THE LEGAL ARGUMENT AGAINST GOVERNMENTS INVITING INTERVENTIONS
- AN ASSESSMENT OF INTERNATIONAL LAW AND THE *JUS AD BELLUM*

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States are intervening militarily in conflicts in other countries like never before. From a legal perspective, this raises the question of which legal ground(s) States use to justify this use of force. Case studies of examples such as Mali shows that States have started to put a particular emphasis on the existence of consent. In other words: the intervention by State A into State B is legal, because State B invited State A to intervene. However, the validity of this argument is not uncontested. During a civil war, some have argued that the right to self-determination of people(s) makes such invitations invalid. Others have argued that governments with a past of grave breaches of peremptory norms of international law should lose their power to invite and that accepting their invitations should be unlawful. This article concludes that there is not sufficient support for these suggestions in the sources of international law.

1. INTRODUCTION
1.1 BACKGROUND AND AIM OF THE ARTICLE

The last 20 years have seen more internationalized intrastate conflicts than any period since 1946.[2] An internationalized intrastate conflict is a conflict between a government and a non-government opponent where one or both of the parties receive troop support from another State that actively participates in the conflict.[3] In other words, States intervene militarily in conflicts in other countries with unprecedented frequency.

This development brings with it the question whether there is any legal basis for such interventions. A quick case study shows that an invitation by the Malian government served as the basis for both the French intervention in Mali 2013[4],

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2 Shawn, D., Pettersson, T., Öberg, M., "Organized violence 1989-2021 and drone warfare", *Journal of peace research*, 2022, 59(4), pp. 593–610, p. 597.

3 UCDP, *UCDP definitions*, Department of Peace and conflict research, 2022, https://www.pcr.uu.se/research/ucdp/definitions/#tocjump_6798901776642399_12 [accessed 2023-04-24].

4 Ministère de l'Europe et des affaires étrangères, *Official speeches and statements of Janu-*

and for the Swedish military participation in the French-led Task Force TAKUBA (2020 – 2022)[5]. This is not an isolated case. In fact, it has been observed that the practice of governments inviting other States to intervene militarily has become so common that the very rule of non-intervention might have been "stood on its head"[6].

The aim of this article is to investigate the legal merits of this kind of State behaviour. Therefore, the article will investigate: (1) the legal basis for requesting military assistance, (2) the legal merits of proposals raised in scholarship arguing for when and how providing and/or requesting military assistance breaches international law.

1.2 METHOD AND MATERIAL

In order to determine the existing law, *or de lege lata,* in the field of international law under study, it is necessary to analyse the sources of law. Article 38(1) of the Statute of the International Court of Justice is generally recognised as the most authoritative statement as to the sources of international law.[7] These sources are (1) international conventions (treaties), (2) international custom, (3) general principles of international law, and (4) judicial decisions and the teaching of the most highly qualified publicists of the various nations. Most relevant for this article will be international treaties and customary law.

"Treaty" refers to a written agreement between States that is governed by international law.[8] They create law as the States are thereafter bound by the agreement.[9]

International custom is created by (1) State practice and (2) *opinio juris*.[10] International customary law is derived from State practice.[11] A resolution passed by an international organisation cannot in itself form a rule of customary international law, but may provide evidence for determining the existence and content

ary 14, 2013. Foreign policy statements, 2013, https://basedoc.diplomatie.gouv.fr/vues/Kiosque/FranceDiplomatie/kiosque.php?fichier=baen2013-01-14.html [accessed 2023-04-24].

5 Government bill 2019/20:86, Svenskt deltagande i militär insats för stärkt säkerhet i Mali, 12 Mars 2020, p. 8–9.

6 Dinstein, Y., *Non-international armed conflicts in international law*, 2nd ed., Cambridge: Cambridge university press, 2021, p. 102.

7 McDougal, M. S., Reisman, W. M., "The prescribing function in world constitutive process: how international law is made", *Yale studies in world public order*, 1980, 6(2), pp. 249–284, p. 260.

8 Vienna Convention on the Law of Treaties (VCLT), Article 2(1).

9 VCLT, Article 26.

10 International Law Commission (ILC), Report of the work of the seventieth session, *Draft conclusions on identification of customary international law, with commentaries*, 2018, A/73/10, conclusion 2.

11 ILC, A/73/10, conclusion 4.1.

of a rule of customary international law, or contribute to its development.[12] Since it has virtually universal participation of States, special attention should be paid to resolutions of the UN general assembly.[13] Decisions of international courts and tribunals, in particular the International Court of Justice (ICJ), concerning the existence and content of rules of customary international law are subsidiary means for the determination of customary international law.[14]

Lastly, this article will not be searching for new State practice, but rather will contribute to collections of, and investigations into, State practice already done by other scholars. A practical problem for the collecting of State practice on State interventions is that States may want to hide an intervention for political or other reasons. This article will therefore look at the sending of ground forces, or "boots on the ground", as these acts of States are difficult to hide and thus provides clear cases of State intervention. This article will also not look at State use of mercenaries or private military companies to aid other States, as proving that a particular State is behind such groups can be very difficult.

1.3 CLARIFICATIONS AND DISTINCTIONS

Two terms exist to describe the action of inviting other States to intervene: "Intervention by Invitation" and "Military Assistance on Request". These terms are interchangeable and only serve as two different names. In this article the term "Military Assistance on Request" will be used. However, the term "Intervention by Invitation" might appear in quotes from other sources if that is the term used by the author in question. The abbreviation MAR will be used instead of "Military Assistance on Request" in this article.

There is no recognised definition of MAR in international law. There are however many separate definitions that share common features. Georg Nolte states that "the expression 'Intervention by Invitation' is mostly used as a shorthand for military intervention by foreign troops in an internal armed conflict at the invitation by the government of the State concerned".[15] L'Institut de Droit International (IDI) states that "'Military assistance on request' means direct military assistance by the sending of armed forces by one State to another State upon the

12 ILC, A/73/10, conclusion 12.1 – 12.2.
13 ILC, A/73/10, conclusion 12, commentary 2.
14 ILC, A/73/10, conclusion 13.1.
15 Nolte G., "Intervention by invitation" in Wolfrum, R (ed.) *Maw Planck encyclopedia of public international law*, (online), updated January 2010, https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1702 [accessed 2023-04-24].

latter's request"[16] with the objective to "assist the requesting State in its struggle against non-State actors or individual persons within its territory"[17].

In other words, MAR refers to the situation where State A invites State B, and State B subsequently sends State A armed forces with the aim of assisting the State A in its struggle against non-State actors.

