SARA MARQUES FÉLIX

The environment: A global question demanding global legal answers. The case for an ecological intervention.

Dissertação com vista à obtenção do grau
de Mestre em Direito na especialidade de
Direito Internacional e Europeu

Orientador:

Doutor Mateus Kowalski, Professor da Faculdade de Direito da Universidade Nova de Lisboa

Setembro 2021

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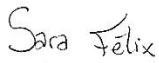

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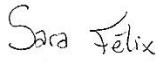

À minha família que me dá um carinho extraordinário,

aos meus amigos que nunca deixam de apoiar

e ao meu namorado por me dar uma constante força para continuar.

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Siglas e Abreviaturas

CUN- Charter of United Nations

CCH- Common Concern Humankind

CHH- Common Heritage Humankind

EIA- Environmental Impact Assessment

EU- European Union

ECtHR- European Court of Human Rights

GPG- Global Public Goods

IACtHR- Inter-American Court of Human Rights

ICC- International Criminal Court

ICJ- International Court of Justice

IEL- International Environmental Law

IL- International Law

ILC- International Law Commission

IO- International Organizations

NASA- National Aeronautics and Space Administration

NGO- Non-Governmental Organization

R2P- Responsibility to Protect

SC- Security Council of the United Nations

UN- United Nations

UNCLOS- United Nations Convention on the Law of the Sea

UNEP- United Nations Environmental Programme

Declaração de Carateres

A presente dissertação é composta no corpo do texto por 199 117 carateres, incluindo espaços e notas de rodapé.

Resumo

A presente dissertação constitui um estudo sobre a proteção jurídica do ambiente no Direito Internacional do Ambiente, fazendo uma análise histórica e atual do Estado da Arte. Tem por objetivo principal a construção de uma narrativa teórica que fundamente a intervenção ecológica como forma de fazer face a emergências ambientais que ocorram no território de um Estado e que tenham impacto direto e significativo no Planeta.

O estudo parte da constatação de que, como referido pelo Secretário-Geral das Nações Unidas, se vive presentemente uma crise climática de consequências devastadoras e relativamente à qual o ambiente e a humanidade estão rapidamente a chegar a um ponto de não-retorno. Dessa premissa, são analisadas as consequências mais visíveis da degradação ambiental, quer a nível puramente ambiental, como a nível social e económico. De modo a mapear as normas existentes a nível do Direito Internacional do Ambiente é efetuada uma visão histórica do seu desenvolvimento e aplicação.

A intervenção ecológica será baseada em ideias já previamente concretizadas por autores como Michel Bachelet e terá por fundamento conceitos já reconhecidos como a intervenção humanitária. Porém, tais conceitos serão equacionados num quadro inovador que permita que perante um desastre ambiental grave que ocorra num Estado e que cause danos ambientais significativos e afete vidas humanas, exista a possibilidade de a comunidade internacional agir, mesmo sem o consentimento desse Estado. Apoiando-se em parte nas premissas que fundamentam a assistência humanitária, a intervenção da comunidade internacional permitiria a prevenção, mitigação e até recuperação dos danos causados, impedindo um maior efeito a nível global. O contraste entre a soberania, e as diferenças significativas entre as emissões e possíveis contribuições dos países desenvolvidos e em desenvolvimento serão parte da problemática a analisar.

Na senda da cooperação internacional, entre Estados e Organizações Internacionais, criar-se-ia o caminho para a intervenção ambiental. Tal intervenção seria possível através do reconhecimento pelo Conselho de Segurança das Nações Unidas do dano ao ambiente como uma ameaça à paz e à segurança. Permitiria uma atuação de auxílio pelos Estados intervenientes para com o Estado que sem querer ou sem poder, tem perante mãos um dano ambiental incontrolável. Com a realização do presente estudo pretende-se contribuir para o debate ambiental, para prevenir graves danos ambientais.

Abstract

This dissertation constitutes a study on the legal protection of the environment in International Environmental Law, making a historical and current analysis of the State of the Art. Its main objective is the construction of a theoretical narrative that justifies the ecological intervention to face environmental emergencies that occur in the territory of a State and that have a direct and significant impact on the Planet.

The study starts from the observation that, as stated by the Secretary-General of the United Nations, humanity is currently experiencing a climate crisis with devastating consequences and that from it the environment and humanity are rapidly reaching a point of no return. From this premise, the most visible consequences of environmental degradation are analyzed, both at a purely environmental level and a social and economic level. To map the existing norms at the level of International Environmental Law, a historical overview of its development and application is carried out.

The ecological intervention will be based on ideas previously put forward by authors such as Michel Bachelet and will be founded on already recognized concepts such as humanitarian intervention. However, such concepts will be equated in an innovative framework that allows that in the face of a serious environmental disaster occurring in a State and causing significant environmental damage and affecting human lives, the international community can act, even without the consent of that State. Relying in part on the premises that underlie humanitarian assistance, the intervention of the international community would allow for the prevention, mitigation, and even recovery of the damage caused, preventing a greater effect at a global level. The contrast between sovereignty and the significant differences between emissions and possible contributions of developed and developing countries will be part of the problem to be analyzed.

The ecological intervention would be created in the wake of cooperation between States and International Organizations. Such intervention would be possible through the recognition by the United Nations Security Council of damage to the environment as a threat to peace and security. It would allow the intervening States to aid the State that is unable or unwilling to control the environmental damage. The purpose of this study is to contribute to the environmental debate to prevent serious environmental damage.

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1- Introduction

The present study begins with the question "How can the international community intervene in the face of ecological threats and how can any shortcomings be overcome?". This question is based on the context of the necessary and urgent action required to take on the environment, considering that the Planet Earth is becoming warmer, and there is the possibility of some cities becoming flooded. Animals that have been part of biological history are becoming extinct or in danger of it, mainly due to human action. Since ever, natural disasters have existed. However, the exploitation of Planet Earth's resources has been too intense, leading to more frequent natural disasters, with extensive and destructive consequences.

The question to be studied creates several hypotheses as an answer. It can be that the ecological intervention is unfeasible because the environment is not and will not in the future be considered as a good that demands such global protection. Another hypothesis is that the ecological intervention may be possible for the environment might be considered as good of concern of all humankind, however, it does not create legitimacy for an intervention on a State's territory. A third hypothesis is that ecological intervention is feasible, as recognized by the SC as a threat to security and peace and recognized by all States as a matter of common concern, where necessary aid shall be given to the State that is unwilling or unable to deal with the significant damage. To answer the question, the study will follow an analysis of the state of art, with a content analysis based on qualitative data. The content analysis will be based on interpretative analysis, aiming to create new concepts and theory propositions, where the texts and material of study will be described and interpreted.

A study of the current instruments of protection will be drawn altogether with a view over the new instruments, and their practical applicability. This study will therefore aim to reach the final answer of whether the ecological intervention is possible and if so, how and with which legal basis. The study will firstly go through a historical overview of IEL and explore its characteristics. Such characteristics include principles and the State's obligations, which will allow for an extensive assessment of the existent rule of law and how is the environment protected these days. From that point on, one will address the question of the environment as a legally protected interest. Such analysis will allow for a recognition of the environment as a good to be protected by the international

community. If it is confirmed that environment is a legally protected interest it reinforces a possibility of global level protection. In this analysis, the question of ecocentrism and anthropocentrism will be central to acknowledge the current protection of environment in law and if the approach followed is the better one to achieve the intended ecological intervention. From that examination, the study will investigate whether there is an effective liability posed on States when they fail with their environmental responsibilities. The private persons' liability will be also studied, for when they are responsible for creating damage, to understand the level of protection of the environment. In this part, the study aims to materialize the rule of law and the effective compensation or restoration of the damage to the point where it was before (if possible). In the end, having all these previous analyses as a starting point, and having looked at current alternatives for the liability of States, the study will focus on the question that was initially made. The ecological intervention will be examined as a possibility, supported by figures such as humanitarian assistance and responsibility to protect. The study will attempt to identify its likelihood and create its basis, supported by previous research from academics on the matter. The conclusion will be whether ecological intervention is possible and if so, how will it not create more difficulties than improvements to the environment.

The environment will be the central topic of this study; however, it is a complex concept to grasp. The IEL treaties do not provide a specific definition of environment. However, they mention the effects that cause damage to the environment. By defining those effects, the treaties allow the understanding of what can be considered protected under IEL. At the international level, the protection of the environment is directed to the "conservation and sustainable use of natural resources and biodiversity, the conservation of endangered and migratory species, prevention of deforestation and desertification, preservation of Antarctica and areas of outstanding natural heritage, protection of oceans, international watercourses, the atmosphere, climate and ozone layer from the effects of pollution, safeguarding human health and quality of life."[1]The need for the protection of the environment is interconnected with the urgency in preventing and mitigating environmental damages, some of them irreversible. Environmental damage can be defined as the "Depletion or destruction of a potentially renewable resource such as air, water, soil, forest, or wildlife, by using it at a rate faster than it can be naturally

[1] BIRNIE, Patricia, BOYLE, Alan, REDGWELL, Catherine - International Environmental Law, p.6

renewed"[2].In that sense, environmental damage will exist every time that action significantly jeopardizes biodiversity, such as the deforestation of a rainforest. The natural resources do not have to remain untouched, and the fact is that humanity needs them to develop. Nonetheless, the exploitation should not reach a level where it goes beyond nature's ability to recover.

