Faculty of Law – School for Advanced Legal Studies

Master in Law Dissertation in International Law

'Can the Protection of Goods of Common Interest be a Justification for Interventions in State Sovereignty? - Possibility of an 'Ecological' Intervention'

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I hereby declare that I have read and understood the regulations governing the submission of LL.M. dissertation, including those relating to length and plagiarism, as contained in the rules of the University, and that this dissertation conforms those regulations.

Signed by candidate

To *la familia* with love

'Sovereignty is the object which eludes us all, which nobody has seized and which nobody can seize for this reason: we cannot posses it, like an object, but we are doomed to seek it.'

Georges Bataille
in: *Literature and Evil*, 1973

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Chapter I: Introduction

To begin with: humankind depends essentially on a functional eco-system. For instance, without clean air, clean water or an intact ozone layer, only a few examples, is life on earth not possible. That means that the protection of the environment is indirectly the protection of humanity as well.

The excessive and non-sustainable exploitation of natural resources and the environment by humans all over the world could not be stopped until now. However, it is not the task of public international law alone to lead to a conscious and proper handling of our habitat and to protect the environment. Meanwhile nobody would deny seriously that international and global environmental laws for protection are necessary. For global environmental problems can just a global designed policy be functionally adequate and expedient. This necessity is expressed in state practice. To coordinate the collaboration of states, the United Nations Organization (UNO or UN) held a conference in 1972 on the human environment in Stockholm.[1] It was the first time that the international community had collectively agreed upon further steps to challenge environmental degradation facing mankind. Furthermore, the United Nations Environmental Programme[2] (UNEP) was established as a *'voice for the environment in the United Nations system'*.[3] In the post-Stockholm period, the United Nations Rio Declaration on Environment and Development from 1992[4], which affirms and updates Principle 21 of the Declaration of the United Nations Conference on the Human Environment from 1972[5], and the World Charter for Nature from 1982 were adopted showing that the global community is aware of their accountability to protect the environment for themselves and for future generations as well.[6] The politics for forestry and watercourses are already in an early stage of internationalisation.

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[1] United Nations Conference on the Human Environment held in Stockholm from June 5-16 in 1972.
[2] UN GA Res. 2997 (XXVII).
[3] http://www.unep.org.
[4] Hereafter: Rio Declaration; Available at: http://www.unep.org.
[5] Hereafter: Stockholm Declaration; Available at: http://www.unep.org.
[6] Christopher Joyner (ed) *The United Nations and International Law* (1999) at 303.

The international community has endorsed the basic idea that states have a responsibility to protect the environment within their territory and avoid transboundary environmental harm. Just to give one example: pollution is an ever-increasing threat to the quantity and quality of water resources such as rivers, watercourses and coastal waters.[7] Pollutants introduced into the transnational rivers of one state can affect the coastal waters or estuaries of other nations through downstream transportation, diffusion or dispersion.[8] The environmental problems and pollution as an aftermath of human activities and impacts are boundless. Quite a number of environmental pollutions may cross national borders of emission states directly or indirectly. Hence, an effective environmental protection requires a national level of actions and even more so an international action level, but still international environmental law provisions are mainly legally non-binding ('soft law'). Furthermore, it often does not apply directly and therefore has to be transformed in the national laws. In the majority of cases, it does not include any sanctions, so the effectiveness of international agreed regulations depend on the will of the states. In several cases the regulations stay nonbinding, because the agreements become not ratified or the ratification takes too much time. For example, the United States of America have still not ratified the so important Kyoto Protocol to the United Nations Framework Convention on Climate Change from 1997 and could not be held responsible if its emissions targets are not met.[9]

Moreover, during the long negotiation rounds the states are often only able to reach a minimal consensus and therefore the protection level for the environment stays quite low. While states have generally accepted international environmental law principles imposing an obligation to inform, and consult, on the other hand principles and obligations such as liability, compensation, prevention and enforcement remain inadequate and ineffective.[10] Additionally, it is easy to see that environmental protection has financial costs. Because of that, different national environmental standards lead to international economic and trade-related effects as well. Especially

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[7] Phillipe Sands *Principles of international environmental law – Frameworks, standards and implementation* Vol 1 (1995) at 346.
[8] Laksham D. Guruswamy *International Environmental Law in a Nutshell* 3ed (2007) at 521.
[9] Earth Friends 'The Kyoto Protocol Summary' Available at: http://www.earthsfriends.com/kyoto-protocol-summary (Accessed 09.07.2011).
[10] Christopher Joyner (ed) op cit at 307.

developing and least-developed countries react sensible to environmental regulations and the following costs are associated as a barrier of their economic growth.[11] In order to reduce for example production costs, several countries disregard cost-intensive environmental regulations and legal requirements concerning environmental protection. Popular instrument to reach still the approval of states to international environmental agreements are exceptional provisions, which become part of the agreements to comply with the individual interests and needs of states.[12] The different interests in environmental protection and economic aims are not necessarily contradictory, when in the long term the realization of international environmental protection measures is more cost-effective than the failure to put these measures into practise. And even this priority to achieve a growth in the own economy can now lead to the loss of natural resources and goods of common interest for humankind.

Imagine that states are not able or willing to react on several grounds to handle incidents which are not affecting necessarily only their own territory such as the catastrophic explosions on the 'Deep Water Horizon' oil-rig in April 2010 which caused a massive oil spill in the Gulf of Mexico[13] or the nuclear catastrophe in Fukushima Daiichi in March 2011 which contaminated huge areas of Japan[14] and will influence land and life of the people for many years. For years the government of Brazil refused to recognize and accept its international obligation to protect the tropical rainforest in the behalf of humankind.[15] In such urgent situations, the help and intervention of the international community may be the only possibility to avoid further harm or irretrievable destruction of the environment. Even if it is against the will of the state within its boundaries the safety hazard is located.

But according to the United Nations Charter (UN Charter) its member states are sovereign equals and it is forbidden for any state to use or to threaten to use force against *'the territorial integrity or political independence of any state'*,

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[11] Robert Repetto et al 'Has Environmental Protection Really Reduced Productivity Growth?' *Challenge* Vol. 40 No. 1 (1997) at 48.

[12] Malcom N. Shaw *International Law* 5ed (2005) at 821, 822.

[13] Parker Waichman Alonso LLP 'BP Gulf Oil Spill: BP Lawsuits, BP Oil Attorneys' Available at: http://www.oil-rig-spills.com/ (Accessed 09.07.2011).

[14] Global Post 'Nuclear expert: "50-50 chance of catastrophic radiation" from Japan' Available at: http://www.globalpost.com/dispatch/news/regions/asia-pacific/japan/110314/japan-nuclear-meltdown-disaster (Accessed 15.07.2011).

[15] Irma S. de Melo-Reiners *Regenwaldschutz in Brasilien und das Umweltvölkerrecht* (2009) at 332.

except in cases of self-defence situations against an armed attack, according to Articles 2(4) and 51 UN Charter. Basically, sovereignty[16] allows a state to dispose of its territory as it is pleases as long as another states integrity is not infringed. International customary law established the principle that states have the duty to pay compensation or other reparations to neighbouring states for transboundary environmental harm,[17] but there is no mechanism that allows states to force the cessation of such harm. The possibility of an 'ecological' intervention would enable states to use force or the threat of force within the territory of another state without the consent of the state concerned to prevent grave environmental damage.

In closing, the question arises, whether it is justified to intervene in states sovereignty and integrity for the necessary protection of common resources in global interests? This research paper will examine the conflict between state sovereignty and the protection of resources of common concern to humankind and therefore the possibility of an 'ecological' intervention.

First, the paper provides in Chapter II general definitions of the terms 'goods of common interest', 'sovereignty' and 'justification' in order to clarify the terminological understanding of the concepts the author worked with and to limit the scope of this paper. Thereafter, it will examine in Chapter III relevant and different types of interventional measures on grounds of protection of common resources. In order to understand the issue relating to the possibility of an 'ecological' intervention it is necessary to consider which measures according to established public international law are admissible and are not an unlawful intervention. Furthermore, it has to be considered which measures are appropriate to abolish a threat to goods of common interest and to protect them. Measures of intervention can be subdivided into measures of self-help, which function directly and immediately by adverting dangers and secondly indirect measures such as coercive means or pressure. The fourth chapter of this paper contains an outlook to the possibility of creating a measure like an 'ecological' intervention compared to the existing humanitarian intervention.

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[16] See in chapter II point 2.

[17] Allan Rosas 'Issues of State Liability for Transboundary Environmental Damage' *Nordic Journal of International Law* Vol. 60 (1991) at 29, 30.

The final Chapter V contains final remarks about the conclusions reached in the preceding chapters.

Chapter II: Definitions

The following definitions are supposed to serve as clarification of the terminological understanding of the concepts the author worked with and to limit the scope of this paper.

1. 'Goods of Common Interest'

The term 'goods of common interest' is on first sight very broad. Common goods are all goods or resources to which the global community's disposal is limited resulting in possible conflicts. Radio frequencies are one example, but they do not bear motive for interventions in state sovereignty; this paper therefore does not make reference to them. Instead, of particular interest are global resources, which have serious significance for the continued survival of humankind as a whole or for which a common preserve-orientated interest exists. Goods of our cultural heritage such as Robben Island near Cape Town, the pyramid complex of Giza, the Museum Island in Berlin or any other place that is listed[18] by the United Nations Educational, Scientific and Cultural Organization (UNESCO) as a World Heritage Site has a special cultural or physical significance and arouses our preserve-orientated interests. The importance of those goods is undeniable, but this paper is focused on resources, which are in the interest of the international community and can be aim of environmental protection measures. Cultural goods of common interest shall be factored out of this paper.

Global resources like natural and environmental goods and resources; for instance the Brazilian rainforest, world climate, freshwater resources, the ozone layer or Antarctica are left in the focus. Above all, a distinction must be

[18] http://whc.unesco.org/en/list.

made between natural resources in the interest of the international community, which are explicitly defined through sovereign rights like the rain forest or fish stocks and global commons which are outside of the jurisdiction of any nation like the atmosphere, ozone layer or flora and fauna of the oceans.[19] In the case of resources in interest of humankind no single state should possess an exclusive right of management and use, nevertheless there is a competition in usage because of the shortage of the good. The resource of global interest can be located within the jurisdiction of one state or reach over the territory of several states or beyond any state jurisdiction. In the event of a threat to resources in common interest is given an international environmental endangerment.

2. 'Sovereignty'

The sovereignty and equality of states represents the basic doctrine underlying international relations.[20] The term 'sovereignty' comes originally from the Latin word 'supra' or 'superanus' and means 'to be superior'. Since the scholars Jean Bodin (1529 – 1596) and Thomas Hobbes (1588 – 1679) we are speaking of state sovereignty, because they are the first to describe the state as sovereign. Jean Bodin is considered to be the founder of the modern concept of sovereignty.[21] In his principle work *'Les six livres de la République'* (1576) Bodin first analyzed systematically and added to his definition of state the concept of a superior authority controlling the fate of the state.[22] He introduced so the idea of sovereignty to the political philosophy of Natural Law. According to his understanding, the sovereign would only be bound by the laws of God and the law of nature, but would not be responsible to earthly instances, which he himself had instituted.[23] That means, that the sovereign would not recognize any authority, except God, as being greater than itself.[24]

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[19] Jeffrey L. Dunoff 'Reconciling International Trade with Preservation of the Global Commons: Can we Prosper and Protect?' *Washington and Lee Law Review* Vol. 49 (1992) at 1408.
[20] Ian Brownlie *Principles of Public International Law* 7ed (2008) at 289.
[21] Richard Joyce in: Charles Barbour and George Pavlich *After Sovereignty – On the question of political beginnings* (2010) at 39.
[22] Malcom N. Shaw op cit at 21.
[23] Ibid.
[24] Supra Richard Joyce at 39.

Hobbes wrote in his master work '*Leviathan*' (1651) that people overcome their state of nature by transferring their natural rights and the autonomy to a sovereign power of their own creation.[25] The idea of Hobbes is that this happens by concluding a social contract in which all citizens of the particular state surrender their rights of self-determination and self-defence irrevocably to this sovereign.[26] As a quid pro quo, the sovereign would defend his citizens against others and themselves.[27]

The sovereign state consists according to Georg Jellinek's '*Drei-Elemente-Lehre*'[28] of a defined territory, a permanent population and an independent and sovereign authority of the state. This theory is recognized in Article 1 of the Montevideo Convention on Rights and Duties of States, 1933:

> *'The State as a person of international law should posses the following qualification: a) a permanent population; b) a defined territory; c) government, and d) capacity to enter into relations with other States.'*

But sovereignty must be distinguished in national and international sovereignty. National sovereignty means that the state within its territory is the sovereign and political authority. It entails the right to prescribe the boundary-setting laws for the public order and everyone is equally obliged to obey these laws.[29] There is no higher institution within the state as the states organs to which the citizens could appeal against rulings and orders. Sovereignty in an international coherence is to be understood as relations of a state to other subjects of international law. There exists no relation of superordination or subordination between states. Every member of international relations is free to decide on its own ends and they are all equal.[30] All states of the international community have the same obligation to respect the international laws as agreed and understood between the members of the system.[31]

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[25] Malcom D. Evans *International Law* 3ed (2010) at 10.
[26] Richard Joyce op cit at 40.
[27] Benedict Kingsbury/ Benjamin Straumann in: Samantha Besson/ John Tasioulas *The Philosophy of International Law* (2010) at 45.
[28] Knut Ipsen *Völkerrecht* 4ed (1999) at 55
[29] Supra Malcom D. Evans at 320.
[30] Martti Koskenniemi in: Malcom D. Evans op cit at 33.
[31] Ibid.

