

## The Article 51 Reporting Requirement for Self-Defense Actions

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*This article examines one of the legal criteria for the exercise of the right of self-defense that has been significantly overlooked in the literature: the so-called “reporting requirement”. Article 51 of the United Nations (UN) Charter provides, inter alia, that “[m]easures taken by members in the exercise of this right of self-defense shall be immediately reported to the Security Council.” Although this requirement to report all self-defense actions to the Council is clearly set out in Article 51, the Charter offers no further guidance with regard to this obligation. Reference to the practice of states since the UN’s inception in 1945 is, therefore, essential to understanding the scope and nature of the reporting requirement. As such, this article is underpinned by an extensive original dataset of reporting practice covering the period from January 1, 1998 to December 31, 2013. We know from Article 51 that states “shall” report, but do they, and – if so – in what manner? What are the various implications of reporting, of failing to report, and of the way in which states report? How are reports used, and by whom? Most importantly, this article questions the ultimate*

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*value of states reporting their self-defense actions to the Security Council in modern interstate relations.*

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## INTRODUCTION

Self-defense is universally accepted as an exception to the general prohibition of the use of force in international law.<sup>1</sup> This paper examines one of the criteria for self-defense that has

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<sup>1</sup> *International Law Commission Commentary on the Articles on State Responsibility*, Report of the International Law Commission on the work of its fifty-third session (Apr. 23–Jun. 1 and Jul. 2–Aug.10 2001), UN Doc. A/56/10, 74 at <http://untreaty.un.org/ilc/reports/2001/2001report.htm> (“the existence of a general principle admitting self-defence as an exception to the prohibition against the use of force in international relations is undisputed”, emphasis added).

been significantly overlooked in the literature: the so-called “reporting requirement”.<sup>2</sup> Article 51 of the United Nations (UN) Charter provides, *inter alia*, that “[m]easures taken by members in the exercise of this right of self-defense shall be immediately reported to the Security Council.”<sup>3</sup>

Although the requirement to report all self-defense actions<sup>4</sup> to the Council is clearly set out in Article 51, the Charter offers no further guidance with regard to this obligation. Reference to the practice of states since the UN’s inception in 1945 is, therefore, essential to understanding the scope and nature of the reporting requirement. We know from Article 51 that states “shall” report, but do they, and – if so – in what manner? What are the various implications of reporting, of failing to report, and of the *way in which* states report? Perhaps most importantly, what value does reporting have in modern interstate relations?

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<sup>2</sup> See MYRA WILLIAMSON, *TERRORISM, WAR AND INTERNATIONAL LAW: THE LEGALITY OF THE USE OF FORCE AGAINST AFGHANISTAN IN 2001* 113 (2009).

<sup>3</sup> UN Charter, art. 51, which in full reads: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.” The reporting requirement was later repeated in a similar form in the 1952 Australia-New Zealand-United States Security Treaty (“ANZUS treaty”), art. IV (“[a]ny such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations...”).

<sup>4</sup> It is evident from the positioning of the reporting requirement within Article 51 that it applies equally in relation to both individual and collective self-defense.

Despite the numerous recent assessments of the international law governing self-defense<sup>5</sup> there has been very little work undertaken on the extent to which, and manner in which, states have (or have not) complied with the reporting requirement. The leading analysis of Article 51 self-defense reporting remains D.W. Greig's 1991 article in the *International and Comparative Law Quarterly*,<sup>6</sup> and even this leading work is not entirely dedicated to the reporting requirement; nor does it significantly engage with the state practice on reporting. Greig's article was later complemented by a brief study of reporting practice undertaken by Bailey and Daws as part of their more general work on the procedure of the Security Council: a study that was last updated in 1998.<sup>7</sup> Since then, reference to the self-

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<sup>5</sup> See, e.g., MURRAY C. ALDER, *THE INHERENT RIGHT OF SELF-DEFENCE IN INTERNATIONAL LAW* (2013); YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* (5th ed 2011); JAMES A. GREEN, *THE INTERNATIONAL COURT OF JUSTICE AND SELF-DEFENCE IN INTERNATIONAL LAW* (2009); JAN KITTRICH, *THE RIGHT OF INDIVIDUAL SELF-DEFENSE IN PUBLIC INTERNATIONAL LAW* (2008); TOM RUYS, 'ARMED ATTACK' AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE (2010); KINGA T. SZABÓ, *ANTICIPATORY ACTION IN SELF-DEFENCE: ESSENCE AND LIMITS UNDER INTERNATIONAL LAW* (2011); Constantine Antonopoulos, *Force by Armed Groups as Armed Attack and the Broadening of Self-Defence* 55 *NETHERLANDS INTERNATIONAL LAW REVIEW* 159 (2008); Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors* 106 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 769 (2012); James A. Green, *Self-Defence: A State of Mind for States?* 55 *NETHERLANDS INTERNATIONAL LAW REVIEW* 181 (2008); Niaz A. Shah, *Self-Defence, Anticipatory Self-Defence and Pre-Emption: International Law's Response to Terrorism* 12 *JOURNAL OF CONFLICT AND SECURITY LAW* 95 (2007); and David Kretzmer, *The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum* 24 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 235 (2013).

<sup>6</sup> D.W. Greig, *Self-Defence and the Security Council: What Does Article 51 Require?* 40 *INTERNATIONAL AND COMPARATIVE LAW QUARTERLY* 366 (1991).

<sup>7</sup> SYDNEY D. BAILEY AND SAM DAWS, *THE PROCEDURE OF THE UN SECURITY COUNCIL* 103-105 (3rd ed 1998).

defense reporting procedure in the literature has been largely anecdotal.<sup>8</sup> Moreover, the requirement remains under-theorized, other than in relation to the particular issue of the legal consequences of a failure to report.

The aim of the current article is, therefore, to reappraise the reporting requirement, particularly through significant engagement with state practice. The analysis herein is underpinned by an extensive study of state reporting practice (encompassing the period from 1998 to 2013, inclusive) conducted by the author and his research assistant, Bethany Lucas.<sup>9</sup> This dataset is, to the knowledge of the author, the most in-depth review of self-defense reporting practice conducted to date.

The UN itself does not collect qualitative or quantitative data in relation to reporting practice or, indeed, in relation to uses of force in internal relations more generally.<sup>10</sup> Admittedly, the *Repertoire of the Practice of the Security Council*<sup>11</sup> does commonly note references to self-defense that appear in member state communications addressed to the President of the Council, including occasions where states have reported in compliance with Article 51. However, it is evident when one reviews the *Repertoire* that it does not comprehensively – or even necessarily *extensively* – set out state reporting practice.<sup>12</sup>

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<sup>8</sup> See, e.g., AVRA CONSTANTINO, *THE RIGHT OF SELF-DEFENCE UNDER CUSTOMARY INTERNATIONAL LAW AND ARTICLE 51 OF THE UN CHARTER* 192-195 (2000); CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 121-124 and 188-189 (3rd ed 2008); and RUY, *supra* note 5, 68-74 (indeed, Ruys explicitly states that he bases his conclusions regarding recent reporting practice on “a quick scan of the UN documentation database”, at 73, emphasis added).

<sup>9</sup> The full dataset that was collected – covering the reports submitted to the Security Council from January 1, 1998 to December 31, 2013 – is on file with the author.

<sup>10</sup> See WILLIAMSON, *supra* note 2, 11.

<sup>11</sup> See *Repertoire of the Practice of the Security Council*, at <http://www.un.org/en/sc/repertoire/index.shtml>.

<sup>12</sup> See GRAY, *supra* note 8, 122-123 (particularly at footnote 35).

Moreover, Article 51 reports are not usually distinguished in the *Repertoire* from other references to self-defense in the documentation that is submitted to the Council. To the extent that reports are referenced in the *Repertoire*, no further information is presented about their technical or substantive nature. At best, therefore, the *Repertoire* provides some limited anecdotal data on reporting. It is also notorious for being a delayed and out-of-date record of Security Council practice: the most recent edition is the 17th supplement for 2010-2011, but this only represents its “advance version”; the most recent *finalised* version of the *Repertoire* is the 14th supplement for 2000-2003.<sup>13</sup>

Beyond the UN, there exists no other substantial data on reporting, be it official or unofficial. The dataset collected for this article has, therefore, has been collated to underpin a detailed consideration of the reporting requirement over last 16 years (i.e., the period since the study that was conducted by Bailey and Daws), in a way that existing data sources simply could not have done. This undertaking is particularly important given the significant scrutiny of the right of self-defense that has occurred post-9/11,<sup>14</sup> but the corresponding lack of assessment of reporting during the same period. Analysis of this core dataset has been combined with some assessment of earlier reporting practice, as well as a review of the (comparatively limited) case law and literature concerning the reporting requirement.

This paper starts, in section I, by considering the purpose of the reporting requirement, and its potential role today. Section II then briefly considers the format of self-defense reports. The frequency of state reporting, particularly in the period under scrutiny (1998-2013), is outlined in section III. Section IV looks at which particular states have reported in recent years, and assesses this data in relation to both the regional spread of reporting and reporting by members of the Security Council. Section V turns to the legal

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<sup>13</sup> All editions of the *Repertoire* can be viewed on its website, *supra* note 11.

<sup>14</sup> GRAY, *supra* note 8, 193. *See also* the authors cited in *supra* note 5.

consequence of reporting, or – more importantly – of the failure to report (something that has been engaged with to a greater extent in the literature). Trends with regard to the timeliness of reporting – given that Article 51 requires that reports be submitted “immediately” – are then outlined in section VI. The burgeoning phenomenon of “pre-emptive” reporting is considered in section VII. The *quality* of the reports that have been submitted to the Council is assessed in section VIII, in terms of the detail and substantive information that they contain. Section IX examines the crucial issue of the use that has been made of states’ reports by the Security Council, international courts and tribunals, and other actors. Finally, section X considers reasons why states may wish to avoid reporting their self-defense claims, or at least to avoid reporting them in detail. The article concludes by arguing that the Article 51 reporting requirement is of questionable value in the modern world, despite the notable increase in state compliance with the obligation since the mid-1980s.

## I. WHAT IS THE REPORTING REQUIREMENT FOR?

The reporting requirement’s original *raison d’être* in 1945 was rooted in the goal of centralizing the use of military force with the newly created UN Security Council following the atrocities of World War II.<sup>15</sup> The requirement was intended to enable the Council to respond effectively to any threat that an attack (or forcible defensive response) may pose to international peace and security.<sup>16</sup> The reporting obligation was also designed to provide the

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<sup>15</sup> This is evident from the Charter’s *travaux préparatoires*. See, e.g., the statement made by Czechoslovakia during debates over (what eventually became) Article 51 at the San Francisco conference in May 1945, *Documents of the United Nations Conference on International Organisation, Volume XII: Commission III*, Doc. 576, III/4/9 (May. 25, 1945), 681-682.

<sup>16</sup> See *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Merits, 1986 ICJ REP. 14, para. 200 (Jun. 27) (hereafter “*Nicaragua*”), dissenting opinion of Judge Schwebel, para. 227. See also ALDER, *supra* note 5, 85; DEREK W. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 198 (1958); RUYS, *supra* note 5,

Council with information with which it could begin to assess the validity of a state's self-defense claim, irrespective of whether it felt it necessary to respond under Chapter VII. Reporting was supposed to give the Council the opportunity to *scrutinize* claims of self-defense.<sup>17</sup> Viewed in this light, the requirement can be seen as, or at least be seen as being intended to be, “a most important safeguard for...the proper scrutiny and control of circumstances when self-defence is invoked...[something that] is essential to the maintenance of peace.”<sup>18</sup>

The intention at the inception of the UN to centralize the use of force meant that self-defense was explicitly conceived as a temporary right, as is clear from the fact that Article 51 holds that the right of self-defense can be exercised only “until the Security Council has taken measures necessary to maintain international peace and security”.<sup>19</sup> This is the so-called

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70; DAN SAROOSHI, *THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY: THE DELEGATION BY THE UN SECURITY COUNCIL OF ITS CHAPTER VII POWERS* 162 (2000); Christine Gray, *The Charter Limitations on the Use of Force: Theory and Practice*, in *THE UNITED NATIONS SECURITY COUNCIL AND WAR* 86, 87 (Vaughn Lowe, Adam Roberts, Jennifer Welsh & Dominik Zaum eds., 2008); Greig, *supra* note 6, 366-367; Ziyad Motala and David T. ButleRichie, *Self-Defense in International Law, the United Nations, and the Bosnian Conflict* 57 *UNIVERSITY OF PITTSBURGH LAW REVIEW* 1, 25 (1995-1996); and James P. Rowles, *Secret Wars, Self-Defense and the Charter – A Reply to Professor Moore* 80 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 568, 577 (1986).

<sup>17</sup> CONSTANTINOU, *supra* note 8, 193; Paul S. Reichler and David Wippman, *United States Armed Intervention in Nicaragua: A Rejoinder* 11 *YALE JOURNAL OF INTERNATIONAL LAW* 462, 471 (1986); Oscar Schachter, *Self-Defense and the Rule of Law* 83 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 259, 263 (1989); and C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 *RECUEIL DES COURS* 455, 495 (1952 II).

<sup>18</sup> SIR ROBERT JENNINGS AND SIR ARTHUR WATTS, *OPPENHEIM'S INTERNATIONAL LAW, VOLUME I (PEACE)* 423 (9th ed 1996).

<sup>19</sup> UN Charter, art. 51.



“until clause”,<sup>20</sup> which obliges that the defending state desist in its forcible response once the Security Council has taken action.<sup>21</sup> Self-defense was therefore merely seen a “stop-gap” measure until the Council could act, and the reporting requirement was inherently tied to this in that it was designed to help the Council step in quickly and effectively.

Beyond this direct relationship between the requirement and the Security Council, it is possible to argue that reporting can fulfill a more general function of “publicizing” a claim of self-defense to the world at large. A report is a formal legal statement – “we are acting in self-defense” – made in compliance with a legal obligation. As such, reporting a self-defense action at least theoretically puts both the initial use of force avowedly being defended against *and* the self-defense claim itself “on the agenda”, not just of the Council, but of the international community generally.

The transparency that can be provided by reporting has the potential to facilitate the objective assessment of *jus ad bellum* claims by actors other than the Council (such as other states, those involved in dispute resolution, or scholars). Compliance with the reporting requirement can help external actors to make “a determination of whether the invocation of the right of self-defense was *proper*.”<sup>22</sup>

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<sup>20</sup> RUYS, *supra* note 5, at 74.

<sup>21</sup> It has been asserted that only the adoption by the Council of “effective” measures require the defending state to desist. *E.g.*, the United Kingdom argued in the context of the Falklands conflict that this aspect of Article 51 “can only be taken to refer to measures which are actually effective to bring about the stated objective,” Letter dated 30 April 1982 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, UN Doc. S/15016 (Apr. 4, 1982). This makes a degree of conceptual sense in that a state’s inherent right of self-defense must surely remain unfettered until the Security Council has *effectively* stepped in to abate the defensive necessity. *See* Malvina Halberstam, *The Right to Self-Defense Once the Security Council Takes Action* 17 MICHIGAN JOURNAL OF INTERNATIONAL LAW 229 (1996).

<sup>22</sup> Motala and ButleRichie, *supra* note 16, at 25, emphasis added.

For a state that has genuinely suffered an armed attack and is responding lawfully to this, reporting could help to highlight the initial unlawful use of force against it and bring this to the world's attention. An objective examination confirming the lawfulness of the state's self-defense action may also underline its law-abiding credentials. Reporting can thus provide the victim state with notable political and legal ammunition with which to defend itself in the arena of world opinion. Yet this also, of course, means that a state can use the reporting procedure to attempt to demonstrate that it has "clean hands", irrespective of whether or not its hands are in fact clean. Reporting has the potential to act merely as a propaganda exercise – a forum for political grandstanding, allowing disingenuous claims of self-defense to gain the sheen of legitimacy.

The intended object and purpose of reporting, its possible role as a source of notification and information for external actors, and the possibility for its misuse all underpin its potential value. In the subsequent analysis, it is worth keeping these factors in mind with regard to the ultimate desirability of the reporting requirement today.

## II. THE FORMAT OF SELF-DEFENSE REPORTS

There is no obligatory "format" for the self-defense reports that are submitted to the Security Council. Article 51 simply requires that measures in self-defense are immediately reported.<sup>23</sup> Moreover, as Greig has pointed out, Article 51 does not even formally require that the state that is acting in self-defense report this fact, only that self-defense must be reported *in abstracto*.<sup>24</sup> The provision simply says that member states' actions in self-defense "shall be immediately reported" to the Council, without specifying by whom. However, while this may be true as a matter of strict textual interpretation, it appears relatively clear that the

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<sup>23</sup> UN Charter, art. 51.

<sup>24</sup> Greig, *supra* note 6, 386.

intention of the Charter's drafters was that the state exercising the right of self-defense would be the one to report it,<sup>25</sup> and this would seemingly be a good faith and "ordinary meaning" interpretation of the provision.<sup>26</sup> Scholars have similarly assumed that the obligation is incumbent upon the state exercising the right<sup>27</sup> and, crucially, it is evident that – to the extent that states comply with the reporting requirement – it is the defending state that does so.<sup>28</sup>

What is therefore of more interest is the fact that *the way in which* defending states report is also left entirely open by Article 51. Indeed, the very notion of "reporting" is perhaps something of a misnomer. The equally authentic French text of Article 51 uses the phrase «portées a la connaissance du Conseil» rather than "reported to the Security Council".<sup>29</sup> The French text therefore directly translates as "brought to the notice" or "brought to the attention" of the Council, suggesting a rather more flexible approach to informing the Council of self-defense actions than the formalized notion of "a report" that is implied by the English version.

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<sup>25</sup> See, e.g., the view expressed by the Soviet Union during discussions at the San Francisco conference to the effect that the draft of what ultimately became Article 51 dealt in part "with the duties of members of the Organization. One of these duties is to inform the Security Council immediately concerning measures of self-defense *taken by the member*, and of his compliance with the obligations of the Charter", *Documents of the United Nations Conference on International Organisation, Volume XII*, Doc. 576, *supra* note 15, 683, emphasis added. The intention of the drafters is, of course, of relevance for treaty interpretation as per Article 32 of the Vienna Convention on the Law of Treaties 1969 (VCLT).

<sup>26</sup> As per the VCLT, *id.*, art. 31.

<sup>27</sup> See, e.g., ALDER, *supra* note 5, 85.

<sup>28</sup> Greig, *supra* note 6, 386.

<sup>29</sup> John Norton Moore, *The Secret War in Central America – A Response to James P. Rowles*, 27 VIRGINIA JOURNAL OF INTERNATIONAL LAW 272, 282 (1986-1987) (noting this difference between the English and French texts).

Nonetheless, when states bring their self-defense actions to the attention of the Council in conformity with Article 51, this does tend to be in the shape of a formal written report; the usual approach to reporting is by means of an official letter, from the reporting state's permanent UN representative, addressed either to the Council president,<sup>30</sup> the UN Secretary General for circulation in the Council,<sup>31</sup> or both.<sup>32</sup> The vast majority of self-defense reports thus look rather similar.

