In the January 2001 issue of this Journal, Michael Matheson analyzed the Security Council's expanding role in administering (or, to use his term, governing) postconflict societies, focusing particularly on Kosovo and East Timor. If the Security Council honors the principles in Article 2 of the United Nations Charter and complies with the appropriate procedural requirements, he says, 

there can in fact be situations in which the Security Council would be justified in directing a permanent change in some aspect of the status, boundaries, political structure, or legal system of territory within a state, if the Council should determine that doing so is necessary to restore and maintain international peace and security. 

Matheson recognizes that Article 2(7) of the Charter precludes UN intervention in matters that are essentially within the domestic jurisdiction of any state. Rather than argue that the kinds of change he advocates are not essentially encompassed by the domestic jurisdiction of a state, he relies on the exclusion contained in Article 2(7) for the application of "enforcement measures under Chapter VII." 

Unquestionably, a great many governmental policies and courses of conduct that were widely thought to be within the "domestic jurisdiction" of states in 1945 are no longer so regarded. The primary examples are found in the category of human rights, and one of the changes Matheson contemplates--nullification of discriminatory restrictions--falls within that genre. Perhaps, in some cases, a guarantee of autonomy would also fall there (as a measure effectuating a right of self-determination), but the proper contours of the right of self-determination are still open to intense debate. A
change in a state's territorial boundaries cannot be considered "domestic" in the sense of a strictly internal matter, but (as with matters of sovereignty) states view the manipulation of boundaries from outside with extreme sensitivity. n4

If one relies, as Matheson does, on the exclusion in Article 2(7) for Chapter VII enforcement measures, it could be asked whether every measure the Council applies after invoking [*580] Chapter VII is an "enforcement measure." Article 50, which is located in Chapter VII, seems to distinguish between preventive and enforcement measures. n5 Similarly, Article 2(5) refers to "preventive or enforcement action." n6 A leading commentary on the Charter treats "preventive" and "enforcement" action in Article 2(5) as separate, though related, categories. n7 In An Agenda for Peace, former UN Secretary-General Boutros Boutros-Ghali deals with preventive measures and enforcement measures separately, and does not contemplate the use of Chapter VII for postconflict peace building. n8 If the governance measures Matheson envisages were regarded as for "preventive" rather than "enforcement" purposes, one could argue that the proviso in Article 2(7) would not apply.

However that may be, once the Security Council decides to invoke Chapter VII, any avenues for legal challenge are extremely narrow, if not altogether blocked. After all, the drafters of the UN Charter consciously omitted any provision for judicial review, and regarded it as inevitable that each organ would interpret the provisions of the Charter relating to its own functions--though the International Court of Justice could be asked for advisory opinions interpreting the Charter. n9 Even if a majority in the General Assembly requests an advisory opinion on an extension of the Security Council's governance powers, it is hardly a foregone conclusion that the Court would declare that specific measures the Council has adopted under the banner of Chapter VII are ultra vires. n10 As for the allocation of authority within the Organization, if any organ has the authority to impose governance measures on a member state, it is the Security Council. Thus, the Council, by its practice, might well continue to expand its powers in the postconflict context. n11

If the Council does expand its authority into this realm, it should demonstrate that it is taking seriously its responsibility under Article 39 to determine, in good faith, the existence of an actual threat to the peace (if there is no obvious breach of the peace or act of aggression). n12 But merely saying that there is a threat to the peace will not make it so. Article 39 calls on the Council to make a determination, not just a recitation. The Charter does not mandate any process for making this determination. Nevertheless, to fulfill the good faith requirement and to address legitimacy concerns, the Council should engage in a demonstrably genuine assessment of the situation and the available options before it decides to impose permanent governance measures on a postconflict society (or on any society, for that matter).

[*581] The first Admissions case shows that there is a legal requirement to act in good faith. Referring to the factors member states may legitimately consider in making decisions on the admission of new states to the United Nations, the ICJ said, "Article 4 does not forbid the taking into account of any factor which it is possible reasonably and in good faith to connect with the conditions laid down in that Article." n13 The Court was referring to the member states rather than the Organization as such, but the member states make the decisions for the Organization. The Admissions case did not deal with Article 39, but there is no reason to suppose that the good faith principle would evaporate somewhere between Articles 4 and 39. The principle is difficult to define n14 and leaves a great deal of discretion to those to whom it applies (especially to the Security Council when it exercises its principal function under the Charter); but at the very least, the principle seems to require the Council to act responsibly when it carries out its Charter-based functions. As Thomas Franck has put it:

Substantively, "enforcement measures" may be taken whenever the requisite Council majority is convinced that there exists "any threat to the peace, breach of the peace, or act of aggression," for which such remedies are appropriate. It is apparent that the Council has broad discretion, but that it is to be exercised bona fide and intra vires, in accordance with [the] specific procedural and substantive standards spelled out in the Charter. The substantive standard is particularly important because it legitimates what would otherwise be an open-ended, indeed wholly arbitrary, vitiation of the central purpose of Article 2(7), namely the protection of member states' sovereignty from interference in essentially internal matters at the whim of the Organization's majority. n15

When the Council has been able to muster enough agreement within its ranks to impose sanctions on a state, it has generally adopted a resolution that simply mentions its concerns about the situation, proclaims that the situation constitutes a threat to peace and security, and culminates in relying on Chapter VII to authorize enforcement measures or to demand that the offending political body mend its ways. n16 One suspects that the decision to take action is made first, and that the justifying Chapter VII language is then inserted in the resolution as a matter of form. This is not a serious problem if the need for action is urgent and the action to be taken is designed simply to deal with the immediate situa-
tion. But the mere recitation of the Chapter VII mantra does constitute a serious problem if the proposed measures are of the sort Matheson contemplated.