States are the sovereigns over their territory, but there are restrictions for the government's freedom of action with regional, bilateral or multilateral outreach out of agreements, customary law, resolutions, declarations, recommendations or decisions. These restrictions are expression of constraining law and soft law. As soon as a state does not confine oneself to the regulation of its own affairs, but rather dispose matters concerning neighbouring states or the global community, this states own sovereignty becomes relative. Through the principle of good neighbouring states reach to the politics of ecological partnership. The awareness of states regarding to international cooperation in environmental issues is mirrored in the development of international environmental law since the Stockholm conference in 1972.

On the one hand, sovereignty means independence, but on the other hand the interdependence of the states influences this independence of every state. The territorial sovereignty is quite ambivalent. Opposed are: the right of the state to cause environmental loads within its territory regardless to consequences for neighbouring states (territorial sovereignty) and secondly the right to be free from external influences what means that any interferences from the outside are unlawful (territorial integrity).[32]

The early approach to territorial sovereignty is named after the US Attorney General Judson Harmon and known as the Harmon-doctrine.[33] The Harmon-doctrine signified that the right of territorial sovereignty shall be absolute, which means states are free to do as they please for example with watercourses within their own territory. But the natural resources comprise international rivers as well, which geographically and economically affect the territory and interests of two or more states.[34] The problem is that in exercise of its rights within the meaning of the Harmon-doctrine, a state could use its waters regardless of the effect this has on contiguous states and could cause irreparable injury upon its neighbours. Therefore the doctrine has little support in state practice[35] and probably does not describe any international law.[36]

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[32] Knut Ipsen op cit at 909.
[33] Patricia Birnie/ Alan Boyle/ Catherine Redgwell *International Law & the Environment* 3ed (2009) at 540.
[34] Ian Brownlie op cit at 260.
[35] Ibid.

Because of that and the principle of territorial integrity, the territorial sovereignty is understood as relative.

The reverse side of the principle of territorial sovereignty is the principle of territorial integrity, which comprises the right that states should not infringe other states territories in any way.[37] To stick with the mentioned example: this would give the downstream state of a watercourse the right to a full flow of water in an absolute natural quality.[38] This theory is equally as questionable as the Harmon-doctrine as it envisages an absolute right to the infringement of the territorial sovereignty of the upstream state, because the usage of a watercourse would modify necessarily its natural conditions. An absolute territorial integrity is jeopardized by the prohibition of serious consequences, what means that states are obliged to tolerate a certain dimension of pollution outside of serious damage. Therefore the principle of territorial integrity can only be understood as a relative right such as the territorial sovereignty.

Both principles are opposed and must be balanced out against each other. Moreover, within this consideration, the general obligation to prevent transboundary environmental harm to others or places outside the state's territory and to protect the rights of others states[39] has to be taken into account. This obligation was reached in the noteworthy decision of an arbitral tribunal in the *1941 Trail Smelter Arbitration*[40], which remains one of the most significant cases in international environmental law.[41] Additionally, this '*sic utere*' obligation was strongly reaffirmed by the International Court of Justice (ICJ) in the *Corfu Channel case*[42] and is normalised in Principle 21 of the Stockholm Declaration:

> *'States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their*

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[36] William W. van Alstyne 'International Law and Interstate River Disputes' *California Law Review* Vol. 48 (1960) at 604.
[37] Knut Ipsen op cit at 909.
[38] Birnie/ Boyle/ Redgwell op cit at 541.
[39] Nico Schrijver *Sovereignty over natural resources* (1997) at 237.
[40] *Trail Smelter Arbitration (United States v Canada)* RIAA III (1938/1941) at 1905.
[41] Lakshman D. Guruswamy op cit at 503.
[42] I.C.J. Rep. 1949 p. 4.

jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.'

Principle 21 is reassured twenty years later in Principle 2[43] of the Rio Declaration[44].[45] The *'sic utere'* principle is clearly accepted as customary international law [46] and a ground pillar of international environmental law.[47]

Besides the obligation not to cause environmental damage to other states, Principle 21 and Principle 2 comprise a second element: the sovereign right of states to exploit their own natural resources.[48] Territorial sovereignty embodies a catalogue of rights and duties what includes the right of a state to exploit freely the natural resources within its territory.[49] Being understood as relative and not as absolute, the principle of permanent sovereignty over natural resources is formulated in several UN General Assembly Resolutions[50] mainly concluded after 1952, international agreements[51] and Declarations[52] and recognized as ground principle. Concerning the exploitation of states resources through foreign private companies, the resolutions reflect the sovereignty over natural resources as an international legal right recognized out of customary international law.[53] In terms of this doctrine, every state is free to exploit and use its resources, free from external interference regarding the usage or exploitation. However, as stated above, this right is not absolute and is limited through the obligation to consider the aftermath of the exploitation and usage of the resources in the behalf of the global community. In this regard, the

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[43] Principle 2: *'States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national.'.*

[44] Supra note 4.

[45] Phillipe Sands op cit at 186.

[46] I.C.J. Rep. 1974 at 389.

[47] Supra Phillipe Sands at 186.

[48] Idem.

[49] Nico Schrijver op cit at 250.

[50] UNGA Res. 523 (VI) 1950; Res. 626 (VII) 1952; Res. 837 (IX) 1954; Res. 1314 (XIII) 1958; Res. 1803 (XVII) 1962.

[51] Article 3 of the Convention on Biological Diversity (1992).

[52] Principle 21 of the Stockholm Declaration (1972); Principle 2 of the Rio Declaration (1992).

[53] Supra Phillipe Sands at 187.

international agreements about the limitation of fishing on the High Seas[54] are a good example.

In conclusion, it is to determine a double nature of territorial sovereignty of a state: on the one hand the right to use and exploit its own natural resource which may also be of global interest and furthermore the right to be protected from any interferences or emissions from the outside. This duty not to intervene in issues within the national jurisdiction of other states is included in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States, 1970:

> *[n]o state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state.'*

Both sides of territorial sovereignty have to be regarded in accordance with the needs of the global community.

3. 'Justification' for Intervention

Finally, the third important point prior to the present question is the meaning of the term 'justification'. To cut it short: justification means the defence to an action.

The 'actors' under international law are the subjects of international law, which are able to intervene into the territory and to interfere in the sovereignty of other states. Personality in international law requires for an entity to possess international rights and duties and to maintain its rights by being capable to enforce international claims.[55] Subjects of international law are legal persons of public law and become able to act through their organs. Mainly states are the principal persons of international law.[56] It is not a state itself that acts at the international level instead a state's organs such as the government take action

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[54] For instance: 1982 United Nations Law of the Sea Convention (UNCLOS); 1995 Agreement for the Implementation of the Provisions of the UNCLOS relating to the Conservation and Management of straddling Fish Stocks and Highly Migratory Fish Stocks; 1958 Convention on the High Seas.
[55] Malcom N. Shaw op cit at 176.
[56] Rebecca M. M. Wallace *International Law* 5ed (2005) at 60.

on behalf of a state.[57] Hence, these organs decide in the end about 'whether' and 'how' of an intervention in the sovereignty of other states.

Justification is the defence that interference with relations of another was justified.[58] In principle, any behaviour in contradiction of the constituent elements of a relevant prohibitive norm is unlawful, if grounds of justification do not remove the unlawfulness.[59] This means in effect, that such an action may be justified and a justified action is not wrongful.[60] The scope of the defence is uncertain, but in international law commonly assumed examples are self-defence and necessity.[61]

Nevertheless, the protection of the environment and natural resources in the interest of the international community could be motivation, origin or reason for the decision for an intervention in sovereignty. For this reason, this decision would get benefit, if the intervention in state's sovereignty would be allowed under the prospect of international law.

Chapter III: Intervention in other states

In essence, the intervention in the sovereignty of states is prohibited, but nevertheless there are interferences, which are lawful according to international law. There are also different types of intervention, which range from use of force, subversive intervention and intervention by propaganda as well as the so-called humanitarian intervention.

1. Prohibition of Intervention in International Law

Just subjects of international law can be addressees of intervention, but no private persons or non-governmental organisations (NGOs). So, the internal

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[57] Knut Ipsen op cit at 54.
[58] Jonathan Law/ Elizabeth A. Martin (eds.) *Oxford - A Dictionary of Law* 7ed (2009) at 310.
[59] Claus Roxin *Strafrecht Allgemeiner Teil – Band I* 3ed (1997) at 501.
[60] Mitchell N. Berman 'Justification and Excuse, Law and Morality' *Duke Law Journal* Vol. 53 No. 1 (2003) at 7.
[61] Supra Jonathan Law/ Elizabeth A. Martin (eds.) at 310.

autonomy and freedom of legal arrangement is mainly in focus. Legally protected good of the non-intervention principle are the independence and sovereignty of states.

Basically, the principle of non-intervention derives from the sovereign equality of states.[62] Not every infringement of a right of another state is an infringement of its sovereignty, but rather an infringement of the rights, which are based on the legal principle of self-determination.[63] Being an unlawful intervention, the infringement of rights has to meet two requirements: first it has to be about any interference in the right of self-determination and secondly this current interference must not be justified.[64] In international law certain exceptions are accepted what means that allowed interferences are not interventions. The domaine réservé as scope of protection just comprises domestic affairs, which are matters of domestic jurisdiction of a state.[65] But matters about obligations of states out of international agreements, international customs or other regulations under international law are not included in the state's domestic jurisdiction (domaine réservé). Because the scope of the domestic jurisdiction of a state is determined by provisions of international law, the content is neither applied in the same way in all states nor is it definitively time-invariable.[66] Usually *'the choice of political, economic, social and cultural system, and the formulation of foreign policy'* are included in state's domaine réservé.[67] Further, the enforcement of those obligations under international law, which are not subject of state's domestic jurisdiction through the UN, what is the liability of states to other states, is not an infringement in the sovereignty at all.[68] In the field of global commons and international environmental law there are a great number of international agreements, for instance the Kyoto protocol or the Antarctica Treaty System. Thus, the environmental protection of global commons is not subject to the domaine réservé of states.

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[62] Irma S. de Melo-Reiners op cit at 333.
[63] Ibid.
[64] Friedrich Berber *Lehrbuch des Völkerrechts* (1975) at 186.
[65] Malcom N. Shaw op cit at 414.
[66] Knut Ipsen op cit at 957.
[67] I.C.J. Rep. 1986 at 108.
[68] Supra Irma S. de Melo-Reiners at 334.

The respect of the territorial sovereignty of states leads through customary international law to the prohibition of interventions.[69] The *Nicaragua Case*[70] sets out this doctrine. Nicaragua brought a claim against the USA for the unlawful use of force and further for an unlawful intervention in its internal affairs. The USA supported the military and paramilitary operations of the contra forces to overthrow the current government.[71] In the view of the ICJ, the USA had violated its obligation under customary international law not to intervene in the affairs of another state by:

> *'training, arming, equipping, financing, supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua.'*[72]

The ICJ stated in its judgment that each state is permitted to decide freely about political, economic, social and cultural matters as well as its foreign policy.[73] The principle of non-intervention includes the right of every state to rule its own affairs without any interference from the outside and to choose its own form of government.[74]

The ICJ acknowledged this approach in its ruling to the case of the *Armed Activities*[75] in the Territory of the Democratic Republic of the Congo (DRC). In May 1997, the DRC government was overthrown by a Congolese Rebels force, which had the support of Uganda and Rwanda. After the relations between the new DRC government and Uganda and Rwanda deteriorated, the permission for the foreign troops to remain within the territory of DRC was withdrawn. But instead leaving, the Ugandan troops advanced further into DRC territory, occupying substantial parts of Eastern DRC and remained there until June 2003. Ugunda justified the presence of its military forces on grounds of self-defence. The training and the military support given by Uganda to the ALC, the military wing of the '*Mouvement de liberation du Congo*', was found by the Court as violation of certain obligations of international law.[76]

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[69] Malcom N. Shaw op cit at 1039.
[70] I.C.J. Rep. 1986 at 14.
[71] Malcom D. Evans op cit at 623.
[72] David Harris *Cases and Materials on International Law* 7ed (2010) at 737.
[73] Supra Malcom N. Shaw at 1039.
[74] Supra Malcom D. Evans at 623.
[75] I.C.J. Rep. 2005 at 168.
[76] Supra David Harris at 758.

Nevertheless, the principle of non-intervention is recognized in international law, comprised in the UN Charter and verified in Resolutions and Declarations of the UN.