Compliance with the reporting requirement has – very occasionally – taken on a different form. For example, the United Kingdom's "report" with regard to its collective action in Jordan in 1958 was delivered orally during debates in the Council.<sup>33</sup> No formal written report was submitted. Such non-traditional forms of reporting have never been common, however, and are becoming rarer still. In the period covered by the dataset collected for this article, 1998-2013, only 1 report was identified that did not take the form of a written submission specifically for that purpose. This was Poland's report with regard to its involvement in the intervention in Afghanistan in 2001, which was delivered in a few paragraphs of a much larger (37-page) and more general report submitted to the Security

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<sup>30</sup> See, e.g., the Democratic Republic of Congo's first 2004 report concerning the regained control of the town of Bukavu by its armed forces, Letter dated 10 June 2004 from the Permanent Representative of the Democratic Republic of the Congo to the United Nations addressed to the President of the Security Council, UN Doc. S/2004/489 (Jun. 14, 2004).

<sup>31</sup> See, e.g., Iran's self-defense report in relation to attacks emanating from Iraq in 1999, Letter dated 12 July 1999 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary General, UN Doc. S/1999/781 (Jul. 12, 1999).

<sup>32</sup> See, e.g., Israel's first 2010 report in regard to its response to rockets and mortars that were fired on it from the Gaza strip, Identical letters dated 12 January 2010 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2010/21 (Jan. 12, 2010).

<sup>33</sup> UN SCOR, 831st mtg. at 5-7, UN Doc. S/PV.831 (Jul. 17, 1958).

Council's Counter-Terrorism Committee in relation to Council resolution 1373.<sup>34</sup> Ultimately, though, Poland went on to submit a "traditional" bespoke report 4 months later in any event.<sup>35</sup>

The length and quality of the reports submitted to the Council vary to some extent, as will be discussed in section VIII, below. It is enough for now to note that, while there is no set format to reporting, the vast majority of reports have an extremely similar appearance. Varied approaches to reporting have been taken; this is now extremely uncommon, though it is worth keeping in mind that – as a technical legal matter – reports in a non-traditional format are equally in compliance with the Article 51 obligation.<sup>36</sup>

The fact that there is no standardized form of reporting has the potential to cause problems, in terms of the transparency of self-defense actions. The informal communication of a self-defense action to the Council, or "reports" that are buried within other documents, are likely to be less visible. On the basis of consistency and transparency, then, one might argue that all reports should be required to follow the same (formal, written) template.

However, a degree of flexibility with regard to the format of reporting is probably not something with which we should be overly concerned. The *substance* of any submitted report is obviously going to be of significantly more importance than its form; the "value" of

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<sup>34</sup> Letter dated 21 December 2001 from the Permanent Representative of Poland to the United Nations addressed to the Chairman of the Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism, annexed to Letter dated 27 December 2001 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, UN Doc. S/2001/1275, at 7-8 (Dec. 21, 2001).

<sup>35</sup> Letter dated 15 March 2002 from the Permanent Representative of Poland to the United Nations addressed to the President of the Security Council, UN Doc. S/2002/275 (Mar. 15, 2002).

<sup>36</sup> Jean Combacau, *The Exception of Self-Defence in UN Practice*, in *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE* 9, 16 (Antonio Cassese ed., 1986).

any given report should largely be judged on what it does or does not say, rather than on the manner in which it is presented to the Council. Moreover, there may be legitimate reasons why states may wish to limit the extent of disclosure in their reports – as will be discussed in section X – and non-traditional methods of reporting may be one way to achieve this.

Given that standardization has for the most part naturally occurred in practice anyway, this is something of a moot point. There may not be a set format to reporting, but practice has evolved to the extent that most reports submitted in compliance with Article 51 have a similar appearance.

### III. THE FREQUENCY OF REPORTING

#### *A. The Frequency of Reporting During the Cold War*

It was noted in section I that the original intention behind the reporting requirement was to link all self-defense actions to the Security Council, as part of a wider agenda of centralizing the use of force with the UN. However, as is well known, this “project” of centralizing military action essentially collapsed under the weight of Cold War politics, meaning that the original purpose of the reporting requirement largely evaporated during the Cold War period.<sup>37</sup>

As such, it is perhaps unsurprising that compliance with the obligation to report through this period was rather poor. Of course, states regularly made self-defense claims during the Cold War,<sup>38</sup> but these were rarely reported to the Council. There was seen to be little point: the Council was paralyzed by the “mutually assured veto” policy of the major

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<sup>37</sup> Greig, *supra* note 6, 389.

<sup>38</sup> Schachter, *supra* note 17, 259 (writing in 1989: “[w]hen they [states] have used force, they have nearly always claimed self-defense as their legal justification”).

powers.<sup>39</sup> To an extent, therefore, states simply went about the business of defending themselves unilaterally, when required, without even telling the Council.

The persistent failure to report had become a point of concern within the international community by the mid-1980s, as can be seen from the debates of the Working Group of the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations in 1986. Delegates in the Working Group discussed the poor compliance with the requirement and ways in which to improve this (including the possibility of empowering the UN Secretary General to investigate instances where states had failed to report).<sup>40</sup> Ultimately, none of these proposals bore fruit.

Concerns about the lack of compliance with the requirement were also raised in the literature at this time. For example, in a hugely influential assessment of reporting practice, also from 1986, Jean Combacau stated that:

[W]hen States claim to be acting in self-defence they only very rarely inform the S.C. of the measures that they take, as Art. 51 says they should, and this failure effects the task of analyzing U.N. practice on the subject.<sup>41</sup>

However, it is worth noting that this common assertion (that reporting practice was extremely poor during the Cold War period) may have been somewhat overstated. Christine Gray, for

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<sup>39</sup> Greig, *supra* note 6, 399.

<sup>40</sup> *Report of the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations*, UN GAOR, 41st sess., Supplement No. 41, UN Doc. A/41/41, at paras. 46 and 68 (Mar. 13, 2006).

<sup>41</sup> Combacau, *supra* note 36, at 15. *See also* RUYSS, *supra* note 5, 72 (stating that “[l]egal scholars have often argued that the duty to report is seldom observed in practice.”); THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, VOLUME II 1424-1425 (Bruno Simma et al. eds., 3rd ed 2013); Greig, *supra* note 6, 385; Natalino Ronzitti, *The Expanding Law of Self-Defence* 11 JOURNAL OF CONFLICT AND SECURITY LAW 343, 356 (2006); and Schachter, *supra* note 17, 263.

example, has argued that reporting during the Cold War was perhaps rather better than has been generally perceived.<sup>42</sup> In particular, she took note of the fact that Combacau's influential assessment was based solely on his review of the *Repertoire of the Practice of the Security Council*: at the time, this only covered practice up until 1974 and – as was noted in this article's Introduction – the *Repertoire* does not give a comprehensive picture of the state reporting practice, and so would not have been a reliable source even up until that date.<sup>43</sup> Gray also pointed out that Combacau focused only on “formal” reports, missing some examples of “non-traditional” reporting (which was a more prevalent practice at the time than it is now).<sup>44</sup> It was with some justification, then, that Gray took the view that Combacau's influential assessment subsequently led others to *erroneously* conclude that reporting practice from 1945-1986 was virtually non-existent.<sup>45</sup>

Gray's claims with regard to the reporting practice of the Cold War era hold true to some extent. Despite the limited utility of the Council itself during the relevant period because of Cold War politics, a number of self-defense actions were still reported between 1945 and 1986.<sup>46</sup> Compliance was sporadic, but far from non-existent. There was

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<sup>42</sup> GRAY, *supra* note 8, 122-123 (particularly at footnote 35).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* On the paucity of “non-traditional” reports in recent years, see *supra* notes 30-36 and accompanying text.

<sup>45</sup> *Id.*

<sup>46</sup> This can be evidenced by a (non-systematic) qualitative assessment of the state practice from the period. *See, e.g.*, the United States in 1958 prior to collective action in Lebanon, UN SCOR, 827th mtg. at 6-11, UN Doc. S/PV.827 (Jul. 15, 1958); Tunisia with regard to its actions against French troops in 1958, Letter dated 13 February 1958 from the Permanent Representative of Tunisia addressed to the President of the Security Council, UN Doc. S/3951 (Feb. 13, 1958) and Letter dated 29 May from the Representative of Tunisia to the President of the Security Council, UN Doc. S/4013 (May 29, 1958); El Salvador in relation to its conflict with Honduras in 1969, Letter dated 15 July 1969 from the Permanent Representative of El Salvador addressed to the President of the Security Council, UN Doc. S/9330 (Jul. 15, 1969); Honduras with respect to the same conflict, Letter dated



undoubtedly a pervasive failure to comply with the reporting obligation prior to 1986, but compliance was equally not as poor as has sometimes been claimed.

*B. The Increased Frequency of Reporting and the Phenomenon of “Repeated Reporting”*

It is also commonly said in the literature that the frequency of reporting has notably increased since the mid-1980s.<sup>47</sup> Such assertions have not been based on a systematic study of state reporting, although Bailey and Daws did provide some relatively convincing empirical evidence for a rise in compliance rates for the period 1986-1998.<sup>48</sup>

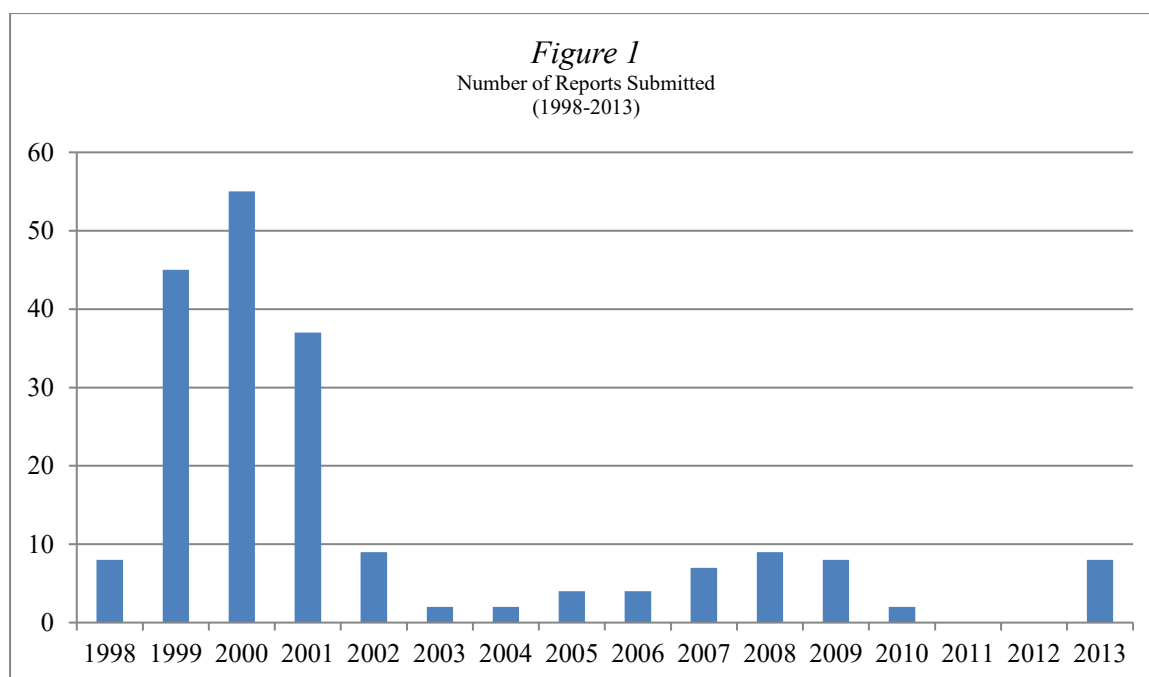
The study of reporting practice from conducted for this article certainly supports the view that reporting frequency is now significantly higher than it was during the Cold War. In what is something of an odd coincidence of orderliness, our study identified *exactly* 200 separate reports submitted by states during the period 1998-2013. *Figure 1* shows the yearly frequency of these reports.

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15 July 1969 from the Chargé d'affaires a.i. of Honduras addressed to the Secretary General, UN Doc. S/9329 (Jul. 15, 1969); the United States in relation to its action against Cambodia in 1975, Letter dated 14 May 1975 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/11689 (May 14, 1975); and Botswana with regard to the repulsion of South African aircraft in 1986, Letter dated 19 May 1986 from the Permanent Representative of Botswana to the United Nations addressed to the President of the Security Council, UN Doc. A/41/345-S/18067 (May 19, 1986).

<sup>47</sup> See, e.g., BAILEY and DAWS, *supra* note 7, 103-105; GRAY, *supra* note 8, 121-123; Christine Gray, *The Eritrea/Ethiopia Claims Commission Oversteps its Boundaries: A Partial Award?* 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW 699, 719 (2006); and Michael J. Kelly, *Time Warp to 1945 – Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law* 13 JOURNAL OF TRANSNATIONAL LAW AND POLICY 1, 24 (2003-2004).

<sup>48</sup> BAILEY and DAWS, *supra* note 7, 103-105.



The submission of 200 reports since 1998 would immediately suggest that compliance with the requirement has significantly improved from the pre-1986 levels. However, one must be cautious about drawing firm conclusions from the number of submitted reports, for various reasons.

First, the lack of a single format for reporting – as discussed in section II – means that it is impossible to be certain that all of the reports submitted in any given period have been accurately identified. The study of reporting practice underpinning this article is therefore best termed an “extensive” rather than a “comprehensive” study, because the fact that there is no standard way to report means that it is impossible to be absolutely certain that all submitted reports have been identified for the period 1998-2013. It was the aim of the study of reporting practice underpinning this article was to identify every report submitted, but it must be conceded that it is possible that some may have been missed.

Secondly, it is significantly *more* difficult to accurately quantify the number of times that states have *failed* to report in the same period. The obligation to report is, of course, only triggered when the right of self-defense is invoked. An increased volume of reports may, therefore, merely indicate that there has been an increased number of instances where states

have been required to act in self-defense (or, at least, a higher number of instances where states have chosen to claim to be acting in self-defense). Compliance rates, as a proportion, may in fact have stayed the same or dropped. This issue is compounded when one considers the occurrence of actions of what may be termed “covert self-defense”.<sup>49</sup>

Identifying a figure for the *total* number of state self-defense claims, against which to compare the number of *reported* claims, is problematic. Unfortunately, none of the major political science conflict datasets<sup>50</sup> are coded in relation to the legal claims made by the state parties, nor do they categorize uses of force as having (or not having) an avowed ‘defensive’ goal on the part of one or more of the belligerents. It is therefore impossible to identify entirely reliable data on the total number of self-defense actions undertaken (or claimed as having been undertaken), either prior to or during the period of 1998-2013.

Having said this, one can extrapolate some indicative quantitative information in this regard from existing data, albeit that this has to be treated with a significant degree of care.

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<sup>49</sup> For discussion of the reporting requirement in the context of “covert self-defense”, see *infra* notes 198-206 and accompanying text.

<sup>50</sup> One of the difficulties in assessing contemporary conflict and the use of force by qualitative means is the lack of official data available on the subject. As was noted in this article’s Introduction, the UN does not collect quantitative data of this sort. However, a number of privately funded research institutes have emerged to act as a source of such information on modern conflict. There are a number of these political science datasets that are commonly viewed as being highly reputable. Perhaps the most prominent of these is the Correlates of War Project, at <http://www.correlatesofwar.org/>, but others include the Uppsala Conflict Data Project (UCDP) at <http://www.pcr.uu.se/research/ucdp/datasets/>; Major Episodes of Political Violence (MEPV), at <http://www.systemicpeace.org/warlist.htm>; and the Conflict Simulation Model (COSIMO) at the Heidelberger Institut für Internationale Konfliktforschung e.V., at <http://www.hiik.de/en/index.html>. None of the various datasets collated by these institutes provide direct information on the number of self-defense claims made by states in relation to uses of force, however. For discussion of these various datasets, including their points of focus and general veracity, see WILLIAMSON, *supra* note 2, 11-16.

To that end, the present author has utilized the Uppsala Conflict Data Project (UCDP) *Dyadic Dataset Version 1-2014* (1946-2013)<sup>51</sup> to act as a broad comparator to his self-compiled original dataset concerning state reporting practice. The UCDP has been selected as a source of comparative data here for a number of reasons. First, it is fully updated on a yearly basis, meaning that its data currently runs to the end of 2013, just as is the case with the study of reporting practice conducted for this article (something which is not true of most equivalent datasets compiled by other similar projects). Secondly, the intensity threshold for inclusion in the UCDP dataset is relatively low compared to other similar conflict-data projects. This means that the UCDP data covers lower level uses of force than other available datasets, which is important because even certain comparatively “low level” actions may nonetheless still qualify as instances of self-defense. Thirdly, UCDP data has been commonly cited by the UN,<sup>52</sup> and the UCDP is regarded by many as the most comprehensive source of quantitative conflict data available.<sup>53</sup> The specific use of the UCDP’s *dyadic* dataset is because this representation of the data aggregates multiple parties to any given conflict or forcible dispute.

Just as with other available datasets, however, the UCDP data is not coded in relation to the question of whether the recorded use of force was related to an action in self-defense (actual or claimed). The UCDP *dyadic* dataset can therefore only provide general guidance in this regard, because extrapolating the total number of self-defense claims from it is

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<sup>51</sup> Uppsala Conflict Data Project (UCDP), *Dyadic Dataset Version 1-2014* (1946-2013), at [http://www.pcr.uu.se/research/ucdp/datasets/ucdp\\_dyadic\\_dataset/](http://www.pcr.uu.se/research/ucdp/datasets/ucdp_dyadic_dataset/) (including codebook).

<sup>52</sup> See, e.g., A More Secure World: Our Shared Responsibility Report of the High-Level Panel on Threats, Challenges and Change, UN Doc. A/59/565, at 17, 20 and 34 (Dec. 2, 2004).

<sup>53</sup> See HUMAN SECURITY REPORT 2005: WAR AND PEACE IN THE 21<sup>ST</sup> CENTURY 20 (Andrew Mack ed., 2005) (arguing that UCDP dataset “is the most comprehensive single source of information on contemporary global political violence”).

necessarily an imprecise process. This first involved the removal from the UCDP dataset of any use of force not involving at least one state party, and not of an international dimension. In other words, wholly “internal” uses of force were excluded, as these cannot have involved the exercise of the right of self-defense. Secondly, it is clear that, absent Security Council authorization, states will almost always justify their uses of military force as actions of self-defense (being as this is the only other accepted exception to the Article 2(4) prohibition of the use of force).<sup>54</sup> It is therefore reasonable to assume, as a starting point, that by removing Council-authorized uses of force – which can be easily identified – from the overall data, the remainder will constitute a broad estimate of the total number of self-defense claims made by states. Finally, this data extracted from the original UCDP dataset was then “spot checked” for veracity by the present author. A 10% sample of the remaining data was quantitatively considered, and in *all* cases the state in question did indeed make a self-defense claim as expected, suggesting that the dataset is at least broadly statistically representative of the total number of self-defense claims made by states. Again, it is important to be clear that this filtered UCDP dataset remains highly speculative, and can only act as a general estimate of wider self-defense claims made by states against which compliance with the reporting requirement can be broadly compared.<sup>55</sup>

Keeping in mind this caveat, the UCDP’s data – suitably filtered – suggests that a total of 141 self-defense claims were made in the period from 1998-2013, inclusive. It is worth noting, first, that there is no indication that this figure has significantly risen from the preceding period; indeed, it would seem that there were more self-defense claims made in the period immediately prior to 1998 than have been made since. Applying the same filters to the UCDP dyadic dataset in relation to the equivalent 16 year period prior to the period under

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<sup>54</sup> See GRAY, *supra* note 8, 114.

