanon between 1976 and 1983¹⁴⁰ without complying with the institutional structure provided for by the Treaty of Joint Defense and Economic Cooperation. Also, the U.N. has always implemented the provisions of Chapter VII of its Charter without complying with the procedural mechanism of Article 43.¹⁴¹ It would be incredulous to argue that such U.N. actions against North Korea and Iraq were invalid simply because the actions were not implemented by the troops that were contemplated by Article 43 of the U.N. Charter. Such defects, it is submitted, are of form not of substance.

However, legally speaking, a distinction is to be made between a mere non-compliance with the formality of a normative rule and the absence of the constitutive elements of an action when considering its validity in international law. In the second phase of the Sierra Leone crisis, ECOWAS applied a provision that did not require the consent of conflicting parties before its intervention. The question that arises thus is, in the aftermath of the ECOWAS Protocol, wither the rule of peacekeeping on host state consent?

A. Did ECOWAS' new Protocol Terminate the Right of Host State to Invite Intervention Under International Law?

It is trite that there is no specific provision of the U.N. Charter that regulates peacekeeping operations whether undertaken by the U.N. or by regional arrangements. Whereas the legal rules governing enforcement action are to be found in the U.N. Charter, especially Chapter VII and Chapter VIII, the 'law' of peacekeeping has evolved mainly through practice by the U.N., individual states and regional arrangements.

Through practice, certain constant and pervasive features of peacekeeping operations have come to be regarded as constituting the 'law' on peacekeeping. These include the principle that peacekeeping operations cannot be used to affect the outcome of a conflict. This principle is guaranteed by the requirement that peacekeepers must

140 For an analysis of the role played by Arab League in the Middle East, see I. O. Pogany, *The Arab League and Regional Peacekeeping*, 34 NILR 54, 54-74 (1987) (discussing the Arab Deterrent Force in Lebanon).

141 The International Court of Justice, in the *Certain Expenses Case*, observed that such forces have their legal basis in the U.N. Charter since they were designed "for the fulfilment of one of the stated purpose of the United Nations." The Court held further that this function created "the presumption that such action is not ultra vires the Organization." *Certain Expenses of the United Nations*, 1962 I.C.J. 151 at 167-168.

remain, at all times, neutral. They may not intervene in a crisis, except with the invitation of parties to the crisis,¹⁴² or use force except in self-defense.¹⁴³ They must remain permanently impartial throughout the duration of an operation.¹⁴⁴ Although there have been instances when some or all of these principles have been compromised by peacekeepers, there is yet a strong consensus among writers and states that these principles constitute the very foundation of peacekeeping operations.

Although it is true that consent of an affected state and other parties to a conflict must be sought and obtained by peacekeeping states before intervening in conflicts, there is no requirement that this consent must be express or, at all times, prior, to intervention.¹⁴⁵ And while it is reasonable to expect that consent will precede intervention, state practice is generally uncertain in this regard, and as such, we cannot rule out further developments. While a prior invitation is practically desirable and reduces the risk of abuses and meddlesomeness, this has not been possible in some circumstances, especially where there are several parties to a conflict. Therefore, in certain circumstances, the existence of consent may be inferred and could be obtained after the commencement of intervention.

In Liberia, the Charles Taylor-led National Patriotic Movement of Liberia (NPFL) did not give its consent expressly before ECOWAS deployed its monitoring group (ECOMOG) to Liberia and, in fact, violently opposed its presence at the early stages. Nevertheless, it subsequently tolerated ECOWAS, participated in the Yamoussoukro Accord IV and agreed to a cease-fire among all the parties. This suggests that, even though the consent of a party to a conflict might not have been

142 Dag Hammarskjöld, the U.N. Secretary-General under whose leadership the idea of peacekeeping operations was hatched, once pointed out to the Advisory Committee of the U.N. that "the very basis and starting point of this effort (UNEF) was the 'recognition of the General Assembly of the unlimited sovereign rights of Egypt'." See FRYE, A. A UNITED NATIONS FORCE 15 (date unknown).

