
AUTHOR
Rahmon Olalekan Yussuf

ABSTRACT
The failure of the League of Nations (‘the League’) is principally attributed to two factors: the ineffectual mechanisms for the maintenance of international peace and security and the non-membership of the United States (‘US’) (Landry, 2012). The League was consequently disbanded unanimously, by the existing member states, having failed to prevent aggressions by or between member states and ultimately the occurrence of another polarized global war of the highest magnitude for which it was formed to prevent. The weakening factors of the League were ostensibly reflected in the constitution of the United Nations (‘UN’) with the incursion of the US into the world international governing system and a positivist prohibition of the use of force against the territorial sovereign or integrity of another state backed by an international collective security system. While Article 2(4) of the UN Charter (‘Charter’) has been widely regarded as the heart of the Charter (Zacklin, 2010), Article 39 has been described as the ‘gateway provision’ (Wilson, 2015) of the Charter and the core provisions of the enforcement techniques for any violation of the international legal obligations on peace and security (Wilson, 2015).

Correspondence Address
Rahmon Olalekan Yussuf, LLM Student, University of Buckingham
Email: olalekan.o.yussuf@gmail.com

INTRODUCTION
The failure of the League of Nations (‘the League’) is principally attributed to two factors: the ineffectual mechanisms for the maintenance of international peace and security\(^1\) and the non-membership of the United States. The text of Article 10 of the Covenant of the League of Nation encouraged a disjointed and or subjective determination of breach of aggression. The legal framework of the League, therefore, provided for loose international peace and security maintenance mechanism which reposed trust in the member states to restrain from use of force without any prescriptive measures or consequence for violation. This may be due to the naturalist approach to the international law and relations, such as ‘just war’ philosophy and Kant’s recommendation of a league of nations whose member voluntarily renounce wars, that was prevalent at the time of formulation of League in 1919 contrary to the positivist background of the UN Charter, built on the failure of the League. See, Covenant of the League of Nations 1919, art 10: ‘[T]he Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.’
The League was consequently disbanded unanimously, by the existing member states, having failed to prevent aggressions\(^3\) by or between member states and ultimately the occurrence of another polarized global war of the highest magnitude for which it was formed to prevent. The weakening factors of the League were ostensibly reflected in the constitution\(^1\) of the United Nations (‘UN’) with the incursion of the US into the world international governing system and a positivist prohibition of the use of force against the territorial sovereign or integrity of another state backed by an international collective security system. While Article 2(4) of the UN Charter (‘Charter’) has been widely regarded as the heart of the Charter (Zacklin, 2010), Article 39 has been described as the ‘gateway provision’ (Wilson, 2015) of the Charter and the core provisions of the enforcement techniques for any violation of the international legal obligations on peace and security (Wilson, 2015).

This paper, divided into different subheadings, will examine the precise or literal situations in which the power and or executory duties of the UN Security Council (‘Security Council’ or ‘UNSC’ or ‘Council’) under Article 39 of the Charter can be triggered. The paper will equally review the manner in which the aforesaid power has been interpreted over the years as well as the flexibility of Article 39 particularly the ‘threat to peace’ threshold to address the emerging threats to international peace and security. It is argued that the initial clog to the operation of the power of the UNSC occasioned by political polarization between the permanent members of the council has dwindled considerably in recent time thereby enabling objective application or invocation of the power of the council under Article 39 in the collective interest of international community as against the parochial debate in the earlier years of the UN.

It is further argued that the inconsistent interpretation adopted by the UNSC in the earlier years of the UN, mainly due to partisan international relations, had weakened or created doubt in the collective security system though several proactive interpretations and critical interventions have been made by the UNSC in the later years. Ultimately, the paper hypothesis shall be that the interpretation of the provisions of the Article ought to be broadened in view of the dynamics of the modern threat to international peace and security particularly in view of the sophisticated weaponry and technological operations that has relegated the conventional warfare to the background. It will be demonstrated that collective security system under the Charter is a reflection of the positivist thought that permeates the modern international legal system.