This article will only look at ad-hoc requests for intervention. Pre-negotiated agreements between States will not be discussed.

1.4 DISPOSITION

This article starts with an introduction where the subject matter of the article, the aim, the method, as well as necessary clarifications and distinctions are presented. The article will then discuss: MAR, the *purpose-based approach* and the *breach-based approach* in three separate parts. Each part ends with a discussion about the legal difficulties and possibilities of the different arguments presented. Lastly, the conclusions of the article will be summarised and a few concluding remarks will be given.

2. MAR

Which legal grounds does a State have to argue that an intervention is legal after an invitation by another State?

In the *Nicaragua* case (1986),[18] the US was accused of having supported the Contras in their rebellion against the Sandinistas in Nicaragua. In the judgement, the ICJ stated that intervention was not allowed on the invitation of the opposition, but that it is "allowable at the request of the government of a State".[19] The court later upheld this statement in the *Armed Activities* case (2005).[20] In this case, the Democratic Republic of the Congo (DRC) started proceedings against Burundi, Uganda and Rwanda, claiming that they had committed acts of armed aggression against the DRC. As Dinstein points out, in *Armed Activities*, the court implicitly seems to accept that intervention is allowable upon request of

16 IDI Resolution, Session of Rhodes, 2011, Tenth Comissions
'Present problems of the use of Force in International Law – Sub-group C – military assistance on request', art. 1(a).

17 IDI, Resolution, Session of Rhodes, art. 2(b).

18 *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua vs. United States of America), Merits, Judgement, ICJ. Reports 1986, p. 14.

19 *Nicaragua case*, para. 246.

20 *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgement, ICJ. Reports 2005, p. 168, para. 39–54.

the government of a State.[21] The implicit acceptance is derived from the fact that the court only discusses whether the countries had broken the conditions of the invitation given by the DRC, and not whether an invitation in itself was permissible.[22] The conclusion in *Nicaragua* has also found support in the practice of the UN Security Council (UNSC)[23], State practice[24], and doctrine[25].

There therefore seems to be a consensus that there is a rule of international law according to which intervention is permissible upon the invitation of the government of another State. Despite this, the question still remains how such a rule relates to other rules of international law. Does MAR breach other rules of international law and what would that mean for the lawfulness of MAR?

3. MAR AND THE PROHIBITION ON THE USE OF FORCE

MAR is the sending of military forces from State A to State B with the purpose of using those forces in armed conflict, thus the relevant question is if MAR breaches the Prohibition on the use of force (Article 2(4) UN Charter). This question is particularly relevant as Article 2(4) represents one of the cornerstones of the Charter[26] and reflects customary international law[27]. For clarity, Article 2(4) UN Charter states that:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.

To answer if MAR breaches Article 2(4) UN Chapter, the first question is whether MAR constitutes "force". The consensus seems to be that MAR is

21 Dinstein, Y., 2021, p. 102.

22 Kreß, C., "The International Court of Justice and the 'Principle of Non-use of Force'", in Weller M. (ed), *The Oxford Handbook of the use of Force in International Law*, 1st ed, Oxford: Oxford University press, 2017, pp. 561–604, p. 577.

23 UNSC, *Resolution 387 (1976) of 31 March 1976*, S/RES/387.

24 Henderson, C., *The Use of Force and International Law,* New York, Cambridge: Cambridge university press, 2018, p. 352; Lieblich, E., *International law and Civil Wars: Intervention and Consent,* New York: Routledge, 2013, p. 2; Dinstein, Y., 2021, p. 102.

25 Corten, O., *The law against war: the prohibition on the Use of Force in contemporary international law*, 1st ed., Oxford: Hart Publishing, 2010, pp. 250, 253; Fox, G. H., 'Intervention by invitation' in *The Oxford Handbook of the use of Force in International Law*, Weller M. (ed), Oxford: Oxford University press, 2015, p. 828; A further example of this is the fact that out of all the doctrine used for this article, not a single work has uttered a discrepant view.

26 *Armed Activities*, para. 148.

27 *Nicaragua case*, para. 188–190.

"force" in the meaning of Article 2(4) UN Charter. Although there is discordance amongst scholars whether an action by a State needs to have a certain "gravity" before being considered "force", there seems to be a consensus that there has to be "intent" behind the action for it to be considered "force" in the meaning of Article 2(4).[28] In other words, the use of "force" needs to be intentional and not an accident (such as a military exercise gone wrong), but it is uncertain if a certain scale of "force" is necessary (in short, is one grenade thrown over the border enough or is the threshold set higher?).

In the case of MAR, it is usually argued that MAR will always fulfill the requirement of "force" regardless if "gravity" is considered a requirement or not.[29] The argument is that cases such as Russia in Syria and the French forces in Mali have shown that the military assistance will always fulfil the gravity threshold, since the assistance is given to take active part in actual armed activities.[30] In other words, the troops being sent wage war. The requirement of intent is also satisfied since the very reason for the military assistance being requested is that the inviting government needs support in an armed conflict.[31] The military assistance is therefore given with the intent to use force.

Article 2(4) also requires "force" to be used in "international relations" of States. It is important to note that Article 2(4) UN Charter has been interpreted as dealing with conflicts between States and not within States.[32] Otherwise put, the Article deals with inter-State relations and not intra-State relations. Regarding MAR, this would seem to suggest that that Article 2(4) UN Charter is "inoperative in such a situation because there is no use of force of one State against another, but two States cooperating together within an internal strife".[33] MAR therefore does not seem to violate Article 2(4) UN Charter.

28 Compare Ruys, T.,"The meaning of 'force' and the boundaries of the *jus ad bellum*: are 'minimal' uses of force excluded from UN Charter Article 2(4)?", *The American journal of international law*, 2014, 108(2), pp. 159–210, p. 159, 209; and Corten, O., 2010, pp. 73–78.

29 Visser, L., "May the force be with you: The legal Classification of Intervention by Invitation", *Netherlands International Law Review*, 2019, 66(1), pp. 21–45, pp. 26–27.

30 Visser, L., 2019, p. 26.

31 Visser, L., 2019, p. 26.

32 Gray, C.D., *International law and the use of Force*, Fourth ed., Oxford: oxford university press, 2018, p. 75; Henderson, C., 2018, p. 22.

33 Bannelier, K., Christakis, T., "Under the UN Security Council's watchful eyes: military intervention by invitation in the Malian conflict", *Leiden journal of international law*, 26(4), 2013, pp. 855-874, p. 860.