When the need for action is not obvious and immediate, and the options being considered include action that could have long-term effects on the political structure or geography of the targeted country, the Council should adopt a two-step process before it invokes its Chapter VII authority. In doing so, it should make use of Rule 28 of its Provisional Rules of Procedure, which allows it to "appoint a commission or committee or a rapporteur for a specified question." n17 First, it should conduct a genuine investigation into the relevant facts. The purpose of the investigation would be to ascertain whether there is a real threat to the peace, and to articulate just what it is. Second, the Council should seriously evaluate alternative solutions, using expert opinions as to the gravity of the threat to the peace and the possible effects of alternative courses of action. The purpose would be to select the course of action with the most favorable ratio of potential benefits to potential costs, taking externalities into account.

[*582] The externalities—unintended or incidental effects on persons or institutions not directly the objects of the proposed measures—could fall on either the benefit or the cost side. An externality on the benefit side might be the deterrent effect strong measures could have on conflict-prone groups outside the state or region in question. On the cost side it would be any adverse effect the measures would have on ordinary citizens who would be displaced or otherwise disadvantaged by the measures.

Once these steps have been taken, the Council could make an informed judgment on whether to invoke Chapter VII. If it decides to do so, it can tailor the preventive or enforcement measures to the situation. Moreover, it can demonstrate to the international community that it has acted responsibly. Good faith and the dictates of legitimacy require no less.

**Legal Topics:**

For related research and practice materials, see the following legal topics:
Criminal Law & Procedure
Criminal Offenses
Miscellaneous Offenses
Disruptive Conduct
Disorderly Conduct & Disturbing the Peace
General Overview
Governments
Local Governments
Charters
International Law
Dispute Resolution
Tribunals

**FOOTNOTES:**

n1 Michael J. Matheson, *United Nations Governance of Postconflict Societies, 95 AJIL 76 (2001).*

n2 *Id. at 85.* Matheson went on to give some examples:

The Council might reasonably find that a change in the boundaries of a state is necessary to give its neighbors better security against a repetition of armed attack; or that a guarantee of autonomy to a particular part of a state's territory or population is necessary to avoid a repetition of civil conflict that would threaten the peace of the region; or that the permanent nullification of discriminatory restrictions on one population group is necessary to bring such a conflict to an end.

*Id.*

n3 *Id. at 84.*

n4 The closest the Security Council has come to imposing territorial boundaries on a state was its decision to demarcate the Iraq-Kuwait boundary under SC Res. 687, UN SCOR, 46th Sess., Res. & Dec., at 11, paras. 2-4, UN Doc. S/INF/47 (1991), *reprinted in 30 ILM 847 (1991),* but the Council merely undertook to give precision to the boundary mentioned in "Agreed Minutes" already concluded between the two states. Agreed Minutes, Oct. 4, 1963, Kuwait-Iraq, 485 UNTS 326. Iraq had accepted Resolution 687 under protest, UN Doc.
S/22456 (1991), but later agreed to recognize the borders of Kuwait as demarcated pursuant to Resolution 687. N.Y. TIMES, Nov. 11, 1994, at A1.

n5 UN CHARTER Article 50 provides:

If preventive or enforcement measures against any state are taken by the Security Council, any other state . . . which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.

n6 Id., Article 2(5) provides: "All Members . . . shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action."


n10 The Court has said that "when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not ultra vires the Organization." Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory Opinion, 1962 ICJ REP. 151, 168 (July 20). This is not to say that the Court should always refrain from declaring such action ultra vires. See Thomas M. Franck, The United Nations as Guarantor of International Peace and Security: Past, Present and Future, in THE UNITED NATIONS AT AGE FIFTY 25, 36-37 (Christian Tomuschat ed., 1995).

n11 Any such expansion assumes, of course, that sovereignty-sensitive permanent members of the Council will not veto resolutions imposing permanent governance measures on member states--a large assumption.

n12 Such a determination is a prerequisite for a decision on measures under Chapter VII. Jochen Abr. Frowein, Article 39, in THE CHARTER OF THE UNITED NATIONS, supra note 7, at 605, 613.

n13 Conditions of Admission of a State to Membership in the United Nations (Charter, Article 4), Advisory Opinion, 1948 ICJ REP. 57, 63 (May 28).


ty for this rule is found in UN Charter Article 29: "The Security Council may establish such subsidiary or-
gans as it deems necessary for the performance of its functions."