**THE CONTEXT OF ARTICLE 39 OF THE UN CHARTER**

The lessons learnt from the failure of the League in terms of a loose mechanism for the maintenance of international peace and security has been rectified by an express statutory prohibition of threat or use of force except as provided in the Charter (Berheim, 1985).\(^4\) The independent approach under the Covenant of the League is now replaced with a system of unified international order by which an aggressor is punished by all (Shaw, 2014). The purpose of the provisions of Article 2(4) and the entire Chapter VII of the Charter is to create a collective security system under which the Security Council is empowered to determine threat or breach of international peace and security as well as acts of aggression, and to take appropriate measure to restore international peace and security in case of impairment (Malanczuk, 1997).\(^5\) It is imperative

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\(^{1}\) Reference to ‘constitution’ here means the formulation of the UN by wider participants on one hand, and the legal framework of the UN in form of the provisions of the UN Charter on the other.

\(^{2}\) The failure of the League to effectively deal with the refusal of Japan to return the Chinese territory of Manchuria forcefully annexed in 1933 as well as failure to restrain Italy’s invasion of Abyssinia in 1935 typified the ineffectiveness of the international peace and security maintenance rules of the League.

\(^{3}\) Article 2(4) of the UN Charter expressly prohibits threat or use of force by compelling all member states to ‘…refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state…’ The only permissible exceptions to the restraint on the use of force are actions taken in the exercise of self-defence and the measures in furtherance of provisions of the charter relating to protection of international peace and security. See United Nation Charter ibid arts 2(4), 42, 51, 52, 53.

\(^{4}\) UN Charter (n 6) art 39: ‘[T]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall
to mention, from the outset, that the Security Council is the only organ of the United Nations and the only international body vested with the power to determine questions of international peace and security by virtue of Article 39 and to order any of measures in the following provisions of Chapter VII of the Charter. *A fortiori*, no state(s) is permitted to act unilaterally in defence of international peace and security (Lee, 2015).  
Any such unilateral act shall be *ultra vires* notwithstanding the altruistic notion offered in support of the action (Yoo, 2003).  
The scope of Article 39 of the Charter and the potent of the Security Council’s resolution adopted pursuant to Chapter VII was determined by the International Court of Justice (‘ICJ’) in the *Lockerbie cases* (Plachta, 2001; Shaw, 2014) where the ICJ held that the singular power to take collective measures under chapter VII is vested in the Security Council whose resolution on the duties or power contained in Article 39 supersedes any other normative obligation in view of the provisions of Article 103 of the Charter.  
In what case then can the powers of the UNSC under Article 39 be triggered? It has been argued, correctly too, that the power of the Security Council under Chapter VII is wide and flexible as to cover a range of situations dependent wholly upon the willingness of the Council to act appropriately (Gray, 2014). It remains to be noted that the power is not without limit as there are threshold issues for which it may be triggered.

### THE THRESHOLDS

The circumstances upon which the collective power vested in the Security Council may be exercised are apparent on the face of Article 39 of the Charter: the determination of the existence of any threat to the peace, breach of the peace, or act of aggression. However, the express mentioned of these tripod situations do not obviate disagreement on the situations in which the power may be exercised (Wood, 2013; Boncour, 1945). The complexity of the three (3) thresholds under Article 39 was noted in pessimistic tone by Edward Stettinius:  
> If any single provision of the Charter has more substance than the others, it is surely this one sentence, in which are concentrated the most important powers of the Security Council’ (Abbot, 2002).

The Challenges that plague the interpretation or application of the provisions of Article 39 of the Charter have appeared as early as the debate on the wordings of the provisions during the San Francisco Conference. Two criteria predominantly featured in the discourse on the application or operation of the Article:  
(a) whether the power vested on the Security Council within the provision is not limited to inter-state disputes; and (b) what manner should the inter-state dispute take to fall within the spectrum of Article 39.  
All...
suggestions, during the conference to render the provisions of Article 39 more definite were rejected in favour of the three extant flexible generic terms (Boncour, 1945; Abbot, 2002).12