4. THE NEGATIVE EQUALITY PRINCIPLE

Some scholars have suggested that the Negative Equality Principle (NEP) limits the use of MAR. NEP refers to the suggestion that during civil war, that is, an internal armed struggle for power within a State where the outcome of which is uncertain, States are under a legal obligation to refrain from intervening in support of *either side*.[34] Simply, when a civil war has broken out, no outside State can provide aid to the opposition or the government, no matter the existence of an invitation.

Observing that inviting foreign military aid could heavily influence the political future of a country, NEP argues that the government requesting foreign military assistance must be representative of the people(s) on whose side it is acting.[35] If it is not, and still invites foreign intervention, the government is maintained in power against the right to self-determination of people(s). Simply, if a government is not representative, then the foreign military aid will maintain this unrepresentative government in power against the will of the people and therefore the right to self-determination of people(s). Crucially, NEP argues that in the event of a civil war, a government cannot be representative of the people since there is an armed struggle concerning the legitimacy of the government. Logically, this would indicate that a government loses the right to request military intervention. A government at war with its own people cannot claim to be representative of that same people when requesting military assistance in order to stay in power.

In legal terms, NEP nullifies the presumption set forth in *Nicaragua* that governments can invite military assistance, under the specific circumstances of a civil war. The next question is what support NEP finds in the sources of international law. It is important to note that there is no specific treaty enshrining NEP, meaning that NEP must be a rule of customary international law.

4.1 SUPPORT IN STATE PRACTICE

The question whether NEP finds support in State practice has received much attention in legal doctrine, but no consensus has yet been found on the issue. In fact, State practice itself on the issue has been described as "chaotic".[36] However, two main lines of argument can be identified.

34 Henderson, C., 2018, p. 362.

35 de Wet, E., "The (im)permissibility of military assistance on request during a civil war", *Journal on the Use of Force and International Law*, 7(1), 2020a, pp. 26–34, p. 28–29.

36 IIFFMCG, *Report of the Independent International Fact-Finding Mission on the Conflict in Georgia*, September 2009, Vol II, 2009, p. 276.

According to the first line of argument, State practice as a whole does not support NEP,[37] and it is not "at all clear that the view that international law (*the jus ad bellum*) treats interventions in civil war differently from any other situation has support in State practice".[38]

After investigating State practice, de Wet argues that there is virtually no explicit reliance on the NEP or the right to self-determination in UNSC debates or the reactions and actions of States and international organisations.[39] She therefore argues that there is no State practice to support NEP.

de Wet also argues that the silence of third States should be seen as amounting to *opinio juris* against NEP. She points out that toleration of certain practices may serve as evidence of acceptance as law (*opinio juris*) when it represents concurrence in that practice.[40] Whether or not inaction (or tolerance) by one State regarding the actions of another is indicative of customary international law depends on the circumstances of each case.[41] For inaction to have such legal value, two conditions must be met. Firstly, a reaction to the practice in question must have been called for.[42] This may be the case when the practice in question is one that directly or indirectly, usually unfavourably, affects the interests and rights of the State failing or refusing to act.[43] Some practice might also be seen as affecting all or virtually all States.[44] Secondly, a State must have had knowledge of the practice (including cases were the publicity of the practice is such that a State must have known about it) as well the sufficient time and ability to react.[45]

de Wet notes that the interventions should be known to all States since they were conducted by an increasing number of State actors across regions and, amongst other things, were announced in letters to the UNSC.[46] Also, de Wet points to

37 Akande, D., Vermeer Z., T*he airstrikes against Islamic State in Iraq and the Alleged prohibition on Military Assistance to Governments in Civil War*, EJIL Talk!, 2 February 2015, https://www.ejiltalk.org/the-airstrikes-against-islamic-state-in-iraq-and-the-alleged-prohibition-on-military-assistance-to-governments-in-civil-wars/ [accessed 2023-04-24].

38 Akande, D., Vermeer Z., 2015.

39 de Wet, E., *Military Assistance on Request and the Use of Force*, Oxford: Oxford university press, 2020b, p. 116.

40 ILC, A/73/10, conclusion 10, commentary, para. 8.

41 ILC, A/73/10, conclusion 10, commentary, para. 8.

42 *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and south ledge (Malaysia/Singapore)*, Judgement, ICJ. Reports 2008, p. 12, at para. 121; ILC, A/73/10, conclusion 10, commentary, para. 8.

43 ILC, A/73/10, conclusion 10, commentary, para. 8.

44 ILC, A/73/10, conclusion 10, commentary, para. 8, footnote 738.

45 ILC, A/73/10, conclusion 10, commentary, para. 8.

46 de Wet, E., 2020a, p. 28.

the *erga omnes* nature of the right to self-determination.[47] *Erga omnes* obligations are "the concern of all States" and, consequently "all States can be held to have a legal interest in their protection".[48] She concludes that it is therefore reasonable to hold that third States were expected to react to these interventions. The fact that they did not react (and did not express any concerns for the consequences of such assistance for the right to self-determination), leads to the conclusion that they did not regard the right to self-determination as legally relevant in the circumstances.[49] According to de Wet, NEP therefore lacks support in State practice, and there is an *opinio juris* against it.

According to those in favour of NEP, State practice in support of the idea can be found. These scholars argue that even though intervention may be frequent "States have never asserted a right to intervene militarily on the side of a *de jure* government engaged in a non-international armed conflict, but have rather sought to defend their conduct by relying on exceptions to a general prohibition of such interference in civil strife (chiefly counter intervention)".[50] Simply, State practice only shows that States try to find exceptions to the overall rule that intervention in civil war is forbidden, and nothing else. However, even Ferro, writing to prove the existence of NEP, admits that an increasing body of contravening State practice indeed exists.[51]

Ferro further argues that there is no *opinio juris* against NEP. Ferro argues that the unprecise motivations for intervention are problematic. With such unprecise justifications for intervention, it becomes difficult to know exactly what legal grounds States invoke, and thus what other States tolerate.[52] In other words, the toleration cannot lead to *opinio juris*, because States do not know what they are tolerating. Also, he argues, States have many reasons for not publicly denouncing an act of another State, such as an intervention. This point was also voiced by the States themselves when commenting the International Law Commission (ILC) draft conclusions. The States informed that there might be practical or political reasons for silence, saying that they could not be expected to react to

47 *Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965*, Advisory opinion, ICJ. reports 2019, p. 95, para. 180.

48 *Case concerning the Barcelona Traction Light and power company*, Limited, Judgement, ICJ. reports 1970, p. 3, para. 33.

49 de Wet, E., 2020a, p. 29.