The motto "There is no Planet B" that has been strongly claimed, demands an urgency to find solutions to hamper the fast pace of destruction of the Planet. The solutions originated recently in IL, even though some conventions and treaties were approved at the beginning of the 20th century. The 1972 Stockholm Declaration was the real turning point for the protection of the environment in general, for it created guidelines to be followed by States. From 1972 on, the IEL has developed at several levels, nevertheless, a few factors still need to be improved, created, and considered.

Companies' role in the depletion of the environment has recently had a turning point. Royal Dutch Shell was considered liable for damaging the climate in a historic court rule in Netherlands[3]. According to the decision, Shell must reduce its emissions of CO2, by reducing it to 45% by 2030. This decision demonstrates that more than ever companies must act sustainability and respect values other than merely focusing on the business. Earlier in 2021 Shell was also considered liable for the oil leaks that occurred in the Niger Delta. Those oil leaks happened from 2004 to 2007 and affected the environment and the people's survival[4]. Both these decisions demonstrate that companies and States are facing the consequences of careless actions on the environment throughout the time. However, the urgency is real, and more must be done. For that reason, this study arose and an attempt of providing answers will begin.

[2] Oxford Reference- Environmental Degradation. [Em linha] [Consult.20th July 2021]. Available at: https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095753548. The definition herein is one of the possible definitions of environmental damage. As this study will show, there is no single and clear definition of environmental damage.

[3] BBC- Shell: Netherlands court orders oil giant to cut emissions. [Em linha]. [Consult. 2nd June 2021]. Available at: https://www.bbc.com/news/world-europe-57257982

[4] De Rechtspraak: Shell Nigeria liable for oil spills in Nigeria. [Em linha]. [Consult.11th June 2021]. Available at: https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Gerechtshoven/Gerechtshof-Den-Haag/Nieuws/Paginas/Shell-Nigeria-liable-for-oil-spills-in-Nigeria.aspx. Nova BHRE: O caso Shell Nigéria. A. Duarte, e R. Oliveira [Em linha]. [Consult.11th June 2021]. Available at: https://novabhre.novalaw.unl.pt/shell-nigeria/

2. Environment and Law in a nutshell: the evolution of International Environmental Law

Biodiversity is the scientific term for the variety of life on Earth, it refers to figures but also ecosystems. Healthy ecosystems can clean the water, purify the air, maintain our soil, regulate the climate, provide food, raw materials, resources for medicine and other purposes.[5] The earth has its rhythm, it provides itself and, from it, humanity collects the resources to have a life with quality. Notwithstanding, humankind has exploited nature, searching for more resources than those available, disregarding natural harmony.

2.1. Current Environmental Challenges

The outcomes of the giant footprint of humanity on the environment are real, as NASA[6] states, due to the expected increase of the global temperature. For instance, most likely in 2050 the Arctic Ocean will be essentially ice-free. According to the same study, the level of the ocean will continue to rise, reaching 1 to 1.3 meters by 2100. The droughts will intensify, the rains will reduce significantly and there will be a decline of the living species of animals and plants. This is a death sentence for Planet Earth, and it needs to be taken seriously. Actions must be taken for a cleaner and greener world. The steps for reversing the deterioration process shall be accompanied by the most important and relevant actors on the matter, the States, the IOs, and the private sector. The predictions that the scientists assert regarding the future of the Earth are based partly on the actions taken by humankind during the last centuries. Some examples of these destructive activities are the growing pollution created by factories, cars, ships, airplanes, the continuous logging of forests, the abuse of resources, amongst many other damages.

For a better understanding of the present chapter, a short definition of concepts such as environmental degradation and climate change shall be given. Environmental degradation or damage "is the deterioration of the environment through depletion of natural resources"[7]. As briefly mentioned in the Introduction, the protection of the environment relates to the prevention of future damages. One of the most alarming consequences of environmental depletion is "climate change" which is a "long-term

[5] European Commission, Environment. – Why do We Need to Protect the Environment? [Em linha] [Consult. 9 November 2020] Available at: https://ec.europa.eu/environment/nature/biodiversity/intro/index_en.htm

[6] NASA: The Effects of Climate Change. [Em linha] [Consult. 10th November 2020]. Available at: https://climate.nasa.gov/effects/

[7] TYAGI, Swati, GARG, Neelan, PAUDEL, Rajan - Environmental Degradation: Causes and Consequences, p.1491

change in the average weather patterns that have come to define Earth's local, regional and global climates."[8]. According to NASA the changes that have been recorded are mainly due to humans' destructive behaviors, especially related to fossil fuel burning. These behaviors increase the greenhouse gas emissions, which trap the heat into the atmosphere creating a greenhouse effect, raising Earth's average surface temperature. These greenhouse gas such as carbon dioxide, methane, nitrous oxide, water vapor and others are produced by humans' activities. They also can originate out of natural effects, for instance, volcano eruptions as in the case of carbon dioxide.[9] As mentioned before, the logical consequence of the increase of the Earth's temperature is the melting of the ice blocks, leading to the rise of the sea level, causing disruptions in the natural balance, affecting plants and animals, and other countless effects.[10]

Another effect of the depletion of the environment is desertification. It consists of land degradation in arid, semi-arid and dry sub-humid areas, known as drylands. According to the Intergovernmental Panel on Climate Change (IPCC)[11], the range of desertification has increased in some of the drylands, leading to the point where those currently cover about 46.2% of the global land area and where 3 thousand million people live. The most affected areas on the planet are South and East Asia, North Africa and all the region that is around the Sahara Desert, including the Middle East. One of the main consequences of desertification is the impact on agriculture because the soils are no longer fertile. It results in less income for those who depend on it and creates a scarcity of resources and a loss of biodiversity. In 2007 the IPCC[12] stated that the African continent will be the most affected by climate change, in special in the agriculture sector, considering that drylands will increase and cover a big part of the continent's territory. The droughts causing the desertification will bring about food insecurity, since the lands for growing food will be scarce, generating starvation and leading to displacements of

[8]NASA: Overview: Weather, Global Warming and Climate Change. [Em linha] [Consult. 10th November 2020]. Available at: https://climate.nasa.gov/resources/global-warming-vs-climate-change/

[9]NASA: The Causes of Climate Change. [Em linha]. [Consult. 10th November 2020]. Available at: https://climate.nasa.gov/causes/

[10]WWF: The Effects of Climate Change. [Em linha] [Consult. 10th November 2020]. Available at: The WWF Organization highlights the effects of Climate Change: https://www.wwf.org.uk/learn/effects-of/climate-change

[11] IPCC: Special Report on Climate Change and Land. [Em linha] [Consult. 12th November 2020]. Available at: https://www.ipcc.ch/srccl/

[12] FAO Regional Officer for Africa: Climate Change in Africa: The threat to agriculture. [Em linha]. [Consult. 12th November 2020]. Available at: https://www.uncclearn.org/wp-content/uploads/library/fao34.pdf

population. The ability to have food security varies on how dependent the population is on agriculture. In some regions in Africa, the dependence on fertile lands is almost absolute. According to the Food and Agriculture Organization of the UN, drought is among the most devastating of natural hazards. In Africa, this situation has been worsening.[13] In 2019 Southern Africa was suffering the worst drought in decades, as mentioned in the NASA Earth Observatory: "Livestock farmers in southern Africa have suffered losses due to starvation and to early culling of herds forced by shortages of water and feed.".[14]

Among many other effects to be tackled, climatic migration demonstrates a direct correlation between the environment and the human right to living conditions and to have a home. Those migrants are moving from a certain State which is their original State to another or moving from parts of their State to others due to environmental motives. Such migrations occur due to the lack of living conditions in the original State or part of the State, either because there are no resources left, or because all the land is unhabitable, among many other possible unliving situations. Most of the time the environmental situations that generate the migrations originate in natural events. These destructive natural events such as earthquakes, tsunamis, floods, hurricanes, have existed since the beginning of humankind, nevertheless, they have been happening more frequently with the deterioration of the environmental conditions, mainly caused or accelerated, by human action. According to the International Organization for Migration, it is estimated that by 2050 there will be 200 million people that will have to leave their homes due to environmental disasters or because of the degradation process of the environment[15]. Although climate disasters may be very strong, it is important to understand that the way they can impact migration or not, will differ from country to country. The reason for this has to do with the country's geophysical aspects and the responsiveness of its local structures. Even though the natural disaster accelerated by human actions may lead to climate migration, other human actions will have a significant impact on it. The overexploitation of the soils, the desertification, the overpopulation, the scarcity of

[13]FAO: Drought in the Horn of Africa. [Em linha] [Consult. 12th November 2020]. Available at: http://www.fao.org/emergencies/crisis/drought-hoa/en/

[14]NASA: Drought Threatens Millions in Southern Africa. [Em linha] [Consult. 12th November 2020]. Available at: https://earthobservatory.nasa.gov/images/146015/drought-threatens-millions-in-southern-africa

[15]LACZKO, Frank, AGHAZARM, Christine- IOM, Migration, Environment and Climate Change, Assessing the Evidence, p.5

environmental resources will slowly intensify unbearable living conditions. Nowadays several people are in danger of having to move due to climate change. In some of these cases are the people who live near the Nile River, for there is a high probability of flooding. There is also the case of the Maldives archipelagos population that will rapidly be affected by the sea-level rise, and they may witness their land being submerged by water.

