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Conduct and subsequent practice by states in the application of the requirement to report under UN Charter Article 51

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ABSTRACT

United Nations Charter Article 51 obliges states to immediately report the use of self-defence to the United Nations Security Council (UNSC). Besides the wording in Article 51, there are no (codified) rules or guidelines on how states should report or what should be included in the report to the UNSC. Reporting on self-defence is predominantly based on the conduct of UN member states and how these actors interpret their obligations. This article analyses whether there is common conduct that could indicate subsequent practice by parties to the Charter regarding the format of reporting, the notion of immediacy in reporting and the quality of reports submitted to the UNSC. It was found that there is subsequent practice identifiable regarding the format of reporting, that there are reliable indicators on parallel conduct regarding the immediacy of reporting and common conduct when reporting on measures taken in self-defence.

KEYWORDS United Nations Charter; Article 51; self-defence; requirement to report; subsequent practice

1. Introduction

A large share of academic attention has focused on the nature of self-defence and the legitimacy of the use of self-defence by state actors. This article will contribute to this field of research by focusing on the part of the Charter of the United Nations (UN Charter) that has been given less academic attention, the legal requirement to immediately report the use of self-defence to the United Nations Security Council (UNSC). Article 51 of the UN Charter states:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to

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> maintain international peace and security. *Measures taken by Members in the exercise of this right of self-defence 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.[1]

The requirement to report contained in Article 51 could become progressively more important, as the Uppsala Conflict Data Project (UCDP) shows that the number of conflicts in the world and the number of states involved in these conflicts have been increasing; at the same time the character of the use of force, and consequently self-defence, has been dramatically altered since the UN Charter came into force.

The requirement to report was included in Article 51 to enable the UNSC to take actions it deems necessary to situations that threaten international peace and security. Besides the wording in Article 51, there are no (codified) rules or guidelines on how states should report or what should be included in the report to the UNSC. Reporting on self-defence is therefore predominantly based on the conduct of the parties to the UN Charter, and how these actors interpret their obligations under Article 51. The conduct of states could signal subsequent practice in the interpretation of the UN Charter. At its core, subsequent practice can be described as the (unilateral) practice of a contracting party following the conclusion of an agreement, which could contribute evidence pointing towards a particular interpretation of the agreement.[2] When the definition of a specific obligation in a treaty is (deliberately) ambiguous or open to multiple interpretations, subsequent practice could reflect or reintroduce what the parties originally intended if this practice is common and concordant.[3] Subsequent practice may become more relevant in the evolving context of treaty obligations, such as under the UN Charter, which entered into force in different circumstances from today.[4]

This article will attempt to answer whether subsequent practice is identifiable through the conduct of the contracting parties in the interpretation of the requirement to report under UN Charter Article 51. To answer this question this article will focus on three crucial elements of reporting with regards to Article 51 and self-defence: the format of reporting, the immediacy of reporting and the quality of the reports submitted. To answer the question of whether subsequent practice is identifiable regarding these three elements,

[1]Charter of the United Nations (entered into force 26 June 1945) 1 UNTS 16, Article 51, emphasis added.
[2]Richard R Gardiner, *Treaty Interpretation* (Oxford University Press, 2008) 226.
[3]Olivier Corten and Pierre Klein, *The Vienna Convention on the Law Treaties – A Commentary Volume I* (Oxford University Press, 2011) 811.
[4]George Nolte, 'Subsequent Practice as a Means of Interpretation in the Jurisprudence of the WTO Appellate Body' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, 2011) 138.

this article analyses reports by the contracting parties from the moment the UN Charter came into force in 1945 until the beginning of 2019, examining how state actors give form and substance to their treaty obligation to (immediately) report the resort to self-defence to the UNSC.

Section 1 of this article will focus on the specifics of Article 51, its relation to the use of force and self-defence (under customary international law) and what the requirement to report compromises. This section will also look into how the primary judicial organ of the UN, the International Court of Justice (ICJ), pronounced on the requirement to report. Section 2 is devoted to subsequent practice as a means of interpretation and what requirements are necessary to establish whether certain conduct in the interpretation of Article 51 could be classified as 'subsequent practice' for this purpose. Sections 4–6 compromise the substantive part of this article, analysing the conduct of states on the format of reporting, the notion of immediacy in reporting and the quality of reports submitted to the UNSC. These three elements are found in the text of Article 51, but neither a textual interpretation nor an interpretation taking into account the object and purpose provide clarity on what is required. Section 4 examines the conduct by states on the format of submitting reports about the resort of self-defence that could potentially amount to subsequent practice in the interpretation of Article 51. The following section focuses on the term 'immediacy' used in Article 51, and states – through the act of submitting a report to the UNSC or by reference to immediacy in the text of their submitted reports – show an interpretation that could be considered subsequent practice. This section also provides special attention to pre-emptive reporting, the practice of reporting measures that still need to be implemented or are still in progress, which is at odds with the text of Article 51. Section 6 will conclude the substantive part of this article with an analysis of the quality of the submitted reports, mainly focusing on the legal justifications given for the resort to self-defence, if and how contracting parties provide legal substantiation for the use of force, and how the measures taken in self-defence are described.

To analyse whether subsequent practice by state actors has occurred regarding the requirement to report, an empirical examination will be provided of more than 60 years of reporting by state actors. There is no obligatory manner in which reports on self-defence must be submitted, and there is no exhaustive list of reports to the UNSC. Since 1946 the circulation of written communications submitted to the UNSC has been firmly established, meaning that all submitted reports on self-defence should (in theory) be identifiable under the S/NC document series.[5] This article provides a comprehensive (but not exhaustive) list of reports found through an extensive search

[5]Sydney D Bailey and Sam Daws, *The Procedure of the Security Council – Third Edition* (Clarendon Press, 1998) 102.

through the database of the United Nations Document System (ODS), the United Nations Digital Library, the Repertory of Practice of United Nations Organs (1945–1984) and the Repertoire of the Practice of the Security Council (1946–2015) and reports mentioned in academic work on self-defence and UN Charter Article 51.

A total of 311 reports to the UNSC have been identified between 1958 and 2019.[6] A substantial proportion of the reports identified have been left out of this analysis because they could be labelled as 'over-reporting'. Over-reporting could be defined, from the literature, as the 'tendency' to repeatedly report the invocation of self-defence, leading to a high number of (almost identical) reports. The instances of over-reporting that are left out of the equation include the 116 almost identical reports submitted by Iraq between 1999 and 2001, regarding the violation of Iraqi airspace by the United States and the United Kingdom. For the same reason, 34 reports from Argentina and the United Kingdom from 1982 during the Falklands conflict are left out. These reports would cause a skewed statistical analysis and do not add to the substantial analysis of the conduct and possible subsequent practice regarding the reporting requirement.[7]

James A Green, in a 2015 study concerning reporting under Article 51, provides a critical analysis of the quantitative scope of reports between 1998 and 2003. Green's analysis is based upon a filtered version of the Uppsala Conflict Data Project (UCDP) and a self-compiled original dataset concerning state reporting practice. That study provides an extensive analysis on the frequency of reporting and compliance with the reporting requirement. Green also provides a starting point for this article by analysing the timeliness of reporting, the practice of 'pre-emptive' reporting and the substantive quality of reports. This article complements and adds to Green's study by statistically analysing a broader timeframe to get the full scope of reporting practice since Article 51 came into effect, and by providing an elaborate and extensive qualitative analysis of how state actors report. This article provides statistical analysis, through basic statistical tests with different variables such as reference to Article 51 or reference to legal conditions such as necessity and proportionality, to identify if there is certain conduct in the interpretation of Article 51, either coordinated or parallel, by states party to the UN Charter. This analysis is followed by a comparative (textual) analysis to identify first whether (and, if so, how) contracting parties express their agreement to a particular practice, and second how states give legal and factual substantiation to their claims of self-defence.

[6]The complete dataset, with reports submitted to the Security Council between 1958 and 2019, is on file with the author. In addition a list with instances of over-reporting is on file with the author.

[7]James A Green, 'The Article 51 Reporting Requirement for Self-Defense Actions' (2015) 55 *Virginia Journal of International Law* 563; Christine Gray, *International Law and the Use of Force* (Oxford University Press, 4th edn 2018) 129.