A real test of the ease with which the power of the Security Council can be triggered under Article 39 occurred in 1947 when Israel urged the Security Council to declare the forceful entry of the coalition of Arab neighbouring states into the mandatory Palestinian territory as a threat to peace, breach of peace, and act of aggression. Consequently, the US framed and submitted a draft resolution for the Security Council’s 293rd meeting. It was argued on behalf of the neighbouring Arab states that:

‘… invocation of Article 39 would raise the question of whether there had been an act of aggression, involving the search for a definition of the aggressor which would lead to interminable wrangles. …it would launch the Council on Chapter VII, under which it might have to take action with forces it did not yet possess.’13

The debate on whether hostilities on the Territory of Republic of Indonesia constitute a breach of peace equally portrays the initial challenges on the invocation of the Security Power under Article 39 of the Charter.14

Despite the initial challenges on the circumstances in which the power of the UNSC under Article 39 may be triggered, the scope of the power has become definite and prescriptive in recent time with the exception of the ‘threat to peace’ threshold. Acts amounting to a breach of the peace have been restrictively determined. Similarly, acts of aggression have now been largely shaped by treaties.15 While one would agree with Harris, quoting Simma, that the ‘threat to peace’ remains the broadest of the three (3) thresholds (Harris, 2010; Simma et al., 2012), the proposition by Abbot that the scope of Article 39 is limited to inter-states conflict ought to be rejected in view of the modern practice and application of the provisions (Abbott 2002).16 It is


14 The United Nations Codification Division, ‘Decision of 1 August in Connection with the Indonesia Question (II)’ (Repertory of Practice of United Nations Organ 1945-1954 [1]) 342-344


16 Abbot submitted, as a set out, in his 2012 journal article that “[B]ased upon an examination of the legislative history of Article 39, this paper will seek to demonstrate that the Security Council may act under the Article only if two specific criteria are met. First, there must be an interstate dispute; that is, the situation must involve more than one nation. Second, the cross-border consequences must fall into one of four categories: (a) actual deployment of military force by one nation across an international border or against the aircraft, shipping, or other military infrastructure of another state, (b) threat of the use of such military force, (c) actual giving of aid by one nation to a foreign military or other armed group in an intrastate conflict, or (d) threat of giving of such aid. That proposition may reflect the intention of the drafter of the Charter, which this paper does not subscribe. Abbot’s proposition cannot be reconciled with the recent practice on the application of Article 39 of the Charter. The Palestinian wall case (Legal Consequence on the Construction of a Wall on the Occupied Palestinian

Kingdom) as well as the debates of the Security Council on the application of the power under the article within the earlier years of the UN. See Abbot ibid, for a discussion on the debates of the US congress and presidential committee on the application of article 39 of the Charter. See Wood (n 14) on debates of the UK House of Commons and the United Kingdom Government Officials on the operation of article 2(4) and Chapter VII over the years.

12 The arguments, championed by Bolivian delegates and supported by delegates from Colombia, Egypt, Ethiopia, Guatemala, Honduras, Iran, Mexico, New Zealand, Uruguay and Philippine, that the clause ‘[I]f the nature of the acts investigated entails designating a state as an aggressor as indicated in the following paragraph, these measures should be applied immediately by collective action.’ was rejected by the conference as a dangerous attempt to confine the application of the power vested under article 39.

13 The United Nations Codification Division, ‘the question of the determination under Article 39 in the matters in which it was Contended that ‘International Peace’ was not Threatened or Breached (Repertory of Practice of United Nations Organ 1945-1954 [1]) <www.http://legal.un.org/repertory/art39.shtml> accessed on 14 March 2017. This argument was however rejected by the Security Council by 8 votes against nil with three (3) abstentions at the 302nd meeting on 22 May, 1948. It was consequently determined by United Nation Security Council resolution 52 (1948) that the Arab states intervention constitutes a threat to peace. See the UN Security
the position of this paper that Abbot’s prescription would lead to a stultified interpretation avoided by the framers of the provisions of Article 39 of the Charter with negative consequences for the recent challenges in the maintenance of international peace and security. The pragmatic approach would be a blanket construction of the power vested in the Security Council depending on facts of each situation.