The interconnection between overpopulation, scarcity of resources and lack of habitable places is also a problem connecting environment and social issues. Considering that the population is growing, there is a need for more households to be constructed for habitable areas to exist. The construction of more habitable areas may lead to the destruction of natural areas and may create poor urban planning. The overpopulated cities will generate more gas emissions, as it has been shown that they contribute to 30 to 40% of emissions[16]. The other effect that is interconnected with overpopulation and the habitable areas is the exhaustion of natural resources. Every year the consumption of resources is being reached earlier than the capability of the planet earth to regenerate those resources. The exhaustion of resources may lead to conflicts due to its unavailability[17]. According to several studies, when resources become relatively scarce, they often grow to be more valuable, which may lead to powerful groups of society appropriating them, leading to overpricing.[18]In the 1990s in Pakistan rapid population growth led to the scarcity of cropland and water. The scarcity helped concentrate valuable land in the hand of the military elite of Pakistan, therefore a gap was created between the elite that could enjoy the lands and the rest of the population. The rural people and refugees from Afghanistan were moving to the cities. The cities were overpopulated, which led to shortages of water and electricity and conflicts and tensions between the communities living there.[19]

Considering the referred consequences, it is important to mention that environmental degradation is identified in the list of the High-Level Threats, Challenges

[16]Apud Baird, in Doris Baus, "Overpopulation and the Impact on the Environment", p.27

[17]Acciona: Causes and Consequences of Overpopulation. [Em linha] [Consult. 20th April 2021]. Available at: https://www.activesustainability.com/sustainable-development/causes-consequences-overpopulation/

[18]PRB: Environmental Scarcity and the Outbreak of Conflict. [Em linha]. [Consult. 20th April 2021]. Available at: https://www.prb.org/environmentalscarcityandtheoutbreakofconflict/

[19]PRB: Environmental Scarcity and the Outbreak of Conflict. [Em linha]. [Consult. 20th April 2021]. Available at: https://www.prb.org/environmentalscarcityandtheoutbreakofconflict/

and Change of UN[20]. According to it "53. Environmental degradation has enhanced the destructive potential of natural disasters and in some cases hastened their occurrence. The dramatic increase in major disasters witnessed in the last 50 years provides worrying evidence of this trend. More than 2 billion people were affected by such disasters. 54. Rarely are environmental concerns factored into security, development, or humanitarian strategies. Nor environmental protection efforts are coherent at a global level. Most attempts to create governance structures to tackle the problems of global environmental degradation have not effectively address climate change, deforestation, and desertification. Regional and global multilateral treaties are undermined by inadequate implementation and enforcement by the Member-States". Indeed, as mentioned a direct reaction may not occur between environmental degradation and natural disasters, but it has accelerated its occurrence. Besides recognizing the high-level threat of environmental degradation and the need for its prevention, the list of High-Level Threats, Challenges and Change of UN alludes to the failures of the IL governing the environment. One considers that the failure of governance on the IEL relates to the lack of practical implementation of those legal texts. In the next chapters, further ideas about this lack of consistency will be discussed.

Recently, in 2019 the world witnessed the fires in Amazonia and 2020 the ones in Australia. The era of climate emergency is surrounding humanity, and it is time to prevent further damage. For that to happen, day-by-day steps need to be taken by every person.

2.2. Protecting the Environment

In general, society has a role in protecting the environment and must allow nature to heal in what is still possible. As already mentioned, this study aims to awaken the hidden global spirit for environmental protection, through the analysis of the approaches that may lead to environmental defense. Currently, the natural resources at risk are everywhere, surpassing the State's borders, therefore society needs to continue to work together because the crisis is universal, it affects all continents, all States. IOs such as the UN, and Regional as the EU, the African Union, or the Organization of American States have already begun to gather a global call. Recently the Secretary-General of the UN, António Guterres, stated that humanity is currently living in a climate emergency and that

[20]United Nations: Note by Secretary-General, Fifty-Ninth- Session, Follow-up to the outcome of the Millenium Summit. [Em linha] [Consult. 21st April 2021]. Available at: https://www.un.org/en/ga/search/view_doc.asp?symbol=A/59/565

decision-makers must make commitments to enhance the transformation of the environment[21].

Sovereignty is at the core of international relations and thus IL. Yet it is of paramount importance that all States understand that their borders do not stop the effects of global threats. The world is facing a climate emergency, and instead of building more walls, society as a whole should build bridges to come together and to find peaceful, attentive, and sustainable environmental solutions. Although sovereignty is not in itself a problem, it needs nevertheless to be considered in the context of the world's ecosystem physical phenomena that knows no borders.

The quest for the global solution for environmental protection must acknowledge the distinct situations and means that developing countries have. There is a great debate around the North-South countries and their roles in environmental depletion. The South States have considered as hypocritical that the North States require environmental protection from the southern States when the first ones were the responsible for the actual "ecological footprint".[22] Other questions arise out of this different view of the ecological question, and for that reason, the IEL has faced some trouble in implementation[23]. The attempt to bridge the disagreements between the North-South States started with the principle of common but differentiated responsibilities. More must be constructed to allow for a more effective IEL, creating a true collaboration and cooperation, where the States do not feel as being hampered when building a sustainable future for humanity.

2.3. International Law on the Environment

A brief approach to the evolution of IEL will be tackled in this section. The history and the aging of the world have not been kind to the environment. There has been a relentless deterioration of natural resources and until the beginning of the 20th century, there was a juridic void towards the conservation of the environment. Fortunately, the new century brought revolutionary ideas; the juridical void was starting to be filled. The

[21]UN News: UN climate report a 'red alert' for the planet: Guterres. [Em linha] [Consult. 3rd March 2021]. Available at: https://news.un.org/en/story/2021/02/1085812

[22]Atapattu, Sumudu, Gonzalez, Carmen G.- The North–South Divide in International Environmental Law: Framing the Issues. In ALAM, Shawkat et al. - International Environmental Law and the Global South. p.10

[23]Atapattu, Sumudu, Gonzalez, Carmen G.- The North–South Divide in International Environmental Law: Framing the Issues. In ALAM, Shawkat et al. - International Environmental Law and the Global South. p.2

first laws which emerged can be considered as a soft recognition of the need for legal mechanisms to allow coexistence with nature in a peaceful way.

Until the 1930s only the *ad hoc* courts were dealing with ecological cases. At that time, an environmental case arose in the arbitral courts. This was the first case to set the precedent for liability in a transboundary pollution situation. The *Trail Smelter*[24]case opposed the USA and Canada, for an air pollution case, seeing that elevated levels of air pollution reached the USA, due to the emissions of pollutant gases from a factory in Canada. For the first time, it was recognized, in an international dispute, that no State has the right to use its territory in a way that causes harm to other States, including environmentally. The arbitral court asserted that there is a general duty of the States to prevent and protect other States from environmental damage, caused by that same State, or by individuals in that State (i.e. companies).

In the same decade of the *Trail Smelter* case, several international legal instruments started to emerge such as the London Convention Relative to the Preservation of Fauna and Flora in their Natural State. At that moment, the adoption of treaties regarding environmental protection was sporadic. Environmental consciousness was growing stronger and international parties were eager to regulate the protection of the natural resources, nevertheless, they were not confident yet on how to do it. The IL as a whole had a major development and robustness with the creation of the UN in 1945.

At the time of the drafting of the UNC, the protection or conservation of the environment was not mentioned, because it still was not judged as a vital matter. However, as Sands et al.[25] refer to, Article 1(3) of the CUN to "achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character", allowed the UN to further develop the work on environmental protection. In 1947 a resolution from the Economic and Social Council (ECOSOC) lead to the adoption of the 1949 UN Conference on the Conservation and Utilisation of Resources (UNCCUR). UNCCUR arose out of the recognition that there was a need to create a balanced approach for the conservation of natural resources. Among many relevant matters of the UNCCUR, it is written that there is a need for the "continuous

[24]A Canadian company was the owner of the factory Trail Smelter, and this factory has emitted sulfur dioxide. That emission caused damages in the state of Washington, United States, and those damages lasted between 1925 and 1937. The case emerged due to air pollution, which was created in Canada, by this factory and reached the closest border.