2. Article 51 and the requirement to report

2.1. UN Charter Article 51

There are two generally accepted exceptions to the prohibition of the use of force under public international law, the first being the use of force authorised by the UNSC when there exists a threat to the peace, breach of the peace, or acts of aggression. The second exception is the 'inherent' right to self-defence of sovereign states under UN Charter Article 51 and customary international law.[8]

It has been argued that Article 51 provides the only legitimate exception of any significance for the unilateral (or collective) use of force.[9] Within treaty law, the right to self-defence is enshrined in UN Charter Article 51. That article is part of Chapter VIII, which confers upon the Security Council the responsibility to maintain peace and security and respond to threats to and breaches of the peace. Article 51 states in 102 words the conditions on which the contracting party has the right to act in self-defence. With Article 51 the drafters intended to restrict the use of self-defence and put a threshold in place by deliberately using armed attack instead of the much broader terminology (threat or use of force) in Article 2(4).[10]

The wording of the first sentence of Article 51 shows that the contracting parties have the right to use individual (or collective self-defence) if an armed attack occurs against a member of the United Nations. The usage of the words *inherent right* suggests that the UN Charter recognises the existent right but does not 'create' the right to self-defence, nor tries to regulate all aspects of its content directly.[11] The *travaux preparatoires* leaves it ambiguous as to whether 'inherent right' refers to all forms of self-defence permitted under customary international law or just limits the use of self-defence to all actions permitted by the UN Charter.[12]

2.2. The requirement to report under Article 51

The second sentence of Article 51 of the United Nations Charter states that '[m]easures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council'. This sentence was constructed to emphasise that the 'inherent' right of states to take measures in

[8] *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v United States of America*) (merits) [1986] ICJ Rep 14, para 193.
[9] Rudiger Wolfrum and Christiane Philipp, *United Nations: Law and Policies and Practice Volume II* (Verlag C.H. Beck Munchen, 1995) 1162.
[10] *Ibid*.
[11] *Nicaragua* (n 8) para 193; Leland M Goodrich, Edvard Hambro and Anne P Simons, *Charter of the United Nations – Commentary and Documents* (Columbia University Press, 1969) 344; Vaughan Lowe *et al*, *The United Nations Security Council and War – The Evolution of Thoughts and Practice since 1945* (Oxford University Press, 2008) 1.
[12] Wolfrum and Philipp (n 9) 1163.

self-defence is only temporarily awaiting the UNSC to scrutinise its exercise and adopt measures it deems necessary. The subordinate nature of the right to self-defence could be traced back to the discussions on the content of Article 51, when several states expressed concerns about providing the UNSC with absolute control over the use of force. The wording of Article 51 incorporated these concerns and showed a balance between, on the one hand the sovereign rights of the state actor to protect itself, and on the other hand, the transfer of the responsibility for peace and security to a community-based system. The requirement to report was included during the San Francisco consultations after a proposal by the British delegation.[13]

The final wording of Article 51 indicates that the requirement to report consist of two prerequisites, first submission of a report and second the immediate submission of this report. The first prerequisite stems from the subordinate nature of the right to self-defence against the primary responsibility of the Security Council for peace and security. The subordinate nature of the right to self-defence also entails that the right only exists until the UNSC has proclaimed its *authority and responsibility*. It has been argued that if the UNSC does not take actions that stop the grounds for self-defence, the right remains in effect.[14]

The UN Charter identifies the UNSC as the primary agent to interpret the implications of conflict and the use of force and the consequences for international peace and security: in principle, decisions made by the UNSC are binding on all UN member states.[15] The second prerequisite to *immediately report* is deemed necessary to enable the UNSC to respond to threats to and breaches of the peace; the UNSC needs to be informed 'immediately' about such situations in order to be able to 'exert its supervening authority in a timely way', placing the use of force under the scrutiny of the international community.[16]

2.3. The ICJ and the reporting requirement

The ICJ referred to the reporting requirement in several dictums, of which the *Nicaragua* case provides the most elaborate (but inconclusive) account on the requirement to report. In *Nicaragua* the ICJ stated that the rule permitting self-defence under customary international law has a separate existence and application from the same permission under the UN Charter, even when their content might be similar. From the reasoning by the Court, it could

[13]Goodricht, Hambro and Simons (n 11) 342–3.
[14]David Schweigman, *The Authority of the Security Council under Chapter VII of the United Nations Charter* (Kluwer Law International, 2001) 192.
[15]Lowe *et al* (n 11) 1–7.
[16]Bruno Simma, *The Charter of the United Nations – A Commentary* (Oxford University Press, 3rd edn 2012) 1424–5.

be concluded that under customary international law there is no obligation to report the use of force or that reporting conditions the lawfulness of the use of force in self-defence.[17]

The ICJ dictum has sparked debate about the substantive character of the requirement to report and whether the requirement is of mandatory or directory nature, leading some scholars to suggest that it is just a procedural requirement.[18] From the *Nicaragua* case, it is difficult to extract what the legal implications would be if a state fails to report under its UN Charter obligation. The ICJ could not form an opinion on the failure to comply under treaty law because of a reservation by the United States that excluded the application of multilateral treaties (such as the UN Charter) from the jurisdiction of the Court. This ambiguity about the dual existence of rules regarding the concept of self-defence is clarified by Green as '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'.[19]

The ICJ dictum in the *Nicaragua* case does not warrant or allow avoidance of states' treaty obligations under the UN Charter. This was clearly articulated by Judge Schwebel, who stated that with the omission of the United States to report 'there remains, under the Charter of the United Nations, a literal violation of one of its terms', which is 'a violation of an important provision which is designed to permit the Security Council to exert its supervening authority in a timely way'.[20] The real significance of *Nicaragua* lies in the fact that the ICJ did articulate that '[t]he 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'.[21]

The ICJ refers to the reporting requirement in several other cases such as the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, repeating the text of Article 51 and adding that the 'requirements of Article 51 apply whatever the means of force used in self-defence'.[22] In the *Oil Platforms* case, the ICJ refers to the reports submitted by the United States to the UNSC but does not mention the requirement under Article 51.[23] In the *Armed Activities* case the Court specifically observed that Uganda failed to report instances that it regarded as self-defence to the UNSC.[24] The common

[17] *Nicaragua* (n 8) paras 78–9.
[18] Avra Constantinou, *The Right of Self-Defence under Customary International Law and Article 51 of the United Nations Charter* (Sakkoulas, 2000) 208; D W Greig, 'Self-Defence and the Security Council: What Does Article 51 Require?' (1991) 40 *International and Comparative Law Quarterly* 366.
[19] Green (n 7) 594.
[20] *Nicaragua* (n 8) dissenting opinion Judge Schwebel, para 376.
[21] *Nicaragua* (n 8) para 200.
[22] *Legality of the Threat or Use of Nuclear Weapons* (advisory opinion) [1996] ICJ Rep 226, para 44.
[23] *Case Concerning Oil Platforms* (*Islamic Republic of Iran v United States of America*) (merits) [2003] ICJ Rep 161, paras 48 and 67.
[24] *Case Concerning Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*) (merits) [2005] ICJ Rep 168, para 145.

denominator in these cases is that the ICJ only reiterates the procedural requirement to report (or the failure to do so) to some extent but does not consider the legal stance or requirements of the article, seemingly avoiding expanding on the inconclusive requirements under Article 51.

3. Subsequent practice and Article 51

The ILC noted that subsequent practice, as a means of interpretation, codified in the 1969 Vienna Convention on the Law of Treaties (VCLT), could be used as a means of interpretation under either Article 31(3)(b) as being part of the general rule on interpretation, or as a supplementary means of interpretation under Article 32 which is considered to be a 'further' means of interpretation.[25] The wording of Article 51 concerning the requirement to immediately report is succinct and ambiguous concerning the requirements that follow from this provision. A grammatical or textual interpretation of UN Charter Article 51 does not expressly provide other requirements besides the need to report and to report immediately. As noted in subsection 2.2, the context and object and purpose of UN Charter Article 51 reveals that the requirement to report was included to enable the UNSC to take actions it deems necessary to maintain peace and security but does not reveal indications on legal or procedural standards. Subsequent practice in the context of Article 51 could be useful to identify how state actors interpret and give substance to the requirement to immediately report the resort to self-defence.

3.1. Requirements for subsequent practice

Subsequent practice could appear in various forms, and the International Law Commission (ILC) definition indicated that there are several requirements before subsequent practice can be used as an authentic means of interpretation. The first requirement consists of *conduct*, meaning the acts by the contracting parties and their respective organs. Conduct could also flow from an omission or relevant silence that contributes to the agreement.[26] Conduct that is not motivated by a treaty obligation does not fall within the interpretive means of subsequent practice, as found in Article 31(3)(b) of the VCLT.