50 Ruys, T., Ferro, L., "Weathering the storm: legality and legal implications of the Saudi-led military intervention in Yemen", *International and comparative law quarterly*, 2016, 65(1), pp. 61-98, pp. 88–89.

51 Ferro, L., "The doctrine of 'negative equality' and the silent majority of States", *Journal on the use of force and international law*, 2021, 8(1), pp. 4–33, p. 6.

52 Ferro, L., 2021, pp. 9–10.

everything, may have other non-legal reasons for doing so, or may choose to respond confidentially, rather than publicly.[53] Accordingly, the argument is that caution must be used when interpreting State practice against NEP.

4.2 SUPPORT IN UN DECLARATIONS

Concentrating on treaties and declarations of the UN that deal with the relationship between the right to self-determination and the use of force, it is uncertain if they give any definitive support for NEP.

The *Friendly Relations Declaration* states that "[e]very State has the duty to refrain from any forcible action which deprives peoples […] of their right to self-determination and freedom and independence"[54]. This statement has been interpreted to mean that States cannot deny people these rights, nor lend support to another State supressing these rights.[55] It remains unclear however, exactly what "forcible action" is, and if providing military assistance at the request of the government would qualify. The declaration does not specify this.

Expanding further on the relationship of the use of force and the right to self-determination, other UN documents grant peoples under colonial or racist regimes or alien occupation the right to "struggle",[56] and give States a duty to provide moral and material assistance to peoples struggling for their freedom and independence in the colonial territories and to those living under alien domination.[57] Observing this, Henderson argues that UN General Assembly seem to have been of the view that "armed struggle" by peoples under colonial dominion, foreign occupation or racist regimes was allowed when writing the documents.[58] It is important to note however, that this is only under circumstances of colonial dominion, foreign occupation or racist regimes.

53 ILC, *Fourth Report on identification of customary international law by Michael Wood, special rapporteur*, 8 march 2016, A/CN.4/695, para. 22; ILC, *Fifth report on identification of customary international law by Michael Wood, special rapporteur*, 14 march 2018, A/CN.4/717, para. 53, 78–79.

54 United Nations General Assembly (UNGA), *Declaration on the principles of International Law concerning friendly relations and co-operation among States in accordance with the charter of the United Nations*, 24 October 1970, A/RES/2625 (XXV), principle 4, para. 5.

55 Henderson, C., 2018, p. 360.

56 UNGA, *Resolution 3314 (XXIX) Definition of Aggression*, 14 December 1974, A/RES/29/3314.

57 UNGA, *Implementation of the Declaration on the Granting of Independence to Colonial Countries and peoples*, 2 November 1972, A/RES/2908(XXVII), para. 8.

58 Henderson, C., 2018, p. 360; UNGA, *Declaration on the Inadmissibility of Intervention and Interference in the Internal affairs of States*, 9 December 1981, A/RES/36/103, Annex para. III(b).

Applying outside the colonial context, Article 1 of both ICCPR[59] and ICESCR[60], enshrines the right to self-determination as a human right of all peoples, regardless if they are under foreign occupation or not. However, as IIFFMCG (Independent International Fact-Finding Mission on the Conflict in Georgia) noted, outside the colonial context, self-determination has basically been seen as limited to internal self-determination.[61] Internal self-determination has been understood by many scholars to equate political participation, in the sense of having a right to participate (a right to have a say) in the decision-making process of the State.[62] According to this view, internal self-determination is focused on the legal-political relationship between a people and its own State.[63] This makes it uncertain if the right to self-determination as a right can be used to support NEP.

As shown, NEP limits military aid to situations during civil war. It is important to note that further uncertainty exists regarding State responsibilities in situations of "civil war". The F*riendly Relations Declaration* states that (1) "Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of *civil strife* […] in another State […]" as well as (2) that "no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in *civil strife* in another State".[64] The ICJ have later declared these statements in the *Friendly Relations Declaration* customary international law.[65] But it is not certain if "civil war" is the same as "civil strife". The declaration itself does not clarify the term "civil strife". In the *Armed Activities* case, the court seems to have classified the situation as "civil strife",[66] as well as one of civil war.[67] This could indicate that the terms are synonymous. However, since the court did not explicitly state that the terms are synonymous, or what circumstances led to defining the situation as "civil strife" or "civil war", it is still difficult to come to a definitive conclusion. It is possible that different circumstances led them to define it as a situation of "civil strife" and "civil war" respectively.

59 International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations on 19 December 1966.

60 International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly of the United Nations on 16 December 1966.

61 IIFFMCG, 2009, p. 141.

62 Raič, D., *Statehood and the Law of Self-determination*, The Hague: Kluwer Law International, 2002, pp. 237–238.

63 Raič, D., 2002, p. 238.

64 UNGA, A/RES/2625(XXV), principle 1, para. 9, and, principle 3, para. 2 (emphasis added).

65 *Nicaragua*, para. 191; Armed Activities, para. 162.

66 *Armed Activities*, para. 162–163.

67 *Armed Activities*, para. 165.

It is also important to note Declaration A/RES/36/103. This declaration does not mention "civil strife", but deals with the same principles of non-intervention and non-interference in the internal and external affairs of States as the *Friendly Relations Declaration*. Declaration A/RES/36/103 states that these rights comprehends the duty of a State to refrain from any economic, political or military activity in the territory of another State *without its consent.*[68] This is supported by the *definition of Aggression*, which states that aggression includes "the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement".[69] *E contrario*, this would seem to suggest that the presence of foreign troops within the limits of the invitation is legal. How does this relate to the rule in the *Friendly Relations Declaration* forbidding states to interfere in civil strife in another State? Do these last two documents form an exception to the rule established by the *Friendly Relations Declaration*, that allows for consensual intervention? The UN declarations do not provide an answer to these questions.

In summary, the UN source material does not provide any clarity to the question if the right to self-determination curtails a State's ability to invite military assistance. Most important are the facts that key terms such as "civil strife" are not specified and that different documents could be interpreted as contradictory, such as the case with the *Definition of aggression* and the *Friendly Relations Declaration*. Given this outcome, it becomes important to look at other sources of international law for potential support for NEP.