<sup>55</sup> The “filtered” version of the UCDP *Dyadic Dataset*, *supra* note 51 is on file with the author.

scrutiny, from 1982-1997, the data suggests that 169 self-defense claims were made. Thus, the overall number of state self-defense claims made from 1998-2013 appears to have been lower (141) than the number that were made from 1982-1997 (169), albeit that this does not represent a significantly decrease in this regard. It therefore seems unlikely that the identified increase in self-defense reporting in our 1998-2013 study has been due to a corresponding increase in the total amount self-defense claims. Rather, the data on the reporting requirement indicates an increase in *compliance rates* in relation to the reporting of self-defense actions to the Security Council.

However, when one compares the filtered UCDP data with our reporting requirement data, an obvious anomaly becomes immediately apparent. From 1998-2013, there have seemingly been more instances where states have submitted a report in relation to a self-defense claim (200) than instances where they have actually *made* a self-defense claim (141).

This apparent incongruity can be explained by the fact that statistical analysis of the frequency of reporting is skewed by the phenomenon of what can be termed “repeated reporting”. It has been argued in the literature that reporting practice has become so ubiquitous that there is now a common tendency to “repeatedly report” self-defense actions, meaning that every incident of a conflict is reported to the Security Council.<sup>56</sup> In prolonged engagements, this could lead to a significant number of reports by the same state regarding the same self-defense action. Gray gives some examples to highlight the practice of what she prefers to label “over-reporting”, and these instances demonstrate that, at least on occasion, states have indeed taken this approach to the reporting requirement.<sup>57</sup> This practice of

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<sup>56</sup> See GRAY, *supra* note 8, 123-124; and Eustace C. Azubuike, *Probing the Scope of Self-Defense in International Law* 17 GOLDEN GATE ANNUAL SURVEY OF INTERNATIONAL AND COMPARATIVE LAW 129, 149 (2011).

<sup>57</sup> GRAY, *supra* note 8, 123-124 (providing, as examples: the repeated reporting of the United States with regard to incidents occurring in the Persian Gulf during the 1980-1988 Iran/Iraq conflict; Iran and Iraq during their

repeated reporting can be identified even in the mid-1980s, at the very beginning of the increase in reporting frequency.<sup>58</sup> However, Tom Ruys has questioned whether this practice of repeated reporting is in fact as prevalent as Gray (and others) have suggested.<sup>59</sup>

Our detailed study of reporting practice from 1998-2013 indicates that reporting of the same instance of self-defense has undoubtedly occurred during that period. Indeed, it is fairly common. Only 26 of the 200 reports identified for the period were entirely “stand-alone” single reports. In all other cases, states reported at least twice with regard to the same (or overlapping) subject-matter. The practice is perhaps not as significant as this figure may suggest, however. The implication of the fact that the majority of states have repeatedly reported in the last decade and a half is that such “over-reporting” is now highly egregious. This is quite misleading: members of the Security Council are not being buried under piles of paper from states over-zealously reporting all facets of their self-defense actions. In the vast

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conflict throughout the 1980s; the approach of both the United Kingdom and Argentina in the 1982 Falklands conflict; and both Ethiopia and Eritrea in relation to their 1998-2000 conflict).

<sup>58</sup> See, e.g., the reporting practice of the United States with regard to its engagements with Iran in the Persian Gulf between September 1987 and July 1998: Letter dated 22 September 1987 from the Acting Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/19149 (Sep. 22, 1987); Letter dated 9 October 1987 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/19194 (Oct. 9, 1987); Letter dated 19 October 1987 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/19219 (Oct. 19, 1987); Letter dated 18 April 1988 from the Acting Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/19791 (Apr. 18, 1988); and Letter dated 6 July 1988 from the Acting Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/19989 (Jul. 6, 1988). This example of repeated reporting is one of those noted by GRAY, *supra* note 8, 123-124.

<sup>59</sup> RUYS, *supra* note 5, 72-73.

majority of instances where repeated reporting can be identified, the state in question has submitted 2 or 3 reports with regard to overlapping subject matter, but no more.

In the rare cases where repeated reporting is slightly more extensive, it still does not generally reach especially high levels. One of the examples of excessive over-reporting provided by Gray – the only example she gives from the 1998-2013 period under scrutiny – was the reporting practice of both parties to the Ethiopia/Eritrea conflict from 1998-2000.<sup>60</sup> Yet only 7 reports were actually submitted in relation to this lengthy dispute: 4 by Ethiopia<sup>61</sup> and 3 by Eritrea.<sup>62</sup> This hardly seems especially excessive. Another example of comparatively significant repeated reporting during the period is the practice of Israel, which submitted 7 separate reports just in relation to Qassam rocket attacks from the Gaza strip.<sup>63</sup>

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<sup>60</sup> GRAY, *supra* note 8, 123.

<sup>61</sup> Letter dated 4 June 1998 from the Permanent Representative of Ethiopia to the United Nations addressed to the President of the Security Council, UN Doc. S/1998/474 (Jun. 5, 1998); Letter dated 10 February 1999 from the Permanent Representative of Ethiopia to the United Nations addressed to the President of the Security Council, UN Doc. S/1999/134 (Feb. 10, 1999); Letter dated 17 February 1999 from the Permanent Representative of Ethiopia to the United Nations addressed to the President of the Security Council, UN Doc. S/1999/162 (Feb. 17, 1999); and Letter dated 2 June 2000 from the Chargé d'affaires a.i. of the Permanent Mission of Ethiopia to the United Nations addressed to the President of the Security Council, UN Doc. S/2000/523 (Jun. 2, 2000).

<sup>62</sup> Letter dated 21 December 1998 from the Permanent Representative of Eritrea to the United Nations addressed to the President of the Security Council, UN Doc. S/1998/1205 (Dec. 21, 1998); Letter dated 22 March 1999 from the Permanent Representative of Eritrea to the United Nations addressed to the President of the Security Council, UN Doc. S/1999/304 (Mar. 24, 1999); and Letter dated 6 September 1999 from the Permanent Representative of Eritrea to the United Nations addressed to the President of the Security Council, UN Doc. S/1999/948 (Sep. 7, 1999).

<sup>63</sup> See Identical Letters dated 15 November 2006 from the Chargé d'affaires a.i. of the Permanent Mission of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. A/61/578-S/2006/891 (Nov. 15, 2006); Identical letters dated 25 December 2006 from the Permanent



However, Israel's reporting practice is inevitably going to be relatively *sui generis*, and – especially in that context – 7 reports does not seem a particularly high number either.

There has been only one case of truly excessive over-reporting since 1998. It is the exception that proves the rule that, while states do repeatedly report, this rarely results in huge numbers of reports being submitted. However, it is an anomaly of some significance. In relation to the asserted violations of Iraq's airspace by aircraft of the United States and the United Kingdom emanating from bases in Saudi Arabia, Kuwait and Turkey, Iraq submitted *103 separate reports* between January 19, 1999 and May 29, 2002.<sup>64</sup> Each document set out an individual alleged intervention into Iraqi airspace, and asserted that Iraq was responding to this in self-defense. Unlike virtually all other instances of repeated reporting, this does correctly – and rather spectacularly – deserve Gray's label of "over-reporting".

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Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. A/61/681-S/2006/1029 (Dec. 26, 2006); Identical Letters dated 16 May 2007 from the Chargé d'affaires a.i. of the Permanent Mission of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. A/61/910-S/2007/285 (May 16, 2007); Identical Letters dated 12 December 2007 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. A/62/585-S/2007/733 (Dec. 13, 2007); Identical Letters dated 4 September 2007 from the Chargé d'affaires a.i. of the Permanent Mission of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. A/61/1038-S/2007/524 (Sep. 4, 2007); Identical Letters dated 29 May 2007 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. A/61/930-S/2007/316 (May 29, 2007); and Identical Letters dated 18 June 2007 from the Chargé d'affaires a.i. of the Permanent Mission of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. A/61/959-S/2007/368 (Jun. 18, 2007).

<sup>64</sup> A full list of the UN Doc. numbers for these 103 reports is on file with the author. It is simply not feasible, for reasons of space, to reproduce this here.

It is worth noting that while the term “over-reporting” has inherently pejorative connotations, submitting more than one report with regard to separate aspects of the same self-defense action might at times be a desirable practice. Theoretically, the more reports that are submitted, the more (and more detailed) factual and legal information that will be available to the Council and other observers, increasing the effectiveness of the reporting requirement in terms of transparency and as a tool for the external assessment of self-defense claims.<sup>65</sup>

The positive results of repeated reporting can be seen from the two separate reports submitted, in 2000<sup>66</sup> and 2002<sup>67</sup> respectively, by Pakistan with regard to its immemorial tensions with India over Kashmir. While these reports relate to broadly the same subject-matter (and certainly the same dispute), the second report provides different and more detailed information to the first, usefully highlighting developments in the dispute in the intervening years (including an alleged increase in intensity by India). Taken together, it is hard to see the two reports as being anything other than *more* useful for any assessment of the conflict than the first report would have been alone.

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<sup>65</sup> Indeed, Sarooshi appears to have interpreted Article 51 as *requiring* repeated reporting in this way. SAROOSHI, *supra* note 16, 162 (“[Article 51 of] the Charter imposes an obligation on States who are lawfully using force not under the direct operational control of the Council to report *on a regular basis* back to the Council,” emphasis added). There is, however, little to suggest that such repeated reporting is in any way required by Article 51.

<sup>66</sup> Letter dated 23 January 2000 from the Permanent Representative of Pakistan to the United Nations addressed to the Secretary-General, UN Doc. A/54/719-S/2000/48 (Jan. 25, 2000).

<sup>67</sup> Letter dated 22 May 2002 from the Permanent Representative of Pakistan to the United Nations addressed to the President of the Security Council, UN Doc. S/2002/571 (May 22, 2002).

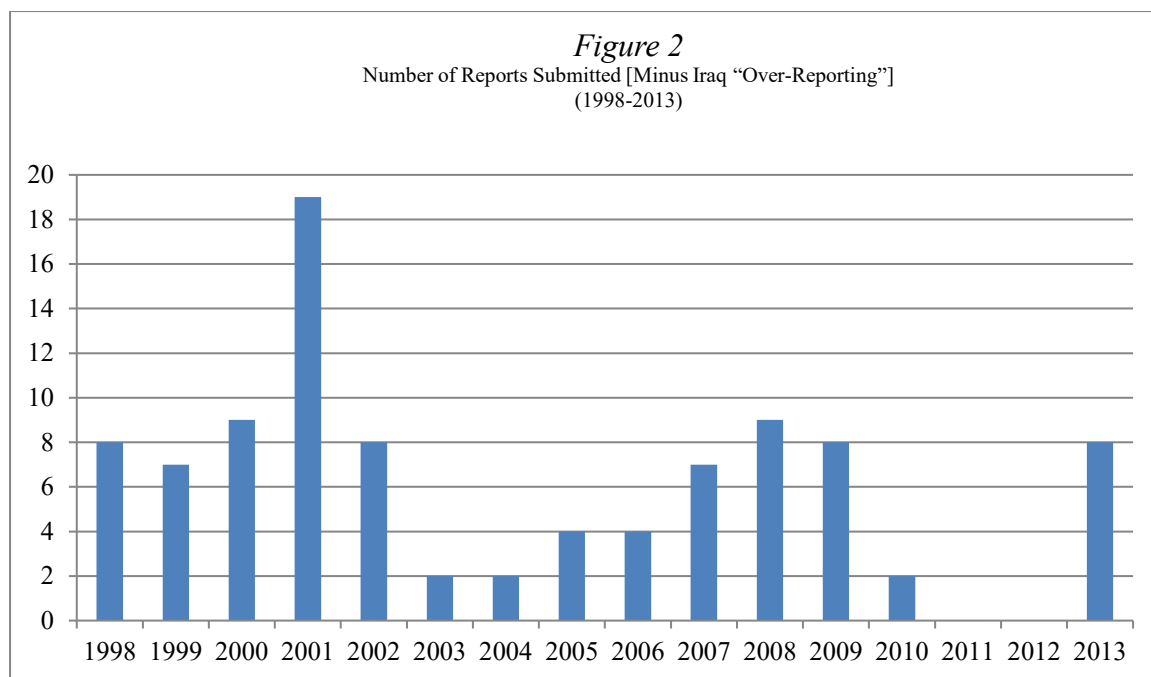
Repeated reporting does, of course, also have the potential act as little more than a concerted propaganda offensive.<sup>68</sup> In some cases, the reports that states have submitted are entirely repetitive. The obvious example here is the 103 reports submitted by Iraq in 1999-2002. While these reports provided a reasonable amount of factual detail with regard to each specific incident, their substance was, essentially, identical from report to report. No additional beneficial information can be gleaned from the repeated reporting policy of Iraq. Repeated reporting in this way, as a propaganda exercise, merely acts to cloud the situation in question and makes the reporting procedure significantly *less* effective as a measure of external assessment. Indeed, it has been suggested that states may continue to report aspects of an ongoing armed conflict as a means of “rooting” any external legal appraisal in the *jus ad bellum*, so as to avoid focus being turned to the application of the more relevant rules of the *jus in bello* (which, for whatever reason, the state wishes to avoid).<sup>69</sup> However, to stress again – the Iraq anomaly aside – states generally do not report their self-defense actions in this excessively repetitive manner.

Given all of the above, one must be cautious about making sweeping claims with regard to the frequency of state reporting. Iraq’s over-reporting alone means that analysis based simply on the number of reports submitted in the period of 1998-2013 gives an inaccurate representation of actual compliance rates during that period. By removing Iraq’s repeated reporting practice from the dataset, therefore, we can see a more accurate reflection of actual compliance: this gives us a total of 97 reports during the relevant period (not 200), with a yearly frequency as shown by *Figure 2*.

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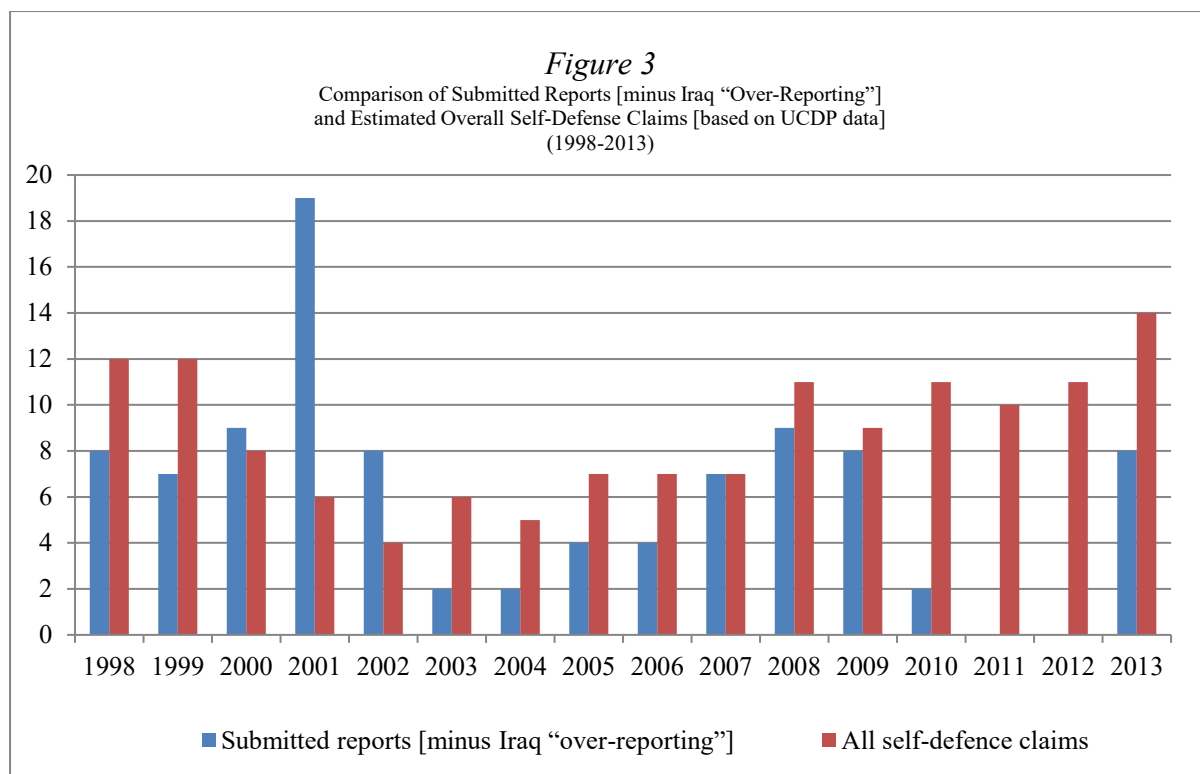
<sup>68</sup> GRAY, *supra* note 8, 124.

<sup>69</sup> *See id.*



*Figure 2* shows a remarkable consistency in the number of self-defense reports submitted during the period under review. By removing the Iraq over-reporting data, it becomes evident that around 5-10 reports have been submitted each year without notable variance. The one remaining anomaly here is in 2001, where 19 reports were submitted: but this is explained by the intervention in Afghanistan that year following the events of 9/11 (an intervention that involved a large number of coalition states – all of which reported).

This data on reporting frequency, as adjusted to exclude the clear case of over-reporting by Iraq, can be mapped on the estimated data on overall self-defense claims, derived from the UCDP dataset, as seen in *Figure 3*.



*Figure 3* is certainly highly indicative of a substantial increase in reporting from the pre-1986 position, and shows that compliance rates, when related to estimated data on the total number of self-defense claims made, have continued to be strong in the post-9/11 world. It may equally be said that compliance with the reporting requirement remains far from absolute. This quantitative conclusion is confirmed by a further qualitative review of the practice. Instances can easily be identified, over the last 16 years, of states officially claiming to be acting self-defense but then failing to report this to the Security Council. For example, “Operation Linda Nchi”, undertaken in pursuit of Al-Shabaab militants in 2011, was officially justified by Kenya through reference to Article 51.<sup>70</sup> However, while Kenya asserted that it would report this to the Council,<sup>71</sup> it never in fact did so. Another recent example is the military action launched by France in Mali in January 2013 (“Operation

<sup>70</sup> See Vidan Hadzi-Vidanovic, *Kenya Invades Somalia Invoking the Right of Self-Defence*, EJIL: TALK! (Oct. 18, 2011), at <http://www.ejiltalk.org/kenya-invades-somalia-invoking-the-right-of-self-defence/>.

<sup>71</sup> *Id.*

Serval”). France explicitly claimed that this action was a lawful exercise of collective self-defense.<sup>72</sup> Yet this was not reported to the Council.<sup>73</sup> There are various other notable examples from 1998-2013 where states invoked self-defense (or at least strongly implied that force was being used for this reason), but failed to report this to the Security Council.<sup>74</sup>

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<sup>72</sup> Press conference given by M. Laurent Fabius, Minister of Foreign Affairs – excerpts, Paris (Jan. 11, 2013), at <http://basedoc.diplomatie.gouv.fr/vues/Kiosque/FranceDiplomatie/kiosque.php?fichier=baen2013-01-14.html/>.