SITUATIONAL CONSIDERATION

The interpretation of the provisions of Article 39 of the Charter over the years has been marked by two eras, the cold war and post-cold war international relations (Malanczuk, 1997; Harris, 2010; Shaw, 2014; Gray, 2014). The distinctive feature of the latter era is the change in the ideological considerations that influenced the decisions of the permanent members of the Security Council. Whether the Security Council would conclusively determine a situation as a threat to peace, breach of peace or act of aggression predominantly depends on the disposition of the five permanent members of the Security Council (Shaw, 2014).

Cold War Era

The era marked the period of strict and literal construction of the provisions of Article 39. It is the era in which the ideological differences between the west (represented by the US, UK and France) and the east (represented by the then USSR) obstruct objective application of the provisions Article. The decisions of the Security Council are rather shaped by political consideration through the respective use of veto power. This appears to be the epoch of realist international relations at the Security Council (Burley, 1993).

During this period, the members were only able to agree on few cases as constituting threat to peace out of several situations of armed conflicts (Malanczuk, 1997). In 1947, the Security Council adopted a resolution calling upon the Netherlands and Indonesia to stop hostilities though without mentioning Article 39 in the resolution. The entry of the Arabs forces on the mandated territory of Palestine was expressly declared a threat to international peace and security in resolution 54 (1948) at the council 338th meeting of 15 July 1948, North Korea’s invasion of the Republic of Korea was denounced as a breach of international peace and security in resolution 1501 adopted at the 498th meeting of the council on 6 September, 1950 in the absence of USSR. A resolution was adopted in 1965 rendering the declaration by the minority white regime in Rhodesia a threat to international peace and security. The foregoing situations clearly constitute threat or breach of internal peace and security or acts of aggression, as the case may be, within the strict interpretation of Article 39 although the Rhodesia case was not an interstate dispute.

Post-Cold War Era

The end of cold war and its attendant ideological international relations witness flexibility in the interpretation of Article 39 of the Charter. The international legal system can be said to have entered a positivist phase in this era. Members of the United Nations at large and Security Council, as the pseudo-executive organs of the UN, are keen on the compliance with legal obligations and invocation of responsibility of transgressors. This led to a sharp decline in interstate armed conflicts (Higgins, 1995).

The situations that triggered the power of the Security Council under Article 39 during this period are diverse in nature attesting to the flexibility of the provisions. Argentina’s forceful occupation of the Falkland Island in 1982 and the Iran and Iraq hostilities as well as Iraq’s invasion of Kuwait were declared as a breach of peace in resolutions 502 (1982), 598 (1987) 660 (1990) (Shaw, 2014).

Aside the demise of ideological relations in the Security Council during this period, the period equally witnesses a remarkable shift in the interpretation of Article 39. The situations that are held out as threat to peace were extended to

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19 UN Security Council Resolution 30 (1947) held at the meeting of 26 August 1947.
20 UN Security Resolution 217 (1965); Shaw (n 8) 899; Gray (n 20) 637
21 UN Security Council Resolution 502 (1982); UN Security Council Resolution 598 (1987); UN Security Council Resolution 660 (1990). Although these resolutions preceded the end of the cold war however, the situations were determined without the earlier period’s constricted discourse.
humanitarian crisis, predominantly non-international armed conflicts. The Security Council declared the hostility in former Yugoslavia, the internal conflict in Somalia, the Genocide in Rwanda as well as foreign aided conflicts in Congo and Liberia in the Security Council resolutions 713 (1991), 733 (1992), 955 (1994), 1279 (1999) and 788 (1993) as threats to peace in the right order. The council equally adopted two resolutions, within this period, declaring non-conflict situations as threat to peace for the first time. The failure of the Libyan Government to respond to the UN Security Council resolution 731 (1992) and the failure of the Sudan Government to comply with resolution seeking for extradition of suspects of assassination of Egyptian President were held as threats to international peace and Security in resolutions 748 (1992) and 1070 (1996) respectively (Gray, 2014; Shaw, 2014; Malančzuk, 1997).