4.3 SUPPORT IN ICJ CASE-LAW

Observers have pointed out that in the cases where the ICJ refers to the right of governments to invite foreign military assistance, they have not made mention of whether self-determination limits this right.[70] This can be seen in the Nicaragua judgement, where the court stated that intervention was not allowed on the invitation of the opposition, but that it is "allowable at the request of the government of a State".[71] The court did this without qualifying the statement further. This might be indicative of a view that the right to self-determination does not curtail this right.[72] However, some have warned about reading too

68 UNGA, *Declaration on the Inadmissibility of Intervention and Interference in the Internal affairs of States*, 9 December 1981, A/RES/36/103, Article 2(II)(o) (emphasis added).
69 UNGA, A/RES/29/3314, Article 3(e).
70 de Wet, E., 2020b, p. 82.
71 *Nicaragua*, para. 246.
72 de Wet, E., 2020b, p. 82.

much into this short statement in *Nicaragua*, as the court in that case was not directly addressing the issue of a government receiving military assistance against a purely internal insurgency.[73]

In the *Armed Activities* case, the court acknowledged that an intervention in a civil war had occurred.[74] The court then implicitly seemed to accept that intervention is allowable upon request of the government of a State, as the main issue with regards to the intervention in the case was whether or not Uganda had overstepped the boundaries by the given consent.[75] However, it must again be stressed that the court did not make an actual statement as to the status of the right to self-determination and its relation to MAR.

4.4 EVALUATING SUPPORT FOR NEP

The UN declarations do not give clear support for NEP. Outside of the colonial context, there is no UN declaration directly addressing the relationship between the use of force and the right to self-determination. Also, the right to self-determination as a human right has been traditionally interpreted as internal self-determination, meaning that it is unclear if the right can be used to support NEP. It is also unclear whether "civil strife" as mentioned in some documents is the same as "civil war". In summary, the UN documents give, at best, unclear support for MAR.

Turning to ICJ case-law, the most authoritative statement remains that of *Nicaragua*, namely that MAR is "allowable at the request of the government of a State"[76]. "Allowable" does not necessarily mean allowed under all circumstances.[77] This means that ICJ case-law remains open to interpretation and does not give definitive answers on the issue whether international law puts limitations on intervention in civil war.

Turning to State practice, it is clear that there exists little State practice to support NEP, as is acknowledged by both sides of the argument. However, when evaluating State practice in support of or against NEP, it is important to note that there is a risk of the discussion becoming purely regarding how a particular scholar interprets the events in State practice. This is observed by Fox when he

73 Perkins, J. A., "The right to counter-intervention", G*eorgia journal of international and comparative law,* 1987, 17(2), pp. 171–227, p. 195.

74 *Armed Activities*, para. 165.

75 Dinstein, Y., 2021, p. 102.

76 *Nicaragua*, para. 246.

77 Corten, O., "Is an intervention at the request of a government always allowed? From a 'Purpose-based approach' to the respect of self-determination", *Zeitschrift Für Ausländisches Recht Und Völkerrecht*, vol 79, 2019, pp. 677–679, p. 677.

states that the debates regarding MAR "mostly involve wildly divergent versions of the facts involved, rather than disagreements over legal standards"[78]. If this is true, then it becomes very difficult, if not impossible, to say if the NEP finds support in State practice or not. Otherwise put, it becomes uncertain to say if there is any settled law regarding if the right to self-determination limits MAR, or only a lot of proposals *de lege ferenda*.[79]

At this point it is also important to recognize that there are other uncertainties regarding NEP. Chiefly, it is very difficult to define "civil war" for the purposes of applying these rules. Since there exists no generally accepted definition of "civil war" in international law, perhaps an analogy between "civil war" and the term "non-international armed conflict" (NIAC) could be made.[80] However, this is not without its complications, most notably as the definition of NIAC has been criticised as "vague and difficult to apply in practice".[81] Also, NIAC encompasses "only the most intense and large-scale conflicts".[82] This would mean that NEP only applies to conflicts of high intensity. If NEP is propelled by the wish to safeguard the right to self-determination, an analogy with NIAC would in turn mean that there is a lot of "room for manoeuvre" for States before the prohibition enters into force.[83] Even if "civil war" was not the same as NIAC, the term "civil war" would still seem to suggest a requirement for a certain level of intensity in the conflict. This leads to the same problem, namely, if the idea behind NEP is to safeguard a people's right to self-determination, it is difficult to understand why it should not apply to situations under the benchmark of civil war as well.[84] Surely the political independence of a State is also active in situations below the threshold of "civil war".[85]

However, it is also important to point out that a clear advantage of NEP would be that it gives a meaning to the principle of self-determination in the contemporary context outside internal self-determination.[86] Apart from pure legal advantages, there is also the practical or humanitarian advantage of the princi-

78 Fox, G. H., 2015, p. 830.
79 Österdahl, I., „The gentle legitimiser of the action of others", *Zeitschrift Für Ausländisches Recht Und Völkerrecht*, vol. 79, 2019, pp. 699–701, p. 699.
80 Gray, C.D., 2018, pp. 85–86; Fox, G. H., 2015, p. 827.
81 Fox, G. H., 2015, p. 827.
82 Moir L., *The law of internal armed conflict, Cambridge: Cambridge university press*, 2002, p. 101.
83 Henderson, C., 2018, p. 364.
84 Henderson, C., "A countering of the asymmetrical interpretation of the doctrine of counter-intervention", *Journal on the Use of Force and International Law*, 8(1), 2021, pp. 34–66, p. 36.
85 Akande, D., Vermeer Z., 2015.
86 Henderson, C., 2021, p. 35.

ple. As some have pointed out, the principle could help avoid escalating a civil war into an international armed conflict.[87]

Mindful of all the arguments above, the stronger case seems to be against NEP. As de Wet has proved, there are many recent examples of States relying on invitations to perform interventions. Also, when interpreting *opinio juris*, it is important to note that the right to self-determination is an *erga omnes* norm. This means that States have a legal interest in its protection. A way of protecting it is to denounce a breach of it. While it is true that silence may have many reasons and that States may have protested by non-official means, the nature of *erga omnes* as "the concern of all States" with the effect that "all States can be held to have a legal interest in their protection"[88] still weighs heavily. States have a *legal* interest in protecting the norm. The fact that States did not respond officially to a potential breach of an *erga omnes* norm, should therefore be taken as their legal conviction that this potential breach was not in fact a breach of the norm.