1.1 Non-Intervention Principle in the UN-Charter

According to the prevailing opinion, the precept of non-intervention is implicit comprised in the UN Charter, but is not normalised in particular.[77] Besides the fact that the Charter does not spell out the principle of non-intervention directly, it was never intended that every essential principle of international law should be confirmed in written form in the UN Charter.[78]

As legislative basis are consulted: Article 1 (2)[79] about friendly relations, equality and self-determination of people, Article 2 (1)[80] about sovereignty and equality of states, Article 2 (4)[81] about the prohibition of threat or use of force and Article 2 (7)[82] about domestic jurisdiction of states.

From *'the respect for the principle of equal rights and self-determination of peoples'* according to Article 1(2) and *'the principle of the sovereign equality of all its Members* [states]*'* according to Art. 2 (1), derives the prohibition for *'the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state'* (Art. 2 (7)). As mentioned above[83], that includes all domestic affairs, which are matters of domestic jurisdiction of a state.[84]

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[77] Irma S. de Melo-Reiners op cit at 343.
[78] David Harris op cit at 731.
[79] Article 1 (2): *'To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;'.*
[80] Article 2 (1): *'The Organization is based on the principle of the sovereign equality of all its Members.'.*
[81] Article 2 (4): *'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.'.*
[82] Article 2 (7): *'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.'.*
[83] See chapter III point 1.
[84] Malcom N. Shaw op cit at 414.

It is therefore understood and because of the formulation 'to intervene' that the precept of non-intervention is implied, but the prohibition applies only for the UN and their organs directly and is not mentioning interferences between states in particular. An inter-state non-intervention principle was not incorporated in the UN Charter.[85] But the provision of Article 2 (7) UN Charter was meant to be flexible and non-technical.[86] Moreover, the principle of sovereign equality out of Article 2 (1) UN Charter would be relative, if other subjects of international law would be allowed to intervene into affairs of domestic jurisdiction of other states. Hence, the warranty of sovereignty needs the protection from the non-intervention prohibition.[87]

Thus, the understanding of the non-intervention principle by reference to the UN Charter is limited, but it was never intended that every principle of international law should be confirmed and detailed in writing. Since the 1990s the notion of intervention has been changed, the goals and purposes of lawful intervention are now supposed to have a universal and humanitarian character and the intervention is undertaken by and on the behalf of the international community.[88] States that intervene in sovereignty of other states portray themselves as 'agents of the international community' and do not act for its own ends.[89] So a further development was reached in customary international law.

1.2 Non-Intervention Principle in Resolutions and Declarations of the UN

The principle has since been reflected in numerous declarations and resolutions by UN organisations.

In the *'Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty'*[90] from 1965 an extended prohibition of intervention was confirmed. Several

[85] Knut Ipsen op cit at 956.
[86] Ian Brownlie op cit at 295.
[87] Knut Ipsen op cit at 956.
[88] Mohammed Ayoob 'Humanitarian Intervention and State Sovereignty' *The International Journal of Human Rights* Vol. 63 No. 6 (2002) at 83.
[89] Ibid.
[90] UN GA Res. 2131 (XX) 1965.

states interpret and use the declaration to include a non-intervention principle directly in the UN Charter, because of the statement that:

> *'1. No state has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state [...]'*[91]

and

> *'[...] further that direct intervention, subversion and all forms of indirect intervention [...] constitutes a violation of the charter of the United Nations.'*[92]

Article 2 (4) UN Charter clearly forbids any intervention with the threat or use of force into the freedom of self-determination of external and internal affairs of states.

This legal prohibition is repeated[93] in the *'Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations'*[94] from 1970. The special importance of this so-called 'Principle-Declaration' (Prinzipiendeklaration) is that the sovereign equality of states was emphasized.[95] Additionally, economic, political or further coercive measures and threats are forbidden as well and constitute a violation of international law. That means while states remain equal, they remain different from each other as well.[96]

It is clearly stated in the *'Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States'*[97] from 1981 that:

> *'No State or group of States has the right to intervene or to interfere, in any form or for any reason whatsoever, in the internal or external affairs of any other State.'*

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[91] David Harris op cit at 742.
[92] UN GA Res. 2131 (XX) 1965.
[93] In paragraphs 1 to 4.
[94] UN GA Res. 2625 (XXV) 1970.
[95] Prosper Weil 'Towards Relative Normativity in International Law?' *American Journal of International Law* Vol. 77 No. 3 (1983) at 419.
[96] Ibid.
[97] UN GA Res. 36/103 (1981).

A further development included is that the strengthening of existing military blocs, the generation of new military confederations, generation of new military bases and by association the recruitment, education and financing of mercenaries is understood as intervention in the internal affair of a state as well. In so far the understanding of intervention became more expanded.

The most significant statement concerning permanent sovereignty over natural resources within the territory of states, what can include natural resources of global interest, is the Declaration of *'Permanent Sovereign over Natural Resources'*[98] from 1962. It is stated, that:

> *'the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned'.*[99]

Furthermore,

> *'the exploration, development and disposition of such resources [...] should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable'.*[100]

Therefore, permanent sovereignty reflects the right of a state to control the exploitation and the use of its natural resources, but a state has to exercise this right for the benefit of its citizens and in regard to resources of global interest for the welfare of humankind as well.

Indeed, it has to be kept in mind, that Resolutions of the UN General Assembly (UN GA) are legally non-binding. UN GA Resolutions function as recommendation for further procedures and bear a significant meaning for understanding the UN Charter. By perception of UN GA Declarations and Resolutions, the non-intervention principle becomes further developed.

As opposed to this, the resolutions of the UN Security Council (UN SC) are legally binding according to Chapter VII UN Charter. They comprise concrete claims whose enforcement in the case of refusal or non-compliance of states

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[98] UN GA Res. 1803 (XVII) 1962.
[99] Ibid.
[100] Ibid.

can be encouraged by use of repressive measures for instance UN Embargo or UN Sanctions or by use of force.[101] These can be justification for interventions in other states and the infringement of their sovereignty.

The principle of non-intervention in the internal and external affairs of state's is firmly established as strong basis in the organs of the United Nations and an approved principle of international law.

2. Types of Intervention

The infringement of sovereignty of states by intervention on grounds of protection of resources of global interest must have the abolishment of the source of danger for the good of common interest as agenda. The intervening authority can be an individual state, a unilateral intervention, or it is a collective intervention. An example of the latter may be a group of states or a collective for instance the United Nations (UN) on grounds of peacekeeping or a military confederation such as NATO.[102]

The removal can be direct and immediate or indirect and mediate. For a direct abolishment, the interfering force has to be in immediate contact with the source of danger. If the source of danger is located within the territory of another state as in the majority of the cases this is only possible by use of military force i.e. by infringing the territorial sovereignty of the state.

However, the removal can also be made indirect, but then the state in whose territory the hazardous source is located, stands between interfering force and endangerment. The interfering force or state shall apply pressure on the hosting state in order to achieve that this state eliminate the endangerment itself or have it eliminated by third parties. Then it is still to be clarified whether and how far pressure and coercive measures in general may be suitable methods for an intervention in another state. Forms of pressure can have a political, economic or propagandistic nature and furthermore an intervention can be made with diplomatic, financial, economic or domestic coercive measures. If they are suitable measures, it has to be examined whether each intervention

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[101] Irma S. de Melo-Reiners op cit at 348.

[102] Louis Henkin 'Kosovo and the Law of "Humanitarian Intervention"' *The American Journal of International Law* Vol. 93 No. 4 (1999) at 824, 828.

through pressure or coercive measures is unlawful or whether there exist in sovereignty interfering measures, which are admissible in their way.

2.1 Use of Force with UN Mandate according to Art. 39, 42 UN Charter

Measures of ecological self-help, which would remove directly the source of danger for natural resources of global interest, are limited by the international prohibition of threat or use of force constituted in Article 2 (4) UN Charter:

> *'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.'*

This provision is regarded as a principle of customary international law and is legally binding for all states regardless whether they are members of the UN or not.[103] Every use of military force contravenes the principles of non-intervention and the prohibition out of Article 2 (4) UN Charter. For instance, the overthrow of the Taliban regime in Afghanistan in 2001, or Saddam Hussein in Iraq in March 2003 or recently the assassination of Osama bin Laden in May 2011 in Pakistan. International law cannot prevent use of force just as international criminal law cannot prevent murder.[104]

Article 2 (4) UN Charter should be read as a whole within the context of the UN Charter whose purposes are spelt out in Article 1 UN Charter:

> *'The Purposes of the United Nations are:*
>
> *1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;*

[103] Malcom N. Shaw op cit at 1018.
[104] Rebecca M. M. Wallace op cit at 276.

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.'

The purposes include respect for equal rights, self-determination, human rights as well as maintenance of international peace and security.[105] Important exceptions to the prohibition of threat or use of force admitted by international law exist in relation to collective measures taken by the UN and with regard to self-defence measures.[106] Basically, measures according to Chapter VII of the UN Charter are an exception, if the UN Security Council determines any threat to the peace or breach to the peace or an act of aggression according to Article 39 UN Charter:

'The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.'

and also the individual and collective right of self-defence according to Article 51 UN Charter[107]. The constitutional basis for actions of the UN SC comes from Article 24 (1) UN Charter[108], which establishes the primary responsibility of the UN SC for maintaining international peace and security for the UN Member states.

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[105] Rebecca M. M. Wallace op cit at 279.
[106] Malcom N. Shaw op cit at 1018.
[107] See chapter III point 2.2.
[108] Article 24 (1): *'In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.'.*

The *'act of aggression'* as constituent element of Article 39 UN Charter is defined as

> *'[...] the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations [...].'*[109]

Because of the definition as *'armed attack'* is an act of aggression eliminated in the context of the environmental protection, because the endangerment of global commons is not an armed attack. Instead intended is an invasion by one state against another, the blockade of ports of a state by armed forces of another state or the sending of armed forces (irregulars, mercenaries etc.) against another state.[110]

Question is, whether the endangerment of resources of global interest could be *'[...]any threat to the peace (or) breach of the peace[...]'* according to Article 39 UN Charter. The Charter itself provides little detail on the specific threat to which the UN SC can or cannot respond.[111] It might be argued that the UN SC has a tendency to the extension of the understanding of the term *'threat to the peace'*. The UN SC considered in a case regarding of the protection of human rights, the Apartheid politics of the South African government in 1977 as threat to peace and thereupon imposed a mandatory arms embargo against South Africa[112] according to Chapter VII UN Charter.[113] The extension of the understanding has been confirmed by the UN SC and Secretaries-General in the Resolution to the Libyan conflict in 1992, when the Libyan government failed to demonstrate *'by concrete actions its renunciation of terrorism'*.[114] Moreover, environmental instability and degradation are identified as one of the major 'non-traditional' threats to international peace and security.[115] Additionally, environmental degradation is understood as a factor in a number

[109] UN GA Res. 3314 (XXIX).
[110] Rebecca M. M. Wallace op cit at 294.
[111] Lorraine Elliott 'Imaginative adaptations: A possible environmental role for the UN Security Council' *Contemporary Security Policy* Vol. 24 No.2 (2003) at 50.
[112] UN SC Res. 418 (1977); earlier, the UN GA adopted a resolution imposing an oil and arms embargo against South Africa in 1963 UN GA Res. 1899 (XVIII).
[113] Mats Lundahl 'Economic Effects of a Trade and Investment Boycott against South Africa' *The Scandinavian Journal of Economics* Vol. 86 No. 1 (1984) at 69.
[114] UN SC Res. 748 (1992).
[115] Lorraine Elliott op cit at 49.

of recent conflicts for instance in Somalia in 1992, Rwanda in 1994 and Haiti in 2004.[116]

In conclusion, the endangerment and degradation of the environmental global resources could also be understood as threat to peace, as well as breach of the peace. The UN SC's mandate has up to the present been in parts an interpretive process regarding a lawful, imaginative adjustment to current needs.[117] Until now, such a scenario concerning resources of global interest has not occurred, which is why it lacks practice. But at an adequate point it will be possible to come back to the opportunities of the UN.[118]

2.2 Use of Force without UN Mandate

Enforcement measures, which are not adopted from the UN SC under Article 42 UN Charter under the requirements of Article 39 UN Charter, are just possible within the scope of Article 51 UN Charter:

> *'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 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.'*

The right of individual or collective self-defence is an inherent right, which is articulated in customary international law: the *Caroline* case.[119] The incident took place in 1837 when British subjects seized and destroyed a vessel in a US port. In the following correspondence between the British and American

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[116] Lorraine Elliott op cit at 49.
[117] Bardo Fassbender 'Quis judicabit? The Security Council, its Powers and its Legal Control' *European Journal of International Law* Vol. 11 No.1 (2000) at 219.
[118] See chapter IV at point 2.3 and 3.
[119] Rebecca M. M. Wallace op cit at 282.

authorities, the American Secretary of State Daniel Webster laid down the essentials of self-defence.[120]

Article 51 UN Charter clearly requires an *'armed attack'*. Precisely that is probably not the regular situation. As stated above, the endangerment of resources of global interest within its own territory is not an armed attack of a state. The right of self-defence would therefore not be due to another state.