On the application of a treaty, the ILC stated 'the way in which a treaty is applied not only contributes to determining the meaning of the treaty but also to the identification of the degree to which the interpretation that the States parties have assumed is "grounded" and thus more or less firmly

[25]Vienna Convention on the Law of Treaties, opened for signature 22 March 1969, 1155 UNTS 331 (entered into force on 27 January 1980); International law Commission, Report of the International Law Commission Seventieth session, *Subsequent agreements and subsequent practice in relation to the interpretation of treaties* (2018) UN Doc A/73/10.
[26]*Ibid*, 32, para 18.

established'.[27] The conduct needs to establish an agreement on the interpretation of the treaty; in other words, if the parties have taken a position regarding the interpretation of a treaty through their conduct or that other considerations motivated the parties. The ICJ dictum in the *Kasikili Sedudu Island* case prescribed that subsequent practice could be found if certain practices could be linked to a belief on the part of the authorities.[28]

A third requirement is that the agreement needs to be by all parties, to this regard it is essential for a multilateral agreement such as the UN Charter that the ILC stated that subsequent practice does not necessarily need to be coordinated or joint conduct, parallel conduct by parties may suffice. The ILC provides a 'disclaimer' that it depends on the particularity the case and of the parallel activity to consist of enough 'agreement' regarding the interpretation of a treaty.[29] The ILC also states that a difference in the application of a treaty does not automatically mean that there is no conventional interpretation of the treaty. Differences could, for example, reflect a difference in the application of the interpretation or reflect 'a common understanding that the treaty permits a certain scope for the exercise of discretion in its application'.[30]

4. The frequency and formats of reporting

4.1. Frequency of reporting

From the judgment of the ICJ in *Nicaragua*, it could be extrapolated that the failure to comply with the reporting requirement does not automatically make a claim to self-defence invalid, but that it could be an important indicator on the belief of the state that it was acting in self-defence. There is a consensus in the literature that the reporting requirement was not frequently observed before the judgment on the merits in the *Nicaragua* case in 1986: Greig even goes as far as calling the general attitude towards reporting neglectful.[31] This is represented in Figure 1, which shows that up to 1958 contracting parties did not report at all to the UNSC, and after 1958 with intervals of sometimes two to three years without reporting, up until 1985. An average of 2.5 reports has been submitted yearly during the analysed 61 years. There are periods with exceptionally high numbers in the years 2001 (response to the 9/11 attacks), 2012 (Israeli-Palestinian conflict) and 2015–2016 (measures against ISIL/Daesh in Syria).

[27] *Ibid*, 44, para 5.
[28] *Case concerning Kasikili Sedudu Island* (*Botswana/Namibia*) (judgment) [1999] ICJ Rep 1045, para 74; Luigi Crema, 'Subsequent Agreement and Subsequent Practice within and outside the Vienna Convention' in George Nolte (ed), *Treaties and Subsequent Practice* (Oxford University Press, 2013) 16.
[29] ILC Report 2018 (n 25) 49–50, paras 22–3.
[30] *Ibid*, 76, para 4.
[31] Gray (n 7) 103; Greig (n 18) 385.

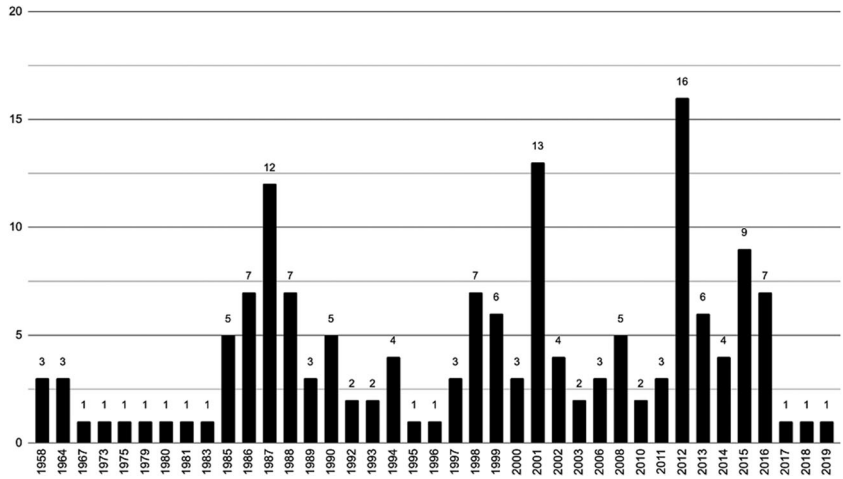

Figure 1. Number of submitted reports pm self-defence to the UNSE (1958–2019).

Figure 1 shows that within the same year as the judgment in the *Nicaragua* case, the number and frequency of submitted reports were steadily increasing. The period after the judgment until 2019 shows a more steady and frequent reporting practice by the contracting parties with an average of 4 reports a year between 1986 and 2019. This increase could indicate that the contracting parties have taken the Court's message that a failure to report could indicate the state's conviction regarding self-defence seriously.[32] An average of 4 reports is still unlikely to represent all instances where self-defence was invoked. These numbers could indicate either that: (1) there have been more instances where state actors have needed to defend themselves; or (2) state actors have become more inclined to report their exercise of the right of self-defence to the UNSC. An assessment of the actual compliance with the reporting requirement is outside of the scope of this article because it would require a comparison between all instances of self-defence and reports submitted. The study by Green provides a clear analysis on the compliance with the reporting requirement between 1998 and 2013, finding that compliance remains far from absolute and that there were many instances where states claimed to have taken measures in self-defence but failed to report this.[33]

Table 1 shows the number of reports from 1958 until 2019 by region. The United States alone submitted 14 percent of all reports and the European states, approximately 12 percent; taken together, as 'Western' countries, submitting close to one-third of all reports analysed. An outlier is the Middle

[32] *Ibid*, 126.
[33] Green (n 7) 584.

Table 1. Frequency of reporting per region (1958–2019).

Region	Reports	Percentage
Africa	27	17%
Asia	24	15%
Australia/Oceania	3	2%
Europe	19	12%
Russia	2	1%
Middle East	58	37%
North America	22	14%
South/Central America	3	2%

East region, responsible for the highest number of reports (almost 37 percent), though it must be noted that this is mainly because of the high number of reports submitted by Israel (30) and Iran (10). Russia, South/Central America and Australia/the Oceanic region have the lowest number of reports during the analysed period. Again, these numbers could indicate that in certain regions, the need for self-defence is less than other regions or that state actors in these regions are less inclined to report. From a total of 159, 32 reports are submitted by a permanent member of the UNSC. It is noteworthy that UNSC permanent members Russia and China respectively submitted two and three reports regarding self-defence during the 60 years analysed.

4.2. The format of reporting to the UNSC

A textual examination of Article 51 only reveals that a report shall be submitted, the use of the word 'shall' could be considered as utilising mandatory language, but leaves it ambiguous as to by whom the reporting should be carried out. It is suggested that a reading of the article in good faith and taking into account its ordinary meaning, the contracting party claiming to act in self-defence is responsible for the submission of a report on self-defence.[34] The word 'report' indicates a spoken or written account of the events, but how the report needs to be submitted is entirely up to the state in question, and the ICJ in the *Nicaragua* case or the *Nuclear Weapons* advisory opinion divert little to no attention to the format of the report.[35] Green suggests that the format of reporting is not something to be overly concerned with as the substance of the report is more important than the form, though the format does play an essential role in establishing certain conduct and agreement to establish if there is subsequent practice identifiably among the parties to the Charter.[36]

For the period 1958–2019, there are four different formats identifiable in which contracting parties provide a practical interpretation of the

[34] *Ibid*, 570.
[35] *Nuclear Weapons* (n 22) para 44.
[36] Green (n 7) 570–3.

requirement to report found in Article 51. The first format being a letter by the permanent representative of the respective state party to the UNSC. The second format is the submission of a document from a state official to the UNSC: these submissions are regularly accompanied by a letter of introduction by the permanent representative of the respective state party to the UNSC. These reports include statements from ministers of foreign affairs or a government.

Submission of a statement or letter written by the head of state is not uncommon, such as the statement made by President Carter after a (failed) rescue mission of the hostages inside the American Embassy in Tehran, Iran.[37] In the case of Pakistan, a letter from a special adviser to the Prime Minister addressed to the Secretary-General of the UNSC was submitted as a report on self-defence regarding a conflict with India in the Kashmir region.[38] The third format is an oral transmission during a UNSC meeting, transcribed in the official records of the UNSC.

The fourth and final format consists of a category of 'other' means of reporting, such as a memorandum on a particular conflict or case of aggression. An example is a report by Poland to the Counter-Terrorism Committee in which it is stated that the right to collective self-defence was exercised by Poland after the 9/11 terrorist attacks on the United States.[39] Another, more recent, example of a divergent way of reporting is the submission of a factsheet on events by Azerbaijan stating that self-defence forces conducted an operation in the Nagorno-Karabakh region.[40] Before the twenty-first century, less formal statements were also submitted as a report on self-defence, such as press releases submitted to the UNSC.[41]

Figure 2 shows that during the period 1958–2019 the most prevalent *modus operandi* of the contracting parties is to report on the use of self-defence through the submission of an official letter by the permanent representative of the respective state to the UNSC. With 103 submissions, this format outnumbers other formats of reporting with 65 percent of the total

[37]Letter dated 25 April 1980 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/13908 (25 April 1980).

[38]Letter dated 11 October 2014 from the Secretary-General addressed to the President of the Security Council, UN Doc S/2014/730 (13 October 2014).

[39]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 (27 December 2001) para 3.

[40]Letter dated 4 March 2019 from the Permanent Representative of Armenia to the United Nations addressed to the Secretary-General, UN Doc S/2019/211 (11 March 2019).

[41]Letter dated 14 September 1985 from the Permanent Representative of Honduras to the United Nations addressed to the President of the Security Council, UN Doc A/39/952–S/17466 (16 September 1985); 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 (5 June 1998); 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 (7 September 1999).