5. THE PURPOSE-BASED APPROACH

However, this does not necessarily mean the end of the discussion whether the right to self-determination restricts the use of force in situations of civil war. Another suggestion put forward is the "purpose-based approach". As the name implies, the approach places great emphasis on the purpose expressed for the intervention and claims that it is necessary to make a distinction between different kinds of interventions. This is perhaps best described by Bannelier-Christakis, when she states that:

> "the criterion of purpose of the foreign military operations is thus decisive and external intervention by invitation should be deemed in principle unlawful when the objective of this intervention is to settle an exclusively internal political strife in favour of the established government which launched the invitation".[89]

According to the proponents of this approach, State practice has never shown any problem with military assistance that has had other objectives such as fighting terrorism, maintaining law and order, and peacekeeping operations.[90] The idea has been described by Corten as an *e contrario* interpretation of State prac-

87 See e *contrario*: Joyner C.C., Grimaldi, M.A., "The United States and Nicaragua: reflections on the Lawfulness of Contemporary Intervention", *Virginia Journal of international law*, 1985, 25(3), pp. 621–692, p. 644.

88 *Barcelona Traction*, para. 33.

89 Bannelier, K., Christakis T., 2013, p. 860.

90 Bannelier-Christakis, K., "Military intervention against ISIL in Iraq, Syria and Libya, and the Legal Basis for Consent", *Leiden Journal of International law*, 2016, 29(3), pp. 743–775, p. 747.

tice. Corten argues that State practice shows that intervention has only occurred to attain certain goals such as to maintain peace or to achieve humanitarian objectives, meaning *e contrario*, that State practice does not give a right for States to intervene in the civil wars of other States.[91]

Proponents of this theory point out that such an interpretation of State practice does not run counter to the dictum in Nicaragua that described intervention as "allowable at the request of the government of a State"[92]. The argument is that "allowable" does not mean allowed in all circumstances.[93]

5.1 SUPPORT FOR THE PURPOSE-BASED APPROACH

In contrast to NEP, proponents of the *purpose-based approach* could argue that there is State practice in support of the principle. Any intervention conducted by States with the motivation to fight terrorism (such as in Mali or Syria) could be claimed to support the principle. de Wet's argument regarding *opinio juris* and the *erga omnes* nature of the right to self-determination can also be interpreted to provide *opinio juris* for the *purpose-based approach*. Simply, if the State saw an intervention with a particular purpose (e.g. fighting terrorism) as a breach of the right to self-determination, they had the obligation to release a statement saying so. Since they have not, the silence of third States could be interpreted as *opinio juris*.

However, Akande and Vermeer points to the difficulty of identifying legal justifications on the one hand and simple motivations for actions taken on the other. This is important as only legal justifications form the basis for *opinio juris*. Akande and Vermeer argue that the justifications provided by intervening States refer more to the motivations or reasons why a State provided military assistance, rather than legal justifications for the intervention.[94] Bílková has called this difference the difference between legality and legitimacy.[95] In other words, the difference between motivating State action to conform with a norm of international law (legality), and States motivating an intervention to avoid international political backlash (legitimacy). Bílková also mentions the fact that States often give many reasons for an intervention for two reasons: (1) they are unsure about the legal grounds for the intervention and invoke all the reasons they believe suitable, and (2) they give all reasons they believe are able to convince the

91 Corten, O., *Le droit contre la guerre: l'interdiction du recours à la force en droit international contemporain*, 2nd ed., Paris: Pedone, 2014, p. 476.
92 *Nicaragua*, para. 246.
93 Corten, O., 2019, p. 677.
94 Akande, D. and Vermeer Z., 2015.
95 Bílková, V., "Reflections on the Purpose-Based Approach", *Zeitschrift Für Ausländisches Recht Und Völkerrecht,* vol. 79, 2019, pp. 681–683, p. 682.

international community of the legality of their intervention, thus putting "all the cards on the table".[96] If this is true, then the reading of State practice has to be approached carefully, as the motivations given could reflect the uncertainty of this particular field of law and States "covering their bases", rather than being evidence of clear rules of international law.

5.2 THE POTENTIAL FOR ABUSE BY STATES

Turning away from the reading of State practice, another issue is that the *purpose-based approach* might be open to wide abuse by States. For example, as there is no international definition of terrorism, this opens up a large degree of subjectivity for States to claim that they are fighting terrorism and terrorists.[97] This lack of a definition might not be a problem if the UN Security Council has branded an organisation as a terrorist organisation. However, there still remains a real danger and an "evident" possibility that a State declares opposition to the government as terrorist to invite intervention.[98] One such example is the Syrian conflict, where at the same time as the Security Council considers some organisations involved in the conflict as terrorists (ISIL, al-Nushrah Front and Al-Qaida),[99] the Assad regime seems to try to have basically all opposition branded as terrorist.[100] On 30 September 2015, Russia started massive airstrikes in Syria to fight these "terrorist groups" in the country after invitation by the Syrian government.[101]

The fact that States can label any group they fight as terrorist prompts the very important question if there really is a difference between allowing counter-terrorism intervention, when the States themselves decide who is a terrorist, and allowing States to invite without restriction. In both alternatives, it is the States themselves who have the power over the intervention, either by simply inviting, or by designating the opposition as terrorist and then inviting. The practical effect of the *purpose-based approach* risks simply becoming the addition of an extra step before intervention.

96 Bílková, V., 2019, p. 682.
97 Bannelier-Christakis, K., 2016, p. 747.
98 Christakis, T., Mollard-Bannelier, K., "Volenti non fit injuria ? Les effets du consentment à l'intervention militaire", *Annuaire français de droit international*, 50(1), 2004, pp. 102–137, p. 125.
99 Bannelier-Christakis, K., 2016, p. 748.
100 UNSC, *Identical letters dated 26 January 2016 from Chargé d'affaires a.i. of the Permanent Mission of the Syrian Arab Republic to the United Nations addressed to the Secretary-general and the President of the Security Council*, 28 January 2016, S/2016/80.
101 UNSC, *Letter dated 15 October 2015 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council*, 15 October 2015, S/2015/792.

5.3 EVALUATING THE PURPOSE-BASED APPROACH

There is a big difference between motivating something for "legitimacy" and doing it for the sake of "legality". Especially problematic is the observation that States may give purposes to their interventions to achieve legitimacy in the eyes of other States. The *purpose-based approach* has to prove that the purposes of the interventions in State practice were not given to make the State action legitimate, but rather to make it legal and in accordance with a rule of international law. So far, the approach has failed to do so. The large potential for abuse by States given the lack of a terrorism definition, also raises the question of the actual practical effects of the *purpose-based approach*.

Observing these strengths and weaknesses of the argument, this article finds that the stronger case is against the *purpose-based approach*.