143 But see Dan Ciobanu, *The Power Of The Security Council To Organize Peace-Keeping Operations*, *United Nations Peace-Keeping: LEGAL ESSAYS* 19, (A. Cassese, ed., Alphen Aan Den Rijn: Sijhoff & Noordhoff 1978) (arguing that "the use of force is not entirely excluded from the carrying out of the peace-keeping operations").

144 See LARRY L. FABIAN, *SOLDIERS WITHOUT ENEMIES: PREPARING THE UNITED NATIONS FOR PEACEKEEPING*, 16 (Brookings Institution 1971); D. WAINHOUSE, *INTERNATIONAL PEACEKEEPING AT THE CROSSROADS*, 1 (Johns Hopkins Univ. Press 1973); I. RIKHYE et al, *THE THIN BLUE LINE: INTERNATIONAL PEACEKEEPING AND ITS FUTURE*, 10 (Yale Univ. Press 1974); I. RIKHYE, *THE THEORY AND PRACTICE OF PEACEKEEPING*, 57 (St. Martin's Press 1984) cited in Pogany, *supra* note 139, at 57, note 19.

145 See for instance Pogany, *supra* note 139, at 57, arguing that "in terms of international law, at least some of these requirements may be unnecessarily restrictive."

obtained before deployment, it is possible to gain this consent at a later stage by necessary implication.

Conversely, an expressly or implicitly given consent may be withdrawn by overt means or by the conduct of one or all the parties to the disputes. Thus, when Charles Taylor eventually turned its fire on ECOMOG troops, and later, on the UNOMIL, this clearly indicated a withdrawal of the implicit consent given by the NPFL by necessary implication. On the contrary, when confronted with the possible invasion of his country by Israel, President Abdel Nasser of Egypt expressly withdrew his consent to the deployment of U.N. troops in the Sinai area.¹⁴⁶

However, the scenario in Sierra Leone is much more complex, and cannot be easily regarded as a case of implicit consent as the one in Liberia. The truth of the matter is that ECOWAS did not require the consent of the government of Sierra Leone, or that of any of the other conflictual parties, when it decided to return to Sierra Leone. The explicit decision, at the Abuja meeting, to undertake enforcement action overrode any consideration of consent or invitation. This is because, when an operation is declared to be an enforcement action, all the principles of peacekeeping take their leave.

Insofar as Sierra Leone ratified the new protocol, notwithstanding that it purportedly terminates member states' right to formally invite ECOWAS to come into their conflict, this new obligation takes precedence over any customary rule in that respect. Article 26 of the treaty lists five parties who may initiate an intervention upon the outbreak of a conflict. These are: the Authority of Heads of State and Government of ECOWAS, the MSC, a member state, the Executive Secretary of ECOWAS, and the Organization of African Unity or the United Nations.¹⁴⁷ It is interesting to note that the only specification in that article that provides that a member state may request an intervention does not state that such a member state must be the one on whose territory the conflict is occurring. Had that been the intention of ECOWAS, it would have undoubtedly said so in the same vein it stated it under Article 16 of PMAD. It is contended here that the use of the phrase 'a member state' in the new protocol as against 'that country' in PMAD is in line with the overall nature of the treaty. ECOWAS deliberately frees its passage of intervention in a situation where the Member State, being a subject of a conflict refuses to invite an intervention. It means any other member State is not precluded from requesting an intervention.

Thus, it is not implausible to conclude that ECOWAS member states have conceded to ECOWAS the sole authority to decide for them

146 W. DURCH, *THE EVOLUTION OF UN PEACEKEEPING: CASE STUDIES AND COMPARATIVE ANALYSIS*, 124 (St. Martin's Press 1993).

147 Protocol, *supra* note 4, at 245.

when to intervene in their intra and inter state conflicts and the means by which it will intervene.