In the cases, where resources of global interest within the territory of another state would be destroyed by use of force, this would constitute an armed attack on another state's territorial integrity. Consequently, use of force or enforcement measures are in principle inadmissible without an UN SC mandate according to Article 39, 42 Un Charter, besides in cases of self-defence according to Article 51 UN Charter, which would be grounded on other reasons than the protection of resources and the environment.

2.3 Subversive Intervention

Force can be of differing nature, such as economic or political and does not stringently to refer to armed force. Disputable is whether Article 2 (4) UN Charter does just prohibit the use of armed force or whether other forms of subversive intervention are similarly prohibited.

In particular, developing countries and former Eastern bloc countries did interpret the prohibition of use of force according to Article 2 (4) UN Charter, in a way, that other forms of force, especially economic and political means of coercion, are comprised.[121] On the contrary, developed countries maintained it was only armed force included.[122] In Article 2 (4) UN Charter is normalised just *'force'*, whereas the preamble of the UN Charter and in Article 51 UN Charter is specifically mentioned *'armed force'*. The *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*[123] from 1970 does not help at this point further. Because in the section about the principle of non-intervention, the Declaration includes indeed the prohibition to

[120] Malcom N. Shaw op cit at 1025.
[121] Rebecca M. M. Wallace op cit at 281.
[122] Ibid.
[123] UN GA Res. 2625 (XXV) 1970.

> *'[...] use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind [...]',*

but neither it does define this as use of force nor does it define use of force at all.

Better arguments can be made for an interpretation of the prohibition to use armed force according to Article 2 (4) UN Charter. A legal order needs established laws and also measures to enforce them in conflict situations. Otherwise the legal order would permanently run the risk to receive no consideration, if states cannot enforce and protect their legal interests. The international law does not provide an obligatory jurisdiction of courts and a peaceful settlement of disputes does not work out in every case, therefore the states have to place a measure of pressure to enforce their rights.

Hence, it has to be recognized that *'force'* under Article 2 (4) UN Charter implies only the use of *'armed force'*.

2.3.1 Forms of Pressure and Means of Coercion

The established intervention in international law can be, besides an armed attack and impact on territory and sovereignty, the utilization of form of pressure or means of coercion for instance of political or economic nature as well. Whether measures likes this are admissible should be evaluated by reference to the principle of non-intervention.

As stated above[124], intervention is the interference of a state into the domestic or external affairs of another state in order to obtain advantages of any kind. Being established by the Charter of the United Nations, the principle of non-intervention is extended in Declarations and Resolutions. Besides in the *Declaration on Principles of International Law*[125], this extended understanding

[124] See in chapter III point 1.

[125] 'Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations', UN GA Res. 2625 (XXV) 1970.

of intervention is normalised equally worded in Article 32 of the *Charter of Economic Rights and Duties of States*[126] from 1974:

> *'No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights.'.*

According to this, the principle of non-intervention does not alone exclude the compulsory interference of free decisions of other states by an armed intervention, concerning this matter it is congruent to the prohibition of use of force, it also exclude the use of economic, political or other types of pressure.

2.3.1.1 Economic Form of Pressure and Means of Coercion

In the current international community are economic relations between states are without any doubt an indispensable part of our modern system. Therefore, the utilization of economic coercion lends itself to achieve the desired objective and to obtain advantages. In doing so, a lot of options come into question: first, perhaps blocking measures against import or export and as a further possible measure the refusal of development aid or other benefits. Economic measures, regardless of whether it is an economic form of pressure or a means of coercion, never contravene against the prohibition of the use of force, because just use of armed force is comprised. But it is a debatable point where exactly the border proceeds between permissible economic pressure and inadmissible economic coercion.

Basically, states are free and independent to choose their partners, to decide in which way and under what conditions are their economic relations to other states. Economic relations render oneself conspicuous through concurrence at the markets and the pursuit of own advantages. Both Boycott and Embargo could be used to set up any barrier to trade entirely in or partially in certain products of one or all countries. Boycott is the refusal of a state to buy particular goods or materials from another state.[127] Embargo is a proclamation

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[126] UN GA Res. 3281 (XXIX) 1974.

[127] James A. Boorman III 'Economic Coercion in International Law: The Arab Oil Weapon and The Ensuing Juridical Issues' *Journal of International Law and Economics* Vol.9 (1974) at 212.

of a state to withhold the departure of ships, goods or materials from some or all parts of the target state until further order.[128] Both blockade measures are considered to be two forms of economic reprisals and are usually issued in time of war or threatened hostilities.[129] At which point the border to an inadmissible economic coercion could be exceeded is hard to say and there do not exist any typical requirements. Furthermore, it is possible to assess with a subjective approach and to ask about the purposes of the intervening state or as well at an objective point whether the economic coercion bappened in accordance with the principle of good faith. It is also entirely possible to combine both approaches and to think about proportionality, namely whether method and purpose bear relation to each other. Every approach is easily conceivable and if the quality of inadmissible economic coercion is achieved should be better examined in any particular case.

Economic sanctions are among the few instruments comprised in the Charter of the UN to arrange compliance with former decisions of the UN SC.[130] In Chapter VII Article 41 the Charter is permitted:

'(the) complete or partial interruption of economic relations [...].'

The member states of the UN are required to implement every sanction adopted under Chapter VII.[131] The effectiveness of blocking trade against one or all states is in doubt[132] in international law, but it makes no point about admissibility or inadmissibility of such a measure.

A good argument can be made that trade-blocking measures are not inadmissible. If the sovereign decision of state 'A' not to enter into trading relations with another state 'B' on wbatever grounds would be inadmissible in international law, it would mean that this state A could be forced to enter into trading relations with other states such as 'B'. This would be an intervention in the sovereignty of state 'A', which wanted to avoid economic relations. However, the General Agreement on Tariffs and Trade (GATT) provides a general prohibition on tbe use of export and import bans and restrictions in

[128] James A. Boorman III op cit at 211.
[129] Ibid.
[130] Simon Chesterman et al *Law and Practise of the United Nations* (2008) at 342.
[131] Ibid.
[132] Mats Lundahl op cit at 69, 70; Simon Chesterman/Thomas N. Franck/David M. Malone op cit at 346; Knut Ipsen op cit at 596.

Article 11 and assigns in Article 1 the Most Favoured Nation (MFN) treatment as a foundation pillar for non-discrimination between countries in effecting those measures.[133] Furthermore, in Article 20 and 21 GATT has reservations permitted on the grounds of conservation of natural resources and national defence. The ICJ found in its judgment to the *Nicaragua case*[134] that a USA trade embargo adopted on 1. May 1985 against Nicaragua did not constitute a breach of the customary law principle of non-intervention.[135] Nicaragua argued that the measure of economic constraint would add up to a systematic violation of its sovereignty. But the Court was unable to regard such action on the economic plane as intervention.[136] Therefore, in following this argument, the assumption of unlawfulness of trade-blocking measures is not sustainable.

Merely, a violation of Article 32[137] of the *Charter of Economic Rights and Duties of States* to achieve the subordination of another state should still be regarded as an inadmissible economic pressure, but then the violation of obligations according to Article 32 does not occur because of the protection of resources of global interest.

Finally, it can be concluded that the use of economic pressure in the form of trading blockades is admissible for the protection of natural resources in the common interest of humankind. The current position with regard to the environment of a state serves as basis of decision-making and justification.

An additional possibility to apply pressure on another state is the refusal of development aid or other benefits. Here again, the question arises whether this could be a form of subversive intervention by a state in the affairs of another state.

When development aid is granted for the very first time, the same arguments as stated above for blocking trade must be applied. No state can be forced to grant development aid or other benefits to another state. Following this argument, no

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[133] Patricia Birnie et al op cit at 757.
[134] I.C.J. Rep. 1986 at 14.
[135] David Harris op cit at 735.
[136] Ibid.
[137] Article 32: *'No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights.'*

state is violating its obligations under international law, if the state is not obtaining such support and sponsorship. Furthermore, in state practice is the linkage between the fulfilment of environmental requirements and the granting of development and economic aid are usual and recognized practice.[138] Thereby the conditions required are usually realized for the receiving states, because they are adapted to the particular situation of developing countries and least developed countries.

It is a debatable point what is going to happen, if development aid was granted over a long-time period without any conditions and now the granting state cuts the support on grounds of environmental protection of global commons. The best approach is to examine the proportionality, what means the relation between method and purpose in these cases. If the method would be suitable to endanger the aid-receiving state in such a way that a serious economic crisis would be tbe consequence and on the other hand the impairment of the environment would not threaten its existence, it might be possible to assume an inadmissible economic coercion. But still, the aid-receiving state has the power itself to carry on obtaining development or economic aid until the conditions of the giving state would have a coercive effect, because they cannot be fulfilled without excessive effort. If the requirements imposed could be met effortlessly by the receiving state and the beneficiary simply does not comply, then there is no need to obligate the donating state to finance development aid.

The general belief[139] is that the refusal or discontinuance of development or economic aid does not constitute inadmissible economic coercion and a violation of the principle of non-intervention. Basically, the granting of aid or other benefits conditioned with environmental terms is admissible under international law and may be used for the environmental protection of resources of common global interest.

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[138] Stein Hansen 'Debt for Nature Swaps – Overview and Discussion of Key Issues' *Ecological Economics* Vol. 1 (1989) at 78.
[139] Knut Ipsen op cit 960.

2.3.1.2 Political Form of Pressure and Means of Coercion

It is more difficult to determine where exactly the border proceeds between permissible political pressure and inadmissible political coercion.

The interference in an election campaign or even elections of another state, critique or political advice which develops a sufficient coercive effect or as well as open and direct orders from one state to another on how to act in certain environmental issues might be ways to intervene in affairs of another state in the meaning of the non-intervention principle, although they might have just a low coercive effect. Once again, to constitute whether an intervention was unlawful, two requirements have to be fulfilled: an affair within the domestic jurisdiction of another state must be affected and this current interference must not be justified.[140] The domaine réservé as scope of protection just comprises domestic affairs, but matters about obligations of states out of international agreements, customary international law or other regulations of international law are not comprised in the domestic jurisdiction.[141] Therefore, the choice of the form of government, who would be entitled to which positions of state and administrative bodies, how to embellish the constitution, which principle will take effect for elections or how the administration of the state would be organised lies within the scope of domestic jurisdiction and cannot be objective of coercive measures to achieve environmental protection for global commons.

However, the critique by a state official against the internal politics regarding environmental issues of another state does not constitute a violation of the non-intervention principle, as long as it is underpinned with facts[142] and not able to evolve inadmissible coercive effects.

Without any doubt, the diplomatic activities of one state within the territory of another state are initially no intervention. On the contrary, the diplomacy is especially protected through international law against interferences from the hosting state. The *Vienna Convention on Diplomatic Relations* from 1961 sets

[140] Friedrich Berber op cit at 186.
[141] Malcom N. Shaw op cit at 414.
[142] Knut Ipsen op cit at 959.

out ground principles to ensure the efficient performance of the functions of diplomatic missions of representing states as well as the rules of customary international law apply as far as there is no principle expressly regulated by the Convention. The attempt to convince the conversational partner during negotiations concerning environmental topics by using psychological pressure and tactics even with intensive effort does not fulfil the requirements of an intervention. That would only be possible if circumstances come along which put constraint on the conversational partner and he cannot evade without fearing serious disadvantages. An intervention by diplomatic negotiations during international conferences or political disputes would be just conceivable if the dialogue partners threaten each other with measures contrary to international law, trying to induce the conversational partner to unlawful behaviour or one forces the other to a certain action, toleration or forbearance.[143] Various activities of diplomatic missions are convenient to cross the tolerable limits of coercive measures, for instance, if a diplomatic mission upon instructions from the own sending state would have influence on the politics of the receiving state by intrigues, lobbying, contacts and personal pressure on decisive parts of the population. A coercive excess of influence would fulfil the elements of an intervention by diplomatic measures.[144]

It also seems to go too far if the cessation of diplomatic relations with other states in consequence of discrepancies about essential environmental questions would be regarded as an act against international law. For example, if Germany would decide to terminate the diplomatic relations with the United States because of the prolonged attitude of the United States not to ratify tbe Kyoto Protocol, despite the fact that the United States is the world's second largest emitter of carbon dioxide.[145] No state can be forced to enter into any kind of relation to other states, because of its sovereignty. The sovereignty of a state signifies that diplomatic relations may exist only to states, with which the sending state wants to have diplomatic relations as well. That implies that the cessation of diplomatic relations cannot be valued as a reaction against international law. Accordingly, the behaviour concerning environmental

[143] Irma S. de Melo-Reiners op cit at 337.
[144] Ibid.
[145] The Guardian 'China overtakes US as world's biggest CO2 emitter' Available at: http://www.guardian.co.uk/environment/2007/jun/19/china.usnews (Accessed 09.08.2011).

questions, politics and thinking of a state serves on the one hand as a basis for a decision and on the other hand as justification as well.

2.3.2 Intervention by Propaganda

The legal position should be assessed differently regarding subversive intervention by propaganda. The measure of which is the insertion of radio and television broadcasts in a targeted way in order to achieve or support the subversion of a current government within another state or to encourage illegal or violent actions.[146] To overturn a government of another state due to its handling of resources of global interest and their missing protection has to be considered as a coercive measure and intervention in the domaine réservé of another state. The requirements of an inadmissible interference by propaganda in foreign affairs and so of a violation of the principle of non-intervention are fulfilled if the actions can be attributed to the sending state.[147] An attribution must be possible.