<sup>73</sup> It should be noted that the self-defense claim made by France is problematic for a number of reasons, and the intervention is probably better seen as either an action of intervention following the consent of Mali, or an action in compliance with UNSC Resolution 2085. See Theodore Christakis and Karine Bannelier, *French Military Intervention in Mali: It's Legal but... Why? Part I: The Argument of Collective Self-Defense*, EJIL: TALK! (Jan. 24, 2013), at <http://www.ejiltalk.org/french-military-intervention-in-mali-its-legal-but-why-part-i/>; and Theodore Christakis and Karine Bannelier, *French Military Intervention in Mali: It's Legal but... Why? Part II: Consent and UNSC Authorisation*, EJIL: TALK! (Jan. 25, 2013), at <http://www.ejiltalk.org/french-military-intervention-in-mali-its-legal-but-why-part-2-consent-and-unsc-authorisation/>.

<sup>74</sup> See, e.g., Uganda in relation to its 1998 action against the Democratic Republic of Congo, Case Concerning Armed Activities on the Territory of the Congo (D.R. Congo v. Ugan.), Merits, 2005 ICJ REP. 168, para. 145 (Dec. 19) (hereafter “*Armed Activities*”) (where the ICJ noted Uganda’s failure to report); Ethiopia with regard to its 2006 intervention into Somalia, UN SCOR, 5614th mtg. at 3, UN Doc. S/PV.5614 (Dec. 26, 2006) (where it was communicated to the Council that Ethiopia claimed to be acting in self-defense, but not by Ethiopia itself); Turkey’s 2008 “Operation Sun” in northern Iraq, UNHRC, Note verbale dated 26 March 2008 from the Permanent Mission of Turkey to the United Nations Office at Geneva addressed to the Secretariat of the Human Rights Council, UN Doc. A/HRC/7/G/15 (Mar. 26, 2008); and Colombia’s 2008 raid against the Fuerzas Armadas Revolucionarias de Colombia (FARC) in Ecuador, Comunicado del Ministerio de Relaciones Exteriores de Colombia, 081, Bogota (Mar. 2, 2008), at <http://web.presidencia.gov.co/comunicados/2008/marzo/81.html> (« El Ministerio de Relaciones Exteriores y el Ministerio de Defensa Nacional en el día de hoy responderán la nota de protesta del Gobierno de la hermana Republica del Ecuador. Por lo pronto, anticipamos que Colombia no violó soberanía sino que actuó de acuerdo con el principio de legítima defensa »).

*Figure 3* nonetheless suggests that, while reporting frequency by year generally falls below the total number of instances (or claimed instances) of self-defense, it does not fall significantly below this number. For most of the years covered, the reporting practice follows, and falls only relatively short of, the overall number of invocations of the right. Anomalies in this pattern can be identified for the early 2000s, but these can be explained by a prevalence of “repeated reporting” in that period and, particularly, in 2001 (again because the number of states that reported the same self-defense claim in relation to “Operation Enduring Freedom”). It is also perhaps of note that no reports were submitted in 2011 or 2012 even though a number of self-defense claims were made in those two years. This indicates that there has been poor compliance with the reporting requirement in the period immediately before the study was conducted. However, it is too soon to draw any conclusions as to the possibility of a changing trend here, especially as 8 reports were then submitted during 2013.

Overall, it appears that states today report a majority of their self-defense actions to the Council. Despite compliance with the reporting requirement remaining far from perfect, our study broadly indicates that states now report when previously they did not.<sup>75</sup>

### *C. Possible Reasons for the Increased Frequency of Reporting*

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<sup>75</sup> Notably, the reporting requirement has almost universally been complied with by states invoking *collective* self-defense, even prior to the increase in frequency discussed in this section, GRAY, *supra* note 8, at 102 (convincingly setting out the practice to support the near-universality of compliance with regard to collective self-defense). *Contra* Josef Mrázek, *The Right to Use Force in Self-Defence* 2 CZECH YEARBOOK OF INTERNATIONAL LAW 33, 44 (2011). It is not the case, however, that claims of collective self-defense have *always* been reported, as can be seen from the example of France/Mali in 2013. *See supra* notes 72-73 and accompanying text.

What led to this increased frequency in reporting? The most commonly credited factor is the 1986 merits decision of the International Court of Justice (ICJ) in the Military and Paramilitary Activities in and against Nicaragua case.<sup>76</sup> In that decision, the first time the ICJ had engaged in detail with the law governing self-defense, the Court famously acknowledged and reaffirmed the importance of the reporting requirement.<sup>77</sup> A number of writers have assumed that the increase in reporting since the mid-1980s has been primarily due to the *Nicaragua* decision.<sup>78</sup> It does seem highly likely that the ICJ's judgment contributed significantly to the shifting trend in state practice with regard to reporting, but it is – of course – impossible to say what its exact contribution was.

More generally, 1986 can be seen as something of a watershed year for the reporting requirement in relation to the subsequent increase in compliance with it. Not only was the obligation reaffirmed by the ICJ, but, as was noted above, it was debated in the Working Group of the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations that same year, and 1986 was also the publication date of Combacau's damning assessment of compliance rates (which influenced subsequent academic criticism of states for failing to observe the requirement).

It is not as though reporting practice changed overnight, however. The end of the Cold War almost certainly also led to a further increase in reporting in the 1990s due to a renewed confidence in the Security Council. The Council had something of a rebirth in the early 1990s, as is well known. Since then, there has been least the possibility that the Council could take Chapter VII action following a state's self-defense report, if it saw that as being

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<sup>76</sup> *Nicaragua*, *supra* note 16.

<sup>77</sup> *Id.*, paras. 200 and 235. For discussion, *see infra* notes 99-104 and accompanying text.

<sup>78</sup> DINSTEIN, *supra* note 5, 239; GRAY, *supra* note 8, 121; Simma et al. eds., *supra* note 41, 1425; and Kelly, *supra* note 47, at 24.



necessary. Similarly, it is now significantly more plausible, politically, for the Council to assess the lawfulness of self-defense actions of which it has been notified. This is not to say that the Council commonly assesses the lawfulness of the self-defense claims that are put before it. Far from it: the Council remains, after all, a political body and not a juridical one.<sup>79</sup> However, the Council is now at least in a position *to be able* to make such a determination, and, indeed, does so on occasion (as can be seen, for example, from its abrogation of Israel's 2006 self-defense claim in relation to its action in Lebanon).<sup>80</sup>

Some of the original intention underpinning the reporting requirement has potentially been revived, therefore, which may perhaps have contributed to an increase in compliance. Having said this, as will be discussed in section IX, the Council rarely in fact makes use of the reports submitted to it. So the Council's "revival" should perhaps not be overstated as a factor influencing increased compliance. It is likely that an increased *perception* of the possibility for Council interaction with submitted reports in the post-Cold War era has been a factor in improving compliance with the reporting requirement, but this is not to say that the Council has actually made all that much use of the reports that have been submitted to it since its "rebirth".

#### IV. WHICH STATES REPORT?

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<sup>79</sup> See CONSTANTINOU, *supra* note 8, 193 (footnote 7). For further discussion, see *infra* notes 164-167 and accompanying text.

<sup>80</sup> See Identical letters dated 12 July 2006 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. A/60/937-S/2006/515 (Jul. 12, 2006). SC Res. 1701(Aug. 11, 2006) *inter alia* called upon Israel to withdraw all of its forces from southern Lebanon. See RUYS, *supra* note 5, at 75.

It was argued in the previous section that reporting practice is now common, at least when compared to the low compliance rates of the Cold War period. The next question to consider is *which* states reported in the 1998-2013 period.

*A. By Region*

*Figure 4* illustrates the spread of reports by the submitting state's region. The "over-reporting" of Iraq from 1999-2002 identified above is omitted from *Figure 4*, as this anomalous practice misleadingly skews the results.

*Figure 4*  
Regional Spread of Reports  
[Minus Iraq "Over-Reporting"]  
(1998-2013)

Africa	31
Asia	5
Europe	14
Middle East	42
North America	3
Oceania	2
South and Central America	0

As was noted in section III, the obligation to report is obviously only triggered when the right of self-defense is invoked; which, in turn, means only when force is used (or at least contemplated) between states.

It is therefore of no great surprise to find that states from the geopolitically volatile Middle East region submitted the largest number of reports in the period under review (42, or 43 percent). To some extent, this is likely due to the fact that states in the region have simply been involved in a greater number of uses of military force since 1998 than have states from many other areas of the world. Having said this, reference to the filtered UCDP data on the regional spread of uses of force indicates that only 16 percent of the total number of relevant

actions for the period took place in the Middle East.<sup>81</sup> This would suggest that, while a disproportionate number of self-defense actions have indeed taken place in the Middle East, there is also a notable tendency towards repeated reporting in the region, with 16 percent of the actual actions of self-defense being represented by 43 percent of the reports submitted. The present writer would suggest that the prevalence of self-defense reporting in the Middle East may therefore have as much to do with the “war” in the region concerning international hearts and minds as it does with actual instances of self-defense. It is also perhaps of no surprise to note that of the reports presented by Middle Eastern states, more than half were submitted by Israel (24, or 25 percent of the total). This makes Israel the state that has submitted the most number of self-defense reports since 1998 (that is, of course, other than Iraq, which submitted a total of 106 reports: 103 of which have been removed from the data analysis).

The regional spread also indicates that developing states have reported more self-defense actions than have developed states. In addition to the reports emanating from Middle Eastern countries, states from the conflict-weary continent of Africa have produced the second highest number of reports of any region (31). This finding could perhaps indicate that developing states are intrinsically more likely to submit reports: for example, it might be that geopolitically weaker states are more inclined to turn to the protections of the UN’s collective security mechanism, and to look to vocally assert their “clean hands” in any particular dispute involving the use of force. While this may be true to an extent, a more significant reason for the fact that a notable majority of reports since 1998 have been submitted by developing states is simply that a predominance of the world’s conflict zones during that period are to be

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<sup>81</sup> See the “filtered” version of the UCDP *Dyadic Dataset*, *supra* note 55.

found in the developing world.<sup>82</sup> To some degree, reporting practice will inevitably link to areas of conflict for obvious reasons.

Given that reporting has been commonplace from both African and Middle Eastern states, it is noteworthy that no reports at all were submitted by states from either South or Central America. Of course, these regions have not suffered the same level of conflict in recent years as either Africa or the Middle East,<sup>83</sup> and where they have this predominantly has been of an internal nature.<sup>84</sup> There have, however, certainly been self-defense claims made during the period under scrutiny by South and Central American states: none of which have led to the submission of a report to the Council.<sup>85</sup> There are examples of Latin American states reporting their self-defense claim to the Council *prior* to 1998,<sup>86</sup> and there has been no explicit rejection of the reporting requirement by any state from the region. It is thus an unexplained anomaly that, while the overall frequency of state reporting has increased – especially in the developing world – this trend has not been replicated in Central and South America.

### *B. By Security Council Membership*

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<sup>82</sup> *Id.*, which indicates that 87% of all relevant uses of force in the period 1998-2013 occurred in the developing world.

<sup>83</sup> *Id.*, which indicates that only 3% of the total number of relevant uses of force in the period 1998-2013 related to states from South or Central America.

<sup>84</sup> *Id.*, which indicates that there were a significant number of “internal” uses of force in South or Central America in the period 1998-2013 (63).

<sup>85</sup> *See, e.g.*, Colombia’s 2008 raid against the FARC in Ecuador, Comunicado del Ministerio de Relaciones Exteriores de Colombia, 081, *supra* note 74.

<sup>86</sup> *See, e.g.*, the reports submitted by both El Salvador and Honduras during their so-called “Soccer War” in 1969, UN Doc. S/9330, *supra* note 46; and UN Doc. S/9329, *supra* note 46.

When examining which states have reported in the period under study, it is worth considering the data not just through the “regional” lens, but also in relation to Security Council membership. Given that the reporting requirement was originally intended to directly link the mechanism of self-defense to the Council’s mandate to maintain international peace and security, it is of interest to consider the extent to which members of the Council have themselves reported to the body of which they are a member.

The 1998-2013 study shows that the vast majority of submitted reports have come from states that were not members of the Council at the time at which they reported. Only six reports were submitted by one of the five permanent member states (P5) in the period: one each by the United Kingdom<sup>87</sup> and France,<sup>88</sup> and two each by Russia<sup>89</sup> and the United States.<sup>90</sup> No reports at all were submitted during the relevant period by an incumbent non-permanent member of the Council. This means that – again excluding Iraq’s over-reporting from 1999-2002 – 94 percent of the reports that were submitted between 1998 and 2013 came from states that were not members of the Council at the time at which they reported.

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<sup>87</sup> Letter dated 7 October 2001 from the Chargé d’affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, UN Doc. S/2001/947 (Oct. 7, 2001).

<sup>88</sup> Letter dated 23 November 2001 from the Permanent Representative of France to the United Nations addressed to the President of the Security Council, UN Doc. S/2001/1103 (Nov. 23, 2001).

<sup>89</sup> Letter dated 11 September 2002 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, UN Doc. S/2002/1012 (Sep. 12, 2002); and Letter dated 11 August 2008 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council, UN Doc. S/2008/545 (Aug. 11, 2008), respectively.

<sup>90</sup> Letter dated 20 August 1998 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/1998/780 (Aug. 20, 1998); and Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2001/946 (Oct. 7, 2001) respectively.

Again, care must be taken not to extrapolate too much from this fact. The present author has been unable to identify a single instance from 1998-2013 where a non-permanent member made a self-defense claim during its tenure on the Council that went unreported. As such, the fact that non-member states have not reported cannot be seen as indicating that these states did not “trust” the body of which they were a member to engage with reports, or that they had any specific political or legal aversion to reporting by virtue of being a non-permanent member. It has seemingly just been the case that no non-member state since 1998 has been in the position where the requirements of Article 51 were triggered.

What is perhaps of more interest than the absence of any reports submitted by non-permanent member states, therefore, is the fact that the P5 have engaged with the obligation to report in recent years, with China being the only P5 state not to have reported. To an extent we can say that there has been a degree of compliance with the reporting obligation from states at both ends of the “power spectrum” within international relations. This also suggests that the P5 are generally willing to submit their claims of self-defense to scrutiny by the Council, which may indicate a wider confidence in the role of the Council by its permanent members.

Reporting is, therefore, certainly not merely the preserve of developing states, nor is it the case that the P5 ignore the requirement (as was more commonly the case during the Cold War). Having said this, half of the reports submitted by P5 members to the Council were submitted in relation to the intervention of Afghanistan in 2001, at a time when there was a pervading sense of multilateral galvanization – within and without the Council – surrounding the self-defense claim of the United States and its allies following the 9/11 attacks. It is

additionally worth noting that P5 states have also failed to report self-defense claims during the relevant period.<sup>91</sup>

## V. THE LEGAL IMPLICATIONS OF REPORTING OR FAILING TO REPORT

To the limited extent that the reporting requirement has been assessed in the literature, this has generally been with regard to the question of the legal implications of reporting or, perhaps more crucially, of the failure to report. For example, Constantinou has argued that the legal consequences flowing from the reporting requirement represent “the *main issue* with regard to the provision.”<sup>92</sup>

### A. *The Legal Implications of Reporting*

The legal consequences of *submitting* a report can be dealt with rather easily. Compliance with the reporting requirement clearly cannot turn an otherwise unlawful “self-defense” action into a lawful one.<sup>93</sup> This is obvious as a matter of legal reasoning: the substantive requirements for lawful self-defense are cumulative and so if any one of them is not complied with – for example, if the response taken is disproportionate – then the action will be unlawful irrespective of other legal requirements having been met. The possibility of

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<sup>91</sup> See, e.g., the military action launched by France in Mali in January 2013 (“Operation Serval”), Press conference given by M. Laurent Fabius, *supra* note 72.

<sup>92</sup> CONSTANTINO, *supra* note 8, 192, emphasis added.

<sup>93</sup> Dino Kritsiotis, *The Legality of the 1993 US Missile Strike on Iraq and the Right of Self-Defence in International Law* 45 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 162, 174 (1996) (“That a State readily complies with the stipulation [the reporting requirement] cannot mean that, ipso facto, the actual use of force used was a lawful exercise of self-defence”). See also DINSTEIN, *supra* note 5, at 241; and WILLIAMSON, *supra* note 2, 113.

alchemically turning unlawful uses of force into lawful actions of self-defense by mere virtue of reporting would obviously be highly undesirable.

This is not to say that states do not view reporting as a sign of good faith in others, or point to their own reporting practice as a means of trying to establish the credibility of their self-defense claims: reporting has an obvious political role. However, defending states do not make the claim that the fact that they have reported *establishes* the lawfulness of their actions. Take, for example, the United Kingdom's report relating to its intervention in Jordan in 1958.<sup>94</sup> The United Kingdom stressed the positive implications of the fact that it had reported, but it clearly saw this as an ancillary factor supporting the lawfulness of its action, not a primary means of establishing it.<sup>95</sup>

### *B. The Legal Implications of a Failure to Report*

A more problematic question is whether a *failure* to report has the effect of making an otherwise lawful action in self-defense unlawful. On a purely textual analysis of Article 51, the reporting requirement appears to be quite unequivocal: “[m]easures taken by members in the exercise of this right of self-defense *shall be* immediately reported to the Security Council.”<sup>96</sup>

Yet in spite of the apparently mandatory wording in Article 51, a majority of writers today take the view that a failure to report does not mean that an otherwise lawful action in self-defense becomes unlawful.<sup>97</sup> This is primarily on the basis that such a conclusion would

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<sup>94</sup> UN Doc. S/PV.831, *supra* note 33, at 5-7.

<sup>95</sup> See UN SCOR, 834th mtg. at 13-14, UN Doc. S/PV.834 (Jul. 18, 1958).

<sup>96</sup> UN Charter, art. 51, emphasis added. See BOWETT, *supra* note 16, 197 (seemingly taking the view that the requirement is a condition precedent for lawful self-defense).

<sup>97</sup> See, e.g., STANIMIR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 147-149 (1996); DIMITRIOS DELIBASIS, THE RIGHT TO NATIONAL SELF-DEFENSE IN INFORMATION WARFARE



lead to the legitimization of an armed attack merely due to a procedural failure on the part of an innocent defending state. In other words, the general view is that the initiative should not be handed to the aggressor simply because the victim failed to complete the paperwork:

With regard to the consequences of treating Article 51 as imposing a mandatory reporting requirement, it is both extreme and unsatisfactory to conclude that an otherwise legitimate act of self-defence could be totally vitiated in this way. The results of such a proposition would be potentially to render the victim state liable to sanctions under Chapter VII of the Charter because its use of force would be wrongful, and presumably also to responsibility for damage caused to the original aggression by the defensive action taken.<sup>98</sup>

As noted in section III, the ICJ examined the scope of the reporting requirement in its 1986 *Nicaragua* merits decision. It must be recalled that the Court could not apply provisions of the UN Charter (including Article 51) in *Nicaragua*, because of the multilateral treaty reservation of the United States: essentially restricting the jurisdiction of the Court to the application of customary international law only. On this basis, the ICJ held with regard to the reporting requirement that:

[I]t is clear that in customary international law it is not a condition of the lawfulness of the use of force in self-defence that a procedure so closely

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OPERATIONS 170-171 (2007); DINSTEIN, *supra* note 5, 240-241; TARCISIO GAZZINI, THE CHANGING RULES ON THE USE OF FORCE IN INTERNATIONAL LAW 154-155 (2005); JENNINGS AND WATTS, *supra* note 18, 423 (footnote 22); GRAY, *supra* note 8, 122; Azubuike, *supra* note 56, 148-149; Gray, *supra* note 47, 718-719; Leslie C. Green, *Armed Conflict, War, and Self-Defence* 6 ARCHIV DES VÖLKERRECHTS 387, 434 (1957); Greig, *supra* note 6, particularly at 384; Kritsiotis, *supra* note 93, at 174; and Ronzitti, *supra* note 41, 356.