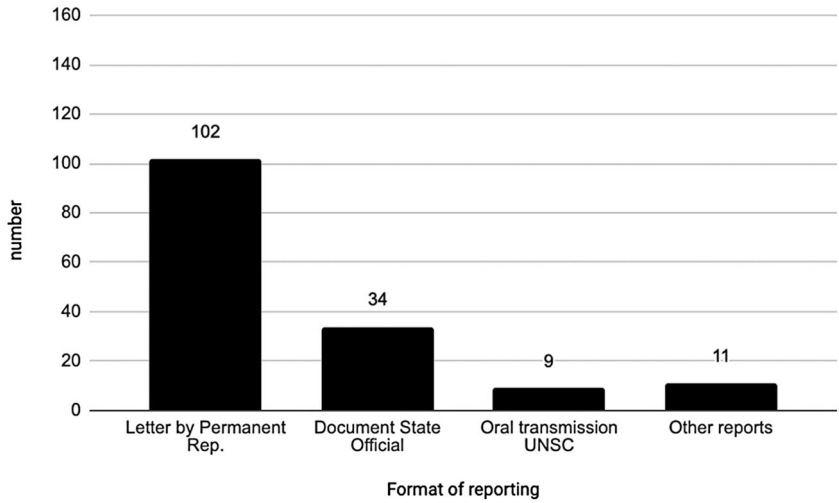

Figure 2. Formats of reports submitted to the UNSC (1958–2019).

submissions analysed. The submission of a document from a state official takes up 21 percent of the total number of reports with 34 reports.

The practice of making an oral transmission during a meeting of the UNSC is scarce: less than 5 percent (9 reports). This specific format seems only to be recurrent from 1958 until 1979, after which only two statements followed, both by Georgia regarding its conflict with Russia in 2008.[42] The exceptional use of this format by Georgia after 1979 provides the impression that this format of reporting has been largely discontinued from the 1980s onwards. The last category of 'other' formats of reporting makes up only eight per cent of the reports analysed with 13 out of 158 reports following this format.

Figure 3 indicates that more recently, from 2000 to 2019, almost all reports submitted to the UNSC are official documents from high ranking state officials, either being a letter from the permanent representative or document from a state official, together making up 91 percent of all reports submitted during this period. This conduct is in line with the finding of the ILC that 'subsequent practice of States in the application of a treaty may certainly be performed by the high-ranking government officials' and the primary role for state parties and their respective organs.[43]

In addition, it must be noted that the format via oral transmission is largely in disuse in the twenty-first century and that states, such as Poland, Israel, Congo and Eritrea, that used other formats also resorted to the more common way of reporting by either submitting a letter or document from a

[42]UNSC Verbatim Record, UN Doc S/PV.5951 (8 August 2008) 4; UNSC Verbatim Record, UN Doc S/PV.5952 (8 August 2008) 3

[43]ILC Report 2018 (n 25) 18–9, para 4.

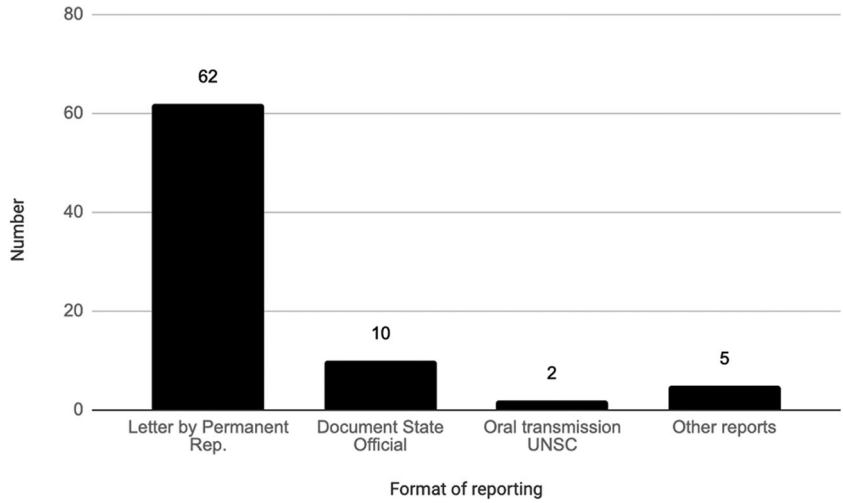

Figure 3. Formats of reports submitted to the UNSC (2000–2019).

high state official during other instances. The fact that contracting parties alternate with the use of formats of reporting does not automatically mean there is no common conduct; it could indicate that there is a scope for the exercise of discretion in the application of the requirement as noted by the ILC.[44]

Reporting practice between 1958 and 2019 shows explicit conduct of the treaty parties in the application of the UN Charter, and is strong evidence of an implicit agreement that the first two formats are the main format through which the requirement to report enshrined in the UN Charter Article 51 should be complied with. The conduct and agreement regarding the format of reporting is observed during the whole period analysed, which strengthens the assumption that the agreement is 'grounded', and more or less firmly 'established' (which are the indicators of relevant 'subsequent practice' according to the ILC).[45] The agreement could be considered implicit because the treaty parties only signal their agreement through their conduct by submitting a report to the UNSC, and without explicitly referring to it in the text of the submission. The conduct of not explicitly referring to the requirement to report could foster the interpretation that for most treaty parties, the mere act of submitting the report suffices to meet the requirement in Article 51.

For most reports, it is evident through its submission to the UNSC that states intend to submit a report as required by Article 51 such as with

[44] *Ibid*, 76, para 4.
[45] *Ibid*, 44, para 5.

letters submitted by the permanent representative of a state. Though for reports that fall under the category of oral transmission to the UNSC or other reports, this intent is sometimes unclear. Without a specific reference that the submission is a report under Article 51, the line between what constitutes a report under Article 51 and just a declaration of the resort to self-defence is in some instances blurred. Exemplary are the oral transmissions from Georgia in 2008 during two UNSC meetings. The permanent representative of Georgia, during special meetings to discuss the conflict with Russia, stated that 'actions were taken in self-defence after repeated armed provocations' but without any further substantiation or indication that Georgia was reporting the use of self-defence under Article 51.[46] This issue could (hypothetically) result in a clash with the object and purpose of the article: without a clear indication whether a reference to self-defence falls under the requirement to report, it could be challenging to assess if the UNSC needs to exert its supervening authority 'triggered' by the wording of Article 51.

A considerable number of states deem it necessary to substantiate the act of submitting a report with a textual reference to the requirement to report in Article 51. Over the whole period analysed almost a quarter of the reports (48 out of 158) specifically refer in some form to the requirement to report. Standing out is the number of such reports by Western states, of which the United States (historically) took the lead, followed by European states, Canada and Australia. To a lesser extent, but with still a considerable number, reports from states in the Middle East include a reference to the reporting requirement, predominantly by Iran. Most reports include language that the respective state wishes to inform or notify the UNSC 'under' or 'pursuant' to Article 51 of measures taken. The report submitted by Liberia in 2003 is exemplary, stating that '[i]n keeping with the provisions of Article 51 […] Liberia hereby informs the Security Council that it has taken measures to provide for its legitimate self-defence'.[47] This conduct could indicate that a considerable number of the contracting parties believe that besides the act of submitting a report it is necessary to textually confirm that the submission is pursuant to Article 51 in order to comply with the requirements in the said Article. This practice could also signal an added indicator on an agreement by emphasising the belief that the chosen format is the correct format to comply with the requirement in Article 51 by adding a textual reference that states that the submission is in line with or in accordance with the article.

[46]UN Doc S/PV.5951 (n 42); UN Doc S/PV.5952 (n 42).

[47]Letter dated 20 March 2002 from the Minister for Foreign Affairs of Liberia addressed to the President of the Security Council, UN Doc S/2002/310 (26 March 2002); Letter dated 3 December 2015 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/2015/928 (3 December 2015).

Noteworthy are the reports by Western states after the 9/11 attacks in the United States, and the measures reported taken in self-defence against ISIS/Daesh in Syria between 2014 and 2016. For each instance, the respective states used almost identical language referring to the requirement to report under Article 51.[48] The report submitted by the United Kingdom regarding its self-defence action in Syria against ISIS is an example, stating '[i]n accordance with Article 51 of the Charter of the United Nations, […] I am writing to report to the Security Council'. All other Western states, with the exception of France, used the same formulation to refer to the reporting requirement under Article 51.[49] The same conduct could be observed from a smaller group of states after the 9/11 attacks, of which the United Kingdom took the lead, using the same language. The nearly identical use of language could indicate that states follow each other's example or that there is coordinated conduct among certain parties (and regions) in order to give an interpretation to the requirement to report.[50]

5. The immediacy of reporting

The first requirement under Article 51 states that a report 'should' be submitted, an important condition for this requirement is that the submission of the report to the UNSC is 'immediate'. Immediate refers to an action that should be conducted promptly, urgently, without delay or instantly and without any considerable loss of time or as soon as it can be done. A purely textual approach to the article only reveals an indication of urgency when

[48]Identical letters dated 25 November 2014 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2014/851 (26 November 2014); Letter dated 10 December 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council, UN Doc S/2015/946 (10 December 2015); UN Doc S/2015/928 (n 47); Letter dated 11 January 2016 from the Permanent Representative of Denmark to the United Nations addressed to the President of the Security Council, UN Doc S/2016/34 (13 January 2016); Letter dated 10 February 2016 from the Chargé d'affaires a.i. of the Permanent Mission of the Netherlands to the United Nations addressed to the President of the Security Council, UN Doc S/2016/132 (10 February 2016); Letter dated 3 June 2016 from the Permanent Representative of Norway to the United Nations addressed to the President of the Security Council, UN Doc S/2016/513 (3 June 2016); Letter dated 7 June 2016 from the Permanent Representative of Belgium to the United Nations addressed to the President of the Security Council, UN Doc S/2016/523 (9 June 2016).