It appears that the said resolutions 748 (1992) and 1070 (1996) were respectively adopted as a proactive measures to forestall inter-states armed conflicts in the situations. While the resolutions are laudable and one has, in fact, attracted judicial interpretation, it is not clear whether the Security Council has power under Article 39 to preempt future hostilities. In view of the broad spectrum of ‘threat to peace’ threshold and the underpinning aim of extending the scope of Article 39 to international terrorism, it is concluded that the resolutions are in consonant with the overriding objective of collective security (Harris, 2010; Plachta, 2001). The Security Council appears to be more ready to exploit the ‘threat to peace’ threshold to address modern threat to international peace and security in recent time than ever.

THE EMERGING TREND

The extent to which ‘threat to peace’ determinant is elastic to trigger the power of the Security Council under Article 39 remains inconclusive in view of the application of the criteria in response to situations that are outside the literal context of the provisions in communal with other relevant provisions of the Charter on prohibition of unilateral use of force, maintenance of international peace and security, and collective responsibility (Deutch, 1971; Micanovic, 2009).

The power of the Security Council in terms of Article 39 has been triggered, in recent time, in respect of acts of terrorism, humanitarian crisis as well as public health issues of a regional magnitude as threat to international peace and security. Between the period 1989 and 1994, the UNSC declared the proliferation of weapon of mass destruction and ‘the non-military sources of instability in the economic, social, humanitarian and ecological fields’ as threat to international peace and security.

The application of the provision of Article 39 became more pronounced during this period such that a coup d’ tat in Sierra Leone was regarded as


\[24\] A flexible interpretation of the provision of Article 39, in recent times, to cover situations presumably outside the consideration of the drafter of the Charter is not inappropriate in view of the dynamics of modern threat to international peace and security, more often, in the form of non-international armed conflicts and human right violations, global terrorism and cyber-warfare. Suffice it to mention that the broad interpretation of ‘threat to peace’ is in compliance with the rules of customary international law on interpretation of treaties as codified in the Vienna Convention on Law of Treaties. Provisions of treaties are to be interpreted ‘in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’ See, Vienna Convention on Law of Treaties 1969, art 31(1). See the decision of the ICJ in Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua) [2009] ICJ Reports 213, 241 [66].

\[25\] See the resolution regarding Libyan Government failure to denounce terrorism and the Ethiopian Government failure to extradite suspects of murder of the former Egyptian President for trial cited above (n 35).

\[26\] The council at its meeting of 31 January, 1992 noted that the absence of war amongst states does not translate to international peace and security. Consequently it was adopted that ‘[T]he non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security …’ and also ‘[T]he proliferation of all weapons of mass destruction constitutes a threat to international peace and security.’ See the United Nations Security Council, ‘Note by the President of Security Council (3046 Meeting of the Security Council 1992) S/23500, 3-4.
threat to international peace and security.\textsuperscript{27} It worthy of note that opinions are divided on whether the provisions of Article 39 of the Charter can be extended to restoration of democracy in the developing countries (Helal, 2017; Nussberger, 2017).\textsuperscript{28} Gray and Shaw are in concurrence that Article 39 may be triggered in humanitarian intervention (Shaw, 2014; Gray, 2014; Pattison, 2009).\textsuperscript{29} Given the overriding objective of the Charter, it is argued that the generic term ‘threat to peace’ is subject to change with the involving situation particularly since the provision is futuristic.\textsuperscript{30} It may be argued further that the most proactive application of the provision in terms of flexibility is most recently exemplified by the declaration of Ebola Crisis in West Africa in 2014 as threat to international