<sup>98</sup> Greig, *supra* note 6, 387. See also DELIBASIS, *supra* note 97, 170-171; and DINSTEIN, *supra* note 5, 241.

dependent on the content of a treaty commitment and of the institutions established by it, should have been followed.<sup>99</sup>

The reporting procedure was therefore not viewed by the Court as a condition precedent for lawful self-defense. Yet the ICJ also indicated in the *Nicaragua* decision that a failure to report to the Security Council can act as an *indication* of the unlawfulness of military action, or at least as evidence that the state concerned did not believe that it was acting in self-defense:

[I]f self-defence is advanced as a justification for measures which would otherwise be in breach both of the principle of customary international law and of that contained in the Charter, it is to be expected that the conditions of the Charter should be respected. Thus for the purpose of enquiry into the customary law position, the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence.<sup>100</sup>

The ICJ therefore seemingly imbued the requirement with legally-relevant evidential value, but fell short of identifying it as a mandatory obligation.

It has been argued that one can construe the Court's dictum in *Nicaragua* as indicating that, *under Article 51*, a failure to report will invalidate an otherwise lawful self-defense claim (in contrast to the view that the Court clearly took of reporting under customary international law).<sup>101</sup> The content of the law of self-defense is not necessarily

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<sup>99</sup> *Nicaragua*, *supra* note 16, para. 200. A similar statement was also made in para. 235 of the decision. Further, this position was reaffirmed by the President of the Court, *see Nicaragua*, *supra* note 16, separate opinion of President Nagendra Singh, 152-153.

<sup>100</sup> *Nicaragua*, *supra* note 16, para. 200. *See also* para. 235 of the decision.

<sup>101</sup> *See* DINSTEIN, *supra* note 5, 240; and R. St. J. Macdonald, *The Nicaragua Case: New Answers to Old Questions* 24 24 CANADIAN YEARBOOK OF INTERNATIONAL LAW 127, 153 (footnote 86) (1986).

identical in custom and convention,<sup>102</sup> and so it is certainly conceivable that a failure to report could be legally determinative under Article 51, while at the same time not having such fundamental implications under customary international law. Some writers have taken a completely opposite view, however, holding that the ICJ's dictum in *Nicaragua* confirmed that the reporting requirement is not a legal necessity under *either* customary *or* conventional international law, albeit that – whether Article 51 is applicable or not – a failure to report is still of legal relevance.<sup>103</sup>

Ultimately, reference to the jurisprudence of the ICJ alone can confirm neither position. In *Nicaragua* the Court simply did not rule on the legal implications of reporting where the Charter is applicable (which, it is worth noting, will be the case in virtually all instances). We cannot know what view the Court would have taken in the case with regard to the status of the reporting requirement if the provisions of the Charter had been available to it.<sup>104</sup> In addition to the *Nicaragua* case, the Court has referred to the reporting requirement in three other decisions.<sup>105</sup> However, in none of these decisions did the Court offer any explicit conclusions as to the legal implications of a failure to report; as such they provide no further elucidation of the Court's findings in this regard in *Nicaragua*.

Given that reference to case law is inconclusive with regard to the legal consequences of a failure to report, it is necessary to consider the question in practice (with regard to the interpretation of Article 51 by *states*). Analysis of state practice shows that, while a failure to report is sometimes criticized by other states, such objections are usually on the basis that the

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<sup>102</sup> Something also noted by the Court, *Nicaragua*, *supra* note 16, para. 175.

<sup>103</sup> CONSTANTINO, *supra* note 8, 194 (footnote 11).

<sup>104</sup> RUY, *supra* note 5, 69; Azubuike, *supra* note 56, 148; and Greig, *supra* note 6, 369.

<sup>105</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ REP. 226, para. 44 (Jul. 8) (hereafter "*Nuclear Weapons*"); Case Concerning Oil Platforms (Iran v. U.S.), Merits, 2003 ICJ REP. 161, paras. 48 and 67 (Nov. 6) (hereafter "*Oil Platforms*"); and *Armed Activities*, *supra* note 74, para. 145.

absence of a report is an indication of “bad faith” on the part of the invoking state. The *opinio juris* does not indicate that states see a failure to report as being determinative of lawfulness.

An example of this can be found from as far back as 1946, where the United States made it clear that it saw a report to the Security Council as a *desirable* measure to be taken when acting in self-defense, and stressed that it would endeavor to report in the course of its international relations; yet it reserved the right not to do so.<sup>106</sup> This suggests that from the very inception of the reporting requirement, states did not see it as mandatory. Similarly, the United States stressed with regard to its clashes with Libya in the spring of 1986 that the fact that Libya had not reported to the Security Council amounted to a sign of bad faith – the United States referred to reporting as indicating a level of “legitimacy”.<sup>107</sup> It would seem, though, that the United States did not view a failure to report as indicating anything more than this.<sup>108</sup>

There are also clear instances of states considering the self-defense claims of others to be legally valid even where there has been a failure to report. Ruys notes, as an example, The

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<sup>106</sup> United States Statement of Policy, American Association for the United Nations, October 1946, reproduced in Commission to Study the Organization of Peace, 6th Report: Collective Self-Defense under the United Nations Charter (1948) 7, at 10 (“Measures taken by members in the exercise of this right of self-defense *should*, of course, be reported to the Security Council,” emphasis supplied).

<sup>107</sup> UN SCOR, 2671st mtg. at 38, UN Doc. S/PV.2671 (Mar. 31, 1986).

<sup>108</sup> *Id.* Interestingly, the same dispute can be cited as evidence supporting a stricter interpretation of the reporting requirement. Libya stressed that action taken against it was *unlawful* on the basis that the United States had not reported this to the Security Council. UN SCOR, 2674th mtg. at 9, UN Doc. S/PV.2674 (Apr. 15, 1986) 9 (arguing that the United States was “in flagrant violation of Article 51 of the Charter, which requires that the Council be immediately informed of any such action”). Rather ironically, the United States had in fact reported, *see* Letter dated 25 March 1986 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/17938 (Mar. 25, 1986).

Netherlands' expression of support for Turkey' self-defense action, taken in response to Parti Karkerani Kurdistan (PKK) attacks in 2008, despite the fact that Turkey had not reported these actions to the Security Council.<sup>109</sup> The endorsement of states such as Burundi and Uganda for Kenya's unreported self-defense action in Somalia in 2011 acts as another example,<sup>110</sup> as does the support of the European Union and United States for France's intervention in Mali in 2013.<sup>111</sup>

An assessment of state practice thus indicates that the position taken by the ICJ in *Nicaragua* with regard to the legal implications of a failure to report accurately represents the law, both with regard to customary international law, but also under Article 51 itself. A failure to report is not legally determinative; self-defense actions may well still be lawful in the absence of a report. Equally, the fact that states that have failed to report have at times faced criticism for this from other states would also indicate that the requirement can correctly be viewed as being at least legally relevant.<sup>112</sup> A failure to report may indicate that a state does not believe in the genuineness of its action, and may, therefore, as part of a cumulative appraisal, undermine the legitimacy of a self-defense claim: "[I]n the end, perhaps

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<sup>109</sup> RUYS, *supra* note 5, 71.

<sup>110</sup> See *Uganda, Burundi Support Kenya Action in Somalia* DAILY NATION (Nov. 11, 2011), at <http://www.nation.co.ke/news/Uganda--Burundi-support-Kenya-action-in-Somalia/-/1056/1271492/-/15mwomb/-/index.html>.

<sup>111</sup> See *EU Countries back France on Mali Air Strikes* EU OBSERVER (Jan. 14, 2013), at <http://euobserver.com/foreign/118716>.

<sup>112</sup> See CONSTANTINO, *supra* note 8, 194; RUYS, *supra* note 5, 74; Greig, *supra* note 6, particularly at 384; Rosalyn Higgins, *The Legal Limits to the Use of Force by Sovereign States – United Nations Practice* 37 BRITISH YEARBOOK OF INTERNATIONAL LAW 269, 306 (1961); and Kritsiotis, *supra* note 93, at 174.

the most that can be said about satisfying the Article 51 reporting requirement is that it is but one of many factors bearing on the legitimacy of a States' claim to self-defense."<sup>113</sup>

It is worth noting that this conclusion holds true despite of the increased frequency of reporting since the *Nicaragua* decision. Improved compliance has not led to a change in the consequences of a failure to report. Rather, this merely indicates that states have perhaps taken on board the ICJ's position that a negative inference can be drawn from a failure to report.<sup>114</sup>

## VI. THE TIMELINESS OF SELF-DEFENSE REPORTING

It will be recalled that it is not merely the case that states are obliged to report actions taken in self-defense to the Security Council: Article 51 states that they must do so "immediately".<sup>115</sup> The reporting requirement, as set out in the UN Charter, thus has a "timeliness" element.

Trends in the timeliness of reporting practice in the period 1998-2013 are illustrated by *Figure 5*. However, it should be noted that much of the data presented in *Figure 5* is based on the *estimated* period between the initiation of self-defense and the submission of a report. This is because it is often not possible to determine the exact "start date" of a self-defense action with any certainty, especially in relation to ongoing disputes or in instances of repeated reporting. Nonetheless, it is possible to identify a broad timeframe for reporting in all cases. *Figure 5* therefore provides a general indication of the timeliness of reporting practice from 1998-2013, rather than an authoritative representation of it. The over-reporting

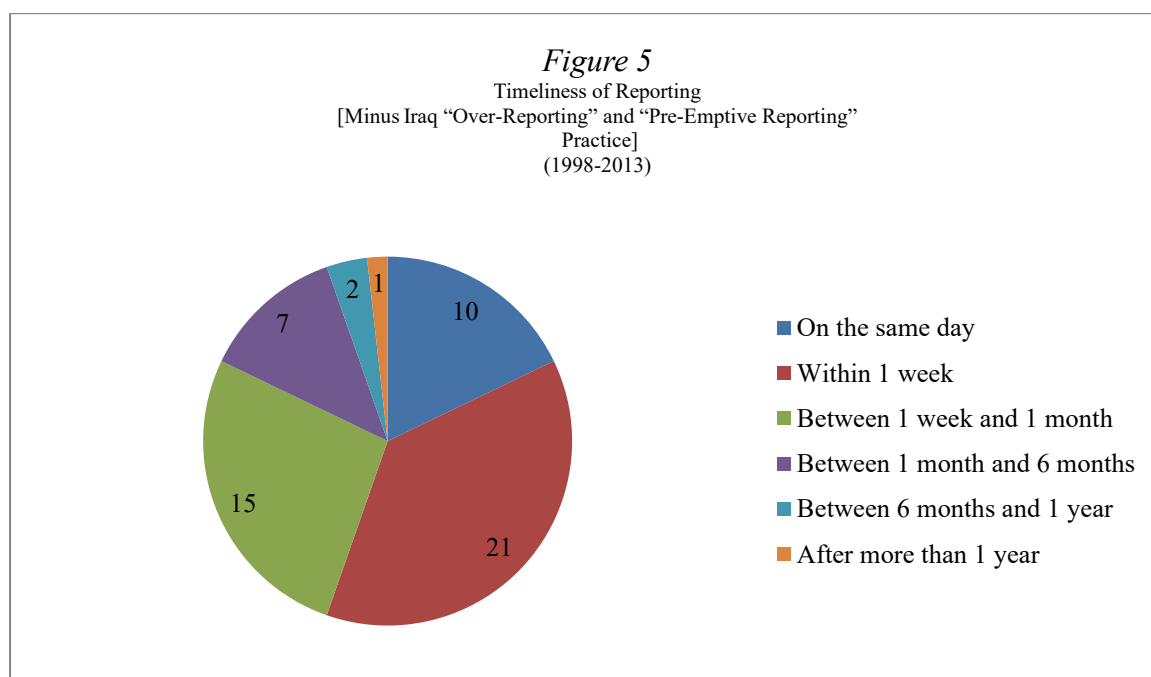
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<sup>113</sup> Christopher M. Petras, *The Use of Force in Response to Cyber-Attack on Commercial Space Systems – Reexamining Self-Defense in Outer Space in Light of the Convergence of U.S. Military and Commercial Space Activities* 67 JOURNAL OF AIR LAW AND COMMERCE 1213, 1264-1265 (2002).

<sup>114</sup> Simma et al. eds., *supra* note 41, 1425.

<sup>115</sup> UN Charter, art. 51.

of Iraq from 1999-2002, identified above, is again omitted from *Figure 5*, as this anomalous practice misleadingly skews the results. Instances of “pre-emptive” reporting (i.e., reports that have been submitted *before* the action in self-defense took place) are also omitted from this dataset for obvious reasons. These “pre-emptive” reports will be discussed in section VII, below.



*Figure 5* shows that, in recent years, the majority of reports have been submitted within one week of the initiation of self-defense measures. Of course, Article 51 does not give any indication as to how the qualifier “immediately” is to be interpreted, but it should be kept in mind that – theoretically at least – when a state is invoking self-defense this is because it is *under attack*. Setting the concept of “immediacy” in the context of a state suffering an armed attack, where the procedural requirement to report may understandably not be a priority, a delay of a week, or even more, would seem to be reasonably “immediate”. It may therefore be said that, to the extent that the time taken for a state to report can be identified, reporting commonly occurs within a relatively short period. The data presented in *Figure 5* would appear to indicate that states for the most part now comply with the requirement in Article 51 not only to submit a report, but also to do so in a timely manner.

Of course, a failure to report “immediately” does not preclude an action in self-defense from being lawful.<sup>116</sup> Given that reporting per se is not a condition precedent for self-defense, it is rather obvious that timely reporting cannot be either. States have on occasion criticized others for “late reporting”, which suggests that – as with a failure to report – overly delayed reporting may indicate “bad faith” on the part of the state claiming self-defense, and thus may at least factor in to the cumulative legal assessment of that claim. However, such criticism based on the timing of a submitted report has been extremely rare in practice, and has not occurred at all in recent years.

Pakistan’s invocation of self-defense with regard to the first conflict over Kashmir in 1947-1948 was criticized on the basis that it had not reported to the Security Council in the initial stages of the conflict.<sup>117</sup> Pakistan did notify the Council, but this occurred more than two years after the initiation of forcible measures.<sup>118</sup> Similarly, the Soviet Union and – notably, given its aligned status – the United States both took the view that the United Kingdom’s 1963-1964 action against Yemen was questionable as a genuine instance of self-defense, in part on the basis that this should have been reported to the Council sooner than it was.<sup>119</sup> The United Kingdom argued in April 1964 that it was taking defensive measures in Yemen, roughly a year after its first use of force, in the spring of 1963.<sup>120</sup>

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<sup>116</sup> Mitchell Knisbacher, *The Entebbe Operation: A Legal Analysis of Israel’s Rescue Operation* 12 JOURNAL OF INTERNATIONAL LAW AND ECONOMICS 57, 79 (1977-1978).

<sup>117</sup> UN SCOR, 466th mtg. at 4, UN Doc. S/PV.466 (Feb. 10, 1950).

<sup>118</sup> See UN SCOR, 464th mtg. at 29-31, UN Doc. S/PV.464 (Feb. 8, 1950). It should be noted that Pakistan was not entirely explicit in claiming self-defense in this Security Council debate, but this is the obvious implication of its argumentation.

<sup>119</sup> See UN Yearbook, at 184 (1964).

<sup>120</sup> See UN SCOR, 1106th mtg. at 10, UN Doc. S/PV.1106 (Apr. 2, 1964).



In 1981, with regard to the infamous Osiraq incident, Uganda criticized Israel for not reporting its avowed self-defense action “promptly” to the Council.<sup>121</sup> Interestingly, in this instance, Israel first raised its self-defense claim before the Council in the plenary session on June 12, a mere 5 days after the action itself.<sup>122</sup> Yet to take a more recent – and entirely contrasting – example, Eritrea’s *ten month* delay in reporting its response to the Ethiopian action in Badme in May 1998<sup>123</sup> went entirely unremarked upon by other states (including Ethiopia).

The present author has been unable to find a single example of a state arguing that another state’s self-defense claim was *invalidated* by virtue of belated reporting. Overall, the paucity and inconsistency of state responses to “late reporting” means that it is impossible to determine the exact legal implications of tardiness in this regard; or, indeed, to say with any degree of certainty how “immediate” reporting should be to comply with Article 51. What may be said is that on the rare occasions where states have criticized others regarding late reporting, they have not gone as far as to argue that the self-defense action in question was unlawful on this basis alone.

It has been argued that timeliness in reporting is important to ensure that the Council (and wider world) is able to quickly take informed decisions and action in relation to threats

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<sup>121</sup> UN SCOR, 2288th mtg. at 13, UN Doc. S/PV.2288 (Jun. 19, 1981).

<sup>122</sup> UN SCOR, 2280th mtg. at 8, UN Doc. S/PV.2280 (Jun. 12, 1981). Uganda’s condemnation of Israel’s late reporting in relation to Osiraq in 1981 likely had more to do with Uganda’s political perception of the action than any assessment of the Article 51 requirement to report per se, and it is notable that Uganda’s primary reason for finding the Osiraq attack unlawful was, in any event, that Israel had not suffered an armed attack. Ultimately, 5 days would seem a reasonable delay: *see* Knisbacher, *supra* note 116, 79 (arguing that a 5 day delay with regard to another controversial Israeli intervention, at Entebbe airport in 1976, should be seen as meeting the requirement that states report self-defense actions “immediately”).

<sup>123</sup> *See* UN Doc. S/1999/304, *supra* note 62, particularly at 4-5.

to international peace and security.<sup>124</sup> However, even a report that is submitted well after the event has the potential to be of value for ex post facto evaluation of the situation that led to force being used; so, in this regard, late reporting may be preferable to a state not reporting at all. The problem with this in practice, as we shall see in section IX, is that the Council and other actors rarely engage with states' self-defense reports, however timely they may be.

In any event, it can be noted at this juncture that most states now report *and* seemingly do so within a relatively short time period after the initiation of their self-defense action: an encouraging trend.

## VII. "PRE-EMPTIVE" REPORTING

Article 51 places an obligation on states to "inform the Security Council of measures *already taken*; it does not require preparatory measures to be reported to the Council."<sup>125</sup> The expectation of the reporting requirement is that states will act in self-defense and then report this.<sup>126</sup> It is therefore of note that a significant number of reports that were submitted during

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<sup>124</sup> Knisbacher, *supra* note 116, 79.

<sup>125</sup> Kritsiotis, *supra* note 93, at 174. *See also* BOWETT, *supra* note 16, 198; DINSTEIN, *supra* note 5, 240-241; Knisbacher, *supra* note 116, 79; Patrick McLain, *Settling the Score with Saddam: Resolution 1441 and Parallel Justification for the Use of Force against Iraq* 13 DUKE JOURNAL OF COMPARATIVE AND INTERNATIONAL LAW 233, 287 (2003); and RUYS, *supra* note 5, 70.