[49]UN Doc S/2014/851 (n 48).

[50]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 (7 October 2001); 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 (23 November 2001); 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 (29 November 2001); Letter dated 6 December 2001 from the Permanent Representative of the Netherlands to the United Nations addressed to the President of the Security Council, UN Doc S/2001/1171 (6 December 2001); 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 (15 March 2002).

complying with the requirement to report to the UNSC but does not indicate the time-frame or what the drafters of the Charter considered to be immediate.

The right to self-defence enshrined in Article 51 is only temporarily and immediacy in reporting is necessary to provide the UNSC with the possibility to give an ex post facto evaluation of the use of self-defence and to take action as it deems necessary [..] in order to maintain or restore international peace and security. Logically this means that in order for the UNSC to assert its supervening authority it needs to be informed in a timely fashion, as '[t]he requirement of immediacy is designed to ensure the earliest possible Security Council consideration of any such incident so that any action necessary to prevent the eruption or widening of hostilities may be taken immediately'.[51] There is no substantiation in the dictums and advisory opinions of the ICJ that indicate what the Court considers to be immediate when it comes to reporting. Without clear evidence from the text, ordinary meaning or jurisprudence the conduct of the contracting parties could indicate what is considered to be a reasonable time-frame for immediate reporting, the use of self-defence to the UNSC.

Green analysed the 'timeliness' element of claims to self-defence and reporting and found that the majority of reports are submitted within one week after the incident that invoked the use of self-defence. The analysis by Green is mainly based on an estimated period between the initiation of self-defence and the report following it.[52] In order to identify if there is subsequent practice regarding the immediacy of reporting it is vital to analyse the actual time-frame of reporting by the treaty parties to the UNSC, and if there is substantive reasoning concerning the requirement to report.

The current study focused on the instances where states mentioned the date of the measures taken in self-defence and the date the report was submitted. From the 158 reports analysed almost half of the reports mention, in some way, the date the measures in self-defence took place, such as, for example, a report from Cambodia regarding a conflict with Thailand about the Temple of Preah Vihear. This report stated that on 15 October 2008, at 2.15pm, Thai troops fired at the Cambodian forces after which measures in self-defence were taken.[53] The other half of the reports do not mention, or leave it ambiguous, when the instance(s) of self-defence took place, such as, for example, the report by Germany on measures taken in Syria in 2016, stating that military measures were initiated, without specifying when the measures were initiated or ended.[54]

[51]Mitchell Knisbacher, 'The Entebbe Operation: A Legal Analysis of Israel's Rescue Action' (1977) 12 *The Journal of International Law and Economics* 57.
[52]Green (n 7) 596.
[53]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 (15 October 2008).
[54]UN Doc S/2015/946 (n 48).

Figure 4 shows that more than 80 percent of reports (58) that mention the date of the measures in self-defence report to the UNSC within a week, of which 20 (14) reports on the same day as the measure took place. The fact that the vast majority of reports are submitted within one week after the measures of self-defence were initiated indicates the possible existence of parallel conduct by contracting parties that interpret the term 'immediacy' in the report as requiring to report within the time-frame of one week. Green found that the majority of states comply with the requirement that reports need to be submitted in a timely fashion (one week), which – as noted – was mainly based on an estimate of the time between the instance of self-defence and the report. This article and the findings by Green add to the conclusion that there is a common practice, which is necessary for establishing that there is subsequent practice when interpreting the term immediate in UN Charter Article 51.

A fraction of reports are submitted more than two weeks after the measures in self-defence took place, with some outliers like the reports submitted by Eritrea concerning its conflict with Ethiopia submitted seven and eleven months after the measures took place. Reports, such as the one by New Zealand after the attacks of 11 September 2001 in the United States, submitted almost 2.5 months later are far beyond what instinctively could be labelled as immediate. Green suggests that late reporting is preferable to states not reporting at all because of the value the report could have for the ex post facto evaluation of the situation by the UNSC.[55] There is a truth to be found in this argument, but it does not necessarily mean that the respective state complied with the requirement to immediately report.

Neither the fact that a small fraction of states do not submit a report within one week nor the fact that the other half of reports not explicitly mention the date of the measures in self-defence necessarily mean that there is no conduct that could amount to subsequent practice. The ILC noted that not all parties have to engage in a particular practice to constitute subsequent practice under VCLT Article 31(3)(b) and relevant silence or omission could contribute to the conduct of the parties involved.[56] It is notable that, besides the reports that mention the date of the incident, none of the reports analysed provided a textual reference or mention the requirement to report immediately. According to the ILC subsequent practice consists of two crucial elements being objective facts (conduct) and the understanding of the parties that this evidence constitutes an agreement on the interpretation of the treaty (agreement).

The ILC provides the impression that the parties involved do not explicitly have to name the agreement, but by performing certain conduct with

[55]Green (n 7) 599.
[56]ILC Report 2018 (n 25) 37–9.

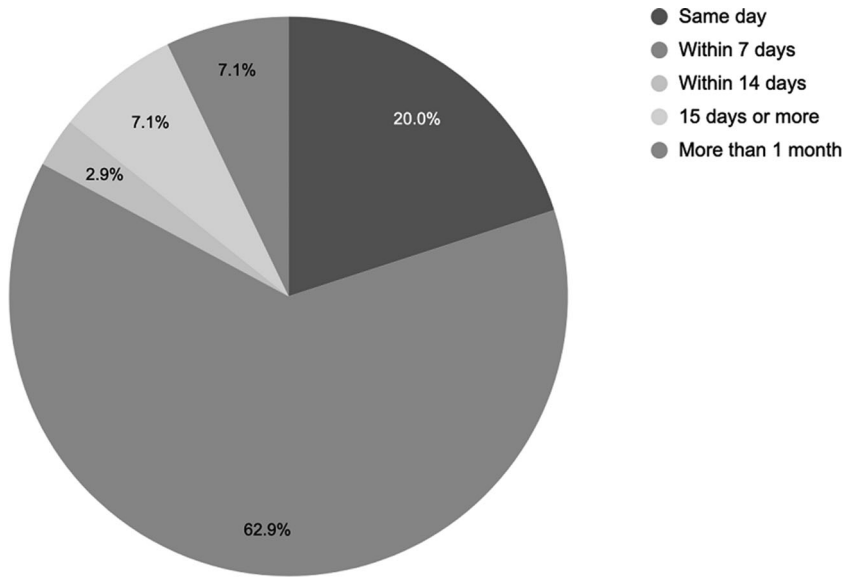

Figure 4. Number of days between incident and submission of reports (1958–2019).

common understanding could signal their agreement.[57] Both this analysis and that of Green have indicated that there is evidence that supports the statement that there could be an agreement through parallel conduct by the contracting parties regarding the immediacy of reporting. Indicating that there possibly is an (implicit) agreement through certain conduct on the interpretation of a term in Article 51 of which the ICJ has not provided direction, as all dictums or advisory opinions are regarding the omission to submit a report.