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\begin{flushright}28 One can only conclude that the United Nations Security Council Resolution 2337(2017) adopted, at the 7866 meeting of the Security Council in 19 January, 2017, in denouncing the former President of Gambia, Yahya Jammeh, subsequent refusal to concede to electoral defeat was predicated on Article 39 of the Charter though the article was not mentioned in the resolution but the usual wordings of resolutions made pursuant to Article 39 were employed in the resolution: ‘[C]alls upon the countries in the region and the relevant regional organisation to cooperate with President Barrow in his efforts to realize the transition of power.’
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\begin{flushright}29 Gray tends to suggest that the intervention of the UNSC in large scale non-international armed conflict is one of Responsibilities to Protect (R2P). He however, recognized that such power to intervene in internal conflict lies only with UNSC, notwithstanding the degree of the obligations. It has equally been suggested that the UNSC intervention is, sometimes, an offshoot of the UN secondary responsibility to protect rather than purely humanitarian intervention which impose no obligation on the UN.
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\begin{flushright}30 The argument is in consonant with the decision of the ICJ in Costa Rica v Nicaragua (n 36) that ‘[W]here the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is ‘of continuing duration’, the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.’
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\begin{flushright}32 A further proposition in the interim, is that other forms of cyberattacks or cyber interference, particularly any forms of attack resulting in substantial economic consequence or direct interference in political affairs of another state, should amount to the use of force under Article 2(4) of the UN Charter. This argument is not without merit as recent events bear, moreso in view of the rumples of the alleged cyber interventions in the US Presidential Election, 2016.
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\textbf{THE PRESENT IMPERATIVE}

Threat to international peace and security has not only shifted from abrasive aggressions, the modern threat to international peace and security is oscillating away from the conventional armed conflicts to cyberwarfare or cyberattacks more often by non-state actors, and terrorism, a war without bother. In the period starting from 2009, The UNSC has taken a number of bold steps by declaring all forms of terrorist activists as one of the gravest threats to international peace and threat (United Nations Security Council, 2009).

The question that appears in early 90s and gained renewed attention recently, was whether international law applies to cyber operations in the aftermath of cyberattacks on Estonia by a Russian non-state actor in 2009 and the dynamics of the conflict between Russia and Georgia which was predominantly fought by cyber operations. It is suffice to add that cyberattacks, mainly of kinetic operation causing injury, were eventually recognized as use of force under Article 2(4) of the UN Charter (Schmitt, 2014; Kilovaty, 2015).\textsuperscript{32} Accordingly, cyberattacks would ordinarily trigger the power of the UNSC under Article 39, like any other forms of attacks proscribed by Article 2(4), based on the overriding purpose and objective rules of interpretation canvassed in this paper.
CONCLUSION

It has been argued, in the foregoing paragraphs, that the post-cold war international relations between the permanent five members of the UNSC have had a positive effect on the interpretation/application of the provisions of Article 39 of the UN Charter. Collective security in the international legal order has evolved over the years more formidable than the League days. The dynamics of the UNSC’s power under Article 39 is increasingly becoming flexible to accommodate new challenges to international peace and security. The adoption of the positivist overriding objective and principle of interpretation of the provisions of the Charter is a proactive step forward in view of the technicality in the procedure for the amendment of the Charter. However, the permanent five of the UNSC are still required to further eliminate subjective realist approaches to the use of their power under Article 39 in such manner that may raise popular suspicion or doubt in the system, as the Libya case in 2009 (Modeme, 2014), or unjustified diplomacy that often blocks out imperative measures required to address humanitarian crises, such as the protracted Syria crisis. The council should be more ready to invoke the power in the collective interest of the international community (Milano, 2003; Stahn, 2003; Wall 2010; Rostow, 2016; Gray, 2014; Shaw, 2014).  

This is where the discourses on the NATO bombardment in Kosovo 1999 and US/UK led coalition forces against Iraq in 2003 are relevant. Any military action pursuant to the Security Council’s Power under Article 39 and 42 of the Charter ought to be express and unequivocal. An implied, revived or retroactive authority by the Security Council, as argued by the coalition forces in these cases, is not sufficient to trigger the collective responsibility of the UNSC under Chapter VII. A higher degree of caution is expected where measures under Article 41 and 42 of the Charter are to be exercised on behalf of the council. Such action requires prior authority as of the UNSC since the council is the only organ that can invoke a binding authority under the Chapter as confirmed by the ICJ in the Lockerbie case (no 12). The flexibility in the construction of Article 39 does not confer derivative or implied authority on any member state a contrary interpretation would lead to ambiguity render the provisions of the Charter susceptible to abuse as the Iraq case turned out. For argument on the merit of otherwise of the NATO intervention in Kosovo.

BIBLIOGRAPHY