<sup>126</sup> Having said this, some examples from state practice do seem to suggest a contrary conclusion. Tunisia argued that French action in 1958 was unlawful because "the problem had not yet been reported to the Council when the [forcible] measures in question were taken." UN SCOR, 819th mtg. at 16, UN Doc. S/PV.819 (Jun. 2, 1958). Also in 1958, Mr Sobolev, the Soviet representative to the Security Council, criticized the United States and the United Kingdom with regard to the interventions in Lebanon and Jordan respectively on the basis that the Council was only informed "after they [the uses of force] had taken place." UN SCOR, 835th mtg. at 13, UN Doc. S/PV.835 (Jul. 21, 1958). However, such examples are rare, and clearly run counter to the usual understanding of the sequence of events envisaged with regard to the reporting procedure.

the period 1998-2013 were what may be called “pre-emptive” reports. This term is used here to refer to reports that were submitted *prior to force being used in self-defense* (or, in some cases, prior to the expected exercise of defensive force that was ultimately never used), rather than necessarily referring to the reporting of pre-emptive or “anticipatory” self-defense actions.<sup>127</sup>

The phenomenon of “pre-emptive” self-defense reporting has been almost entirely unremarked upon in the literature.<sup>128</sup> This is perhaps because, although reporting in this manner has occurred on rare occasions throughout the UN era,<sup>129</sup> it is only in recent years that pre-emptive reporting has become common practice for states.<sup>130</sup> It can be seen from *Figure 6* – which again omits the over-reporting practice of Iraq from 1999-2002 – that close to half of the reports submitted in the last 16 years were pre-emptive in nature.<sup>131</sup>

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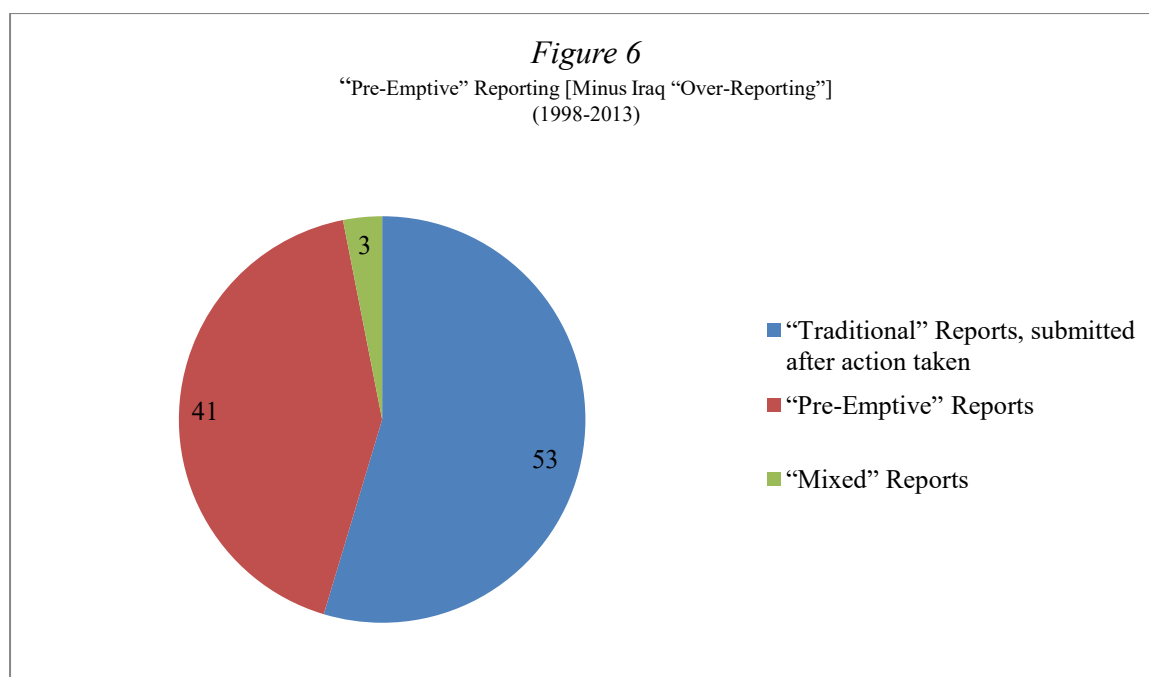
<sup>127</sup> See JACKSON N. MAOGOTO, *BATTLING TERRORISM: LEGAL PERSPECTIVES ON THE USE OF FORCE AND THE WAR ON TERROR* 111-149 (2005) (providing an overview of the debates concerning anticipatory/pre-emptive self-defense).

<sup>128</sup> See RUYSS, *supra* note 5, 73 (a rare example of an author acknowledging the phenomenon, by briefly noting that, through reporting, states are often “expressly *reserving* their right of self-defence or *warning* about the possible exercise thereof”).

<sup>129</sup> *E.g.*, in 1958, Tunisia reported to the Security Council that it *would* take forcible action against French troops stationed within its territory if those troops occupied positions prohibited by the Tunisian government. UN Doc. S/3951, *supra* note 46.

<sup>130</sup> See Bethany Lucas, *Pre-Emptive Reporting in the Modern Day Exercise of Self-Defence: The Increase in the Number of States Issuing Pre-Emptive Reports and the Categorisation of Such Reports* (unpublished background paper, produced for the author and on file with him), at 1.

<sup>131</sup> *Figure 6* is adapted from a pie chart produced in Lucas, *supra* note 130, at 3.



These “pre-emptive” reports that have been submitted to the Council have varied in character. As can be seen from *Figure 6*, a small number constitute what may be termed “mixed” reports, meaning that they relate to a self-defense action that has already occurred, but also include reference to defensive action to be taken in the future. For example, in 2001, Syria reported that its “air defences engaged the attacking [Israeli] aircraft and drove them off,” but then also went on to “reserve...its right to legitimate self-defence against any aggression in the future.”<sup>132</sup>

Another “type” of pre-emptive report are those that inform the Council of a specific defensive response *that is about to be taken*. This form of pre-emptive reporting may almost be viewed as a particularly strict interpretation by the reporting state of the “immediacy” requirement – a report submitted so “immediately” that it is actually supplied before the fact. An example of this type of reporting practice is the submission to the Council in 2003 that

<sup>132</sup> Letter dated 16 April 2001 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General, UN Doc. A/55/900-S/2001/362 (Apr. 16, 2001).

“Lebanon *will* exercise its natural and lawful right of self-defence, opposing [an airspace violation by Israeli aircraft] with ground anti-aircraft fire.”<sup>133</sup>

Pre-emptive reporting in this manner acts as a warning to the aggressor,<sup>134</sup> doubling as both an advance report in compliance with Article 51 and as a threat, which could potentially lead to the aggressor “backing off” without the need for the reporting state to actually resort to the forcible measures that it is reporting.<sup>135</sup> Similarly, by providing the Council (and wider international community) with information regarding an act of aggression and the intention to respond to this forcibly prior to any escalation caused by a defensive response, the reporting state increases the possibility of it receiving timely and effective support. Pre-emptive reporting in reference to a specific forthcoming defensive measure, to be taken in response to a specific attack, can thus be viewed as being a positive development in reporting practice. However, as will be discussed in section X, such a step equally has the potential to unnecessarily escalate tensions in relation to the dispute in question: possibly making the use force in relation to the dispute in question *more*, rather than less, likely.

The submission of pre-emptive reports has, in any event, commonly taken on a rather more abstract form. 39 of the 41 “pre-emptive” reports submitted from 1998-2013 involved the state in question generally reserving its right to respond in self-defense, in relation to a non-specific threat, without particular reference to the defensive measures to be taken (and

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<sup>133</sup> Letter dated 4 February 2003 from the Chargé d'affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General, UN Doc. A/57/722-S/2003/14 (Feb. 5, 2003) (emphasis added).

<sup>134</sup> Lucas, *supra* note 130, at 6.

<sup>135</sup> With regard to the potential desirability of “defensive threats” (threats to use force in self-defense if necessary), as a means of deterring actual or would-be aggressors without actually resorting to the use force itself, see James A. Green and Francis Grimal, *The Threat of Force as an Action in Self-Defense Under International Law* 44 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 285, 310-311 (2011).

usually without providing information as to when the response will be taken either). This is a concerning trend, where a formal report submitted to the Council acts as a threat – not a specific *defensive* threat but a general one, through the flexing of military muscles – as well as a way for the reporting state to assert and illustrate its “clean hands” and “victim” status.<sup>136</sup>

For example, the report issued by Iran in 2000 regarding mortar rounds launched by members of the Mojahedin-e-Khalq Organisation (MKO) merely made the vague assertion that Iran “reserve[d] its right to legitimate self-defence and removal of any threats.”<sup>137</sup> More recently, the Democratic People’s Republic of Korea (DPRK) submitted a report to the Council in January 2013, where it proclaimed that it would:

[t]ake steps for physical counteraction to bolster the military capabilities for self-defence, including the nuclear deterrence, both qualitatively and quantitatively, to cope with the ever more undisguised moves of the United States to apply sanctions and pressure against the Democratic People’s Republic of Korea.<sup>138</sup>

Vague and abstract pre-emptive reporting of this sort has little relation to the obligation as detailed in Article 51, and certainly does not act to fulfill the object and purpose of that requirement.

It is difficult to say with any certainty *why* there has been a significant increase in pre-emptive forms of reporting in recent years. This is perhaps the result of the increased focus on the use of military force post-9/11, as well as of the more general effects of globalization

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<sup>136</sup> Lucas, *supra* note 130, at 4.

<sup>137</sup> Letter Dated 13 March 2000 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, UN Doc. S/2000/216 (Mar. 14, 2000).

<sup>138</sup> Letter dated 24 January 2013 from the Permanent Representative of the Democratic People’s Republic of Korea to the United Nations addressed to the President of the Security Council, UN Doc. S/2013/50 (Jan. 24, 2013).

and increased media scrutiny<sup>139</sup> on modern international relations. Whatever the reason, the increasingly common “abstract” form of pre-emptive reporting – where the state in question merely issues a thinly-veiled threat to potential adversaries by reasserting its right to self-defense – bears little relation to reporting as was intended by the drafters of Article 51.

#### VIII. THE SUBSTANTIVE QUALITY OF SELF-DEFENSE REPORTS

This section considers an aspect of reporting procedure that has been notably overlooked in the literature: the *quality* of reporting. As noted above, to the limited extent that writers have examined the requirement, they have tended to focus on the frequency of reporting, and – even more so – on the legal implications of a failure to report. The depth and content of submitted reports has not been discussed in the literature. However, what states say in their reports (and what they do not say) has significant implications for the potential “value” of the reporting requirement.

The obligation contained in Article 51 is, of course, merely that states acting in self-defense must report this.<sup>140</sup> Once a state has informed the Council of its self-defense action, the requirement is technically met irrespective of the quality of the information provided: a “report consists, as a minimum, of a plain notification of the invocation of the right of self-defence.”<sup>141</sup> Anything more than this goes beyond what is formally required by Article 51. Yet, the original intention underpinning the requirement was that reporting would facilitate informed decision-making by the Security Council as to whether to respond to a threat to the peace; on this basis, the more detail provided by the reporting state the better, especially as time is often at a premium in the context of decision-making in relation to international uses

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<sup>139</sup> Lucas, *supra* note 130, at 4-5.

<sup>140</sup> UN Charter, art. 51.

<sup>141</sup> DINSTEIN, *supra* note 5, 237.

of military force. More generally, any *ex post facto* assessment (legal or otherwise) of a state's self-defense claim will rely on detailed factual and legal information, which could potentially be provided, *inter alia*, by a state's self-defense report.

It is perhaps notable that an early incarnation of the reporting requirement, set out in the initial Dumbarton Oaks proposals for the UN organization in October 1944 (an obligation which, at that stage, was linked more deliberately to regional arrangements for collective self-defense), was phrased thus:

The Security Council should *at all times* be kept *fully informed* of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.<sup>142</sup>

In fact, this wording from Dumbarton Oaks – requiring the Council to be “at all times...fully informed” – was retained well into the subsequent round of debates at the San Francisco conference in 1945,<sup>143</sup> before ultimately being replaced with the final terminology of Article 51.

Taking the view that such “full” and detailed reporting is inherently positive, some commentators have since claimed that there exists an obligation that reports include *evidence* supporting the alleged circumstances triggering self-defense,<sup>144</sup> or at least some detail concerning the defensive measures envisaged by the defending state.<sup>145</sup> The final adopted

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<sup>142</sup> *Documents of the United Nations Conference on International Organisation, Volume III: Dumbarton Oaks*, The United Nations Dumbarton Oaks Proposals for a General International Organization, Doc. 1, G/1, Chapter VIII, section C, para. 3, (Oct. 7, 1944), 19, emphasis added.

<sup>143</sup> See, e.g., *Documents of the United Nations Conference on International Organisation, Volume XII*, Doc. 576, *supra* note 15, 688.

<sup>144</sup> See, e.g., Yutaka Arai-Takahashi *Shifting Boundaries of the Right of Self-Defence – Appraising the Impact of the September 11 Attacks on Jus Ad Bellum* 36 INTERNATIONAL LAWYER 1081, 1095 (2002).

<sup>145</sup> *Id.*



wording of Article 51 requires no such thing, of course.<sup>146</sup> Moreover, as will be discussed in section X, there may be good reasons why a state would wish to *avoid* reporting in a detailed manner.

Nonetheless, there are certainly policy reasons that would support the notion of full and frank reporting, at least as a rebuttable presumption. Reporting alone does not support the goal of aiding effective responses to (and assessment of) threats to international peace and security. For reports to be of any real value in this regard, they have to be informative. As such, it has been argued that:

[T]he State should report the action undertaken to the Council in a special act referring to the exception of self-defence...backed up by arguments aimed at establishing the existence of the requisite conditions. If this procedure were followed, the debate would be concerned principally with establishing whether the conditions existed in the case in point. The Council could either find that the conditions were present and on this legal footing undertake a collective action under the terms of Chapter VII...or else it could declare that the conditions were not present, in which case it would take action against the State [that reported].<sup>147</sup>

During the period 1998-2013, however, the reports submitted by states were generally extremely cursory, for the most part including little factual or legal detail. For example, only 26 percent of the reports submitted in the period were of 3 or more pages in length, and only 3 percent were over 10 pages. The longest report submitted in this period was a 13 page document.<sup>148</sup> This suggests that, while states now tend to technically *comply* with the

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<sup>146</sup> DINSTEIN, *supra* note 5, 237.

<sup>147</sup> Combacau, *supra* note 36, at 15.

<sup>148</sup> Letter Dated 31 August 1998 from the Permanent Representative of the Democratic Republic of the Congo to the United Nations addressed to the President of the Security Council, UN Doc. S/1998/827 (Sep. 2, 1998).

reporting requirement, they rarely do so by submitting a detailed statement of their self-defense claim. In general, states merely submit a 1 or 2 page report to the Council: reports are invariably brief.

Of course, the length of the reports being submitted does not, in itself, tell us all that much. Just because the vast majority of reports are short does not mean that they are necessarily without any substantive depth. When one begins to engage with the reports, though, it is clear that their *content* also tends to be rather cursory. Take, for example, the report submitted in relation to Germany's involvement in the post-9/11 coalition intervention in Afghanistan in 2001, which amounted to little more than a notification that Germany was acting in self-defense.<sup>149</sup> This report is representative of most of the wider practice.

To the extent that detail *is* provided in state's reports, this is commonly factual, rather than legal detail. For example, Lebanon's pre-emptive report in 2003 regarding Israel's violations of its airspace provided relatively detailed assertions regarding Israel's conduct, and also set out exactly how Lebanon was going to respond in self-defense.<sup>150</sup> However, while the report invoked the "natural and lawful right of self-defence", there was no mention – for example – of Article 51, or of the requirement that the Lebanese action be both necessary and proportional.<sup>151</sup>

Nonetheless, Lebanon's 2003 report should perhaps be viewed as a relatively detailed report, because it is a rare example of a state providing information as to the nature of its self-defense action. The factual detail provided by states in their reports – to the extent that they provide any – generally focuses on the act being responded to, with very little assessment of

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<sup>149</sup> Letter dated 29 November 2001 from the Permanent Representative of Germany to the United Nations addressed to the President of the Security Council, UN Doc. S/2001/1127 (Nov. 29, 2001).

<sup>150</sup> UN Doc. A/57/722-S/2003/14, *supra* note 133.

<sup>151</sup> *Id.*

the measure(s) that the defending state is taking in response. Thus, Article 51's stipulation that "[m]easures taken" in self-defense must be reported has in practice been interpreted with rather more focus on the need (perceived or actual) for such measures than on the measures themselves. A good example here is the comparatively extensive report submitted by Eritrea in 1998 with regard to its ongoing hostilities with Ethiopia.<sup>152</sup> The report ran to 11 pages, but only one line was devoted to the defensive response taken,<sup>153</sup> with the rest of the report being dedicated to the background to the dispute and the Ethiopian bombing of Asmara.<sup>154</sup> This is perhaps unsurprising: political grandstanding by a victim state (whether it is a "true" victim state or not), is much more likely to focus on the "evil" done to it by the aggressor than on the nature of its response.

Overall, a review of the reports submitted since 1998 reveals a general trend towards perfunctoriness in reporting practice. To finish this section with a stark statistic: only three of the 200 reports submitted from 1998-2013 referred to the crucial proportionality criterion,<sup>155</sup> and only one of those – a report submitted by Iran in 2001 – actually made any real attempt to substantiate the claim that the self-defense action undertaken *complied with* the proportionality requirement.<sup>156</sup>

If reports do little more than notify the Council and other actors rather than *inform* them, then the value of reporting at all is perhaps questionable. Further doubt is cast on the utility of the reporting requirement when it is considered that reports are rarely used in a

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<sup>152</sup> UN Doc. S/1998/1205, *supra* note 62.

<sup>153</sup> *Id.*, at 8.

<sup>154</sup> *Id.*

<sup>155</sup> See UN Doc. S/1999/781, *supra* note 31; Letter dated 18 April 2001 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the President of the Security Council, UN Doc. S/2001/381 (Apr. 19, 2001); and UN Doc. S/2008/545, *supra* note 89.

<sup>156</sup> UN Doc. S/2001/381, *supra* note 156.

substantive sense by either the Council or other actors. It is to this crucial issue that we now turn.

## IX. THE UTILIZATION OF SELF-DEFENSE REPORTS

It has been argued that states, for the most part, now report actions of self-defense (and do so in a timely manner), but that this in itself may be of rather limited value because the reports submitted are generally very cursory in nature.

In addition, the value – or potential value – of the reporting requirement needs to be assessed not merely in relation to the volume and nature of the reports submitted, but also through an examination of the extent to which, and way in which, they are used. However timely and detailed a report may be, if other actors (be it the Security Council, courts and tribunals, or scholars) do not *engage* with the reports in a meaningful way then reporting will be of little practical worth.

### *A. Use by or within the Security Council*

The Security Council is, of course, the body for which self-defense reports were originally intended to be of value, and so an obvious point of inquiry is to consider the extent to which the Council engages with submitted reports. This can be examined in relation to formal decision-making by the Council, but also in terms of whether the Council acts as a “review body” in responding to the reports, or – more generally – as a forum in which individual state views are expressed in relation to submitted reports.

With regard to formal decision-making in the Council, its decisions can – according to established publication practice – be categorized as one the following “types” of decision-making processes: 1) resolutions; 2) statements by the President of the Security Council; 3) formal letters by the President of the Security Council on behalf of the Council; 4) notes of

the President of the Security Council; and 5) Council press statements.<sup>157</sup> Of course, the significance of each of these different categories of decision varies, with resolutions being the most politically and legally significant, and press statements (agreed only by consensus within the Council) being commonly viewed as the least significant.<sup>158</sup> Nonetheless, all five categories represent formal decisions toward action taken by the Security Council as an organ of the UN.

