

Replicating Article 51

A Reporting Requirement for Consent-Based Use of Force?

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Unlike self-defence, intervention by invitation is not anchored in the United Nations (UN) Charter. The requirements governing this legal basis to use force can thus not be derived from a concrete provision and there is no treaty obligation to report similar to Art. 51, second sentence. This *Impulse* considers a reporting requirement for consent-based use of force. It discusses the function of Art. 51's reporting requirement in light of current Security Council practices and it examines the potential to construe a parallel reporting requirement, or at least a practice, for consent-based use of force.

The initial rationale of Art. 51's reporting requirement was to alert the Security Council that force in self-defence had been used and to place the matter on the international agenda with a view to enabling the Council to exercise its primary responsibility to maintain peace and security.¹ As the system of collective security is becoming more decentralised and as the Security Council has been adopting a new role recently whereby it condones and/or blesses non-authorised uses of force rather than authorising use of force itself,² the reporting requirement has taken on new meaning. In such a constellation, the purpose of the reporting requirement is not mainly to notify or alert so that the Council can take over, but rather to report in the ordinary sense, namely to offer information and to account so as to enable the Security Council and the international community at large to discuss whether the use of force was in accordance with the applicable rules and requirements.

In addition to self-defence as an exception, consent is also relied on to justify the use of force and it has increasingly been invoked as an additional

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¹ J. A. Green, The Article 51 Reporting Requirement for Self-Defense Actions, Va. J. Int'l L. 55 (2015), 568.

² As also discussed by M. Hakimi, The Jus Ad Bellum's Regulatory Form, AJIL 112 (2018), 151 et seq.

basis for counter-terrorism operations. Also in the context of consent-situations, a practice has emerged whereby the Security Council refrains from authorising use of force itself, and instead it may appraise the circumstances surrounding the formulation of the invitation thereby endorsing the consent. Whether the Security Council makes such appraisal in concrete situations depends, *inter alia*, on whether the use of force is reported and whether the matter is placed on the Security Council's agenda. This raises the question regarding the existence of a reporting requirement for consent-based use of force.

Since the UN Charter is silent on intervention by invitation, any legally binding reporting requirement would have to be construed under customary international law. Scholarly arguments have been made in this respect, proposing that Art. 51's reporting requirement should be applied *mutatis mutandis* to consent-based use of force.³ In its Resolution on military assistance on request, the *Institut de Droit International* also stated that "any request that is followed by military assistance shall be notified to the Secretary-General of the United Nations".⁴ Suggesting the Secretary-General as recipient of notifications rather than the Security Council might be explained by political sensitivities and reluctance of States to accept any hard core reporting obligation. In this vein, the following US statement may be noted when reporting on missile strikes in Houthi-controlled territory in Yemen in 2016,

"These actions were taken with the consent of the Government of Yemen. Although the United States therefore does not believe notification pursuant to Article 51 of the Charter of the United Nations is necessary in these circumstances, the United States nevertheless wishes to inform the Council that these actions were taken consistent with international law."⁵

This can be read as implying that no reporting requirement exists at all, or that Article 51 cannot serve as a legal basis for a reporting requirement on consent-based use of force. It is, in any event, not self-evident to construe a legally binding reporting requirement for consent-based use of force

³ K. Bannelier/T. Christakis, *Under the UN Security Watchful Eyes: Military Intervention by Invitation in the Malian Conflict*, LJIL 26 (2013), 855 et seq., 870. And more tentatively, O. Corten, *Intervention by Invitation: The Expanding Role of the UN Security Council*, in: A. Peters/C. Marxsen, *Max Planck Trialogues on the Law of Peace and War Volume IV: Intervention by Invitation* (forthcoming).

⁴ IDI, *Present Problems of the Use of Force in International Law*, Sub-Group C – Military Assistance on Request, Rhodes, 2011, Rapporteur: M. Gerhard Hafner.

⁵ Letter dated 15.10.2016 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/2016/869, 17.10.2016.

under customary international law. Even if there is a certain practice of informing the Security Council of forceful action taken pursuant to an invitation,⁶ there are also clear examples of non-reporting.⁷ Reporting on consent-based use of force may be sensitive in particular when the consent is not public. Moreover, to construe a customary reporting rule for consent-based use of force, there also needs to be *opinio iuris* which at this point in time does not necessarily seem to clearly exist (yet). States outside the Security Council as well as non-permanent members could perhaps play a role in contributing to the expression and formation of such *opinio iuris*. In this regard, Brazil's statements in 2018 are noteworthy as they insisted on a more meaningful reporting requirement for Art. 51,⁸ as well on the need for periodic reporting on military operations pursuant to Art. 42 of the UN Charter,⁹ thus suggesting a more holistic reporting requirement.