It is submitted further that it is not an aberration in international law for states to bind themselves to this kind of obligation, notwithstanding the apparent effect such might have on their sovereignty. Legal writers of note have expressed the opinion that "the right of intervention may arise as a result of a treaty by which one state, expressly or by implication, consents to intervention for certain purposes by another state."¹⁴⁸ Sierra Leone did, not only agree under the new Protocol that ECOWAS could come into its territory in the manner already discussed, it also agreed to pre-determined occasions that might lead to such interventions. These are the circumstances enumerated in Article 25 of the Protocol as constituting the *casu foederis* for ECOWAS action.¹⁴⁹ Thus, by agreeing in advance that ECOWAS may intervene in certain times in specific crises affecting member states, these states waive their 'customary' right to specifically invite ECOWAS intervention in terms of crises.

It is contended that no rule of international law governing peacekeeping operations forbids the coming together of member states of an international organization for the purpose of giving to the organization in advance, and collectively, a privilege or right they are legally able to give to it individually and when the need arises.

It seems entirely credible that the provision of Article 27, which relates to the procedural application of the Protocol, culminated from ECOWAS' previous practice in Liberia and its experience in the first phase of the Sierra Leone crisis. Thus, it is a perfect instance in which treaty provisions developed from customary international law. The constant practice by ECOWAS intervening in the affairs of member states, with or without clear invitation, would appear to have matured into a situation in which its position as having the *de facto* authority to intervene in West African crises is now a *fait accompli*. The evolution of customs into treaty law is an affirmation of Anthony D'Amato's observation that "if treaties generate customary rules when they come into force, treaties do not "freeze" such customary rules forever. Rather

148 OPPENHEIM, INTERNATIONAL LAW 446 (9th ed. 1992).

149 This article provides that the Protocol shall apply "(a) in cases of aggression or conflict in any Member State or threat thereof; (b) In case of conflict between two or several Member States; (c) In case of internal conflict: (i) that threatens to trigger a humanitarian disaster, or (ii) that poses a serious threat to peace and security in the sub-region; (d) In the event of an overthrow or attempted overthrow of a democratically elected government; (f) Any other situation as may be decided by the Mediation and Security Council. Protocol, *supra* note 4, at 244.

new customary rules may arise out of the practice of states, and these new rules may alter the previous treaty-generated rules."¹⁵⁰

B. Did Sierra Leone and Other ECOWAS States Forever Bind Themselves to ECOWAS Sole Discretion on Intervention in their Affairs?

The next issue that arises for determination is whether, under the new regime, ECOWAS member states perpetually bind themselves by consenting in advance to ECOWAS' intervention in their conflicts. Article 27 of the Protocol seems to warrant an affirmative answer to this question. Indeed, since there is no requirement of any form of invitation in the article, it would appear that the act of consenting in advance by ECOWAS' member states has curtailed their right to decline an intervention by ECOWAS in their conflicts.

The rationale for the non-inclusion of the requirement of invitation or consent in the Protocol indicates that Member States may not terminate ECOWAS missions in their conflicts at will, or prevent its intervention upon the outbreak of violence. Often, it is difficult to obtain consents from all parties to a conflict. Somalia is a classical example of this. General Farah Aideed refused to give his consent and opposed the intervention by the U.N. from the outset. Furthermore, despite the claim by ECOWAS that it was invited by Samuel Doe into Liberia, the fact that ECOWAS did not obtain the consent of the de facto ruler of Liberia at the relevant time, Charles Taylor, cast a long shadow over the legality of that action. In addition, even where consent of all parties is obtained before deployment of troops, sustaining the consent to the very end of the conflict is quite problematic. In the Suez Canal crisis, UNEF pulled out because Egypt withdrew its consent.

ECOWAS was clearly unwilling to subject its ability to police its hemisphere to the whims and caprices of conflictual parties who cannot always be expected to be enthusiastic of ECOWAS' intervention bid. Experience in Liberia, where Charles Taylor's NPFL and Sierra Leone where the RUF consistently opposed ECOWAS actions means that rebel factions will always use their consent as a trump card whenever ECOWAS chooses a path different from their dictates. Apart from that, obtaining consent in advance will go a long way in helping ECOWAS to deal not only with conflictual parties, but also certain of its member states acting against their collective decision. In the Liberia crisis for instance, Côte d'Ivoire and Burkina Faso were alleged to be acting against the collective interest of the organization by siding with the rebels.¹⁵¹ During the Liberia crisis these countries did not consent to

150 A. D'Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 AJIL 516, 523 (1993).

151 Communiqué, *supra* note 33.

ECOWAS action although they did not explicitly oppose it. With advance consent in place, it is legally difficult for states to prevent ECOWAS intervention by withholding their consents, except, of course, if such is implemented at the level of the Authority decision.