A review of the decisions of the Council across all five categories for the period 1998-2013 reveals that no formal decision of the Council has directly referenced (let alone substantively engaged with) a self-defense report submitted in compliance with Article 51. This fact obviously significantly undermines any claims of potential “value” for the reporting procedure in terms of its relationship to Council action. When the Council acts, in whatever manner, it does so without referring to self-defense reports at all.

However, the picture painted by this finding is tempered somewhat when one considers the *substance* of the decisions taken by the Security Council during the same period. While the Council never explicitly references states’ self-defense reports – or, at least, has not done so since 1998 – Council decisions have commonly overlapped with submitted reports in terms of their subject matter. The Council has undoubtedly taken action on a number of occasions with regard to circumstances that relate directly to the self-defense claims made by states in submitted reports. *Figure 7* therefore represents the Council decisions that have had notable substantive overlap with one (or more than one) submitted self-defense report.

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<sup>157</sup> See Rossana Deplano, *Building a Taxonomy of UN Security Council Decisions: a Biased Compliance with the UN Charter Obligations?* 1 STATE PRACTICE AND INTERNATIONAL LAW JOURNAL 46, 50-54 (2014). It should be noted, however, that this categorization of Council decisions is not necessarily authoritative; it is merely derived from the Security Council’s practice and publication record.

<sup>158</sup> *Id.*, 52-54.

*Figure 7*  
Security Council Decisions that Substantively Overlap with Reports  
(1998-2013)

Resolutions	42
Presidential Statements	26
Presidential Letters	14
Presidential Notes	2
Press Statements	55

The data presented in *Figure 7* could be interpreted as indicating that, while the Council does not explicitly refer to self-defense reports in the context of its formal decisions, it does at least engage with them to some degree. Given that there are a notable number of instances where the situation at the heart of a self-defense claim reported to the Council subsequently has become the subject of a decision by that body, one can infer that the submission of a report has contributed to putting the Council on notice with regard to an emerging threat to international peace and security (as was the original intention underpinning the reporting requirement), or, more generally, that reports have had at least some procedural or substantive influence on Council decision-making.

However, such an inference would be entirely speculative. Without explicit reference having been made to submitted reports, it is impossible to determine the extent to which these reports have been used by the Council in relation to the decisions that it has taken, if at all. It is also worth noting that the decisions taken by the Council that relate to the substance of a submitted report represent only a small proportion of the overall number of Council decisions. Deplano's recent detailed study of formal Council decisions over a broadly comparable period (2001-2012), identified 2712 separate formal decisions taken by the Security Council.<sup>159</sup> This means that only a fraction of the decisions taken by the Council

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<sup>159</sup> *Id.*, 55.

(somewhere in the region of 5 percent) could be seen as even having *potentially* been influenced – in whole or in part – by the submission of a self-defense report.

Similarly, outside of the process of official decision-making, the Council does not formally review the reports that are submitted to it. Reports are brought to the attention of all members as per Rule 6 of the Council’s rules of procedure.<sup>160</sup> However, the situation underpinning the report is not placed on the Council’s agenda as a matter of course. If a state were to specifically request in its submitted self-defense report that the content of that report be placed on the Council’s agenda then it would be, as per – inter alia – Article 35 of the UN Charter, but states notably do not request this in their reports.<sup>161</sup> As such, the relevant subject matter may appear on the agenda of the Council and, as we have seen, action may be taken, but it seems that this is not commonly as a direct result of the submission of a report.

The Council does not formally assess or engage with the reports submitted to it as a procedural matter, and there is certainly no substantive review of the factual or legal claims made by the reporting state by the Council as a whole, even in cases where the situation in question is placed on the agenda of the Council (including instances where the Council then goes on to take action). This means that, in the majority of cases, reports are merely logged and added – without comment – to the list of Council “communications” in the relevant annual report of the Security Council to the General Assembly,<sup>162</sup> as well as being sporadically noted in the *Repertoire of the Practice of the Security Council*.<sup>163</sup>

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<sup>160</sup> Provisional Rules of Procedure of the Security Council, UN Doc. S/96/Rev.7 (Dec. 21, 1982).

<sup>161</sup> For the period 1998-2013, the present author was unable to find a single report that specifically requested that the matter be placed on the agenda of the Council per se.

<sup>162</sup> These reports are required of the Council under UN Charter, art. 24(3). They are published as part of the Official Records of the General Assembly and publicly available on the UN website, at <https://www.un.org/en/sc/documents/reports/>.

<sup>163</sup> See *supra* notes 11-13 and accompanying text.

Although the Council is today better able and thus more likely to act on a report than it was during the Cold War era,<sup>164</sup> it is still the case that it is “often precluded by the veto from reaching formal decisions on the validity of claims of self-defense.”<sup>165</sup> Indeed, even in instances where the veto is unlikely to be used or threatened, the Council remains an inherently political body.<sup>166</sup> It thus usually aims to avoid condemning a state for aggressive action, preferring to address its pronouncements to all of the states involved, in relation to the general situation (identifying a generic “breach of the peace”, rather than an “act of aggression” for which a particular party can be seen as responsible).<sup>167</sup>

The Council has, of course, determined the validity of a state’s self-defense claim on occasion, whether or not a report has been submitted.<sup>168</sup> This is generally an approach that the Council prefers to avoid, however, for obvious political reasons. It is a rare occurrence for the Council to determine that a state’s claim of self-defense is invalid or, conversely, that it was legitimately responding to an aggressive act by another state. It is perhaps unsurprising that the Council does not explicitly refer to or engage with the reports submitted to it: to do so would be for it to travel dangerously close to apportioning blame.

In relation to debates within the Council, there have again been very few instances where *individual* members have explicitly referred to a submitted report, and even in the rare cases where this has occurred, reference has been brief and has not involved substantive engagement with the report submitted. For example, in 1986, the United Kingdom noted

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<sup>164</sup> See *supra* notes 79-80 and accompanying text.

<sup>165</sup> ALEXANDROV, *supra* note 97, 146.

<sup>166</sup> See, e.g., MAX HILAIRE, UNITED NATIONS LAW AND THE SECURITY COUNCIL vii (2005) (“[t]he Security Council is primarily a political body and political considerations take precedent over legality”).

<sup>167</sup> See, e.g., Michael Selkirk, *Judge, Jury and Executioner – Analysing the Nature of the Security Council’s Authority under Article 39 of the UN Charter* 9 AUCKLAND UNIVERSITY LAW REVIEW 1101, 1130-1131 (2003).

<sup>168</sup> See ALEXANDROV, *supra* note 97, 146-147.



with approval that a claimed exercise of the right of self-defense by the United States against Libya “was duly reported to the Security Council as provided for in Article 51.”<sup>169</sup> Yet the United Kingdom made no further substantive comment on, and did not make further use of, the report submitted by the United States.<sup>170</sup> Pertinently, the present author has found *no* examples of members of the Council referring directly to a self-defense report in an open session of that body over the period under review (1998-2013).

There have been some instances in that period where *non*-member states have, in official documents submitted *to* the Council, referred to the self-defense reports of other states. However, these still amount to only a handful of cases, and – when one reviews these documents – it quickly becomes clear that such references have simply been in the context of the alleged aggressor state formally refuting the self-defense claim in question.<sup>171</sup>

#### *B. Use by International Courts or Tribunals*

In the context of the decisions of international courts or tribunals, reference to the reporting requirement has also been rare, and consideration of specific reports has been rarer still. As has been discussed in previous sections, the ICJ famously referenced the reporting requirement in the *Nicaragua* case, in spite of the multilateral treaty reservation preventing the Court from considering the UN Charter.<sup>172</sup> It will be recalled that the Court considered

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<sup>169</sup> UN SCOR, 2669th mtg. at 36, UN Doc. S/PV.2669 (Mar. 27, 1986).

<sup>170</sup> *Id.*

<sup>171</sup> *See, e.g.*, Identical Letters dated 1 March 1999 from the charge d'affaires a.i. of the Permanent Mission of Saudi Arabia to the United Nations addressed to the Secretary-General and to the President of the Security Council, UN Doc. S/1999/217 (Mar. 2, 1999); and Letter dated 18 April 2001 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General, UN Doc. A/55/908–S/2001/385 (Apr. 19, 2001).

<sup>172</sup> *Nicaragua, supra* note 16, paras. 200 and 235.

the fact that the United States had failed to report its avowed action of collective self-defense to be legally relevant with regard to the validity of the action, but not legally determinative.<sup>173</sup> The ICJ made no further reference to the reporting requirement in *Nicaragua* beyond this general dictum. Of course, it could not have been expected to engage with the substance of a submitted report, precisely because of the fact that no such report was submitted.

However, in relation to the self-defense claim that was at issue in the 2003 ICJ merits decision of the Case Concerning Oil Platforms, the United States *did* report this to the Security Council in two separate documents relating to each of the separate attacks launched against offshore Iranian oil production complexes in the Persian Gulf, on October 19, 1987<sup>174</sup> and April 18, 1988,<sup>175</sup> respectively. The majority of the ICJ referred to both of these reports in its decision, quoting, in detail, from each.<sup>176</sup> The Court did not engage directly with the reports themselves to any meaningful extent; indeed, it did not even acknowledge that the documents referred to were self-defense reports submitted in compliance with Article 51.

Nonetheless, in its *Oil Platforms* decision, the ICJ did quote directly from the two reports as a means of identifying and setting out the formal claim of self-defense made by the United States in relation to the dispute. That self-defense claim had been made elsewhere, including – of course – in the pleadings submitted to the Court,<sup>177</sup> but the ICJ seemingly viewed its most authoritative expression as being found in self-defense reports submitted to

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<sup>173</sup> See *supra* notes 99-104 and accompanying text.

<sup>174</sup> Letter dated 19 October 1987 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/19219 (Oct. 19, 1987).

<sup>175</sup> Letter dated 18 April 1988 from the Acting Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/19791 (Apr. 18, 1988).

<sup>176</sup> See *Oil Platforms*, *supra* note 105, at paras. 48 and 67 respectively.

<sup>177</sup> See *Oil Platforms*, Counter-Memorial and Counter-Claim submitted by the United States of America (1997), at <http://www.icj-cij.org/docket/files/90/8632.pdf> (Jun. 23), Part IV, 126-160.

the Security Council (as opposed to making what one assumes would be rather more convenient reference to the pleadings submitted directly to it). While the Court did not then go on to engage with the substance of those reports in and of themselves, it did use the reports as its means of identifying the precise legal claims of the United States, which it then went on to analyze in its decision. To this admittedly limited extent, then, *Oil Platforms* indicates that self-defense reports can be of value to international judicial bodies.

The ICJ again referred to the reporting requirement in the 2005 merits decision in the Case Concerning Armed Activities on the Territory of the Congo merits decision. It “observe[d] that in August and early September 1998 Uganda did not report to the Security Council events that it had regarded as requiring it to act in self-defence.”<sup>178</sup> However, as was the case in *Nicaragua*, the ICJ did nothing more than note this fact; it clearly drew a negative inference from Uganda’s failure to report, but did not expand further upon what exactly that inference was. It is therefore unclear as to the extent to which the majority in the decision saw the failure to report as having legal implications for Uganda’s self-defense claim (and, if so, what those implications were). As such, the dictum in *Armed Activities* does not help to clarify the position in *Nicaragua* with regard to the legal implications of a failure to report. One might argue that the Court’s discontent with the fact that no report was submitted by Uganda in *Armed Activities* was because it felt that a report would have been a valuable source of information to aid it in reaching its decision, and that it would have used a report in this way had one been submitted. There is little to actually indicate this, however; indeed, it seems unlikely given that Uganda did later report a self-defense action with regard to a related aspect of the dispute in 2000 (five years before the ICJ reached its merits decision).<sup>179</sup>

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<sup>178</sup> *Armed Activities*, *supra* note 74, para. 145.

<sup>179</sup> Letter dated 15 June 2000 from the Permanent Representative of Uganda to the United Nations addressed to the President of the Security Council, UN Doc. S/2000/596 (Jun. 17, 2000).

In 2005, the Court did not consider or reference the report submitted in 2000, only the absence of a Ugandan report in relation to the events of August/September 1998.

The only other reference to the reporting requirement by the ICJ was in its 1996 *Legality of the Threat or Use of Nuclear Weapons* advisory opinion, but the consideration of the requirement in that opinion was entirely in the abstract. The Court held that the reporting procedure remains intact “whatever the means of force used”<sup>180</sup> – clearly in reference to the notion of using nuclear weapons in self-defense – but provided no further clarification concerning reporting or its value. The fact that the Court did not refer to a particular act of reporting (or not reporting) in *Nuclear Weapons* was, of course, entirely appropriate given that the decision was an advisory rather than a contentious proceeding. Nonetheless, the opinion cannot be said to constitute a further “use” of reports by the ICJ.

Beyond the decisions of the ICJ, the only reference made to the reporting requirement in the context of international judicial or arbitral decisions has come from the Eritrea/Ethiopia Claims Commission, which observed in 2005 that Eritrea had failed to report its avowed self-defense action to the Council,<sup>181</sup> while at the same time noting with approval that Ethiopia had done so.<sup>182</sup> As was the case in the ICJ *Armed Activities* decision, the Commission clearly viewed Eritrea’s failure to comply with this aspect of Article 51 in a negative light, but did not expand upon the legal consequences of this as such.<sup>183</sup> It again seems unlikely that the

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<sup>180</sup> *Nuclear Weapons*, *supra* note 105, para. 44.

<sup>181</sup> Eritrea-Ethiopia Claims Commission – Partial Award: *Jus Ad Bellum* – Ethiopia’s Claims 1-8, Volume XXVI REPORTS OF INTERNATIONAL ARBITRAL AWARDS 457, para. 11 (Dec. 19, 2005).

<sup>182</sup> *Id.*, at para. 17.

<sup>183</sup> Therefore, as with the jurisprudence of the ICJ, the Commission’s reference to the requirement could be interpreted as indicating either that the reporting requirement is mandatory, or that a failure to report is merely an additional evidentiary matter to be taken into account when assessing a self-defense claim, but it establishes neither position. *See Gray, supra* note 47, at 718.

Commission's displeasure as to the lack of a report was because it wanted a report from which to glean substantive information, given that it made no use of the report that was submitted by Ethiopia (other than to highlight its existence as a positive). It is also the case that Eretria *did* later submit reports related to the ongoing conflict prior to the Commission's award,<sup>184</sup> but these were not referred to by the Commission at all.

To the limited extent that the reporting requirement has been discussed in international case law, then, this has largely concerned the *absence* of a report (with the exceptions being comparatively notable – but still limited – use made of reports in the *Oil Platforms* case, and an offhand statement concerning Ethiopia's submission of a report in Eritrea/Ethiopia). There has been no true *assessment* made of a submitted report by the ICJ or other international judicial (or quasi-judicial) body.

International adjudicatory decisions concerning the *jus ad bellum* are admittedly relatively rare, so the sample size to test the use made by the ICJ or other international decision-makers of self-defense reports is too small to draw any firm conclusions as to the lack of potential value of such reports to judicial decision-making. Nonetheless, the fact remains that reports have generally not been used in a substantive sense in the context of international adjudication or arbitration.

### *C. Use by Other Actors*

There have been other limited uses of self-defense reports by international bodies or sub-organs. For example, the Secretary General referred to reports submitted by both Syria and Israel in his review of the activities of the United Nations Disengagement Observer Force (UNDOF) in 2013. To a degree, the Secretary General engaged with the self-defense claims

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<sup>184</sup> See UN Doc. S/1998/1205, *supra* note 62; UN Doc. S/1999/304, *supra* note 62; and UN Doc. S/1999/948, *supra* note 62.

of both states (without, unsurprisingly, reaching a conclusive position), and used the reports to evidence the factual situation on the ground during the period covered (April 1, 2013 – June 30, 2013).<sup>185</sup>

Another example is the fact that the Panel of Experts established pursuant to Security Council resolution 1874 – set up to assess the DPRK’s nuclear programme in 2009 – pointed in its 2013 final report to a “pre-emptive” self-defense report submitted by the DPRK.<sup>186</sup> This was so that the panel could establish the prospective factual assertion, made by the DPRK, that it would “continue developing and launching long-range rockets and bolstering its nuclear deterrence, both quantitatively and qualitatively.”<sup>187</sup> This limited consideration was the only use of the report made by the panel, however. In a similar vein, the Human Rights Council’s Commission of Inquiry on Lebanon in 2006 referred to reports submitted respectively by Lebanon and Israel as the source of the *legal* claims advanced by the two parties (although, again, it then made no further use of these reports).<sup>188</sup>

Such uses of submitted reports are notable precisely because of their scarcity. Utilization of reports outside of the context of the Security Council or courts/tribunals is similarly rare, and to the extent that it has occurred, it has been extremely brief and uncritical.

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<sup>185</sup> Report of the Secretary-General on the United Nations Disengagement Observer Force for the period from 1 April to 30 June 2013, UN Doc. S/2013/345 (Jun. 12, 2013), para. 4.

<sup>186</sup> Report of the Panel of Experts established pursuant to resolution 1874 (2009), UN Doc. S/2013/337 (Jun. 11, 2013), at 12-13.

<sup>187</sup> *Id.*

<sup>188</sup> Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1, UN Doc., A/HRC/3/2 (Nov. 23, 2006), at para. 54.

This pattern is repeated again in relation to the use made of submitted reports by scholars.<sup>189</sup> There have been occasions where writers have noted the existence of a specific report in compliance with Article 51 and drawn general conclusions from that submission.<sup>190</sup> However, such reference in the literature to reports has not been common and when it has occurred this has not taken the form of notable substantive review. The increase in compliance with the reporting requirement in recent years has thus not led to a corresponding increase in engagement with these reports by writers.

Unrestricted, as scholars are, by the sorts of procedural, political, or legal constraints of bodies such as the Security Council or the ICJ, one might perhaps assume that it would be in academic commentary that most use would have been made of the resource represented by the (increasingly large number of) self-defense reports submitted by states to the Council. Yet, while scholars commonly assess and critique the self-defense claims made by states,<sup>191</sup>

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<sup>189</sup> The writings of scholars can, of course, be considered a secondary material source of international law, as per art. 38.1(d) of the Statute of the International Court of Justice.

<sup>190</sup> See, e.g., Dino Kritsiotis, *International Court of Justice: Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)* 8 INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 507, 509 (1993) (pointing to the fact that the United States had reported as self-defense its actions relevant to the *Oil Platforms* dispute, a decade prior to the ICJ's merits decision in the case); and Knisbacher, *supra* note 116, 78-79 (in relation to the report submitted by Israel justifying "Operation Entebbe" as self-defense in 1976).

<sup>191</sup> Some recent examples include: Awol K. Allo, *Ethiopia's Armed Intervention in Somalia: The Legality of Self-Defense in Response to the Threat of Terrorism* 39 DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY 139 (2010); Jordan J. Paust, *Permissible Self-Defense Targeting and the Death of Bin Laden* 39 DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY 569 (2010-2011); Tom Ruys, *Crossing the Thin Blue Line: An Inquiry into Israel's Recourse to Self-Defense against Hezbollah* 43 STANFORD JOURNAL OF INTERNATIONAL LAW 265 (2007); and Michael N. Schmitt, *Change Direction 2006: Israeli Operations in Lebanon and the International Law of Self-Defense* 84 INTERNATIONAL LAW STUDIES. US NAVAL WAR COLLEGE 265 (2008).

rarely in so doing do they refer to the state's report, or indeed even note whether or not a report was submitted.<sup>192</sup>

There has ultimately been extremely little use made of submitted reports both within and without the Security Council. To some extent it is likely that there is an element of circularity with regard to the quality of, and then subsequent use made of, submitted reports. It is difficult to draw conclusions based upon the lack of detailed engagement by various actors with submitted reports, because the majority of such reports are so cursory that there is often little of consequence with which to engage. Similarly, one can hardly blame states for not providing substantive detail in their reports, when the reports that they submit are generally just "filed away", however detailed they may be (especially as *any* form of reporting technically meets the requirement under Article 51). It is likely that at least one reason why the Council and others do not make extensive substantive use of submitted reports is because the reports are so brief; one of the reasons that reports are so brief is probably because they are not used in any event.