6. THE BREACH-BASED APPROACH

Finally, the "breach-based approach" points to a third possibility when intervention might breach international law.[102] The *breach-based approach* suggests that

> if a government is engaged in mass atrocities, and invites another State to assist it to defeat its internal enemies, the invited State – in its actions – would be assisting in maintaining a violation of *jus cogens*.[103]

The *breach-based approach* further suggests that the consequence of this should be that the invitation for military intervention in itself becomes null and void, and that the intervention would be prohibited. The ground for this would be that as per the law of State responsibility, such situations cannot be recognised as lawful.[104] In other words, if the military support maintains a government committing mass atrocities in power, then both the invitation and intervention ought to be unlawful under international law.

But exactly which atrocities or breaches of peremptory norms by a State would warrant military aid becoming unlawful? Lieblich suggests that "it is clear that if the inviting government has violated a peremptory norm at some point of the conflict […] this would not, in and of itself, render *any* assistance to the gov-

102 In the absence of an official name for this suggestion, this article has chosen to call this approach the "Breach-based approach" since the argument puts great emphasis on the breaching of peremptory norms of international law.
103 Lieblich, E., "The international wrongfulness of unlawful consensual interventions", *Zeitschrift Für Ausländisches Recht Und Völkerrecht*, vol 79, 2019, pp. 667–670, p. 668.
104 Lieblich, E., 2019, p. 668; ARISWA, Article 41; VCLT, Article 53.

ernment a maintenance of a *jus cogens* violation"[105]. Lieblich gives the example of government troops at some point during the conflict using torture (which is a breach of a jus cogens norm of International Humanitarian Law (IHL), and argues that this in itself would not be enough. Instead, he argues that "when violations are continuous, gross, and systemic, this might implicate the entire government effort and render any assistance to the government a violation of peremptory norms"[106]. Nolte suggests something similar and argues that "if a government appears to reveal a consistent pattern of gross and reliably attested violations of the principles and rules concerning the basic rights of the human person, including the protection from slavery and racial discrimination, it may not invite foreign troops to act on its behalf"[107]. From this, it is clear that the *breach-based approach* demands that the breaches reach a certain threshold before military aid becomes unlawful.

It is also important to be precise as to what kind of violations are referred to. In this article, the violations discussed will be situations of widespread breaches of humanitarian and/or human rights law, including, but not limited to, the willful killing or indiscriminate targeting of civilians, torture and conflict-related sexual violence.[108]

6.1 SUPPORT IN STATE PRACTICE

Whether or not there is State practice supporting the *breach-based approach* has previously been studied by de Wet. She found no case where the previous record of breaches of jus cogens or human rights by the inviting State was raised as a ground to prevent the invited States from accepting the request for military assistance.[109] Instead, the criticism by third States referred to the way in which the military assistance was exercised. One example of this is the Saudi-Arabian intervention in Yemen. The international criticism regarding Saudi Arabia in this conflict has centred around the breaches by Saudi Arabia itself, such as attacks against hospitals or water facilities.[110] No State criticised the intervention

105 Lieblich, E., 2019, p. 668.
106 Lieblich, E., 2019, p. 668.
107 Nolte, G., *Eingreifen auf Einladung: Zur völkerrechtlichen Zulässigkeit des Einsatzes fremder Truppen in internen Konflikt auf Einladung der Regierung*, New York: Springer, 1999, pp. 633–634.
108 For similar reasoning, see: de Wet, E., "Complicity in violations of human rights and humanitarian law by incumbent governments through direct military assistance on request", *International and comparative law quarterly*, 67(2), 2018, pp. 287–314, p. 292.
109 de Wet, E., 2018, p. 296.
110 UNSC, *Letter dated 27 January 2017 from the panel of experts on Yemen addressed to the president of the Security Council*, 31 January 2017, S/2017/81, para. 120 and 126–134.

on grounds of the previous record of the government inviting or that of the government intervening.[111]

de Wet's conclusion is therefore that "State practice at first sight does not support the conclusion that the human rights record of the inviting State (or that of the invited State) would in and of itself form a legal barrier under international law to extending or accepting an invitation for forcible intervention".[112] It is important to note that de Wet claims that there are no such cases *at first sight*. This could be interpreted as meaning that de Wet admits that there might be evidence to support it after further study. When writing the thesis and later re-working it into this article, this author has continued the search in State practice to try and find cases where the past records of States have been argued to affect their ability to intervene in, or invite, other States.[113] No such cases were found.

6.2 SUPPORT IN OPINIO JURIS

Another question is whether it is possible to find the required *opinio juris* to prove a rule of customary international law. As has been shown above in the study of State practice, States do not release statements on the legality of invitations by countries with a record of grave breaches of international law. *Opinio juris* must therefore be based on the silence of States.

Erga omnes obligations are "the concern of all States" and, consequently "all States can be held to have a legal interest in their protection".[114] As de Wet previously argued regarding NEP (see part 4.1), this legal interest of States in their protection could be argued to mean that States had an obligation to react if they perceived that the conduct of another State broke the rule.

The question then becomes if there are any breaches of *erga omnes* norms observed in the State practice under evaluation. As previously stated in the *Wall advisory opinion*, some rules of IHL constitute *erga omnes* norms.[115] The ICTY (International Criminal Tribunal of the former Yugoslavia) has held that most rules of IHL should be viewed as *erga omnes* obligations, and has pointed specif-

111 de Wet, E., 2018, pp. 295–296.
112 de Wet, E., 2018, p. 296.
113 See digest of State practice in: Ruys, T., Corten, O., Hofer, A. *The use of force in international law: a case-based approach*, 2018, Oxford: oxford university press, part 1, 2 and 3; Gray, C.D, 2018, pp. 86–95; Various authors, "Digest of State practice", *Journal of the use of force and international law*, various ed., all volumes and issues, 2014–2022.
114 *Barcelona Traction*, para. 33.
115 *Legal consequences of the construction of a wall in the occupied Palestinian territory*, Advisory opinion, ICJ. reports 2004, p. 136, para. 157.

ically to the prohibition of torture and the provisions of IHL that prohibits war crimes, crimes against humanity and genocide to be *erga omnes* obligations.[116] The prohibition against genocide has also been declared an *erga omnes* obligation by the ICJ.[117] The ICJ has also declared that some obligations of IHL are so fundamental to the respect of the human person and elementary considerations of humanity, that they constitute intransgressible principles of customary international law.[118] With the rules of IHL having such a protected status in international law, States might therefore reasonably also have an interest in their protection.