Only recently, in January 2011 in Tunisia the so-called 'Jasmine Revolution' took place thereby the ruling dictator Zine el-Abidine Ben Ali being overthrown after 23 years and he and his venal family were sent into exile.[148] The aftermath of a democratic revolution in Tunisia just started to overrun further states in the Mediterranean region such as Egypt and Libya. The US Central Intelligence Agency (CIA) in charge for providing national security intelligence to senior US policymakers[149] was said to have initiated (or at least contributed) the Tunisian revolution by propaganda measures.[150]

At least, an intervention confirmed by law through the declassification of secret documents was the overthrow of Brazilian President Joao Goulart in

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[146] Jamie Frederic Metzl 'Rwandan Genocide and the Law of Radio Jamming' *The American Journal of International Law* Vol. 91 (1997) at 638.
[147] Knut Ipsen op cit at 959.
[148] The Guardian 'Tunisia's Jasmine revolution: A flower that could be crushed' Available at: http://www.guardian.co.uk/commentisfree/2011/jan/17/tunisia-jasmine-revolution-editorial (Accessed 09.08.2011).
[149] CIA 'Today's CIA' Available at: https://www.cia.gov/about-cia/todays-cia/index.html (Accessed 10.08.2011).
[150] Webster Tarpley 'Tunisian Wikileaks Putsch: CIA Touts Mediterranean Tsunami of Coups' Available at: http://www.prisonplanet.com/tunisian-wikileaks-putsch-cia-touts-mediterranean-tsunami-of-coups.html (Accessed 13.082011).

March 1964 by US CIA operations by supporting coup plotters and backing street demonstrations, civilian forces and resistance groups.[151]

2.4 Humanitarian Intervention

Between the idea of an 'ecological' intervention and humanitarian intervention exist a lot of very strong parallels and both are controversial[152] subjects. Similar to the 'ecological' intervention are two substantial objects of legal protection by humanitarian intervention opposed: on the one hand is the sovereignty of a state, which is protected by the prohibition of threat or use of force and the non-intervention principle and on the other hand the protection of human rights.

Under humanitarian intervention are several different cases of intervention subsumed. Generally spoken, humanitarian intervention is the use of force in order to protect the lives and rights of humans, not necessarily own nationals, situated in another state[153] and to prevent humanitarian catastrophes or genocide with or without a UN mandate according to Chapter VII of the UN Charter in response to threats and breaches of international peace and security. Thus, the intervening state is not protecting its own rights in every case.[154] For the current examination humanitarian intervention is understood as intervention, which does not focus on the protection of own nationals of the intervening state(s) in principal without a mandate of the UN SC in another state.

The intervention on grounds of humanitarian protection comprises both non-forcible action for instance measures as diplomatic talks, UN resolutions and assistance by relief organisations and forcible actions to help and protect humans within a foreign territory of a government that does infringe human rights.[155] The sovereignty of states allows a government a range of treatments

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[151] The National Security Archive 'Brazil marks 40th Anniversary of Military Coup' Available at: http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB118/index.htm#docs (Accessed 13.08.2011).

[152] In the following is given just a brief outline of the idea and discussion about humanitarian intervention. In chapter IV point 2.2 will be made a comparison between both concepts.

[153] Malcom Shaw op cit at 1045.

[154] Rebecca M. M. Wallace op cit at 286.

[155] Nancy D. Arnison 'International Law and Non-intervention: When Do Humanitarian Concerns Supersede Sovereignty?' *The Fletcher Forum of World Affairs* Vol. 17 No. 1 (1993) at 200.

of its citizens and if a state denies access to international aid measures, the legal opportunities for Humanitarian Intervention are limited.[156]

The requirements for the admissibility of humanitarian intervention are fiercely disputed. The UK produced guidelines on humanitarian intervention, which refer in one principle only to possible collective interventions and based on this understanding no state can act on behalf of the international community.[157] According to the point of view of the UK there are another five principles, which must be met to make a humanitarian intervention lawful: Basically, before any intervention will be necessary, every state should strengthen its 'culture of conflict prevention'.[158] Second, the use of armed force to protect human rights should only be seen as a last resort.[159] Further, the guideline includes the responsibility for ending the violence immediately of the state in which territory it occurs.[160] Fourth, before the international community intervenes in internal affairs of another state, there must be convincing evidence of an overwhelming humanitarian catastrophe, which requires an urgent relief, and there should be no other alternative to save the endangered lives.[161] The last condition to be met is that any use of force must be proportionate and suitable to achieve the humanitarian purpose.[162] If these requirements would be fulfilled, the UK would accept a humanitarian intervention by use of armed forces as lawful. The guidelines established from the UK were triggered by the Iraq case[163] in 1991 and by the NATO military intervention in the former Republic of Yugoslavia[164] in 1999.[165]

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[156] Nancy D. Arnison op cit at 202.
[157] Rebecca M. M. Wallace op cit at 289.
[158] David Harris op cit at 785, 786.
[159] Ibid at 786.
[160] Ibid.
[161] Ibid.
[162] Ibid.
[163] During the aftermaths of the termination of Iraq's occupation of Kuwait, the UN SC adopted its Res. 688 (1991) to respond to the suffering of Kurdish people in Northern Iraq. In April 1991 the US, UK and France put into force 'Operation Provide Comfort' following the adoption of Res. 688 to provide aid for the Kurdish refugees. The coalition also created 'safe heavens' and 'no-fly zones' within Iraqi territory. The whole operation was not based on the Res. and not sanctioned by the UN SC. Being highly disputed and criticised on grounds of interferences in the domestic jurisdiction, the operation is seen rather to fall within the principle of humanitarian aid.
[164] Neither a self-defence situation was given nor was the intervention authorized according to Chapter VII of the UN Charter by the UN SC. Thus, the military action in Kosovo in 1999 appeared to violate international law, but the Independent International Commission on Kosovo concluded in its report that it was 'illegal but legitimate'. (This report is available at:

The recent civil war in Libya led to the intervention of a multi-state coalition of several states into Libya and ended into the coup d'état of Muammar Abu Minyar al-Gaddafi in August 2011. In March 2011 a military intervention by French, British, Canadian and US forces called 'Operation Unified Protector'[166] began in Libya including air strikes against the state's army forces, a no-fly zone and a naval blockade to implement the UN SC Res. 1973 from March 2011.[167] Basically, the UN has 'authorized' a humanitarian intervention by adopting this particular resolution. The reasons given for justifying the military intervention by a multi-state coalition are in the main the protection of the civilian population and populated areas from the Libyan government itself following anti-government protests,[168] because the regime under Gaddafi was about to mistreat more civilians in the opposition strongholds in Eastern Libya.[169]

The UN SC Resolution 1973 (2011) is consistent with former Resolutions adopted as for instance UN SC Res. 794 (1992)[170] or 929 (1994)[171] when it formulates the authorization quite broadly 'to take all necessary measures'[172] to achieve secure and stable conditions for humanitarian reinforcement.[173] But the UN Charter does not precisely authorize the UN SC to take measures in cases

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http://www.oxfordscholarship.com/oso/public/content/politicalscience/9780199243099/toc.html).

[165] David Harris op cit at 786.

[166] Before the NATO took over full command on 31 March 2011, the military intervention was split into different national operations with different names of the intervening coalition.

[167] NATO 'Arms Embargo against Libya Operation Unified Protector – Factsheet' (2011) Available at: http://www.nato.int/nato_static/assets/pdf/pdf_2011_03/20110325_110325-unified-protector-factsheet.pdf (Accessed 10.09.2011).

[168] Sarah Joseph 'Humanitarian Intervention in Libya' (2011) Available at: http://castancentre.wordpress.com/2011/03/18/humanitarian-intervention-in-libya/ (Accessed 15.08.2011).

[169] Lawrence Emeka Modeme 'The Libya Humanitarian Intervention: Is It Lawful In International Law?' Available at: http://mmu.academia.edu/LawrenceEmeka/Papers/577779/The_Libya_Humanitarian_Intervention_Is_it_Lawful_in_International_Law (Accessed 18.08.2011).

[170] This Resolution concerns the intervention in Somalia on grounds of humanitarian protection. The UN SC authorized the member states 'to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia'.

[171] This Resolution established a temporary multinational operation for humanitarian purposes in Rwanda and the authorization was formulated 'to use all necessary means to achieve the humanitarian objectives set out'.

[172] UN SC Res. 1973 (2011).

[173] Simon Chesterman '"Leading from Behind": The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention after Libya' *New York University Public Law and Legal Theory Working Papers* Paper 282 (2011) at 3.

of violations of human rights.[174] Nevertheless, the UN SC has already taken this authority for more than a decade[175], it did not use the explicit 'label' of 'humanitarian intervention'.

In 2001 the International Commission on Intervention and State Sovereignty (ICISS) established by the Canadian government tried to handle the question how to challenge the violation of human rights, if humanitarian intervention is an unacceptable infringement of sovereignty after the NATO intervention in Kosovo in 1999.[176] As one result, the Commission also found six criteria[177] for such military interventions on grounds of human protection[178], which embrace the same core issues as the principles mentioned by the UK. Furthermore, the ICISS has grounded the military intervention between prevention and post-conflict peace-building.[179] The report formulates what should occur, if the UN SC fails to fulfil its responsibilities.[180] The emergence of the 'Responsibility to Protect' (R2P) policy took place while the Commission decided to refrain from the utilization of the phrase 'humanitarian intervention' in its report.[181] It concluded that it is impossible to find a consensus about humanitarian intervention without UN authorization, but the Commission did not condemn the possibility of such an intervention at all.[182] The 'Responsibility to Protect' in the context of humanitarian intervention was quite broadly formulated and the report went far beyond what international law permits.[183]

The military actions in Libya in 2011 are seen as an example 'par excellence' for the 'Responsibility to Protect' policy. The 'Responsibility to Protect' policy was endorsed by the World Summit in 2005 as well as recognized by the UN through the adoption by consensus of corresponding resolutions[184]. In principle, the duty was imposed on each state to protect its nationals from

[174] Lawrence Emeka Modeme op cit at 6.
[175] For instance, the interventions in Somalia and Bosnia-Herzegovina in 1992 and in Rwanda in 1994.
[176] International Commission on Intervention and State Sovereignty (ICISS) *Responsibility to Protect - Report of the International Commission on Intervention and State Sovereignty* (2001) at 2.
[177] In the view of the ICISS the six core points are: right authority, just cause, right intention, last resort, proportional measures and reasonable prospects. See: ICISS op cit at 32.
[178] Supra ICISS Report at 32.
[179] Simon Chesterman op cit at 4.
[180] Linda A. Malone 'Green Helmets: Eco-Intervention in The Twenty-First Century' *Proceedings of the Annual Meeting (American Society of International Law)* Vol. 103 (2009) at 22.
[181] Supra ICISS Report op cit at 9.
[182] Supra Linda A. Malone at 23.
[183] Ibid at 21.
[184] UN GA Res. 60/1 (2005) and UN SC Res. 1674 (2006).

grave human rights violations, for example genocide, war crimes and crimes against humanity as well as cleansing based on ethnic heritage.[185] The UN GA went further and constituted that in the case of a failing state, the UN SC in particular would bave the 'Responsibility to Protect' if force is needed.[186] It is argued, that the UN SC could now authorize humanitarian intervention on a case-by-case basis.[187] But neither the 'Responsibility to Protect' policy in general nor Resolution 1973 in particular have managed to change or add a further exception in form of humanitarian interventions to the scope of exceptions to the prohibition of Article 2 (4) UN Charter[188] and the non-intervention principle.

Finally, it has to be pointed out, that every state, which was ever involved in a military action concerning purposes of humanitarian aid, avoided formulating a legal argument that might be useful for other states to justify other interventions.[189]

3. Résumé

In conclusion, the non-intervention principle is elaborated above as the obligations of states not to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. Matters about obligations of states out of international agreements, international customs or other regulations under international law are not comprised as an exception in the state's domestic jurisdiction. Generally speaking, the principle of non-intervention is recognized in international law, comprised indirectly in Article 2 (7) of the UN Charter and verified in Resolutions and Declarations of the UN organs.

Anyway, in international law certain exceptions are accepted which means that allowed interferences are not considered to be unlawful interventions. The use of force with UN SC mandate according to Article 39, 42 UN Charter might be possible on grounds of endangerment and degradation of the environmental

[185] Sarah Joseph op cit.
[186] Ibid.
[187] Simon Chesterman op cit at 4.
[188] Ibid at 5.
[189] Ibid at 6.

global resources if it is understood as a threat to the peace or a breach of the peace. The UN SC's mandate has up to the present been in parts an interpretive process regarding to a lawful, imaginative adjustment to current needs.[190] But so far, such a scenario concerning resources of global interest has not occurred.

However, unthinkable are cases of self-defence according to Article 51 UN Charter grounded on the protection of natural resources of global interest, because Article 51 UN Charter requires an 'armed' attack and the endangerment of resources of global interest within its own territory is not an armed attack at all.