[25]SANDS, Philippe [et al.]- Principles of International Law, p.27

development and widespread application of the techniques of resource conservation and utilization". This was the beginning of the intense work developed by the UN to develop IEL and to codify it. In the first years after the UNCCUR, the UN and its agencies were mainly focused on the protection of fauna and flora. Nonetheless, the issue of dangerous nuclear activities and atomic energy emerged. In 1955 the General Assembly of the UN adopted resolutions on the effects of atomic radiation. In 1962 the General Assembly of the UN adopted a resolution affirming the relationship between economic development and the environment. The work of the UN was essential for developing the environmental protection and conservation, for the codification and implementation of IEL and to expand its rule of law. Furthermore, it allowed the autonomy of the environment as a diverse field of law that needed specific measures and processes to enable the conservation of natural resources and prevent harm to them.

2.3.1 Evolution

Even though the international community was starting to worry about the environment and the scarcity of natural resources, the population was still not conscient of the reality. Such reality was that the natural resources and biodiversity were being overexploited, thus creating environmental damage. For that reason, the birth rate continued to grow. As the population and the need to explore beyond what is feasible[26] grows, the available resources diminish. The hole in the layer of Ozone was not reducing nor were the greenhouse gas emissions. A few years later, ecological catastrophes began. One of the first ones was the sink of an oil vessel that led to a spill on the coast of France, Belgium, and the United Kingdom, in 1967.

In the 1970s the Club of Rome, an NGO that served as an international think tank for global issues, released a publication titled "The Limits to Growth".[27] In this work, they declared that society would face several changes on account of pollution and depletion of the environment, which would be a critical part of the challenge[28]. Adding to it, in 1971 Greenpeace was founded, an NGO that through pacific means fights for a greener world and a peaceful future.

[26]TYAGI, GARG, PAUDEL - Environmental Degradation… p.1492

[27]Club of Rome: About Us. [Em linha]. [Consult. 5th December 2020]. Available at: https://www.clubofrome.org/about-us/

[28]GOMES, Carla Amado – Direito Internacional do Ambiente: Uma Abordagem Temática, p.14

The truth is that the protection of the environment had a fast internationalization, due to the actors involved in the creation of the laws and principles around it. In 1972 a "big step" for the environment was taken, with the Conference of the UN on the Human Environment that took place in Stockholm. The Conference highlighted the environment and the need for its safety. The Stockholm Declaration, without binding effect, has 26 principles, and the main emphasis is on the recognition of the need to protect the environment, by applying sustainable development, by educating people on how to use the resources, by international cooperation, and by announcing for the first time in a global scale that the natural world cannot be ignored any longer.

The most notable principle the Principle 21, which reads as follows:

"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 jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."[29]

This principle reaffirms what the arbitral court stated in the *Trail Smelter*[30] case and underlines the necessary discipline States must have when performing activities that may have environmental adverse effects. As Birnie et al. mention it recognizes the sovereignty of the States and their right to develop but focuses on the balance that must exist on controlling environmental harm.[31]The Conference together with the Declaration brought the Action Plan, through which the UNEP was created.

Back then, the expectation was high about the recent steps that were being taken for the protection and prevention of depletion of the environment, especially regarding the number of instruments that were being approved and ratified by so many countries. Kiss and Shelton affirm that the Stockholm Conference had "immense value in drawing the attention to the problem of environmental deterioration and methods to prevent or remedy it".[32]To add to it, in 1982 the World Charter for Nature was adopted, and it

[29]Declaration of the United Nations Conference on the Human Environment.

[30]According to MAZZUOLI this principle 21 enshrines the customary law principle (*sic utere tuo ut alienum non laedas*) according to which the property must be used in a way that it will not harm others, and its violation consequently leads to the liability of the responsible State- MAZZUOLI, Valério de Oliveira- A Proteção Internacional dos Direitos Humanos e o Direito Internacional do Meio Ambiente, p. 169;

[31]BIRNIE, Patricia et al.- International Environmental Law, p.49

[32]KISS, Alexander, SHELTON, Dinah- Guide to International Environmental Law. p.37

developed a "code of conduct" where five principles set out the general rules- (i) the respect for nature and its natural process; (ii) life on earth either wild or domesticated must be sufficient for the survival of the Earth; (iii) the conservation of all areas and particular attention shall be given to areas of uniqueness; (iv) the resources that are utilized by humans shall be managed in a sustainable way and (v) the protection of nature in warfare or other hostile activities[33]. As stated by Atapattu[34], this instrument is unique because it recognizes the rights of nature, distinctly from human rights, following the *ecocentric* thesis, which will be outlined in the next chapter.

When twenty years passed since the Stockholm Conference was held, it was necessary to review the rules and to check the results. During that interval, the hole in the ozone layer had enlarged and species were continuously becoming extinct. In the '70s the Vietnam War was taking place and with it, the world observed the USA military using a biological weapon called Agent Orange. This biological weapon killed several people and created countless consequences for their health since it destroyed entire forests. In 1986 the Chernobyl nuclear accident occurred and the danger of the emission of tons of deadly radiation to the atmosphere was witnessed. This accident, which led to transboundary pollution and affected the entire city population, happened due to human error.

It was 1992, in Rio de Janeiro, when a UN Conference took place, with the ambition to build a renewed plan for the defense of the environment. A few authors[35] perceive this Conference and its Declaration, as a turning point for the environment, considering that the concept was for States to cooperate amongst themselves, honoring their responsibilities and ensuring that the future generations would live in a place where the quality of life is not endangered. A world strategy for the preservation of species is defined during the Conference of Rio. Sustainable development was the star of this

[33]The reference to hostile activities is a consequence of the wars that occurred during the 20th century, which had huge consequences and led to uncountable damages to the environment. International Humanitarian Law, through the Red Cross, regulated first the rules about the protection of the wounded, sick, and shipwrecked in armed conflicts, creating rules about the respect for human dignity and humane treatment during armed conflicts. Only in 1977 with the emergence of the Additional Protocol (P-I) the environment is deemed to be protected during hostilities. According to this Protocol, no damage that is widespread, longer, and severe shall occur in nature. Although the World Charter for Nature appeared later than the P-I, the truth is that the protection of the environment during hostilities was and still is more theoretical than a practical figure.

[34] ATAPATTU, Sumudu- The Right to a Healthy Life or the Right to Die Polluted? The Emergence of a Human Right to a Healthy Environment Under International Law, p.75

[35]SAMPAIO, Jorge Silva- Do Direito Internacional do Ambiente à Responsabilidade Ambiental e seus meios de efetivação no âmbito do Direito Internacional, p.4

Conference, where the international community swore to protect the generations to come.[36]As Bachelet[37] mentions, this principle implies that the development that is taken by the contemporary society, and the resources it uses, cannot and must not jeopardize the survival of the next generation, impeding them to develop. Yet, the principle of sustainable development created a barrier between the North and the South countries, because at the time (and still today) many countries were using natural resources to develop, to become wealthier nations, and to provide for their citizens.[38] While the developed countries were destructively using the natural resources. For that reason, the Declaration set different guidelines for the developed and the developing countries. Principles 6 and 7 firstly recognized the special situation of the developing countries and secondly established a differentiated method of contributions- the Principle of Common but Differentiated Responsibilities. The developed countries would contribute more, for they have created more pollution and destruction of the environment. This Principle arose out of the necessity to "bridge the North-South divide".[39] The 1992 Declaration also set forth the precautionary principle, which is extremely important for the prevention of damages to the environment. This principle claims that every time there is a serious risk or irreversible damage, actions shall be taken to prevent it, even if the scientific requirements are not fulfilled[40].

Kiss and Shelton consider that the Rio Conference led to acceleration and attention to environmental protection, international actors and stakeholders became even more alert for reality.[41] The States needed to take sustainable actions and decisions to thwart the unbearable living conditions on earth. Humanity was and is in hazard and the principles that were always the main commanders of the IL needed to be reconfigured and the sovereignty over the natural resources needed to be reconsidered. In the Rio Conference, several documents were signed, from which three can be highlighted - the UN Framework

[36]Rio Declaration "Principle 4 - In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."

[37]BACHELET, Michel- Ingerência Ecológica, p.185

[38]GOMES - Direito Internacional do Ambiente…; p.23

[39]ISLAM, M. Rafiqul- History of the North–South Divide in International Law: Colonial Discourses, Sovereignty, and Self-Determination. In ALAM, Shawkat et al. - International Environmental Law and the Global South, p.48

[40]Rio Declaration- Principle 15 "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

[41]KISS, Alexander, SHELTON, Dinah- Guide to International…, p.42

Convention on Climate Change, the UN Convention on Biological Diversity, and the Convention to Combat Desertification.