In collecting State practice to evaluate the *breached-based approach*, this article looked at situations of widespread violations of humanitarian and/or human rights law, including, but not limited to, the willful killing or indiscriminate targeting of civilians, torture and conflict-related sexual violence. This means that there are cases of breaches of *erga omnes norms* and rules of IHL in the presented State practice. The fact that no States denounced any intervention in the State practice could therefore be interpreted as *opinio juris* against the *breach-based approach.*

6.3 THE BREACH-BASED APPROACH AND ARSIWA

Lieblich argues that Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) Article 41 gives support to the *breach-based approach*.[119] According to Article 41, no State shall recognize as lawful a situation created by a serious breach of *jus cogens* norms, nor render aid or assistance in maintaining that situation.[120]

When using this rule to support the *breach-based approach*, it is important to note that ARSIWA is only binding for States as long as it reflects customary international law. The ILC is of the opinion that ARSIWA Article 41 reflects international law.[121] In support of this, amongst other sources, the ILC references the *Wall advisory opinion*,[122] as well as case law of the International Crimi-

116 ICTY, Prosecutor v. Anto Furundžija, Judgement, 10 December 1998, JL/PIU/372-E, para. 151; ICTY, Prosecutor v. Kupreškić et al, Judgement, 14 January 2000, IT-95-16, para. 517–520.
117 *Barcelona Traction*, para. 34.
118 *Wall advisory opinion*, para. 157.
119 Lieblich, E., 2019, p. 668.
120 ILC, *Draft articles on Responsibility of States for internationally wrongful acts, with commentaries, Report of the international law Commission on the work of its 53rd session*, 23 april-1 June and 2 july-10 August 2001, A/56/10, pp. 113–116, (Article 41).
121 ILC, *Report of the international law commission*, Seventy-third session, 18 april – 3 june and 4 july-5 August 2022, A/77/10, pp. 76–78, conclusion 19, commentary, para. 12–16.
122 *Wall advisory opinion*, para. 155–159.

nal Court (ICC), which stated that "as a general principle of law, there is a duty not to recognise situations created by certain serious breaches of international law"[123]. Article 41 does therefore seem to reflect customary international law.

The problem is that neither these cases, nor ARSIWA, provide further guidance as to what "recognition" or "aid or assistance", as written in Article 41, might be. Would accepting the invitation for military assistance be considered "recognition"? Would the military assistance be "aid or assistance"? In other words, even though Article 41 might reflect a rule of customary international law, there remains uncertainty as to how to interpret that rule.

6.4 SUPPORT IN UN DECLARATIONS AND ICJ CASE-LAW

There exists no declaration of the UN stating whether the accumulative effect of breaches of such laws during a conflict might render invitation null and void, or prohibit intervention.

Turning to the ICJ, it is true that *Nicaragua* stated that military assistance was allowable at the request of the government of a State.[124] While this opens up to a discussion of when intervention might not be allowable anymore, it is important to stress that the *Nicaragua* judgement itself does not give further guidance for such a debate.

In the *Armed Activities* case, the court acknowledged that an intervention in a civil war had occurred,[125] and then implicitly seemed to accept that intervention is allowable at the request of the state.[126] It is important to note that president Laurent-Désiré Kabila, who had given the relevant invitation in the case, had previously been the head of l'Alliance des Forces Démocratiques pour la Líberation du Congo-Zaïre (AFDL). Under his leadership, the AFDL had committed crimes against humanity, including, but not limited to, the killing and disappearing of thousands of civilians in events in 1996 and 1997.[127] The US also noted that when in power, Kabila's government was responsible for numerous extrajudicial killings, disappearances, torture, beatings, rape and other abuses.[128] With this information, and the fact that the court implicitly seems to have

123 ICC, *The prosecutor vs. Bosco Ntaganda, case no. ICC-01/04-02/06-1707, Second decision on the defence's challenge to the jurisdiction of the court in respect to counts 6 and 9, of January 2017*, Trial chamber VI, International Criminal Court, para. 53.
124 *Nicaragua*, para. 246 (emphasis added).
125 *Armed Activities*, para. 165.
126 Dinstein, Y., 2021, p. 102.
127 UNSC, *Letter dated 29 June 1998 from the secretary-general addressed to the president of the Security Council*, 29 June 1998, S/1998/581, pp. 23–25.
128 U.S department of State, *Democratic republic of Congo country report on human rights practices*

accepted the invitation by Congo, the relevant question becomes whether ICJ case-law should be interpreted as not supporting the breach-based approach. However, it is worth noting that none of the parties in the conflict raised the issue of these breaches of humanitarian law during the proceedings or produced evidence to the court of such abuses. Nor did the court directly address it, and no one questioned the validity of the invitation during the proceedings. As was the case with *Nicaragua* case, caution would therefore be advised as to not read too much into this judgement.

6.5 EVALUATING THE *BREACH-BASED APPROACH*

In view of the above, there seems to be scant evidence for the *breach-based approach*, both the idea that intervention is prohibited and as that invitation becomes null and void. No source of international law gives clear support that "recognition" or "aid or assistance" could be equated to military assistance. There is also a lack of State practice in support of the suggestion. Also, *opinio juris* is problematic as State practice shows that States have accepted invitations from countries that have broken *erga omnes* norms and fundamental rules of IHL. The fact that States did not object to other States intervening in countries guilty of the breach of such norms could be interpreted as *opinio juris* against the *breach-based approach*. The stronger case therefore seems to be against the *breach-based approach*.

7. CONCLUDING REMARKS

The aim of this article was to investigate the legal merits of the State practice of inviting foreign intervention. To achieve this, the article would look into: (1) the legal basis for requesting military assistance, (2) the legal merits of proposals raised in scholarship arguing for when and how providing and/or requesting military assistance breaches international law.

Regarding the first question, it was concluded that governments requesting military assistance finds support in both ICJ case-law, the UN Security Council, State practice and doctrine. Regarding the second question, no support was found for NEP, the *purpose-based approach*, or the *breach-based approach* in the sources of international law.

However, a major conundrum regarding the conclusions presented in this article is whether they represent *de lege lata* or *de lege ferenda*. Given the uncertainty of how to interpret both State silence and the actions of States, it is difficult to definitively state the current content of contemporary international law on the

for 1998, 26 February 1999, https://1997-2001.state.gov/global/human_rights/1998_hrp_report/congodr.html [accessed 2023-04-24].

issue. The only true remedy for this is for States to begin to clearly motivate their interventions and to start objecting if they perceive an intervention to be a breach of international law. In other words, for States to clearly motivate their actions and put into words what they perceive the law on the subject to be, instead of leaving scholars to interpret silence and very broad motivations for intervention that can be interpreted in many ways.

Mindful of this problem, the overall conclusion of this article remains that the proposals limiting MAR do not find sufficient support in the sources of international law. Therefore, there is currently no rule of international law preventing governments from inviting an intervention.