CHAPTER THREE

THE SECURITY COUNCIL AND ENFORCEMENT MEASURES SHORT OF ARMED FORCE

This Chapter contains an examination of Security Council practice with respect to international law in cases of enforcement measures short of armed force, which can take a multitude of forms. However, the measures taken most frequently by the Council under Article 41 have been either mandatory or recommended sanctions in the wake of more frequent findings of threats to the peace during the 1990s. Initial optimism about the use of particularly economic sanctions as a coercive, non-violent means of attempting to effectuate change in state behaviour has nevertheless waned considerably, as the impact of sanctions on the target population and sometimes on third states has become clear. As early as 1992, the UN Secretary-General observed that sanctions were “a blunt instrument”\(^1\) and that “[t]he Security Council’s greatly increased use of this instrument has brought to light a number of difficulties, relating especially to the objectives of sanctions, the monitoring of their application and impact, and their unintended effects”.\(^2\) Consequently, issues of so-called ‘collateral damage’ have led to increased debate on the efficacy of sanctions and on ways to improve sanction regimes. However, within governmental and UN circles the debate seemed not to focus on the legal implications of the use of sanctions and collateral damage. As O’Connell observes, it was within the community of international lawyers that the legal debate was started in a forward-looking manner.\(^3\) Nonetheless, the Security Council has also taken innovative steps to combat threats to the peace by establishing two ad hoc international criminal tribunals for the prosecution of serious violations of international humanitarian law. Moreover, as discussed in Chapter 2, the Council has increasingly involved itself in efforts to combat terrorism, and it has done so

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\(^1\) UN Doc. S/24111, 17 June 1992, at para. 70.
\(^2\) Id., at para. 67.
\(^3\) O’Connell (2002: 63, 69).
through the imposition not only of collective sanctions, but also of general measures that are not aimed at changing the behaviour of a certain state or (group of) individual(s). These enforcement measures are prima facie at odds with the executive nature of the Security Council’s powers and functions. In this Chapter, it is examined whether the Security Council, in accordance with the principle of legality, has taken into account issues of international law, including its own competences, arising from the imposition of the types of enforcement measures mentioned above.

3.1 Preliminaries

As in other Chapters, some preliminary matters are discussed that constitute the theoretical framework for the detailed discussion of Security Council practice. Thus, in this section the authority of the Council to impose enforcement measures short of armed force is discussed, as well as the law applicable to such measures and the pré-1990 practice of the Security Council.

3.1.1 Authority, objectives and the concept of ‘sanction’

The Security Council is granted the authority to impose sanctions, or rather, “measures not involving the use of armed force,” in Article 41 in conjunction with Article 39 of the Charter. Having determined under Article 39 that a particular situation constitutes a threat to peace, breach of the peace or an act of aggression, the Council may take a range of measures, unspecified by either. Ostensibly, these measures are intended to enforce demands made by the Council to remove the threat to peace, restore the peace or counter the act of aggression. The authority of the Security Council to take enforcement measures is seen as an essential element in the collective system, and is an improvement on Article 16(1) of the Covenant of the League of Nations. On the basis of Article 25 and the distinction made in Article 39 between recommendations and the decision to take other measures, UN member states are under the legal obligation to implement the measures decided upon by the Security Council. The question that may be raised is whether the Council’s authority can also be derived from Article 24, which sets out its general responsibility and which is the source of its implied powers.

Article 41 states that measures short of armed force “may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of

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