On the other hand, the use of economic pressure in form of trading blockades seems to be admissible for the protection of natural resources as well as the granting of aid or other benefits conditioned with environmental terms might be admissible under international law and may be used for environmental protection of resources of common global interest. Additionally, another states attitude concerning environmental questions, politics and thinking could be useful to serve as basis to decide whether or not to enter diplomatic relations or to justify the ending of diplomatic missions. The sovereignty of a state signifies that diplomatic relations just may exist to states, with which the sending state wants to have diplomatic relations. Because of this, the cessation of diplomatic missions cannot be valued as violation of international law.

Whereas the coup d'état of a government of another state by intervention with propagandistic measures due to its handling of resources of global interest and their missing protection is an inadmissible coercive measure and infringement of the sovereignty of another state.

There are many similarities between the idea of an 'ecological' intervention and humanitarian intervention. The requirements for the admissibility of humanitarian intervention are still fiercely disputed and the recent military intervention in Libya by NATO forces in 2011 stirred up discussions. It is argued that the UN SC has 'authorized' a humanitarian intervention by adopting UN SC Res. 1973 (2011), but it must be reiterated that this particular resolution is consistent with former resolutions.[191] The UN Charter does not

[190] Bardo Fassbender op cit at 219.
[191] See this Chapter under point 2.4.

precisely authorize the Security Council to take measures in cases of violations of human rights, but the UN SC already taken this authority in a few cases.[192] With the examination regarding the violations of human rights in 2001 of the International Commission on Intervention and State Sovereignty (ICISS) emerged the 'Responsibility to Protect' policy, which seems to be a re-labeling of humanitarian intervention.

But after all, neither the UN SC Res. 1973 nor the 'Responsibility to Protect' policy caused a change of exceptions to Article 2 (4) UN Charter and non-intervention principle besides authorization by UN SC and cases of self-defence. However, so far the interventions on grounds of humanitarian aid are considered to be illegal but legitimate. The sovereignty of states is one of the foundation pillars in international law and interferences in such an important principle need strong justification and consideration.

Chapter IV: The Idea of an 'Ecological' Intervention

There is a huge dispute in international environmental law whether in the light of environmental devastation with global intensity, including exploitation and pollution of resources in the interest of the international community, individual states or the collective community should have the right or even duty to intervene in the domestic affairs of the state concerned. Furthermore, the issue is that the emitting states have indeed the duty to pay reparations following the principle of responsibility for transboundary environmental harm, but there exists no enforcement measure for the states affected to end such transboundary environmental harm. The possibility to legitimise an 'ecological' intervention comes to mind and for this reason, this Chapter comprises the attempt to formulate the concept, requirements and justification as well as possible forms of a lawful 'ecological' intervention.

[192] See this Chapter under point 2.4.

1. Approaches to 'Ecological' Intervention

The characterisation of resources to be in the interest of the international community sbould create the responsibility, if not the duty, to embrace counter-measures. The question occurs how to establish a forum for 'ecological' intervention.

1.1 Internationalisation of Environmental Protection

'Ecological' intervention might take place in the form of internationalisation of environmental protection. It is undeniable, that each member of the international community has an increasing legal interest and right in the conservation and utilization of natural resources and the environment in general.[193] Agreements concerning the environment on an international level have expanded the boundaries of common responsibility in the last decades.[194] Furthermore, the UNCED implemented in Principle 7 of the Rio Declaration that:

> *'States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem.'*

So far, this common responsibility has not diminished environmental degradation, because of the lack of serious consequences in cases of non-compliance. By internationalising environmental affairs, the international community would partly give up their sovereign rights regarding nature. The internationalisation of environmental protection means that the international community would have the compelling obligation and duty to cooperate to ensure environmental preservation and protection for the benefit of present and future generations. A legal binding act with enforcement measures should be comprised. Included within a framework under international law should be the obligation to create joint action strategies and national action plans in order to implement economic and ecologic effective measures to protect and preserve the environment and especially resources of common interest.

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[193] Phillipe Sands 'The "Greening" of International Law: Emerging Principles and Rules' *Independent Journal of Global Legal Studies* Vol. 1 (1994) at 294.
[194] Ibid.

Such a protective convention would infringe the sovereignty of states, but could be a possibility to lead the international community to sustainable management of the environment within their territory. In doing so, the wider context to the growth of economic income and the reduction of poverty, trading and sustainable development, biodiversity and degradation of land as well as climate change and the management of resources must be considered and included in decision-making processes.[195] The focus of a multilateral specific convention should be the cooperation of states in the utilization of nature and environment and furthermore the creation of enforcement instruments in the case of non-compliance of a state. The existing environmental agreements under international law are to the greatest extent 'toothless' and do not provide powerful enforcement measures for the obligations reached, should there be any included.

Finally, the internationalisation of the protection of the environment might by an 'ecological' intervention and infringement of the sovereignty of states,[196] but it would not be an military intervention and it could be a possibility to achieve comprehensive and sustainable protection instruments.

1.2 Implementation of an 'Eco-Humanitarian' Intervention

This approach would lead to the inclusion of the protection of the environment via human rights into the concept of international peace and security. Genocide and crimes against humanity are universally condemned[197], because of this the possibility to implement a prohibition of targeted destruction or non-sustainable exploitation of non-renewable natural resources ('ecocide')[198] and crimes against nature as well come to mind.

For instance, climate change and derogation of land are having far-reaching consequences on the rights to adequate food[199] and to water[200] supply. These

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[195] Irma S. de Melo-Reiners op cit at 374.
[196] Ibid at 375.
[197] Robyn Eckersly 'Ecological Intervention: Prospects and Limits' *Ethics and International Affairs* Vol. 21 No. 3 (2007) at 301.
[198] Mark Allan Gray 'The International Crime of Ecocide' *California Western International Law Journal* Vol. 26 (1996) at 217.
[199] Article 11: *'1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing,*

rights are contained in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)[201] adopted by the UN GA in 1966. A further exploitation of the environment in general and in particular resources of common interest without a sustainable management with protective aspects is able to endanger necessities of life and international security followed by violations of human rights especially of people in the Southern Hemisphere.[202] Furthermore, the 1992 Rio Declaration is indeed not legally binding, but it is normalised that in Principle 1 that:

> *'Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.'*

In consequence, the formulation of a life *'in harmony with nature'* allows an ecological interpretation leading to the conclusion that at least the targeted destruction or non-sustainable exploitation of natural resources could be a violation of human rights. Thus, an ecological dimension of buman rights is undeniable, that is why there is a linkage between environmental harm and human rights violations in some cases.[203] For this reason, it might be possible to intervene into the territory of another state with use of force to stop ecocide that involves genocide as well, if ecocide produces immediate and grave consequences for humans causing significant human suffering or deaths or crimes against humanity.[204] The 'eco-humanitarian' intervention would bring together the arguments of both concepts of intervention. Through the combination of both interventions it would be ensured that violations of human rigbts could not be committed on behalf of an 'ecological' intervention.[205]

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and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.'

[200] The right to water is not explicit normalised in Article 11 of the ICESCR, but the interpretation of the right to adequate food implies the right to water.

[201] The ICESCR is part of the International Bill of Human Rights.

[202] Irma S. de Melo-Reiners op cit at 376.

[203] Robyn Eckersley op cit at 301.

[204] Ibid.

[205] Ibid.

1.3 'Ecological' Intervention by UN 'Green Helmets'

The third option discussed is the dispatch of forces as so-called 'Green Helmets' by the United Nations for an 'ecological' intervention. Based on the UN Blue Helmets function as peacekeeping forces, the UN 'Green Helmets' would function as quick response force to environmental catastrophes and for verification of compliance with imposed restrictions.[206]

In doing so, the intervening forces should consist of experts of sciences related to environmental issues and solution strategies, instead of armed intervention forces. Because the development of long-term solutions is more appropriate for the dealing with latent problems and might gain more acceptance from the state concerned and its citizens than the intervention by armed soldiers. This is due to the fact that under normal circumstances soldiers are not educated with regard to environmental protection and solution-finding processes concerning environmental catastrophes. It would be of course desirable that the UN 'Green Helmets' should enjoy the protection of soldiers, if their security would be endangered by current events.

Such scientists need a targeted education and specific training. The education and recruitment of such scientific experts could be done by the UNEP in order to use existing structures within the UN system. Moreover, while realising an 'ecological' intervention by UN 'Green Helmets' national and especially local qualified environmental scientists of the state concerned should be integrated into the mission to improve on the one hand the acceptance of the intervention and to use the knowledge of the local environmental circumstances of the past years.

There are several options or tasks a UN 'Green Helmet' mission could undertake, for instance: monitoring of preservation flora and fauna, resources and realization of national environmental action plans, implementation and protection of safety zones or perhaps the takeover of administrative functions as long as an urgent need for protection might exist.[207]

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[206] Irma S. de Melo-Reiners op cit at 381.
[207] Ibid at 383.

1.4 Consideration

All three approaches to implement an 'ecological' intervention in international law are conceivable. Nevertheless, it is appropriate to proceed with the consideration of these approaches in order to establish guidelines and requirements for an intervention on grounds of environmental protection of resources of global interest.

The first approach of the internationalisation of environmental protection as an instrument to coordinate the utilisation and sustainable management of resources of common interest of the international community has the advantage, that no military intervention, in whatever form it may take, in the territory of another state would be included. Instead of using force to achieve the necessary protection, it would be the consensus set down in a written agreement, which would improve the acceptance of the internationalisation and ensure the protection needed. But on the other hand, every state is free in international law to enter agreements or not, so eventually not every state would agree to internationalise its environmental affairs especially with regard to resources. So far, international environmental law clearly shows that it is almost impossible to reach consensus on establishing legal binding obligations such as liability, compensation, prevention and enforcement. Additionally, in catastrophic situations where an environmental harm has to be challenged immediately and an urgent relief is necessary, there must be an opportunity to intervene in the territory of another state, which did not sign the internationalisation of its environmental affairs, in order to react quickly if the state concerned fails or refuses to embrace necessary measures. Therefore, a further idea should be sought.

The second concept of a combination of 'ecological' and humanitarian that leads to an 'eco-humanitarian' Intervention would have the advantage that principles and guidelines needed could be developed and built on existing humanitarian law as a 'top-up' so to say. The problem with 'eco-humanitarian' intervention is that the law applicable to humanitarian interventions is not yet settled. Moreover, a disadvantage of a combination would come to the surface if ecocide or crimes against nature would not involve serious human rights violations. An 'eco-humanitarian' intervention would not be triggered in such

cases and the environmental degradation could not be challenged through the international community. The concept presented is also contradicted by the suspicion of developing and least developed countries regarding humanitarian intervention as imperial interference of Western States into their right of self-determination.[208] The state's concerns are likely to be extended to 'eco-humanitarian' intervention.[209] Hence, the second concept does not seem to be the appropriate approach.

The last approach to implement the possibility to dispatch UN 'Green Helmets' forces consisting of environmental scientists, specially educated, trained and nominated by the UNEP together with local environmental experts of the offending state seems to be preferable to the other two approaches. An argument against the implementation of 'Green Helmet' troops is that the primacy of the sovereign state as the 'first responder' has to be recognized.[210] It is the duty of the international community to support the state to meet its responsibilities.[211] On the one hand, the intervention and use of force provide a breach of international law, but can be justified, thus the authorisation through the UN of 'Green Helmets' would be the best option to reach acceptance of such interference into a state's domaine réservé. On the other hand, the international community has the right to refuse to accept a single state's failure to act in areas of global priority as a last resort.[212] Furthermore, the UN Blue Helmets missions are widely accepted among the international community, hence it might be easier to achieve acceptance for a similar concept. Particularly noteworthy is, that the mission of UN 'Green Helmets' would not consist of soldiers, but rather of experts trained for solution-finding processes in view of degradation of the environment and resources of global interests. It is also important to point out that a body of legal provisions addressing environmental destruction in time of war and military activities[213] may be most fully defined and already exists, therefore the step to write down provisions in

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[208] Robyn Eckersley op cit at 302.
[209] Ibid.
[210] Gareth Evans 'The Responsibility to Protect in Environmental Emergencies' *Proceedings of the Annual Meeting (American Society of International Law)* Vol. 103 (2009) at 32.
[211] Ibid.
[212] Ibid.
[213] The Fourth Geneva Convention, the 1972 World Heritage Convention and the 1977 Environmental Modification Convention include provisions to limit environmental harm during the time of war and military activities.

peacetime should be possible especially regarding a sustainable management of natural resources.

Finally, the 'ecological' intervention by UN 'Green Helmets' appears to be the most adapted approach under international law.

2. Scope of 'Ecological' Intervention

By the term 'ecological' intervention is understood the threat or use of force by a state or international community within the territory of another state on grounds of prevention or termination of grave environmental damage of resources of global interest[214], if the state concerned is unable or unwilling to do so. Thereby the 'ecological' intervention includes besides use of force the utilization of economic and political coercive measures as well.