In considering a reporting requirement for consent-based use of force specifically, complex questions arise on timing and modalities as well as on when and how consent-based use of force that is very temporary or that involves a one off action must be reported, and on what exactly must be reported under this heading, i.e., whether a reporting requirement would also cover pure aiding.

Absent a clear requirement thus far, States nonetheless tend to rely on multiple justifications including consent and they have reported on this to the Security Council. Given this existing practice, the issue whether a perceived duty to explain translates into a hard legal obligation to report and whether this obligation extends to consent-based use of force in addition to

⁶ E.g., France in Mali (UN Doc. S/2013/17), US in Iraq (UN Doc. S/2014/695), Russia in Syria (UN Doc. S/2015/792), and less clearly Saudi Arabia in Yemen (UN Doc. S/2015/217). On the latter operation also see *T. Ruys/L. Ferro*, *Weathering the Storm: Legality and Legal Implications of the Saudi-Led Military Intervention in Yemen*, ICLQ 65 (2016), 61 et seq.

⁷ See *A. Deeks*, *A Call for Article 51 Letters*, Lawfare, 25.6.2014. On US non-reporting of its drone strikes and other operations in Yemen, Somalia and Pakistan, see Columbia Law School Human Rights Clinic and Sana'a Center for Strategic Studies, *Out of the Shadows Recommendations to Advance Transparency in the Use of Lethal Force*, June 2017, 54. Also see *D. Bosco*, *Letters from the Front Lines: State Communications to the U.N. Security Council During Conflict*, Columbia Journal of International Law 54 (2016), 341 et seq.

⁸ Statement by Brazil in the UN General Assembly (Sixth Committee) debate on the report of the Special Committee on the Charter of the United Nations, 15.10.2018, available at <<http://statements.unmeetings.org>>.

⁹ Statement by *H.E. Ambassador Mauro Vieira* in the UN Security Council open debate on Upholding International Law within the Context of the Maintenance of International Peace and Security, 17.5.2018, UN Doc. S/PV.8262, 44 et seq. On effective monitoring and accountability, also see Brazil's Concept Paper on Responsibility while Protecting: Elements for the Development and Promotion of a Concept, UN Doc. A/66/551 S/2011/701, 11.11.2011, para. 11 (h) and (i).

self-defence is perhaps not the most pressing one. Even absent overall agreement that reporting on all uses of force is legally required, States have in fact reported beyond Art. 51's requirement or at least they are often inclined to make statements that are meant to be explanatory. The bigger problem is that the reporting and related discourse is not always centralised and sometimes done at other venues such as the Human Rights Council, the European Union, domestic parliaments, or the media. A second bigger problem concerns ambiguous and/or superficial language and absence of reasoning, legal argument and failure to adduce any supporting factual material and evidence.¹⁰ This raises the question how States may be persuaded to engage in more structured and meaningful reporting and use of force discourse. In a previous *Impulse*, suggestions have been made for holding routine debates, the setting up of an official database collecting Art. 51 and other reporting letters,¹¹ and the development of best practices on when exactly and how often letters should be submitted and on what they should contain. Inspired by the UN sanctions architecture, some thinking may also go into the creation of a subsidiary body that collects and monitors submission of Art. 51 and other letters as well as the creation of panels of experts to gather, examine and analyse relevant information from States, including from third States, and possibly to make *prima facie* evaluations.¹² Such structures could offer a space that encourages and facilitates all States, including third States, to be explicit in their position on unilateral uses of force, including intervention by invitation. A modest role for independent panels of experts would reflect the interests that the entire international community has in upholding the prohibition of the use of force as a central norm.

Broad participation in use of force discourse is essential precisely because of the centrality of Art. 2(4) of the UN Charter and it being a cornerstone of our international legal order. As noted by *Oona Hathaway*,

“States that do not use force need to be more active in voicing their legal positions. If the only States that take legal positions on the use of force are those *using* force, the exceptions will continue to expand until they swallow the rule.”¹³

¹⁰ On strategic ambiguity, see *M. Milanovic*, Belgium's Article 51 Letter to the Security Council [UPDATED], EJIL: Talk!, 17.6.2016. On intentional ambiguity within the Security Council, outside a context of self-defence, also see *M. Byers*, Agreeing to Disagree: Security Council Resolution 1441 and Intentional Ambiguity, *Global Governance* 10 (2004), 165 et seq.

¹¹ For very useful databases outside formal UN structures, see <<https://pilac.law.harvard.edu>>.

¹² *L. van den Herik*, Proceduralizing Article 51, *ZaöRV* 77 (2017), 65 et seq.

¹³ *O. Hathaway*, Twitter, 23.10.2018.

As there is a shared interest that Art. 2(4) is not swallowed, some consideration of countervailing structures at Security Council level might not be superfluous.

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