2.3.2 Sources and Principles

IEL is presently an essential field of law and the legislation and other sources that are part of it have proliferated. The sources of IEL, as an IL branch, are treaties, customary international law, and general principles of law. Judicial decisions of international courts, as well as legal writings, are also important in the identification, interpretation, and application of IEL.

Regarding IEL sources, multilateral and bilateral international treaties have spread and currently cover several areas of the protection of the environment, such as biodiversity, ozone layer, greenhouse gas emissions, and the seas. A treaty as defined in the 1969 Vienna Convention on the Law of the Treaties is "an international agreement concluded between states in written form and governed by IL, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".[42] When assessing the authority of a treaty one should focus on the subject it addresses, the number of States participating in the negotiation and becoming parties of it and the commitment it established from the parties.[43] Some examples of IEL treaties that are considered as having "law-making" characteristics are the 2015 Paris Agreement, the 1946 International Whaling Convention, the 1987 Montreal Protocol or the UNCLOS. As with any other treaty, the environmental treaties also obey the Vienna Convention, they follow the rules of treaty formation and the necessary adoption by the State parties. Sands implies that in general, the IEL treaties have required a low number of ratifications to enter into force than the treaties in IL commonly do.[44] That is not the case of all treaties, for example, the UNCLOS which needed 60 signatures to enter into force, took 12 years to be concluded.

Currently, IEL faces several challenges, mostly regarding gaps in its rule of law. The abundance of documents, either binding or non-binding, has created an overwhelming quantity of rules which produces gaps of governance, verified in the lack of attribution of responsibilities. Many efforts have been made in the UN, mainly by the ILC and the UNEP to fill this gap in responsibilities for environmental damage. UNEP

[42] 1969 Vienna Convention on the Law of the Treaties; Article 2 (1) (a)
[43] SANDS,[et al.]- Principles…p.97
[44] SANDS [et al.]- Principles… p.102

has been working through the Montevideo Programme to develop and implement the environmental rule of law. The Fifth Montevideo Programme for the Development and Periodic Review of Environmental Law (Montevideo Programme V)[45] is designed to implement and identify priorities in the environmental rule of law between 2020 and 2030. To achieve the goals set out for the Programme, UNEP will work closely with national governments, UN agencies, civil-society organizations, the private sector, IOs, and academics. The final objectives are to strengthen the effective implementation of environmental rules at the national level, support national governments, in the development and implementation of environmental rule of law, support the development of adequate and effective environmental legislation and legal frameworks and promote the role of environmental law in the context of effective environmental governance.[46]

The assessment of customary law as a source of IEL demonstrates that it cannot be very expressive, since the time for the practice to be perceived as obligatory, has not been enough yet, due to the short period of time this field of law has had. The ICJ has issued a few considerations about the creation of customary law about the criteria of State practice. It merely requires a general tendency in such practice - "It is preferred that the States that participate are widely representative and that the legal rule be consistently followed."[47] The ILC Draft Conclusions on Identification of Customary Law with commentaries[48] supported that the State practice to be ascertained needs to be general, meaning "it must be widespread and representative, as well as consistent" (Conclusion 8). As written in the commentaries the demonstration of widespread and representative practice can differ from circumstances and it is clear, that universal participation, is not required for the conclusion of the existence of State practice. Therefore, the participating States are enough to prove the State's practice, but it must be considered the extent to which those States are particularly involved in the activity. As regards consistency it is

[45]UNEP: Delivering for People and the Planet: Fifth Montevideo Programme for the Development and Periodic Review of Environmental Law. [Em linha] [Consult. 15th April 2021]. Available at: https://wedocs.unep.org/bitstream/handle/20.500.11822/30819/Final_MonteV_Assess.pdf?sequence=1&isAllowed=y

[46]UNEP: Environmental Governance Update - October 2020. [Em linha] [Consult. 10th August 2021]. Available at: https://spark.adobe.com/page/YMcTxosemfSVJ/

[47]Course on Environmental Law, University of London: Unit 1 Background, development, and sources. [Em linha] [Consult. 20th October 2020]. Available in: https://www.soas.ac.uk/cedep-demos/000_P514_IEL_K3736-Demo/unit1/page_21.htm

[48]UN: ILC Draft Conclusions on identification of customary international law, with commentaries. [Em linha] [Consult. 15th April 2021]. Available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf

important "to consider instances of conduct that are in fact comparable, that is, where the same or similar issues have arisen so that such instances could indeed constitute reliable guides."[49]

Concerning the criteria of *opinio iuris*, it is considered difficult to establish that it is present in the State practice, since it requires evidence of the motives behind the State activity. However, in the Advisory Opinion on the Legality of the Use of Nuclear Weapons the ICJ demonstrated that it does not place great weight on the need to identify *opinio iuris* before confirming the existence of customary law.[50] In that same Advisory Opinion, the ICJ referred that Principle 21 of the Stockholm Declaration is incorporated in texts of several States, which demonstrates its confirmation as customary law. On the ILC Conclusions, it is stated in Conclusion 10 the forms that the *opinio iuris* may be interpreted from. The list is not exhaustive, and it includes examples such as public statements made on behalf of States; official publications; diplomatic correspondence; treaty provisions, etc.

In what concerns the IEL Principles, those are expressed in various sources and are of extreme importance, configuring the guidelines that States should follow to have environmentally conscious behaviors. Besides the already mentioned Principle 21 of the Stockholm Declaration, there are other principles to examine. The "Polluter-Pays Principle", which was formally recognized in the Rio Declaration[51] asserts that the State or the company that pollutes or causes any other environmental harm will have to pay compensation for the pollution, internalizing the costs. This principle is also economic and in economic analysis, if the companies that may be responsible for damage would work on a perfect market, they would rather invest in avoiding the damage, than spending amounts on the reparations.[52] It has, therefore, a preventive feature, as it leads the subjects to be more careful in their behaviors and decisions since the costs for causing damage will be higher than the costs to act greener. This principle enshrines a mechanism for the victims of pollution or the defenders of the environment (i.e., NGOs), to hold the polluter responsible for the environmental damage. The pollution that will trigger the liability of the polluter, does not need to have occurred yet, it can be based on a probability- in the

[49] UN: ILC Draft Conclusions on identification of customary international law, with commentaries. [Em linha] [Consult. 15th April 2021]. Available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf

[50] SANDS [et al.] Principles… p.114

[51] Rio Declaration, Principle 16, "National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment."

[52] KISS, Alexander, SHELTON, Dinah- Guide to International… p.96

end, the potential pollution will have to be paid by the potential polluter[53]. As regards the legal nature of this principle, it is cited, in the Treaty of Functioning of the EU in article 191 (2), as a principle of European law, and in the view of some writers, it is increasingly being accepted as customary law.[54] In the Protocol on Civil Liability and Compensation for Damage caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters[55], there is a preamble that asserts the recognition of the "polluter-pays" principle as a general principle of IEL.

The Precautionary Principle as mentioned earlier pretends to mitigate and avoid threats to the environment, allowing preventive actions even if no scientific evidence is reunited. For this principle to be relevant, certain conditions must be met - in the first place the situation shall have a percentage of the uncertainty of damage, the preventive principle will apply. [56]Additionally, there must exist a serious and irreversible threat to the environment. Despite the great impact on the protection of biodiversity, it is still a principle that generates a lot of debate, due to the action occurring in "half-blindness". For that reason, the International Union for the Conservation of Nature (IUCN) and the Commission of the EU (EU Commission) have issued Guidelines on it. The EU Commission states on the Guidelines that to prevent environmental damage, actions should be taken from a risk assessment perspective. One of the specific guidelines given by the IUCN is to allocate responsibilities to those who propose or derive benefits from an activity that raises threats of serious or irreversible harm. Those should provide evidence that those activities will not cause any harm, having the burden of proof. Relative to the nature of the Precautionary Principle, it is yet undefined, but it is as well, in the path to be accepted as customary law.

[53]European Commission: Workshop on EU Legislation, the Polluter Pays Principle. [Em linha] [Consult. 20th October 2020]. Available at: https://ec.europa.eu/environment/legal/law/pdf/principles/2%20Polluter%20Pays%20Principle_revised.pdf

[54]Course on Environmental Law, University of London: Unit 1 Background, development and sources. [Em linha] [Consult. 20th October 2020]. Available at: https://www.soas.ac.uk/cedep-demos/000_P514_IEL_K3736-Demo/unit1/page_21.htm

[55] Protocol on Civil Liability and Compensation for Damage caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters to the 1992 Convention on the Protection and use of Transboundary Watercourses and International Lakes and to the 1992 Convention on the Transboundary Effects of Industrial Accidents.