On the other hand, 'ecological' intervention should include the possibility of 'ecological-defence'. This means the preventive use of force to respond to the threat of serious and immediate environmental damage, which flows from the territory of a neighbouring state into the territory of the state affected.[215]

3. Guidelines of 'Ecological' Intervention

To make sure that an 'ecological' intervention would be admissible and lawful, it should be conducted in accordance with international law principles and should be justified. Since the implementation of the UN Charter in 1945 just the UN and its organs are capable to legitimise an intervention in the territory of another state. Therefore, the requirements for an 'ecological' intervention should be negotiated within the members of the UN and adopted through an organ of the UN.

In order to formulate requirements of 'ecological' intervention it seems to be appropriate to orientate to the guidelines of the UK[216] and the principles of the ICISS[217] for humanitarian intervention in consequence of the parallels between

[214] Robyn Eckersley op cit at 293.
[215] Ibid.
[216] See chapter III at point 2.4.
[217] Ibid.

'ecological' and humanitarian intervention. The following guidelines and requirements are suggested:

I. Every state should strengthen its obligation not to cause transboundary harm in order to fulfil its duty to establish preventive conflict measures.

II. The primary responsibility for ending the environmental harm immediately is the burden of the state in which territory it occurs.

III. The UN GA could send a fact-finding mission by signs of environmental crimes and establish an investigation committee, which would evaluate the results gained and report to the UN SC. The fact-finding mission should consist of scientists of environmental matters trained, educated and nominated through the UNEP.

IV. If the danger of greater environmental harm remains and convincing evidence of an overwhelming environmental catastrophe is there, should the UN SC pass a first decision including the observation of the endangerment of international peace and security in order to show clearly the international concerns. But still the choice and option to end the endangerment of resources must be left to the state violating the environmental law.

V. The nomination and sending of special representatives could be the next step. The special representatives would function as international mediators in order to find an internal solution of the environmental problem while maintaining the sovereignty of the state.

VI. Only if this internal solution fails because the state concerned is unable or unwilling act, should tbe UN SC pass an authorization of an intervention under the command of the UN. Specially trained and educated environmental scientists from the UNEP should be the delegated forces mixed with local environmental experts. The use of force should only be seen as a last resort, if there is no other alternative to safely or end the endangerment of resources of global interest. The authorization must conform to Article 39 UN Charter and the mandate must include an unerring description of the object of the operation. Any use of force must be proportionate and suitable to achieve environmental protection. Primarily, the sending of environmental specialists instead of soldiers would be helpful to master the environmental crisis.

4. Justification of 'Ecological' Intervention

One may ask whether it is possible to justify an 'ecological' intervention with the existing provisions and if so, which would be applicable. It comes to mind that the conservation of the environment is generally speaking in the interest of current and future generations. Further approaches to justify an intervention on grounds of environmental protection and preservation of resources in global interest are on the one hand to think about environmental security as a guarantee of security for humankind or on the other hand to consider rights for the nature itself or a human right to a functioning nature. The continuous increase in world population as much as environmental degradation and catastrophes as for instance the contamination of huge areas of Japan after the nuclear catastrophe in Fukushima Daiichi in March 2011[218] mentioned at the beginning or the recent big oil pollution scandal of August 2011 in Ogoniland, Nigeria triggered by a report from the UNEP. The Shell Petroleum Development Company (SPDC Nigeria) is accused of not meeting the local regulatory requirements or the international industry best practises and that the control, maintenance and decommissioning of oilfield infrastructure was inadequate.[219] According to the report oil pollution may require the world's widest ranging and long-term clean-up ever undertaken.[220]

The global threat for natural resources moves the protection measures needed from a human-centric point under international environmental law in a more eco-centric direction.

4.1 Human Rights

Humankind depends essentially on a functional eco-system, due to the fact that provisions about environmental protection measures serve indirectly as protection of humanity as well. Therefore, the reciprocal connection between environment and individuals is recognised. This approach considers the non-

[218] Global Post op cit.
[219] UNEP Report *Environmental Assessment of Ogoniland* (2011) Available at: www.unep.org/nigeria (Accessed 01.09.2011).
[220] UNEP 'UNEP Ogoniland Oil Assessment Reveals Extent of Environmental Contamination and Threats to Human Health' Available at: http://www.unep.org/newscentre/default.aspx?DocumentID=2649&ArticleID=8827 (Accessed 01.09.2011).

observance of environmental standards and ongoing degradation of the environment in the context of human rights law and demands for the acceptance of the rights of individuals and groups to a clean environment as an independent human right.[221] This right is based upon the human need for survival.[222] It has been argued, that human rights are not a closed category and the addition of a 'third generation' of rights including a human right to a functioning environment might be possible. With the needs for further development the international community may create new rights to meet changing protective goods.[223] The basis for environmental human rights should be the intergenerational obligation to protect the environment for both present and future generations as environmental justice.[224] Some writers have the opinion that Principle 1 of the 1972 Stockholm Declaration already includes such a human environmental right.[225] In Principle 1 it is normalised that:

> *'Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. [...]'*

This formulation suggests that there might exist a human right to a functioning environment leading to a right of environmental protection, because of the following obligation of states and the international community in sum to guarantee an adequate quality of the environment.[226] Moreover, in order to ensure the continued existence of humankind on earth, the preservation of livelihoods and natural resources for future generations is unquestionable necessary.

But tbe problem is, that in an environmental context, it is hard to define what a right should contain and how to formulate such rights. There are too many

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[221] Alan Boyle and M. Anderson in: Phoebe N. Okowa *State Responsibility for Transboundary Air Pollution in International Law* (2000) at 63.
[222] Laura Horn 'The Implications of the Concept of Common Concern of a Human Kind on a Human Right to a Healthy Environment' *Macquarie Journal of International and Comparative Environmental Law* Vol. 1 (2004) at 239.
[223] Phoebe N. Okowa op cit at 94.
[224] Richard P. Hiskes *The Human Right to a Green Future* (2009) at 118.
[225] Patricia Birnie/ Alan Boyle/ Catherine Redgwell op cit at 277.
[226] Irma S. de Melo-Reiners op cit at 357.

inaccuracies: What amount of air pollution would be an infringement of the right to a clean environment? Who would be the right holder and who would be the duty holder? Should this right be a collective or individual right? Who should monitor the compliance and in which forms?[227] Moreover, there is no international consensus about the terminology.[228] The lack of an appropriate definition of such a human right is one of the main obstacles to the development of this right.[229] It is also obvious that the value of a human environmental right is questionable. The potential obligations of states can be found in existing environmental treaties and other agreements and without a procedural mechanism to enforce this kind of human right, it would be no more than a further memoranda of understanding.[230]

4.2 Nature as a Holder of Legal Rights

Theoretically, a collective 'ecological' intervention could be justified, if it would rest on protection and enforcement of legal rights of nature itself as a legal person. The idea whether that nature itself should be a holder of rights is based on the observation that the national law systems and also international law comprise several non-living holders of rights, as for example states, NGOs, corporations, trust and municipalities. In comparison, the question why nature should not have rights as well, which could be claimed by judicial processes, is not that far-fetched at all.

Basically, the main point of the idea is, that the environment is the holder of rights, insofar that those rights are not disposable and therefore the environment would be addressee and beneficiary of judgments and decisions. Of course nature could not hold the same rights as human beings have and not every area in the environment need to have the same rights as every other thing in the environment.[231] Despite the fact, that nature would be a proper plaintiff, it would need legal representation in front of courts. A system is suggested in

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[227] Phoebe N. Okowa op cit at 94.
[228] Patricia Birnie/ Alan Boyle/ Catherine Redgwell op cit at 279.
[229] Laura Horn op cit at 239.
[230] Supra Phoebe N. Okowa at 94.
[231] Christopher D. Stone 'Should Trees Have Standing? – Toward Legal Rights for Natural Objects' *Southern California Law Review* Vol. 45 (1972) at 458.

which a volunteers[232] could apply to a court for the creation of a guardianship if a natural object seems to be endangered.[233] Right from the start, such a right of application for a guardianship should only be available to qualified state bodies occupied with environmental concerns, to make sure that those rights are internationally enforceable through the UN on behalf of the international community.

The possibility to make the environment itself a legal holder of rights would end the connection needed until now to violation of human rights. Furthermore, the creation of rights of the environment would be an opposite pole to the sovereign rights of states. Not only the states would have any longer sovereign rights over the environment and resources within their territory, the environment would also have rights notable by states.[234] According to this, the rights of nature would build a limitation of territorial and permanent sovereignty of states Additionally, the development of rights of the nature might be able to fix current problems in international environmental law with lacking a mechanism of obligatory enforcement measures and legally binding agreements.[235]

It would also be the next step from a human-centric environmental legal system towards more an eco-centric approach to protect the environment and essential resources in global interest for the present and future generation. Problematic is the circumstance that rights of the nature under international law would require a fundamental modification of the international law system.

4.3 Linking Ecological Security and International Peace and Security

Within the next 50 years the Earth's population may exceed the nine billion mark and consequently scarcities of renewable resources will increase.[236] The former Vice-President of the World Bank Dr. Ismail Serageldin prophesised in

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[232] Within the European Union was discussed instead of using volunteers to implement a collective action ('Verbandsklage'), which could be brought by qualified entities such as environmental organisations or state bodies on behalf of the environment.
[233] Christopher D. Stone op cit at 464.
[234] Irma S. de Melo-Reiners op cit at 361.
[235] Ibid.
[236] Thomas F. Homer-Dixon/ Jeffrey H. Boutwell/ George W. Rathjens 'Environmental Change and Violent Conflict – Growing scarcities of renewable resources can contribute to social instability and civil strife' *Scientific American* (1993) at 38.

1995 that: *"Many of the wars this century were about oil, but those of the next century will be over water."*[237] Moreover, the UN warned in its 2009 World Water Development Report No. 3 that climate change has the potential for serious conflicts over water as UN Secretary-General Ban Ki-moon put it in a way that scarcity of food and water might be able to transform peaceful competition into violence.[238] In Africa alone by 2020, approximately 75-250 million people may be exposed to water stress due to climate change.[239] Climate change and following water shortages coupled with an increased demand will sooner or later hurt livelihoods and water-related conflicts may rise, if international trading and agreements fail to help in time. The highest pressure will rest on the shoulders of least developed and developing countries with a weak infrastructure. Currently circa 11 million people in Eastern Africa are suffering from famine as consequence of the worst drought in 60 years caused by climate change.[240] If states like Somalia, Ethiopia, Kenya, Djibouti and Uganda would collapse, the international order and collective security of the international community might be destabilized as well. Crisis prevention measures and peacekeeping interventions in endangered states would be necessary.[241]

These scenarios are showing that there is a linkage between international peace and security and ecological security. The environmental degradation is in itself a threat to the security of humankind and life on earth and can be both root and consequence of conflicts.[242] For instance, climate change is a matter of international peace and security as well as being environmentally serious and there are social and economic implications.[243] A further similarity between international and environmental security is that predictability and control are basic elements military safeguarding considerations as well as important parts of environmental protection.[244] It is understood, that *'[...] any threat to the peace (or) breach of the peace [...]'* according to Article 39 UN Charter can be

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[237] Wendy Barnaby 'Do Nations go to war over water? *Nature* Vol. 458 (2009) at 282.
[238] UN 'Water in a Changing World' *UN World Water Development Report 3* (2009) at 19.
[239] Ibid.
[240] Clemens Höges/ Horand Knaup 'A Catastrophe in the Making - Famine in East Africa' Available at: http://www.spiegel.de/international/world/0,1518,775338,00.html (Accessed 05.09.2011).
[241] Irma S. de Melo-Reiners op cit at 363.
[242] Nina Graeger 'Environmental Security? *Journol of Peace Research* Vo. 33 No. 1 (1996) 109, 110.
[243] Supra Irma S. de Melo-Reiners at 363.
[244] Supra Nina Grager at 110.

interpreted by the UN SC in a broader way. To which threats specifically the UN SC can or cannot respond is not in detail provided in the Charter itself.[245] It might be argued that the UN SC has a tendency to extend the understanding of the term *'threat to the peace'* within the last decades. As mentioned before[246], the UN SC has developed and confirmed in related cases[247] 'non-traditional' threats to international peace and security. The mandate of the Security Council has up to the present been in parts an interpretive process regarding a lawful, imaginative adjustment to current needs.[248] By extending its understanding of threats to security and recognizing environmental instability and degradation as factors in a number of recent conflicts for instance in Somalia, Rwanda and Haiti[249], the UN SC could in the time to come legitimise interventions in the territory of another state on grounds of endangerment of the environment. The endangerment and degradation of the environmental global resources could be included without limitation as a threat to the peace and as well as breach of the peace into Article 39 and 25[250] UN Charter. The current development towards potential endangerment of the World community through the degradation of the environment should be precisely encompassed in the Charter in order to extend the competences of the UN SC. In this case the UN SC would be entitled to legitimate 'ecological' interventions to prevent environmental damage under a mandate according to Article 39, 42 UN Charter.