However, one may well question the extent to which the Security Council or international courts and tribunals would engage with reports even were they to be of significant substantive depth, at least based on current practice. It is debatable how much use would be made of reports by, for example, the Security Council, given the political tightrope that it necessarily must walk. It is possible that writers may be more inclined to make greater use of reports if they contained more detail. Yet one cannot know whether this would in fact be the case. The lack of engagement with the reports that have been submitted ultimately undermines any potential value for the reporting requirement in the modern world.

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<sup>192</sup> *Contra* Daley J. Birkett, *The Legality of the 2011 Kenyan Invasion of Somalia and its Implications for the Jus Ad Bellum* 18 JOURNAL OF CONFLICT AND SECURITY LAW 427, 450 (2013) (a rare recent example of a scholar referring to the absence of a report in a particular case and drawing conclusions from this).



## X. REASONS NOT TO REPORT, OR NOT TO REPORT IN DETAIL

There are good reasons why a state may wish to report its self-defense claim, and to report it “fully”. For example, a report may help the reporting state to establish the genuineness and credibility of its claim. However, it cannot simply be assumed that full and frank reporting is inherently a “good thing”. There may also be legitimate reasons why states would wish to avoid reporting, or at least to only report in brief.

Rather obviously, the right of self-defense remains a treasured corollary of sovereignty for UN member states. Given that the right intrinsically relates to national security, states are – unsurprisingly – not all that keen for there to be external scrutiny of actions that they have taken in self-defense.<sup>193</sup> So perhaps it should be expected that, when reports of claims of self-defense are submitted, states will tend not to provide much detail to aid other actors in performing such scrutiny (especially as technical compliance with the reporting requirement can be achieved through any act of notification). However, beyond a general desire for the details of the exercise of their “inherent right” to remain “private”, there may be genuine security concerns underpinning states’ reluctance to report, or to report in depth.

### *A. Information Security*

First, detailed reporting has the potential to undermine the defensive measures taken by the reporting state by providing the aggressor (or a potential future aggressor) with information as to the methods and means of defense adopted, strategy, deployment, defensive capability, or other compromising intelligence. As such, detailed reporting has the potential to hand the initiative to the aggressor and to compromise the security of the victim. This concern is

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<sup>193</sup> Schachter, *supra* note 17, 263.

amplified in the modern context of irregular warfare, the prevalence of armed conflicts involving non-state actors, and the increasing capability of terrorist groups. Defensive action is now less likely to involve one “big push” of the armed forces to repel an invading army, but, rather, a more ad hoc defensive campaign,<sup>194</sup> where information security will be particularly crucial.

Arai-Takahashi has thus argued that detailed reporting may be undesirable in many circumstances, because it may undermine the effectiveness of the exercise of the right of self-defense:

There is...a reasonable fear that disclosure of highly sensitive intelligence information might undermine the operational effectiveness of defence action against an enemy as determined and efficient as a global terrorist network.<sup>195</sup>

It is also worth recalling that self-defense reports are supposed to be submitted “immediately”. Timely reporting will inevitably increase the likelihood that the reporting state will still be engaged in defensive action (as opposed to reporting entirely ex post facto). Where defensive action is ongoing, states will be particularly reluctant to report, or at least to report the nature of their defensive action in any detail.

It is of no surprise that, in instances where reporting has been on a comparatively detailed variety, this has tended to occur in situations where a brief “flare up” has occurred, with the use of force having ended prior to the submission of a report. Take the respective reports of Cambodia<sup>196</sup> and Thailand<sup>197</sup> in 2008, concerning their border clashes in October of

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<sup>194</sup> See, e.g., Theresa Reinold, *State Weakness, Irregular Warfare and the Right to Self-Defense Post 9/11* 105 AMERICAN JOURNAL OF INTERNATIONAL LAW 244 (2011) (in general, with regard to the increase in irregular warfare).

<sup>195</sup> Arai-Takahashi, *supra* note 144, 1095.

<sup>196</sup> Letter dated 15 October 2008 from the Permanent Representative of Cambodia to the United Nations addressed to the President of the Security Council, UN Doc. S/2008/653 (Oct. 15, 2008).

that year. Both states reported with a relatively high level of detail as to their (mutually contradictory) self-defense claims; but this was all in the context of an end to the violence having already been achieved. In such circumstances, the risk of disclosure is lower, and may be outweighed by the political benefits of more “open” reporting.

Nonetheless, in general, states are understandably cautious of full disclosure. Detailed reporting may provide potentially beneficial information to the Council, writers and other actors, but it also may divulge information to the benefit of the very aggressor that the defending state is seeking to protect itself against.

### *B. Covert Actions*

A related issue concerns the impact of the reporting requirement on entirely “covert” self-defense actions. Significant disagreement exists in the literature as to whether a state can – or should – be able to exercise its inherent right of self-defense in a clandestine manner. This is not the place to examine this debate in detail. Nonetheless, in broad terms it may be said that some scholars take the view that “intervention is not *prima facie*...unlawful simply because it is covert.”<sup>198</sup> Those taking this position argue that the substantive requirements for lawful self-defense can be complied with even in covert operations, and – if such conditions are indeed met – then the action must be considered a lawful one.<sup>199</sup>

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<sup>197</sup> Letter dated 16 October 2008 from the Permanent Representative of Thailand to the United Nations addressed to the President of the Security Council, UN Doc. S/2008/657 (Oct. 17, 2008).

<sup>198</sup> Catherine Lotrionte, *The Just War Doctrine and Covert Responses to Terrorism* 3 GEORGETOWN JOURNAL OF INTERNATIONAL AFFAIRS 85, 92 (2002).

<sup>199</sup> See, e.g., John N. Moore, *The Secret War in Central America and the Future of World Order* 80 AJIL 43, 83 (1986) (“there is no doubt that Article 51 applies to secret or ‘indirect’ armed attacks as well as to open invasion”).

In contrast, many commentators have taken the view that self-defense actions cannot be undertaken clandestinely. This is on the basis that, if covert self-defense is acceptable then there exists an obvious potential for the abuse of the right,<sup>200</sup> given the inherent impossibility of external scrutiny. Others have similarly argued that covert self-defense unacceptably circumvents the primacy of the Security Council's authority to maintain international peace and security.<sup>201</sup>

The reporting requirement is of notable relevance to this debate. Rather obviously, given that reporting represents an official acknowledgement and notification of the exercise of self-defense, a “[s]tate undertaking covert action cannot at the same time publicly and officially report that action to the Security Council.”<sup>202</sup>

Opponents of the clandestine exercise of the right of self-defense have pointed to the reporting requirement as evidence of the inherent unlawfulness of all covert defensive actions. This is on the basis that a state that is acting covertly will necessarily not have reported that action to the Council in breach of this aspect of Article 51, which in turn means that the state's claim of self-defense is invalidated. It is claimed, therefore, that the existence of the reporting requirement *establishes* the unlawfulness of covert self-defense.<sup>203</sup> As a manner of legal reasoning, this simply cannot be correct. As was demonstrated in section V, a failure to report does not per se invalidate the lawfulness of a self-defense claim. Covert

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<sup>200</sup> Paul W. Kahn, *From Nuremburg to The Hague: The United States Position in Nicaragua v. United States and the Development of International Law* 12 YALE JOURNAL OF INTERNATIONAL LAW 1, 29 (1987).

<sup>201</sup> DINSTEIN, *supra* note 5, 240; and Rowles, *supra* note 16, 577.

<sup>202</sup> *Nicaragua*, *supra* note 16, dissenting opinion of Judge Schwebel, para. 222.

<sup>203</sup> See DINSTEIN, *supra* note 5, 240 (“Article 51 imposes a blanket obligation of reporting to the Council whenever the right of self-defense is invoked and the text does not even hint at the possibility of making an exception for covert operations”); and Rowles, *supra* note 16, 577 (“it is not easy to see how a covert defensive response could satisfy the explicit reporting requirement contained in Article 51”).

self-defense actions therefore cannot be found to be unlawful merely on the basis that they have not been reported to the Council, because the lawfulness of any self-defense action – overt or covert – does not turn on the failure to report.

While the existence of the reporting requirement does not invalidate outright a covert exercise of the right of self-defense, we also saw in section V that the ICJ has indicated that a failure to report can be considered an indicative factor in assessing the lawfulness of a claim of self-defense, or at least that a report can help to establish a “good faith” invocation of the right (in that the invoking state itself genuinely intends to act defensively). To this extent, while a state acting in self-defense in a covert manner would not be legally compelled to report, the failure to do so would nonetheless inherently disadvantage that state.

This problem was notably raised by Judge Schwebel in his dissenting opinion to the 1986 *Nicaragua* case. He took the view that the indication of the majority of the ICJ in that decision that compliance with the reporting requirement had implications (albeit not determinative ones) for the lawfulness of a self-defense claim placed too onerous a restriction on states acting in self-defense.<sup>204</sup> One of the key reasons for this was that Judge Schwebel felt that any legal weight attached to the reporting requirement would necessarily undermine covert responses in self-defense:

Does it follow from the reporting requirement of Article 51 that aggressors are, under the régime of the Charter, free to act covertly, but those who defend themselves against aggression are not? That would be a bizarre result.<sup>205</sup>

The way in which the ICJ’s *Nicaragua* dictum has been interpreted by states in practice is almost impossible to assess, because of the very nature of covert use of force in a defensive context restricts analysis of “state practice” in this regard. Clearly, though, states do act in

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<sup>204</sup> *Nicaragua*, *supra* note 16, dissenting opinion of Judge Schwebel, paras. 221-230.

<sup>205</sup> *Id.*, at para. 222.

self-defense in a clandestine manner (or, at least, have retrospectively claimed self-defense in relation to previously covert action).<sup>206</sup>

This is not the place to further explore the general debate as to the wider desirability of such actions within the framework of self-defense: however, it certainly may be said that states that use force covertly are likely to see reporting such actions as instances of self-defense as highly undesirable. The belief on the part of even a proportion of states that self-defense can, indeed, at times *must*, be conducted covertly further undermines any general assumption that compliance with the reporting requirement is desirable in all circumstances (or, at least, that this will necessarily be considered desirable by the state acting in self-defense).

### *C. Reports as Potentially Undermining International Peace and Security*

Finally in this section, it is worth noting that requiring states to report that they have been the subject of an armed attack has the potential to derail diplomatic efforts to resolve the dispute in question. The act of reporting to the Security Council necessarily constitutes an accusation that another state (or, perhaps, a non-state actor) has committed an armed attack against the reporting state. The very act of reporting therefore has at least the potential to escalate interstate conflict, particularly where the responsibility for the armed attack or the seriousness of it is subject to competing views.

It is again impossible to know the full extent to which any particular instance of reporting has or has not contributed to a wider escalation of tensions (or indeed violence) between the relevant parties; just as one can only speculate as to the positive implications of any particular decision not to report in terms of avoiding unnecessary escalation. In most cases, where forcible action of some kind will already be occurring, it seems unlikely that

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<sup>206</sup> Some examples from state practice are provided by Moore, *supra* note 199, 89-90.

reporting will add in any great measure to existing tensions between the states involved. However, if there is even a *perception* on the part of the “victim” state that reporting may further contribute to aggressive action against it then it is understandable that the state may decide not to report its self-defense action in response. This fear is likely to be heightened where the aggressor is a powerful state and the victim is a politically weaker one.

Moreover, beyond “traditional” self-defense actions, there is more potential for tensions to rise – possibly leading to a use of force where none would have otherwise occurred – where a state decides to report pre-emptively. For example, the submission of 4 “pre-emptive” reports in 2008/2009 by Iran,<sup>207</sup> asserting its right to act in self-defense if the “unlawful and insolent threats of resorting to force”<sup>208</sup> directed at it by Israel became manifest, undoubtedly raised tensions within Israel and the wider international community in the context of discussions over Iran’s nuclear future.<sup>209</sup>

The reporting requirement was originally designed to contribute to a wider goal of centralizing the use of force with the Security Council, with the ultimate aim of maintaining international peace and security. If, and to the extent that, the submission of a self-defense report might be detrimental to international peace and security, there is little question that it

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<sup>207</sup> Letter dated 6 June 2008 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the President of the Security Council, UN Doc. S/2008/377 (Jun. 10, 2008); Identical letters dated 9 September 2008 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2008/599 (Sep. 12, 2008); Letter dated 14 April 2009 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the President of the Security Council, UN Doc. S/2009/202 (Apr. 15, 2009); and Letter dated 6 October 2009 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the President of the Security Council, UN Doc. S/2009/520 (Oct. 7, 2009).

<sup>208</sup> UN Doc. S/2009/202, *supra* note 207.

<sup>209</sup> See, e.g., Naomi Farrell, *Iran Afraid of Israel?* JEWISH POST (2009), at <http://www.jewishpost.com/archives/news/Iran-Afraid-of-Israel.html>.

would be preferable for no report to be submitted: “the Council would not wish to regard itself as hampered in carrying out this function [maintenance of international peace and security] by any reading of Article 51 which [placed too much emphasis on the reporting requirement].”<sup>210</sup>

## CONCLUSION

This article has provided a detailed consideration of the requirement that self-defense actions be reported to the UN Security Council, as per Article 51 of the UN Charter. This has been based in part on an extensive study of the reports submitted to the Council during the period 1998-2013, which produced a unique dataset.

Reporting has been relatively overlooked in the literature, but to the extent that it has been considered, the general view – premised most notably on the 1986 *Nicaragua* decision of the ICJ – has been that compliance with the reporting obligation is not legally determinative for the lawfulness of a state’s self-defense claim, but it is nonetheless of legal relevance. On this basis, a further general assumption in the literature has been that the requirement was “failing” during the Cold War because states did not in fact report, but that it has since started “working”, because states now tend to comply with the obligation. The only notable criticism of this assumption is the claim – made by Gray and others – that the requirement may in fact now be working “too well”, in the sense that detrimental “over-reporting” has been occurring in recent years.

These various assumptions in the literature have not been based on a systematic review of reporting practice. Our review of reporting since 1998 therefore provides the opportunity to assess the requirement in a new light. The dataset confirms that states for the most part do indeed now report their self-defense actions, as a number of writers have noted

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<sup>210</sup> Greig, *supra* note 6, 368.



anecdotally. Compliance with the reporting requirement remains imperfect, but it is clear that the claim in the literature that there exists a trend towards reporting is borne out by reference to practice. Moreover, states for the most part tend to report their self-defense actions in a relatively timely manner, in compliance with the qualifier that reports be submitted “immediately”. Indeed, there is now a common trend for states to report pre-emptively, prior to the actual use of force occurring. In a few instances, this has related to a specific forthcoming response. In most cases, though, “pre-emptive” reports actually take the form of abstract assertions of innocence or victimhood, which are of little value other than as a propaganda tool.

Repeated reporting is common, but actually the general trend is not towards egregious repetition in reporting, as Gray feared. In most instances, states report related aspects of the same self-defense claim on two or three occasions, but this rarely extends to excessive “over-reporting” (with the one notable exception of Iraq’s 103 reports submitted in 1999-2002).

While concerns related to over-reporting may have been generally unfounded, this does not mean that it can be assumed that the reporting requirement is now “working”. Simply because states today generally comply with the reporting requirement does not establish that reporting is always necessarily a positive action. It is evident from a combination of case law, the literature and state practice, that, as writers have generally noted, reporting is not a condition precedent for lawful self-defense. It is nonetheless easy to assume that, by mere virtue of the reporting requirement’s presence in Article 51, compliance with it is inherently a “good thing”, and that the increased frequency of reporting since the mid-1980s is therefore also intrinsically “good”. This may be the case, but this assumption is not well supported by further investigation.

There is, of course, some degree of inherent value in states complying with the requirement to report simply *because it is a legal requirement*. Compliance with any

international legal norm – even an obligation that is of a comparatively “soft law” nature such as the reporting requirement – has positive implications in terms of general respect for the binding norms of the system and its reciprocal integrity. International law in particular must rely on *lex propter se*, given that it is a system possessed of comparatively limited enforcement.<sup>211</sup> Yet while the inherent value in complying with legal norms is something that the present author feels should not be too lightly dismissed, the reporting requirement must ultimately be assessed in relation to its *utility*.

It might initially appear to be in the interests of a state acting in self-defense to report, so as to provide the Council (and, through it, the world at large) with as much detail as possible regarding that claim; on the basis that, the more detail provided demonstrating the defensive necessity (and proportionality) of the action, the more credible the self-defense claim being advanced. Similarly, it can certainly be argued that a state should not be the sole judge of its own self-defense claims,<sup>212</sup> and that quality reporting has the potential to facilitate the external assessment of the initially self-determining right of self-defense: a right notably open to abuse.

In practice, however, the *way in which* states report significantly undermines the original object and purpose of the reporting requirement. States now largely comply with the letter of Article 51 in relation to reporting, but the potential value of the requirement is often hamstrung by the limited nature of the reports submitted. Without the submission of “quality” reports, the requirement becomes predominantly a “box ticking” exercise, or simply a means of political grandstanding. There may be valid security reasons why states may wish to avoid reporting, or at least avoid detailed reporting. These include concerns over

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<sup>211</sup> See Francesco Paris and Nita Ghei, *The Role of Reciprocity in International Law* 36 CORNELL INTERNATIONAL LAW JOURNAL 93 (2003-2004).

<sup>212</sup> See DELIBASIS, *supra* note 97, 165; and Schachter, *supra* note 17, 264.

information security, as well as more general political implications such as the potential escalation of the situation and the perceived credibility of the reporting state. It is perhaps of no surprise that states do not report in a detailed way, especially given that Article 51 does not require them to.

Crucially, it is also the case that the Security Council almost never *engages* in a meaningful way with the reports that are submitted. Nor do international courts and tribunals, or other actors (including writers). This may be in part because Article 51 reports are generally so brief, but – whatever the reason – the lack of actual usage made of submitted reports further undermines the value of the reporting requirement.

As has been noted, the reporting of actions taken in self-defense has the potential to help facilitate swifter and more effective responses to threats to international peace and security, and could also act as an important tool for scrutinizing international uses of force. Notably, a significant number of self-defense actions are now reported: compliance with the reporting requirement is, today, reasonably good overall, if still far from perfect. In this regard there has been a significant change in practice. Yet, despite this notable increase in the frequency of reporting, states do not tend to report in detail – at times with good reason – and the reports that are submitted are commonly left un-reviewed and unused. One may therefore ultimately question whether the common tendency to report is in any meaningful sense preferable to the Cold War situation where states almost never reported. Is a cloud of paperwork – allowing for political grandstanding but little real information, and generally ignored by the actors to which it might be of worth – any better than no paperwork at all? Ultimately, the value of the reporting requirement today remains, at most, potential.