[56]Guidelines for Applying the Precautionary Principle to Biodiversity Conservation and Natural Resource Management- Approved by the 67th meeting of the IUCN Council 14-16 May 2007, p.2. Available at: https://www.iucn.org/sites/dev/files/import/downloads/ln250507_ppguidelines.pdf

The Principle of Prevention was firstly recognized in the Stockholm Conference in Principle 7[57] when it was decided that States should take preventive measures to not pollute the seas, which is the basic idea applied to the environment in general. One figure that has been introduced, which helps to create robustness around this principle is the EIA, as referred to in the Rio Declaration[58]. This impact assessment should be performed every time a new project begins, and evidence needs to be collected of whether such a project will harm the environment.

For the protection of the planet, inherently all the States ought to get together and work, either by giving information or by giving expertise to each other, to guarantee that the safeguard is absolute, and this is the base of the International Cooperation Principle. This exchange of information is of extreme importance and correlates with the duty to inform every time a State considers that an action taken will likely affect another State[59]. Both the prevention and the cooperation principles correlate with each other, for the principle of notifying and the information among States can and will lead to suitable prevention of damage. These two principles reflect the already briefly mentioned necessity for a global response to environmental emergencies which pose a threat to all the nations. The ICJ has already recognized cooperation and prevention as IEL Principles. Cooperation should be a priority of every State and other international actors in the environmental arena.

The last principle to be addressed is the Sustainable Development Principle. As already elucidated this principle aims to safeguard the ability of future generations to meet their needs. A debate around the nature of the principle of sustainable development as a principle of IEL is enduring. According to Amado Gomes, this "principle" lacks normativity, and the practice of its premises is not consistent.[60]In the same line, Viñuales refers that the principle of sustainable development is losing its trace and is currently inadequate for the protection of the environment, not only because it was constructed as

[57]"States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere withother legitimate uses of the sea".

[58]Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.

[59]SOTO, Max Valverde- General Principles of International Environmental Law, LSA Journal of Int'l & Comparative Law, p. 197-199

[60]GOMES - Direito Internacional do Ambiente… p.204

a principle to apply to a multiplicity of fields (economy, social), as it as well aims to create more diplomacy rather than effective measures.[61]

The jurisprudence as an auxiliary source on IEL has become more developed on the environmental matters but mostly related with the consequences of the pollution created by companies and the reactions of individuals towards it than disputes between States[62]. Nevertheless, it has allowed for the sedimentation of principles and to reinforce the importance of prevention on environmental matters. Cases like the already mentioned such as the *Trail Smelter* have allowed for further development of IEL in legal texts and customary law. The development and interpretation of IEL have been also possible due to the legal writings of scholars, by interpretations and drafts by the ILC in the matters of responsibility of States and private actors, by resolutions of the General Assembly of the UN, the conference declarations such as the 1972 and 1992 Declarations, and other non-binding acts of IOs.

2.2.3 Obligations (*Facere and Non-facere*)

The reference to the several legal multilateral and bilateral texts regarding IEL demonstrate that such documents have created obligations that States must comply with. The obligation related to the Principle 21 of the Stockholm Declaration (2 of the Rio Declaration) requires States to refrain from causing transboundary or environmental harm when developing their internal activities.

The environmental harm or damage can be differently envisioned by the various treaties that deal with it, hence, harm to the environment can be harmful to water or could be harmful to the wildlife. Yet, UNEP has already concluded that the environment will include fauna, flora, air, soil, water, ecosystems, and their interactions[63]. Pollution will exist when there is a detrimental alteration in the quality of the resources. Similarly, the definition of pollution will be differently understood depending on the context and on the literature. The damage and pollution, however, shall pose a certain risk or pass a threshold that therefore creates responsibilities. Such analysis will be conducted in chapter 4.

In the view of Birnie et al. two rules enjoy significant support internationally (i) States have a duty to prevent, reduce and control transboundary pollution and environmental harm and (ii) States have a duty to cooperate in mitigating transboundary

[61]VIÑUALES, J. E- The Rise and Fall of Sustainable Development. p.3
[62]Further information about the jurisprudence will be referred throughout the present dissertation.
[63]UNEP, Report of Working Group on Liability, 1996

environmental risks and emergencies, through a notification and, among other instruments, EIAs.[64] This connects with the prevention principle already succinctly described, which was firstly introduced in the *Trail Smelter Case*. The ICJ had the opportunity to strongly refer to the prevention principle in the *Corfu Channel Case*. This case opposes the United Kingdom and Albania, as a United Kingdom ship suffered an accident where almost a hundred people died, and this occurred due to mines that were in the Corfu Channel. Even though Albania did not place the mines there, the Channel was under Albania's jurisdiction, and it had the duty to inform the passing ships about the mines, hence, the ICJ recognized that Albania had a responsibility to prevent further damage and to inform about the possible damage.

The first duty referred by Birnie et al. is present in Stockholm (21) and Rio Declaration (2) and has been considered a principle of IEL by the ICJ. It is additionally expressed in the ILC 2001 Draft Articles on Prevention of Transboundary Harm from Hazardous Activities ("2001 ILC Articles"), article 3. This project of the ICL aimed to develop the principle 21/2 into a stronger judicial principle, thus, article 3 demands that States take all appropriate measures to prevent transboundary harm and, minimize the risk at any event. Such a rule is a reflex of the no-harm rule of IL versed in IEL. Complementarily article 4 of the 2001 ILC Articles requires cooperation in good faith between States, which is essential to allow effective policies to prevent significant harm to the environment. The element of good faith reflects the provision set out in the CUN, article 2 that requires States to fulfill their obligations in good faith. Articles 3 and 4 of the 2001 ILC Articles provide the basis for the prevention principle, explaining that when States act to prevent transboundary harm, they should act with due diligence, meaning that the State shall take the best and appropriate measures to prevent any harm, using suitable policies and if necessary developing technologies and innovative mechanisms. Due diligence should still be proportional to the degree of risk.

One obligation that relates to prevention and cooperation is the information duty, which configures the second duty identified previously. The Rio Declaration in Article 19 has highlighted it, by demanding the States to inform the other States in cases of emergency and to perform prior and timely notifications involving activities that might trigger transboundary harm. In the *Case Lac Lanoux*, an arbitral case, the information

[64]BIRNIE, Patricia et. al - International Environmental Law… p.137

principle was addressed. This case began because France intended to use the waters, of Lake Lanoux, a French lake, which waters flow in Spain. The French project would alter the course of the waters, and, as it would impact France and Spain, the two States entered in negotiations in 1917 aiming to reach a consensual decision regarding the project. However, no decision was reached, and the States agreed to resort to an arbitral court. The court stated that France had complied with its obligations of consulting Spain before taking any action, complying with the information duty. In the end, it was between the States to solve the matter, but according to the court, the consultation to Spain would not mean that the project would only be legitimate if Spain would consent to it. Currently, prior notification and consultation are applied in several situations, such as the case of nuclear installations near borders. The principles of cooperation, prevention, and information consequently apply to emergency cases, as provided in article 17 of the 2001 ILC Articles. Treaties such as the UNCLOS article 28 and the Rio Declaration article 18 confirm this duty to cooperate in case of environmental emergencies. Such cooperation follows a notification issued by the State where the situation is occurring, to other States, regarding an emergency with harmful effects.

Still, in line with the prevention principle, the EIA is a duty that derives from the prevention principle together with the information duties. It allows the States to consciously decide to conduct or not, an action that might have a negative impact on the environment. It permits States and businesses within States to investigate the risks and consequently integrate green measures to mitigate them, promoting sustainability. Article 17 of the Rio Declaration affirms the conditions for when the States should perform EIAs- whenever there is a likely significant impact on the environment and those actions were taken or are under a decision of a competent national authority. The ICJ has already qualified the duty of performing an EIA as an obligation based on an IL duty, in the *Pulp Mills on the River Uruguay case*[65]. In this case, Argentina instituted proceedings against Uruguay concerning breaches by Uruguay of obligations incumbent upon it, under the Statute of the River Uruguay, a treaty signed by the two States on 26 February 1975. Uruguay was charged by Argentina with having unilaterally, authorized the construction of two pulp mills on the River Uruguay without complying with the obligatory prior notification and consultation procedures under the Statute. Argentina claimed that those mills posed a threat to the river and its environment and were likely to impair the quality

[65]ICJ, Pulp Mills Case on the River Uruguay.

of the river's waters and to cause significant transboundary damage to Argentina. The court has emphasized the requirement for the previous notification to the potentially affected States, and somehow referring to the EIA, the court does not, however, define the procedures to conduct an EIA.

Among other duties, the States should comply with the precautionary approach, stipulated in the Rio Declaration Article 15. That article refers that States ought to apply the precautionary principle according to their capabilities. The Ozone Convention (1985) and the Montreal Protocol (1987) are an example of treaties that reflect the precautionary principle. At the time, States were required, to take measures regarding the emissions of chlorofluorocarbons (CFCs), considered nowadays as the cause for the depletion of the Ozone layer, even before a link between CFCs and the ozone layer depletion was proved. In general, as examined, the obligations that States must comply with are of *facere* such as the obligations of performing EIA and of *non-facere* as the obligation to prevent environmental transboundary damage.