4.4 'Common Concern of Humankind'

Probably the most significant environmental problem in the future will be global climate change. Recognizing this, the concept of 'common concern' emerged in 1988 when the Government of Malta proposed a declaration to the UN GA regarding the proclamation of climate as part of the common heritage

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[245] Lorraine Elliott op cit at 50.
[246] See chapter III at point 2.1.
[247] South Africa's Apartheid politics were considered as threat to peace in UN GA Res. 1899 (XVIII) 1963 and UN SC Res. 418 (1977); further development of the understanding of threat to peace in UN SC Res. 731 and 748 to the Libyan conflict in 1992.
[248] Bardo Fassbender op cit at 219.
[249] Ibid.
[250] Article 25: '*The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.*'

of humankind.[251] In the following, the UN GA adopted a resolution[252] concerning the protection of the climate for the present and future generations using the 'common concern of humankind' approach.

The 'common concern' idea has been further developed in the 1990s. In the Preamble of the Climate Change Convention is acknowledged that *'change in the Earth's climate and its adverse effects are a common concern of humankind'* because of the average of global warming caused by human activities increasing the concentrations of greenhouse gases and effect. The concept is continued in the Preamble to the Convention on Biological Diversity by affirming that *'conservation of biological diversity is a common concern of humankind'*. As we can see, common concern has been linked to areas of the global commons (the Earth's climate) and to areas falling within the jurisdiction of states (the biological diversity, which is a natural resource) as well. But of course, these preambles do not contain legally binding commitments.

Besides the fact that climate change constitutes the biggest environmental difficulty, other environmental problems for instance scarcity of drinking water resources, destruction of forests, pollution of water and steady global population growth as well as air pollution and spread of hazardous substances are recognised as common concern of humankind.[253]

In 1990 a group of legal experts examined the concept of the common concern of humankind in relation to global environmental issues. In its summary report the experts concluded that the common concern might develop into a principle of customary law.[254] They affirmed the linkage of this concept to other environmental concepts. The idea of a right of future generations to a functioning eco-system, ecological security and a human right of a healthy environment as well as the rights of the nature itself are embodied by the concept of common concern of humankind.[255] Generally speaking, the concept contains the approach that protection measures have to be taken for the benefit

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[251] Frederic L. Kirgis Jr. 'Standing to Challenge Human Endeavours That Could Change the Climate' *The American Journal of International Law* Vol. 84 No. 2 (1990) at 525.
[252] UN GA Res. 43/53 (1988).
[253] Irma S. de Melo-Reiners op cit at 368.
[254] Laura Horn op cit at 247.
[255] Supra Irma S. de Melo-Reiners at 367.

of humankind as a whole. Common concern leads for members of the international community towards the common responsibility as a duty to take into account the needs of all other members states in developing and applying laws which previously have been subject just to their own domestic jurisdiction.[256] This concept would encourage decision-makers to take into account sustainable development and inter-generational equity into their reasoning while solving disputes.[257]

5. Résumé

Generally, during the last decades interest in the conservation and utilization of natural resources and the environment of each member of the international community has increased[258] and agreements concerning international environmental law have expanded the boundaries of common responsibility.[259] But still lacking are serious consequences in case of non-compliance of the parties.

It was shown above, that there are different approaches to accomplish an 'ecological' intervention for environmental preservation and protection. The first option, internationalisation of environmental protection, would mean that the international community could have a duty to cooperate to ensure environmental protection on behalf of present and future generations. Sure, such a protective convention would interfere in the sovereignty of states, but could be a possibility to lead the international community to sustainable management of the environment. The internationalisation could be a possibility to implement a wider context in decision-making processes regarding to growth of economic income, reduction of poverty, trading and sustainable development, biodiversity and degradation of land as well as climate change and management of resources.

The second approach was the combination of human rights and environmental protection to an 'eco-humanitarian' intervention. In particular, the preservation

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[256] Phillipe Sands 'The "Greening" of International Law: Emerging Principles and Rules' *Independent Journal of Global Legal Studies* Vol. 1 (1994) at 296.
[257] Laura Horn op cit at 234.
[258] Supra Phillipe Sands at 294.
[259] Ibid.

and protection of the environment and natural resources could be included via human rights into the concept of international peace and security. Environmental degradation will endanger necessities of life and international security followed by violations of human rights especially of populations in the Southern Hemisphere.[260] An ecological dimension of human rights is indicated by the formulation of a life *'in harmony with nature'* according to Principle 1 of the Rio Declaration and allows an ecological interpretation. Thus, at least the targeted destruction or non-sustainable exploitation of natural resources could be a violation of human rights. An 'eco-humanitarian' intervention would be a possibility to intervene into the territory of another state with use of force to stop ecocide that involves genocide.

Last option examined, the 'ecological' intervention by UN 'Green Helmets' could function as a quick response force to environmental catastrophes and additionally ensure the verification of compliance with imposed restrictions.[261] Comparable to the peacekeeping mission by UN Blue Helmets, the UN 'Green Helmets' would be authorised by the UN SC. Such a mission should consist of environmental scientists and experts related to environmental issues. Their main focus would lay in finding long-term solution strategies to deal with latent environmental problems. Hopefully, the acceptance of these interventions would be achieved by integration of local scientist and experts as well and the fact that it would not be an intervention by armed forces and soldiers. The recruitment, education and nomination of such scientific experts could be done by the UNEP in order to use existing structures within the UN.

The examination of all three possibilities implies that the authorisation by the UN SC of a 'Green Helmets' mission might be the best option to reach acceptance of such an interference into another state's domestic jurisdiction. The internationalisation-idea is problematic, because every state is free to decide whether or not to enter international agreements. A far-reaching structural change in environmental protection appears not be achievable. The problem of 'eco-humanitarian' intervention is that the law applicable to humanitarian interventions is still not settled and an 'eco-humanitarian' intervention would not be triggered, if ecocide or crimes against nature would

[260] Irma S. de Melo-Reiners op cit at 376.
[261] Ibid at 381.

not involve serious human rights violations. Finally, the best way to challenge environmental degradation and reaching wide acceptance within the international community seems to be an intervention by UN 'Green Helmets'. The international community has the right to refuse to accept a single state's failure to act in areas of global priority as a last resort.[262] There already exists a body of legal provisions regarding environmental destruction in time of war[263], consequently the step should be to write down provisions for peacetime.

Furthermore, an intervention by UN 'Green Helmets' would need guidelines and requirements written to create and provide legal certainty for the international community. The guidelines proposed are: as a precaution to strengthen the awareness of every state not to cause transboundary harm and to end environmental harm caused, which occurred in their own territory; by non-compliance the sending of a UN GA fact-finding mission and establishing of an investigation committee; afterwards a first decision by the UN SC in order to show clearly the international concerns; the sending of mediators to find an internal solution for the environmental problem could be the next step; finally, if the state concerned is unable or unwilling to act, the UN SC could pass an authorization of an intervention as a last resort, if there is no other alternative to save or end the endangerment of the environment and resources of global interest whereby use of force must be proportionate, suitable to achieve environmental protection and the UN mandate must include a clear and limiting description of the mission's object.

The justification of 'ecological' intervention is possible on grounds of human rights, rights of the nature, the consideration of ecological security as collective security and the concept of 'common concern for humankind'.

Firstly, there is already a demand to accept the rights of individuals and groups to a clean environment as an independent human right.[264] The main arguments for the creation of such a human right is first, that human rights are not a closed category and the addition of a 'third generation' of rights including a human right to a functioning environment is possible and secondly, that there exists an

[262] Irma S. de Melo-Reiners op cit at 381.
[263] The Fourth Geneva Convention, the 1972 World Heritage Convention and the 1977 Environmental Modification Convention include provisions to limit environmental harm during the time of war and military activities.
[264] Alan Boyle and M. Anderson in: Phoebe N. Okowa op cit at 63.

obligation to protect the environment for both present and future generations as environmental justice.[265] However, the main problem of environmental human rights is to find appropriate definitions for what a right should contain and the formulation of such rights, because there are currently too many inaccuracies.

Additionally, based on the observation that law systems comprise several non-living holders of rights, the justification of 'ecological' intervention could be reached with the argument to protect and enforce legal rights of nature itself as a legal person. Qualified state bodies occupied with environmental concerns could be the guards of those rights. The creation of rights of the nature would be an opposite pole to the sovereign rights of states and might be able to fix the lack of mechanism of obligatory enforcement measures and legally binding agreements.[266]

The third approach to justify such an intervention on grounds of environmental protection is the consideration of ecological security as collective security. Environmental degradation will sooner or later hurt livelihoods. If states with a weak infrastructure would collapse in consequence of civil conflicts about remaining natural resources, the international order and collective security of the international community might be destabilized as well. Clearly, there is a linkage between international peace and security and ecological security. The environmental degradation is a threat to security of humankind and life on earth[267] and the UN SC has shown a tendency to extend the understanding of threat to the peace within the last decades.

The last possibility described is the 'common concern of humankind' concept as a justification. It is like an umbrella for the former environmental concepts examined, because the ideas of a right of future generation to a functioning eco-system, ecological security and a human right to a healthy environment as well as the rights of the nature itself are embodied.[268] The leading thought of this concept contains the approach that environmental protective measures have to be taken for the benefit of humankind as a whole. The international community would have the duty to take into account the needs of all other

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[265] Richard P. Hiskes op cit at 118.
[266] Ibid.
[267] Nina Graeger op cit at 109, 110.
[268] Irma S. de Melo-Reiners op cit at 367.

member states in developing and applying laws which previously have been subjected to their own domestic jurisdiction.[269]

To summarize, every approach to justify an 'ecological' intervention has its advantages and disadvantages, but all are so far conceivable.

Chapter V: Concluding remarks

I. The principle of non-intervention in the territorial and domestic affairs of another sovereign state remains fundamental doctrine in international law.[270] The conflict between state's sovereignty and protection of environment and natural resources of global interest is after this examination just short in favour of the principle of sovereignty of states. But the discipline of international environmental law is still a young developing part of the international law system. Theoretically, an 'ecological' intervention seems to be necessary regarding to progressive environmental degradation and increasing human suffering because of a lack of access to natural resources. As mentioned above, a justification of 'ecological' intervention is possible under international law provisions on grounds of human rights, rights of the nature, the consideration of ecological security as a collective security and the 'common concern of humankind' concept.

II. If a state has lost one or more of the essential elements of statehood, it is considered as 'failed state'.[271] It can be argued that such a state is no longer a state in a legal sense and since it is no longer a state, it should not have any rights, which could be infringed by an intervention. However, if such a failed state still remains a member state of the UN, then statehood could still continue by recognition as a fiction. Another argument might

[269] Phillipe Sands op cit at 296.
[270] Lawrence Emeka Modeme op cit at 20.
[271] Thomas Risse/ Ursula Lehmkuhl 'Governance in Areas of Limited Statehood - New Modes of Governance?' *Research Program of the Research Center (SFB) 700, Working Paper Series No. 1* (2006) at 10, 11 Available at: http://www.sfb-governance.de/en/publikationen (Accessed 10.09.2011).

be, that the people of the failed state continue to enjoy human and perhaps human environmental rights.

III. Nevertheless, the primacy of the sovereign state as the 'first responder' has to be recognized.[272] It is the duty of the international community to support the state to meet its responsibilities, hut it is the right of the international community to refuse to accept the single state's failure to act in areas of global priority as a last resort.[273] Thus, the condition of the global environment is a considerable concern to UN and its organs and to governments.[274]

IV. Within the system of the UN, the UN SC might be the qualified organ to authorise an 'ecological' intervention. Under Chapter VII of the UN Charter the UN SC is allowed to decide in favour of interferences in usually domestic affairs of another state. But the current competence of the UN SC does not include the authorisation of interventions on grounds of environmental protection specifically. Moreover, an implementation of the possibility of an 'ecological' intervention by the UNEP is excluded for the moment as well. In the legal system of the UN, a programme like the UNEP is un-endued with far-reaching authority as for instance an organisation like the World Trade Organisation (WTO).[275] In consequence of the weak legal status, the UNEP would also not be able to execute a mandate like an 'ecological' intervention.

V. The estimation of environmental degradation as a threat to international peace and security and the corresponding acting of the UN SC are within the realms of possibility. The implication of environmental protection as or into human rights is not necessary anymore[276] in order to achieve the

[272] Gareth Evans op cit at 32.
[273] Ibid.
[274] Robert F. Gorman *Great Debates at the United Nations* (2001) at 214.
[275] Irma S. de Melo-Reiners op cit at 386.
[276] Ibid at 380.

implication of enforcement measures of sustainable management and protection of the environment and in particular resources of global interest.

VI. Similar to UN Blue Helmets peacekeeping mission, it seems to be the best option for a quick response to environmental catastrophes, but also as a last resort, UN 'Green Helmet' forces consisting of environmental experts from the UNEP and local scientist of the state concerned in each case.

VII. In the 20th century is international law in its approach regarding to the use of force 'state-centric', it is developing features to 'human-centric' thinking, but is in no way 'eco-centric'.[277] In the 21st century the transformation of national security to human security will proceed in international law.[278] Similar to the successful development of civil and political human rights and the following second generation of rights such as economic, social and cultural rights, the development of the 'Responsibility to Protect' policy and the protection of resources in the interest of humankind in international law will proceed as well. It might be difficult to achieve a widespread recognition, but difficulties in acceptance do not negate its necessity.[279]

[277] Linda A. Malone op cit at 20.
[278] Ibid at 26.
[279] Ibid.

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