5.1. Pre-emptive reporting

Article 51 states that 'measures taken […] shall be immediately reported' to the UNSC. The language used in Article 51 is formulated in the past tense, suggesting that only measures that are taken ex post facto should be reported and the requirement to report does not arise until defensive measures have been taken.[58] The majority of reports analysed are referring to measures taken ex post facto, though a small number of reports could be considered to be pre-emptive referring to measures that were going to be conducted instead of already taken. Pre-emptive reports include language indicating that the respective state actor will or may be forced to exercise its right to self-defence or is taking measures, indicating that measures still need to be

[57] *Ibid.*
[58] Knisbacher (n 51) 78–9.

implemented or are still in progress. Green found that close to half of the reports submitted by states between 1998 and 2013 consisted of pre-emptive (or mixed) reports. Green's analysis includes reports that only confirm or reserve the right to self-defence by the respective state. The current study has left out reports that do not mention 'measures' in self-defence, on the basis that these submissions could be considered as political statements instead of reports under Article 51 because they do not meet the requirement under Article 51 that a report needs to be on 'measures' taken in self-defence.[59]

This study found that only 26 reports could be labelled as being pre-emptive of nature, less than twenty percent of the total amount of submission analysed. An increase in the use of pre-emptive reporting is observable during the measures against ISIS/Daesh in Syria. From the 15 reports submitted during this conflict to the UNSC, eight of these reports (by Western states) used language that indicates pre-emptive reporting, such as, for example, the Netherlands stating that it 'will be providing the international coalition against terrorism with air-transport capacity (air-to-air refuelling), naval forces, navy aviation (maritime patrol planes) and necessary support'. Another example of pre-emptive language is the report by Belgium, stating that the state is 'taking necessary and proportionate measures' and 'will support the military measures of those States that have been subjected to attacks by ISIL'.[60]

Pre-emptive reports – such as the reports on (collective) self-defence in Syria – could be problematic for two reasons. First, because it is unclear if these submissions constitute a report as required under Article 51, mainly because the article requires the contracting party to report on measures taken, not measures *to be* taken. From a purely textual interpretation, the question arises whether, by submitting a pre-emptive report, the respective

[59]See, e.g. Letter dated 2 May 1996 from the charge d'affaires a.i. of the Permanent Mission of Cameroon to the United Nations addressed to the President of the Security Council, UN Doc S/1996/330 (2 May 1996); Letter dated 10 May 1999 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, UN Doc S/1999/536 (11 May 1999); Letter dated 11 May 2001 from the Chargé d'affaires, a.i. of the Permanent Mission of Liberia to the United Nations addressed to the Secretary-General, UN Doc S/2001/474 (11 May 2001); Letter dated 31 October 2001 from the Permanent Representative of Liberia to the United Nations addressed to the Secretary-General, UN Doc S/2001/1035 (1 November 2001); 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 (12 September 2002); 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 (12 July 2006).

[60]UN Doc S/2014/851 (n 48); Letter dated 31 March 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council, UN Doc S/2015/221 (31 March 2015); Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council, UN Doc S/2015/693 (9 September 2015); UN Doc S/2016/34 (n 48); UN Doc S/2015/928 (n 47); UN Doc S/2016/132 (n 47); UN Doc S/2016/513 (n 48); UN Doc S/2016/523 (n 48).

contracting party is complying with the requirement to report under Article 51.

The second reason why pre-emptive reports could be problematic lies in the object and purpose of Article 51. The prerequisite to immediately report on these measures taken in self-defence is deemed necessary to enable the UNSC to respond to threats to and breaches of the peace, and the UNSC needs to be informed on measures taken to place the use of force under the scrutiny of the international community. A pre-emptive report could be a first indicator for the UNSC that certain measures might be necessary 'in order to maintain or restore international peace and security', and could be considered 'immediate' in order to enable the UNSC to 'exert its supervening authority in a timely way'.[61]

The data suggests that there is a link between reports that are pre-emptive in nature and lack a substantial and factual description of the measures (that will be) taken in self-defence. The lack of description of measures is inherent to the nature of pre-emptive reporting as an act of self-defence itself has not occurred or is still in progress. In addition, almost none of the pre-emptive reports are followed up by a report on the measures ex post facto. Only in the case of a prolonged conflict, such as, for example, the ongoing border conflict between Iran-Iraq, do reports regarding the same conflict sometimes follow pre-emptive reports, without providing further detail on the initial pre-emptive reporting.[62] Submitting pre-emptive reports under Article 51 of little use in helping accurately to assess the circumstances of the invocation self-defence or the need by the UNSC to intervene when necessary.

6. The quality of reporting

Article 51 states that all measures in self-defence 'shall be immediately reported' to the UNSC. From a textual approach, this could be read as that the only obligation of the contracting party under Article 51 is to 'submit' a report and the requirements under the Article are met.[63] Taking into consideration the object and purpose of the article and the ICJ judgment on the merits in the *Nicaragua* case, the quality of the submitted report issued could be significant in establishing the legitimacy of the use of self-defence.

This is, first and foremost, because of the nature of the requirement under Article 51 which implies the need for a report that is factual and legal substantiated concerning the use of self-defence to provide the UNSC with the

[61] *Nicaragua* (n 8) dissenting opinion Judge Schwebel, para 376.
[62] See Letter dated 11 March 1988 from the Acting Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, UN Doc S/19603 (11 March 1988); Letter dated 23 May 1993 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, UN Doc S/25843 (25 May 1993).
[63] Green (n 7) 603.

possibility to properly scrutinise the use of self-defence and enable the Council to assume its primary responsibility for peace and security. As Green sums up, 'any ex post facto assessment (legal or otherwise) of a state's self-defence claim will rely on detailed factual and legal information'.[64] Green also found that, between 1998 and 2013, reports were 'generally extremely cursory' and excluded factual or legal detail.[65] Therefore this part of the analysis focuses on the legal and factual backing states give to their claims of self-defence in their submitted reports. Looking at the legal substantiation and how descriptive the contracting parties are in the description of certain requirements for the legal invocation of self-defence.

6.1. Reference to the justification for self-defence

Not every form of the use of force prohibited under UN Charter Article 2(4) could be qualified as an exception under the right to self-defence. Article 51 states that self-defence is only permissible 'if an armed attack occurs'. According to Gray, common practice amongst state actors using some form of force against another state is the almost automatic invocation of the use of self-defence, especially following *Nicaragua*, 'the controversy centres on the question of facts as to whether there has actually been an armed attack'.[66] The ICJ in the *Nicaragua* case and the *Oil Platforms* case confirmed that only an armed attack could constitute grounds on which there was a necessity for self-defence and that there is a distinction between 'the most grave forms of the use of force (those constituting an armed attack) from other less grave forms'.[67] The requirement of an armed attack to invoke self-defence is also found within customary international law.[68] The ICJ differentiates between an armed attack and other forms of force, indicating that the use of force does not automatically amount to an armed attack, but could constitute an armed attack under Article 51 depending on the factual circumstances and the gravity of the force used. Besides the use of the term armed attack in an Article 51, of which the ICJ stated that a definition is not provided in the Charter and that it is not part of treaty law, is not clearly defined anywhere. The text Article 51 gives the impression that the use of self-defence is only legal if an armed attack occurs, explicitly using the term armed attack instead of other ways of referencing to the use of force.

The first indication of legal and factual language in the submitted report is the use of basic textual parameters referring to the right that is claimed (self-

[64] *Ibid*, 563.
[65] *Ibid*.
[66] Gray (n 7) 121.
[67] *Nicaragua* (n 8) paras 41–245; *Oil Platforms* (n 23) para 74.
[68] *Oil Platforms* (n 23) para 74; James A Green, *The International Court of Justice and Self-Defence in International Law* (Hart Publishing, 2009) 26.

defence) and in which authority this claim is vested, such as the right to self-defence under Article 51. More than 80 percent of the reports analysed refer in some capacity to self-defence or the (inherent) right to self-defence. In addition to referring to the right to self-defence more than half of the submissions refer to Article 51, but a considerable amount of reports do not refer to the article from which the requirement to report originates. None of the reports analysed refer to the right to self-defence under customary international law.

From the basic textual parameter that self-defence or the right mentioned under Article 51 is invoked normally follows the justification for its invocation. As mentioned, a legal invocation of Article 51 occurs when an armed attack has occurred, though this is not necessarily reflected in the reports submitted to the UNSC. The absence of a clear definition of what constitutes an armed attack has led to creative interpretations of Article 51 and possibly makes the term susceptible to abuse or misinterpretation. The analysis of reports submitted uses a variety of justifications intertwined in their reports, such as 'armed attacks', 'threats', 'provocations' and 'aggression'.

Roughly eight different formats of justification could be subtracted from analysing reports between 1958 and the beginning of 2019. The first justification is based on some form of force, which generally is not mentioned as such, but as circumstances such as bombardments, rocket fire or military actions. The common denominator for this category is that it does not indicate a specific category of the use of force (such as an attack or aggression). The second category encapsulates references made to a threat, which is signalled by language indicating the justification of self-defence following an imminent threat, a global and unprecedented threat or the constant threat of violence. The third category consists of submissions using the justification of an armed attack, which employ language indicating an ongoing armed attack, unprovoked armed attacks, or attacks in violation of international law.

The fourth category of justifications is a provocation, indicated as, for example, continued acts of provocation, or (repeated) armed provocations. The fifth category of defence is used as a justification in different ways, some reports mention the defence of sovereignty, and territorial integrity and others use the right to (collective) self-defence as a justification for the use of self-defence.

Terrorism is mentioned in a substantial number of reports, though this sixth category only includes the reports that use terrorism or terrorist attacks as the primary justification for the use of self-defence. The seventh category consists of reports that use some form of aggression as the primary justification for invoking self-defence. The final category includes justifications that could not directly be related to a specific category of force or the use

of force, such as the seizure of a merchant vessel;[69] the transport of weapons and ammunition;[70] violations of territory;[71] requests by other state(s);[72] the testing of weapons;[73] or border incidents.[74]

Figure 5 shows the distribution of justifications mentioned in the reports submitted to the UNSC between 1958 and 2019 through the different formats of reporting. Although used often, the justification of an armed attack is far from universally used, and a variety of other justifications is observed. For most of the categories observed, it is not automatically implied that they equal an armed attack under Article 51 of the UN Charter. Taking into consideration that the second biggest category mentioned as justification (other), after an (armed) attack, is the category that in most cases could not directly be related to a specific category of force or the use of force.