One should clarify and claim that although in this study the obligations of States in the protection of the environment are studied, focusing on IL, the truth is that several times the damage originates from corporations, rather than directly from organs of the public administration. Hence, although these corporations have not been considered internationally as subjects of duties, the treaties that pose obligations on States to act green and perform EIAs, among other environmental obligations, will impact nationally the corporations and business. Currently, it is considered that most of the pollution comes from industrial and agricultural businesses. While internationally there are no clear-cut rules that companies must adopt regarding environmental behavior, in the EU several directives and regulations have already established emissions limits, among other rules to be directly followed by the private actors. Businesses should, thus, perform diligently, preserving the environment.

2.5. Current State of IEL

Even though the international instruments continued to grow, the deterioration of the environment did not stop, and the instruments were not effective enough[66]. More

[66] Such interpretation is carried out of the fact that even though the legislation exists and is creating obligations, the environment continues to be jeopardized. Atapattu and Gonzalez. refer based on a Report from the UN- "Despite the proliferation of laws and legal instruments to combat environmental degradation, the global economy continues to exceed ecosystem limits, thereby jeopardizing the health and well-being of present and future generations and threatening the integrity of the planet's biodiversity."- Atapattu,

attempts to improve IEL and its rule of law happened in 2015 when all the Member States of the UN adopted the 2030 Agenda for Sustainable Development. In that Agenda, there were set 17 goals, the SDGs (Sustainable Development Goals) which contain among others, goals to reduce poverty, create equality, reduce hunger, generate sustainable cities and communities, responsible consumption and production, climate action, life below water and life on land.[67] In that same year, the Paris Agreement[68] was signed, being the ultimate goal of this agreement to keep the raise of the medium global temperature of this century below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5 degrees Celsius. The Paris Agreement is the sequence of the Kyoto Protocol that entered into force in 2005. This Protocol, which emerged from the UN Framework Convention on Climate Change was the first text that aimed to create limits on the emission of greenhouse gas, demanding States to reduce it. The protocol had a monitoring and verification system, together with a compliance system to hold the Parties who would breach the Protocol, accountable[69].

The cooperation between States, IO's and other actors is improving. Though, if the damaging behavior continues, such as pollution and species overexploitation[70], the loss of biodiversity will increase, as from 1970 to 2016 it has fallen to 68%. The logical conclusion, as the Living Planet Report stresses out, is that there will be no Planet Earth left for humankind. The 2020 Report refers that the "current human enterprise demands 1,56 times more than the amount Earth can regenerate".[71] The 2019 Report from Greenpeace states that in 2019 nearly 1,500 national, regional, and local authorities have declared a climate emergency[72].

Nevertheless, there is also hope and projects, missions and developments focused on improving nature conservation. The current state of depletion is an absolute truth, but

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Sumudu, Gonzalez, Carmen G.- The North–South Divide in International Environmental Law: Framing the Issues. In ALAM, Shawkat et al. - International Environmental Law and the Global South.

[67]UN: The 17 Goals. [Em linha] [Consult. 20th December 2020]. Available at: https://sdgs.un.org/goals.

[68]United Nations Climate Change: The Paris Agreement. [Em linha] [Consult. 20th December 2020]. Available at: https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement

[69]United Nations Climate Change: What is the Kyoto Protocol? [Em linha] [Consult. 20th December 2020]. Available at: https://unfccc.int/kyoto_protocol

[70]WWF: Living Planet Report. [Em linha] [Consult 12th April 2021]. Available at: https://livingplanet.panda.org/pt-pt/

[71]WWF: Living Planet Report. [Em linha] [Consult 12th April 2021]. Available at: https://f.hubspotusercontent20.net/hubfs/4783129/LPR/PDFs/ENGLISH-FULL.pdf

[72]Greenpeace: Annual Report 2019. [Em linha] [Consult. 12th April 2021]. Available at: https://www.greenpeace.org/international/publication/43852/annual-report-2019/

if national governments, civil society, private sector, and IOs work collectively it might become part of a gloomy past. The effort to create mitigation measures, to achieve a restoration of some biodiversity and to maintain the current global temperature, should be done through cooperation between all relevant actors and stakeholders, and observing the principles of solidarity and good faith.

3. Legal Approaches to the Protection of the Environment

In the previous chapters the topics of the evolution of the protection of the environment in history, and the reasons to continue and to intensify it were discussed. In the present chapter, the legal protection of the environment will be analyzed, aiming to dissert its legal framework. To deepen the analysis of the legal protection the concepts of CCH, CHH, and Common Goods will be addressed. Following such evaluation, the human right to a good environment will be tackled.

3.1. The Environment as a legally protected interest

As endorsed previously the environment has been the subject of many instruments, which were drafted to protect it. The environment is considered as a legally protected interest, being protected nationally, regionally, internationally, and by different areas. The environment is considered as good of intrinsic value which shall be conserved and protected from the interferences of others. The environment started to be considered as a legally protected interest at an international level after the 1972 Declaration. However, when one tries to dissert about the environment as a legally protected interest, one finds herself at a crossroads, as the matter is not as simple as it might sound.

The doctrine divides itself between two approaches, one approach is the *ecocentric* one, based on the idea that the environment shall be protected as the subject of law, for its natural value. The other approach is the *anthropocentric* one, which endorses that the environment must be protected, preventing further damage, to allow the human species to have a life of quality and to live in a habitable world, for the contemporary and coming generations.

The *ecocentric* approach provides a more radical expression of the relationship between human beings and nature, one that recognizes among other matters, the legal subjectivity of natural entities. The non-humans (such as rivers, mountains, forests) are considered the subjects of the law, alongside humans, who must act as the caretakers of

the natural entities.[73]In Advisory Opinion Number 23 of the IACtHR, it is mentioned that Ecuador and Bolivia have already recognized inherent rights for nature[74]. The Advisory opinion specifically mentions that the *ecocentric* approach "values not only the utility of nature for human beings but also its importance to the living organisms on the planet, having a claim on themselves to exist and flourish".[75] In India legal personality has been attributed to rivers and in Colombia, the river Atrato has been declared subject of rights, ordered by the Constitutional Court.[76] According to the authors of the Advisory Opinion, the recognition of such rights is proving effects on indigenous communities that aim to protect their lands against exploitation[77], and proves, therefore, in one's considerations, that the more protection given to the natural resources as legal subjects, the less degradation there will be. The defense of such an approach is interconnected with the theory of Earth Jurisprudence which endorses that nature shall not be a commodity or a subject of property rights, but a legal subject with its rights. Berry was a strong defender of this theory and he believed that the world's governance should shift its orientation towards a fellowship with nature. In his book "The Great Work", Berry states that "The Great Work now, as we move into a new millennium, is to carry out the transition from a period of human devastation of the Earth to a period when humans would be present to the planet in a mutually beneficial manner".[78]

The Earth Jurisprudence and *ecocentric* approaches are supported by some legal documents, such as the most ratified convention so far, the Convention on Biological Diversity. It states in its preamble "the intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components."[79] The Universal Declaration of the Rights of the Mother Earth was signed at the World's People Conference on

[73]KOTZÉ, Louis Jacobus, FRENCH, Duncan- The Anthropocentric Ontology of International Environmental Law and the Sustainable Development Goals: Towards an Ecocentric Rule of Law in the Anthropocene, p. 16

[74]FERIA-TINTA, Monica, MILNES, Simon - International Environmental Law for the 21st Century: The Constitutionalization of the Right to a Health Environment in the Inter-American Court of Human Rights, Advisory Opinion No.23, 2018. p.57

[75] FERIA-TINTA, MILNES - International Environmental Law for the 21st Century (…) P.57

[76] FERIA-TINTA, MILNES - International Environmental Law for the 21st Century (…) P.57

[77] FERIA-TINTA, MILNES - International Environmental Law for the 21st Century (…) P.57

[78] Thomas Berry and the Great Workhttps://thomasberry.org/quotes/

[79]Convention on Biological Diversity. [Em linha] [Consult. 2nd December 2020]. Available at: https://www.cbd.int/doc/legal/cbd-en.pdf

Climate Change and the Rights of the Mother Earth is considered the main symbol of the *ecocentric* approach.

The *anthropocentric* approach asserts that humankind is in the center of the world. Anthropocentrism is therefore the belief that "value is human-centered and that all other beings are means to human ends". [80] The *anthropocentric* approach as Gillespie mentions has arrived million years ago when humanity had to fight against other species and the environment to survive. The Greek philosophers had thoughts on the superiority of humanity. For instance, Aristotle recognized that humanity was different from the rest of the species due to its rationality. Other philosophers such as Kant considered the centrality and importance of the human being as superior and as able to use nature for its own survival and pleasure.[81]Gillespie defends that the 1972 Stockholm Declaration reflects anthropocentrism in all the provisions.[82] This approach studied in the environmental implication aims to allow humanity to live securely, with health, and do not cease to exist due to the depletion of the Planet. It is therefore an approach that pretends to prevent the extinction of the human species and to ensure that future generations still can strive and develop in this world.