Nevertheless, it is yet difficult to argue that when ECOWAS member states ratified the new protocol in November 1999 they, for all intents and purposes, intended to bind themselves forevermore to ECOWAS' sole authority to intervene in members' conflicts. Article 91 of the Revised treaty of ECOWAS states that "Any Member State wishing to withdraw from the Community shall give to the Executive Secretary one year's notice in writing who shall inform Member States thereof. At the expiration of this period, if such notice is not withdrawn, such a State shall cease to be a member of the Community." In accordance with this provision, a member State not willing to accept ECOWAS intervention in a conflict occurring within its territory, or between it and another state, is legally able to withdraw from the Organization. Upon such withdrawal, ECOWAS cannot legally intervene in such conflict even if it threatens the peace and security of the region.

The provision of Article 91 however raises one practical problem. The duration between the serving of a notice and the notice maturing into an effective withdrawal is one year. A notice served is thus not effective until after the expiration of this period. Could ECOWAS then continue its plan to intervene, or its intervention, in a conflict affecting a member state which has served a withdrawal notice under that article, but which notice has not matured into an effective withdrawal? The question is answered by the second paragraph of Article 91. This states that "[d]uring the period of one year referred to in the preceding paragraph, such a Member State shall continue to comply with the provisions of this Treaty and shall remain bound to discharge its obligation under this Treaty."

This provision is extremely significant concerning the inquiry whether ECOWAS states perpetually bind themselves to the obligation to entertain intervention by the organization in their conflicts. Article 91(2) binds member states to their obligations under the ECOWAS constituent treaty of 1975 as revised. The Protocol was adopted in conformity with the provisions of Article 58 of the constituent treaty of ECOWAS, which imposes an obligation of the nature in question on member states.¹⁵² Thus, the obligation incurred under the constituent treaty extends to the obligation assumed under the subsequent treaties. In

¹⁵² Article 58 of the Revised Treaty states that "member States undertake to work to safeguard and consolidate relations conducive to the maintenance of peace, stability and security within their region. In pursuit of these objectives, member States undertake to co-operate with the Community in establishing and strengthening appropriate mechanisms for the timely prevention and resolution of intra-State and inter-State conflicts." Revised Treaty, *supra* note 1.

addition, the terms of Article 91(2) are mandatory and not open to the discretion of member states. It states that such a member state shall continue to comply with the provisions and shall remain bound to discharge its obligation under the treaty. Although it may prove practically difficult for ECOWAS to be able to enforce the terms of this provision against a state that has served a notice of withdrawal on the organization, this does not affect the import of that provision. During the pendency of the notice to withdraw, a state is theoretically bound to accept ECOWAS intervention.

The Rules of Procedure of the Mediation and Security Council¹⁵³ may, in practice, become the only procedural solution to the problem of member states which are unwilling to remain bound to their obligation under the Protocol. By virtue of Article 34 of the Rules, "a member of the Security Council may move that the consideration of [a] matters be postponed." This provision however only avails a state which is a member of the MSC. Where a reluctant state is not a member of the MSC, it may act to stop the consideration of a proposal to intervene in its conflict under Article 30 of the Rules. Under this article,

Where an objection is recorded on behalf of a member State to a proposal submitted for the decision of the Security Council, the proposal shall, unless such objection is withdrawn, be referred by the Ambassadors to the Ministerial meeting and to the meeting of Heads of State and Government if emanating from a meeting of Ministers.

Thus, it is submitted that notwithstanding the stringent terms of Article 91(2), a member state which is unwilling to accept an intervention by ECOWAS in its conflict may prevent such intervention by raising a preliminary objection before the proposal is considered by the MSC. Should the latter fail to resolve the matter, a final recourse is to be had to the Authority of Heads of States and Government on which the head of state of the concerned state sits whether or not his or her state is a member of the MSC.