The UN Charter mentions aggression specifically in Article 1 and Article 39 linking the act of aggression to a breach of peace. According to Wolfrum and Phillipp, there exists a consensus among legal scholars that the concept of armed attack is 'narrower than the notion of aggression and that armed attack is the most serious form of aggression'. This consensus leads to the conclusion that when a treaty party speaks of aggression or an act of aggression as a justification for the invocation of self-defence it does not automatically mean that there is an armed attack in the context of Article 51. The category of threat has the same dilemma, the threat of force and threat of an armed attack that (in theory could) fall under the prohibition mentioned in Article 2(4) does not automatically amount to an armed attack which would provide grounds for self-defence under Article 51.[75] In the *travaux preparatoires* of the 1970 Declaration on Principles of Friendly Relations, several concepts of the use of force were mentioned as not

[69]See, e.g. 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 (15 May 1975).
[70]See, e.g. Letter dated 20 May 1986 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General, UN Doc S/18071 (20 May 1986).
[71]See, e.g. Letter dated 19 August 1981 from the Permanent Representative of Jordan to the United Nations addressed to the Secretary-General, UN Doc A/36/443–S/14633 (21 August 1981); Letter dated 14 January 1986 from the charge d'affaires a.i. of the Permanent Mission of Viet Nam to the United Nations addressed to the Secretary-General, UN Doc S/18599 (14 January 1987).
[72]See, e.g. UNSC Verbatim Record, UN Doc S/PV.831 (17 July 1958); Letter dated 90/08/16 from the charge d'affaires a.i. of the United States mission to the United Nations addressed to the President of the Security Council, UN Doc S/21537 (16 August 1990).
[73]See, e.g. Letter dated 11 October 2006 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/2006/801 (11 October 2006).
[74]Letter dated 85/12/26 from the Acting Permanent Representative of Israel to the United Nations addressed to the Secretary-General, UN Doc A/41/65–S/17698 (27 December 1985); Letter dated 1 August 1994 from the Chargé d'affaires a.i. of the Permanent Mission of Yugoslavia to the United Nations addressed to the Secretary-General, UN Doc A/49/290–S/1994/917 (2 August 1994); Letter dated 9 January 1999 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General, UN Doc S/1999/29 (11 January 1999).
[75]Constantinou (n 18) 19.

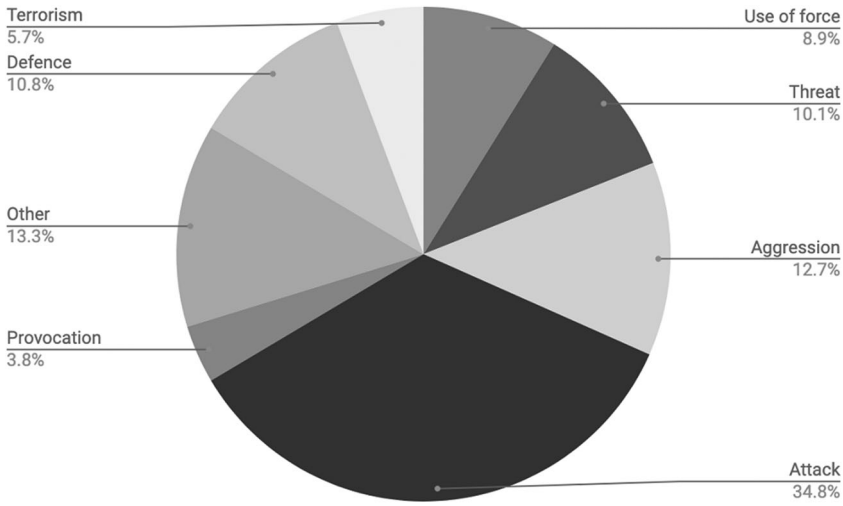

Figure 5. Justification mentioned in reports submitted to the UNSC (1958–2019).

constituting an armed attack; provocation was considered the same as the threat of force and was excluded from the understanding of an armed attack.[76] Reports that use (the right to) self-defence as a justification for their measures taken could be considered paradoxical as self-defence by itself is not a justification but a condition that arises after some form of force has been used that allows for resort to self-defence in return.

The text of Article 51 is narrowly constructed in terms of which measures in self-defence are legal, providing the impression that the use of self-defence is only legal when an armed attack occurs. The parallel rule under customary international law prescribes to the same requirement, and the ICJ has confirmed in several dictums and advisory opinions that only an armed attack could constitute grounds on which there was a necessity for self-defence.[77] The notion that only an armed attack can act to trigger the legal use of self-defence is not reflected in the conduct of states when reporting on self-defence and the justification presented for its use. The high number of states that use other forms of justification than the (legal) justification of an armed attack mentioned in Article 51 could indicate that there is conduct by the treaty parties in the application of the article that suggests a wider interpretation regarding the circumstances which would lead to the (legal) invocation of self-defence. From the ILC conclusions on subsequent practice, it is apparent that different forms of practice, such as the practice

[76] *Ibid*, 208.
[77] *Nicaragua* (n 8) paras 41–245; *Oil Platforms* (n 23) para 74.

of providing justification for the use of self-defence, could contribute to both a narrow or broad interpretation of a term used in a treaty.[78]

6.2. Use of other legal concepts

Almost all reports give some indication about the legal substantiation of the invoked self-defence by referring to basic parameters such as mentioning self-defence or Article 51, followed by a certain type of justification. Some reports include references to other concepts related to self-defence such as necessity, proportionality or other legal concepts. The requirement of necessity and proportionality are not found in the text of Article 51 but are considered part of customary international law.[79] The customary rule that measures in self-defence have to be necessary and proportionate stem from the *Caroline* incident in 1837 and have consistently been considered to be underlying conditions for exercising self-defence by the ICJ.[80] Reference to the justification for self-defence could be closely linked to the legal concepts of necessity, as the *Nicaragua* case considered an armed attack which gave 'rise to the necessity for defensive actions under Article 51'.[81] Around three-quarters of the reports analysed do not mention necessity in the text that described the invocation of the use of self-defence. The reports that do mention necessity, state that the measures taken are necessary, using language, for example, indicating that only necessary force is used or that the state is taking necessary and proportionate measures.[82] None of the reports analysed provide a detailed assessment of why the measures taken adhered to the condition of necessity.

Proportionality in the context of self-defence stresses that the purpose of the use of force is to repel an armed attack until the danger of this attack has ceased to exist. Any action beyond what is required to meet the need to repel an armed attack is considered disproportionate, and thus unlawful.[83] It is argued that proportionality consists of a threefold limitation on the use of force: the quality of the use of force or the kind of weapons used, geographical constraints, and the chosen target.[84] Green found that states do mention proportionality in the period analysed (1998–2013) but that only one state

[78]ILC Report 2018 (n 25) 13.
[79]*Nicaragua* (n 8) paras 41–245.
[80]Green (n 68) 63.
[81]Constantinou (n 18) 208.
[82]Letter dated 20 December 1989 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/21035 (20 December 1989); UN Doc S/2015/693 (n 60); Letter dated 24 August 2016 from the Permanent Representative of Turkey to the United Nations addressed to the President of the Security Council, UN Doc S/2016/739 (25 August 2016).
[83]Report of the Special Committee on the Question of Defining Aggression – 24th Session (1969) UN Doc A/7620, Supplement no. 20, para 73.
[84]Constantinou (n 18) 208.

provided an attempt to substantiate this claim.[85] This study's analysis of reports from 1958 until the beginning of 2019 shows that states refer even less frequently to proportionality then to necessity in their reports: only 29 out of 158 reports do so. Nearly all reports only mention the fact that measures taken are (or will be) proportionate but do not provide factual or legal substantiation on how and why these measures are considered proportionate.

A small fraction of the reports (11 percent) mention other legal obligations or restrictions to the measures taken in self-defence. An example is the report by Australia following the invocation of collective self-defence after the 9/11 attacks, in which it stated that it would 'scrupulously abide by its obligations under international humanitarian law'.[86] A report that indicates some form of restraint is the report from the United States in relation to measures taken against Iraq after an attempted assassination of a former president, stating that the US had 'chosen its target carefully so as to minimise risks of collateral damage to civilians'.[87] The common conduct regarding the use of legal concepts seems to prescribe that a mere reference to legal terms such as necessity, proportionality or other legal conditions for the use of self-defence suffices. The states that claim to have acted in accordance with these conditions do not provide comprehensive information on how and why this is the case.

6.3. Description of the measures taken in self-defence

The text of Article 51 leaves it ambiguous what should be included in the report to comply with the requirement to report, though the text gives one indication, that it should include a description of the *measures taken* in self-defence. In order to analyse if there is common conduct regarding the description of the measures taken in self-defence, a distinction has been made between three classifications describing the measures taken in self-defence.

The first classification compromises of reports where no description of measures taken is given, using language that measures are being taken or that force has been used. An example of a report that does not describe the measures taken is the report by Syria in 2013 concerning self-defence invoked against Israel, which only stated that Syria was responding to violations of the UN Charter 'by exercising the right to self-defence'.[88]

[85] Green (n 7) 570.
[86] Letter dated 23 November 2001 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council, UN Doc S/2001/1104 (23 November 2001).
[87] Letter dated 26 June 1993 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/26003 (26 June 1993).
[88] Identical letters dated 21 May 2013 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2013/303 (21 May 2013).

The second category consists of reports that give some form of description of measures taken but are vague on its content, such as, for example, the report by France on the collective self-defence action against ISIL/Daesh in Syria, in which it described the measures it was taking as 'actions involving the participation of military aircraft'.[89] Another example of a report using a vague description of the measures taken is the report by New Zealand following the 9/11 attack on the United States in September 2001, which simply indicated that 'military contribution has been employed in support of military operations'.[90] A report describing the measures taken by the reporting state as 'military actions have been taken' is more direct on how the measures have been conducted (through its armed forces) but unclear on what these actions amount to.

The last category provides a more detailed description of the measures used: for example, describing a location, the weapons used or targets of the measures in self-defence. An example of a report that is detailed on the measures taken is that of Iran in 2001, which stated that 'defensive measures against a number of the MKO command and control, training and logistic bases inside Iraq. This operation, which began at 4.15 and concluded at 7.30 in the early hours of this morning, targeted the following MKO bases [then providing a list of six bases]'.[91]

Figure 6 shows that a little less than half of the reports submitted to the UNSC do not have a description of the measures taken in self-defence. Together with the reports that have a vague description, these make up the vast majority of the reports submitted: 67 percent. What should also be noted is that report included in the 'detailed' description category are more explicit about the measure(s) taken but not on the substantiation of these measures. The detail of the report by Iran in 2001 is almost unique: most 'detailed' report analysed are less descriptive on its measure taken and describe in elementary terms that, for example, airstrikes have been conducted or that the military fired back. The reports usually do not give comprehensive detail on, for example, the components of proportionality such as the quality of the use of force or the kind of weapons used geographical constraints and the chosen target.[92]

In addition, there is a strong connection between reports that have no or vague description of the measures taken and reports that are pre-emptive in nature. The vague description in pre-emptive reports could be considered

[89]Identical letters dated 8 September 2015 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2015/745 (9 September 2015).
[90]Letter dated 17 December 2001 from the Permanent Representative of New Zealand to the United Nations addressed to the President of the Security Council, UN Doc S/2001/1193 (18 December 2001).
[91]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 (19 April 2001).
[92]Constantinou (n 18) 208.

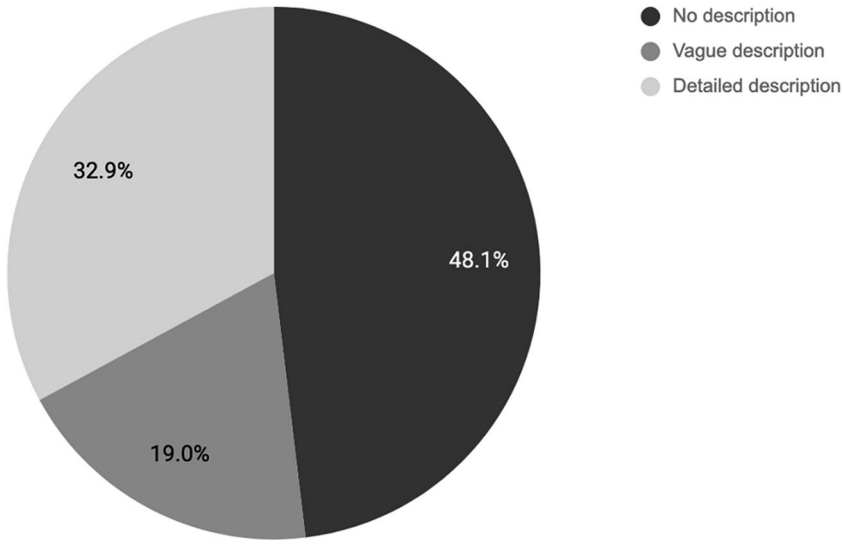

Figure 6. Description of measures taken in self-defence (1958–2019).

a logical consequence of pre-emptive reporting, as the measures still have to be taken or are still in process. There are various ways in which states describe the measures taken in self-defence, but the commonality that the vast majority of reports do not provide a description or are vague in their description indicates that there is certain conduct regarding the interpretation of the terms on which states are required to report on measures in Article 51. The conduct signals an interpretation by the states that when describing the measures taken in self-defence no description or an extremely succinct description suffices to comply with the requirement to report in Article 51.

7. Conclusion

This study shows that after the judgment on the merits in the *Nicaragua* case in 1986 the requirement to report the use of self-defence to the UNSC has been more frequently observed, though it is unlikely that all instances where self-defence is invoked are also reported. Combined with the ambiguity regarding the consequences of a failure to report following *Nicaragua*, there is an imperative for further research into compliance with the requirement to report under Article 51, assessing whether and how states that do not report the use of self-defence could (or should) be held accountable for their omission to follow the requirement in Article 51.

A textual examination of Article 51 only reveals that a report *shall* be submitted, the use of the word 'shall' could be considered mandatory language, but leaves the way of reporting to the interpreter. For the period analysed

(1958–2019) there are four different formats identifiable in which the contracting parties give a practical interpretation of the requirement to report found in Article 51. Conduct by the contracting parties seems to move gradually towards a more generalised way of reporting instead of a variety of formats, towards a more de facto formalizsd manner of reporting through the submission of documents from a high-level state official to the UNSC. This development could be seen as desirable because, for other formats of reporting, it could be more difficult to distinguish if the expression regarding a certain incident could be considered a notification on self-defence (which needs to follow the requirements in Article 51) or is just a (political) statement. In theory, the submission of a letter by the permanent representative of the respective state or a document from a state official provides a more formalised and better-documented method of providing the UNSC with factual or legal details to review, though this analysis has shown that in reality for any format of reporting the factual and legal basis of the use of self-defence remains succinct.

There is less explicit conduct that could indicate subsequent practice on the immediacy of reporting than can be observed on the format of reporting. This study focused on the instances where the contracting parties mentioned the date of the measures taken in self-defence and the date the report was submitted. Of the 158 reports analysed, almost half of the reports mention in some way the date the measures in self-defence took place. Together with the findings of Green regarding the 'timeliness' element of reports, there are reliable indicators that there exists parallel conduct by the contracting parties that in order to comply with the requirement to immediately report in Article 51 measures taken in self-defence should be reported within a week after the measure was initiated.

In addition, the fact that other half of the reports do not mention the date on which measures in self-defence took place means that a considerable number of reports do not provide the UNSC with specific information regarding the 'timeliness' element of reporting. From the text of these reports, it could not be identified whether the omission by the states in question to include specific dates was deliberate or unintentional, but it could potentially constrain the ability of the UNSC to scrutinise the crucial elements to the invocation of self-defence. The Repertory of Practice of United Nations Organs (1945–1984) and the Repertoire of the Practice of the Security Council (1946–2015) do not give any indication that the immediacy of reporting or the omission to mention specific dates are a subject of debate among the contracting parties, as the debate regarding instances of self-defence generally focuses on its (political) justification.

This study provided that certain conduct could be observed regarding the justification for the resort to self-defence and the description of the measures taken, though caution is necessary when stating that this conduct could signal

an (implicit) agreement, which is critical to establishing whether there is relevant subsequent practice. The ILC stated that in order to establish subsequent practice it is necessary to identify whether the parties have taken a particular position regarding a certain interpretation or whether other considerations motivated the conduct.[93] Other considerations that could foster the conduct could be political, as the use of force and its implementation could be highly politicised. Gray has previously observed that most reports do not provide substantiation on the doctrinal part of self-defence, but 'more time is devoted to expounding their version of the facts and their political justification'.[94] The findings of this analysis regarding the quality of reporting could indicate how the treaty parties with their conduct signal other considerations than a (legal) agreement on the interpretation of terms in the UN Charter. Using the requirement in Article 51 as a procedural (administrative) necessity that needs to be complied with to be able to claim the legitimate use of self-defence, or as a means to create ambiguity about the legal cover or justification for the use of force or self-defence. In conclusion, it could be said that a report without a proper factual or legal substantiation tends to lean towards a ritual incantation of a provision within Article 51, of which the ultimate object and purpose is to provide the UNSC with the ability to scrutinise and respond to threats to international peace and security.

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Disclosure statement

No potential conflict of interest was reported by the author.

[93]ILC Report 2018 (n 25) 44, para 5.
[94]Gray (n 7) 125.