In Sierra Leone, for example, the government was able to regulate the activities of ECOWAS and UNOMSIL through letters issued by its president to the Security Council demarcating the responsibilities of the two organizations on its soil. Had Sierra Leone had any reason to reject ECOWAS intervention, it would either have expressly said so during the ECOWAS summit that preceded its return to Sierra Leone, or would have served a withdrawal notice under Article 91 of the new protocol which had entered into effect at the relevant time. While it is admitted that the procedures by which a reluctant state may wriggle out off what looks like a perpetual obligation under the new protocol, it is submitted that the matter would be resolved procedurally.

¹⁵³ On file with author.

CONCLUSION

The *joint* implementation of Resolution 1270 by UNAMSIL and ECOMOG forces highlights the many problems that attend to this kind of action. One lesson the Sierra Leone experiment does teach is that the last is yet to be seen as to the development of new trends by regional arrangements. It seems appropriate thus to observe that it is too early in the day to arrive at definitive conclusions about the nature of relationship between the U.N. and regional organizations. It should not always be assumed, as most analysts of regional collective security tend to do, that once the U.N. peacekeepers are afield and are joined by the forces of a regional organization, then the collective security equation is automatically tantamount to a peacekeeping action. It is urged that each action, each operation that involves two or more organizations should be assessed in accordance with the particular facts and dynamics of the case. A generic assumption about joint operations may obliterate evolving trends as Sierra Leone clearly demonstrates.

The U.N. Charter codifies, amongst other things, the laws of armed conflict and use of force. States implement those laws. It is this implementation of these laws that is referred to as collective security. Whilst states incur certain obligations under the Charter, the Charter has not carved how states may apply its laws in stone. The Charter is an evolutionary document with ample life in its lungs still. States, through their practice, must make meaning out of Charter provisions. Whilst a single act by a regional arrangement may not constitute an acceptable departure from the Charter norm, a recurrent pattern of events, even by a single regional arrangement may be signaling a new trend in how states perceive a particular provision of the U.N. Charter.

The Charter prescribes, but states apply. In this application, states have their own assessment of the Charter laws, as to their adequacy or otherwise to specific scenarios. When states perceive the need, they adopt other treaties which may complement the Charter or depart from it. ECOWAS did. Whether one perceives the ECOWAS Protocol as complementing or departing from the Charter is up to individual assessment. But what is undoubted is that the provisions of that treaty signal a new development in the law and practice of regional collective security.

The U.N. must adjust to new trends in the regional collective security system. Obstinate adherence to classical notions could only lead to further complexities. Peacekeeping developed because the centralized collective security machinery of the Chapter VII of the U.N. Charter could not be realized. Since the end of the Cold War, the world has witnessed a momentous involvement of regional arrangements in collective security. Can the U.N., then, afford to stay faithful to classical notions of peacekeeping, which evolved in response to the circumstances of the 1950s?

In Sierra Leone, the U.N. stuck to a peacekeeping mandate in a situation where there was no peace to keep. Yet, it accepted to work in conjunction with an organization which is committed to enforcement action. Divergent mandates are a recipe for disaster. The relationship between UNAMSIL and ECOMOG attests to that much. Unclear regime of command and control in joint missions is all that is required for the forces to pull in different directions. If there was any lesson the U.N. must learn from this so-called joint-peacekeeping, it is that in reality the action was neither *joint* nor a substantial part of it *peacekeeping*.

The law of peacekeeping develops through the practice of its practitioners. Regional arrangements are one of the most legitimate practitioners of peacekeeping. ECOWAS pioneered joint-peacekeeping operations. It is undoubtedly one of the most active regional arrangements since the end of the Cold War. As such, its recent trends—a wider conception of peace and security, broader framework of collective security, and a new approach to the rules of peacekeeping—will most likely influence how operations by regional arrangements must be viewed and evaluated in international law henceforth. It is our view that the future of the relationship between the U.N. and regional organization does not lie in the perception that the Charter obligations are immutable, but that a harmonious *modus operandi* can be worked out between the two organizations, even if they must occasionally or at all times operate under different legal regimes.