According to Gillespie, "anthropocentrism is the core of environmental policy. Historically, this has meant that the natural world will only be conserved on account of the instrumental values attributed to it by humans, rather than being protected because of its own intrinsic value."[83] The consequence for many of the authors who believe that IEL has been based on the *anthropocentric* approach is that the ecological disasters and the continuous crises were not prevented and ceased[84]. The authors Kotzé and French following the same considerations, refer that the international ecological instruments "merely reinforce the prevailing conviction that the natural resources need to be protected for the human development and survival"[85]. These authors defend a passage from Anthropocentrism to Ecocentrism in the lawmaking of IEL, for it will have better results and become more efficient than what is right now.

[80]KOPNINA, Helen et al- Anthropocentrism: More than just a misunderstood problem. Journal of Agricultural and Environmental Ethics, 2018. [Em linha] [Consult. 3rd July 2021] Available at: https://link.springer.com/article/10.1007/s10806-018-9711-1

[81]GILLESPIE, Alexander- International Environmental Law, Policy & Ethics. p.8

[82]GILLESPIE, Alexander- International Environmental Law, Policy & Ethics. p.11

[83]GILLESPIE, Alexander- International Environmental Law… p.13

[84]DE LUCIA, Vito- Beyond Anthropocentrism and ecocentrism... p.185

[85]KOTZÉ and FRENCH - The Anthropocentric Ontology… p.20

Considering both perspectives, one could assert that the results and effectiveness of further regulation of the field on environmental law may differ from one perspective to another. If perhaps anthropocentrism is the chosen approach and considering that currently most of the legislation is *anthropocentric* as this study aims to suggest, the protection of the environment will be targeting humanity. Thus, *the anthropocentric* approach might lead the States and companies to be more compliant with the rules, aiming to protect future generations. Therefore, the rule of law would be more effective, yet, if one considers that this is the current situation of IEL, the effectiveness has not proven enough results. Moreover, the protection followed in this approach would be utilitarian as Kotzé and French mention for the sustainable behaviors and the protection of the environment would foresee the defense of the environment for the possibility of humanity to survive and develop.[86]The *ecocentric* approach which is present on the World Charter for Nature would allow for holistic protection of the natural resources, as bearers of the rights. While it would allow for such pure environmental protection it would benefit humanity as well. Kotzé and French expressed that idea as they mention that "it would be possible to address human concerns while simultaneously respecting ecological limits and ensuring Earth integrity."[87] One considers that the *ecocentric* approach would create more effectiveness on the protection of the environment, however, recognizes that the will of States to sign and comply with rules that foresee the protection of the environment itself would be weaker than the one present in the *anthropocentric* approach.

The present study suggests that for optimal protection of the environment, the best approach to follow is the combination of *anthropocentric* and *ecocentric* approaches. It would allow nature to be a bearer of the rights as it is nowadays in few States and creating specific protection for those natural resources, such as forests, rivers, natural parks[88]. At the same time, it would protect the environment envisaging the preservation of the human species, joining forces between the two approaches to acquire an improved and effective (hopefully) environmental legislation. The two approaches combined would create protection more directed to the natural goods, preventing damages from occurring and allowing the possible intervention of other States when the good is at environmental risk.

[86]KOTZÉ and FRENCH - The Anthropocentric Ontology… p.21

[87]KOTZÉ and FRENCH - The Anthropocentric Ontology… p.31

[88]The protected areas given the juridical personality as occurred in Ecuador or Colombia is an idea to be followed, in one's opinion, by the other States, allowing those natural resources to remain in their original state and creating a duty on the individuals to act as caretakers.

While it would allow for such robust defense, it would protect humanity. The recognition of the combination of both approaches will allow this study to dissert over the intervention on other State's territory, for it permits the acknowledgment of the rivers or forests as legal subjects.

3.2. Common Heritage of Humankind, Common Concern and Environmental Goods

As mentioned, the environment is a legally protected interest that is safeguarded by the IEL, and consequently by national law. The approaches previously mentioned (*anthropocentric* and *ecocentric*) have had an impact on the rule of law and the legislation of IEL. Even though it might be considered that in general IEL has been *anthropocentric*, ecocentrism has been present in the protection of natural resources, and it is essential to recognize their importance for humanity. To better appreciate such protection few words should be stated about the concrete protection of the environmental goods, particularly in territorial terms, exploring the concepts of CHH and CCH.

3.2.1 Common Heritage of Humankind

The first official mention of CHH was made by a Maltese diplomat, Ambassador Arvid Pardo. He addressed the UN General Assembly and stated that the area of seabed beyond the limits of the States should be declared as CHH. From that statement instruments seeking to protect goods outside the State's jurisdiction were drafted, and currently, there are two areas considered as common to the whole of humankind - the High Seas[89] and the Outer Space[90]. Some authors consider Antarctica[91] as well as a common good, however, there is also a doubt about it, since it is extremely used for scientific purposes, but the exploitation is not permitted, due to the moratorium of the Madrid Protocol. The global areas which fall under the protection of humankind, represented by the States, are considered as common goods or global commons. In the

[89]United Nations Convention on the Law of the Sea (UNCLOS), part XI regulating the common heritage principle. The International Law recognizes that the deep seabed is also considered as pertaining to the common concern of humankind, because of the location it has in the common area that the High Seas are.

[90]Outer Space Treaty and the Agreement Governing the Activities of States on the Moon and other Celestial Bodies.

[91]Antarctic Treaty, Washington 1959.

view of Stone, these common goods are the "portions of planet and its surrounding space which lie above and beyond the recognized territorial claims of any nation."[92]

The concept of CHH is a broad figure to be concretized. Nevertheless, it has four main elements that can be highlighted: the areas that are under the protection of this principle such as the outer space cannot be subject to appropriation of individual States, meaning that the property of those areas is common and indivisible; the second element has to do with the management of the areas, by which all States must coordinate to manage it, acting as "representatives' agents of mankind"; the third element is that the benefits that may arise from the exploitation of the resources will be divided by all States, lastly, the fourth is that those areas cannot be used for military purposes and shall be protected for the use of future generations. To some authors, the concept of CHH relates to the *res communis*, goods that cannot be subject to individual rights and acquisition, such as the deep seabed or the moon. In the words of Pureza, the concept of the CHH goes beyond the *res communis* since it emphasizes the need for universal participation and subordinates' freedom to equity[93]. This author also states that the expression "Humanity" in the concept, refers to all the people, contemporary and following generations to come.[94]The protection given by the CHH to the common areas will ensure the protection of its environmental features and prevent human depletion. According to Pureza, the CHH creates legitimacy for all States to render the international liability of any State who has caused serious damage to the common areas[95]. However, this extension of the legal standing does not correspond to a verification of a solid mechanism, such as a court specialized in environmental matters, that could lead to a judicial settlement, which demonstrates that this legal concept needs further development[96].

Considering the CHH concept and its possibility of application to the protection of the environment, Fitzmaurice stated that, the existent CHH was configurated to protect the outer space and deep seabed. The theory of applying it to the environment, in general, would pose some obstacles, mainly in the territorial application. The principle was

[92]STONE, Christopher- Defending the global commons. In SANDS, Philippe. Greening International Law, 1993, p.35

[93]PUREZA, José Manuel – O Património Comum da Humanidade: Rumo a um Direito internacional da solidariedade? p.174

[94] PUREZA– O Património Comum da Humanidade… p.175

[95]PUREZA– O Património Comum da Humanidade… p.275

[96]PUREZA– O Património Comum da Humanidade… p.275

initially considered for the protection of the deep seabed which lays beyond the national State's jurisdiction. The environmental resources, contrarily, will be present in areas protected under the State's territory. A natural resource such as a tropical forest inside a certain State will be under its property. Thus, the principle of sovereignty applies, meaning that a State can exploit those resources in the manner it wishes, and there will not occur any breach of law. The exception is if the State causes transboundary pollution. This exploitation and management of natural resources occur due to the economic and energetic value that they have. In the end, the balance to be found between developing economically and energetically and being green in such development (sustainable development) is one of the main tasks States have. The pressure that the States and other international actors may create to restraint certain States from a damaging environmental attitude will be limited.[97]

For Fitzmaurice, the protection of the environment through the CHH should be drawn from the existing regime and certain features of it should apply to the protection of the environment such as the common interest to protect the earth's environment, sharing benefits and burdens and non-appropriation by individual States. To apply it to the environment would mean to cover areas under State's jurisdiction but also the areas beyond State's jurisdiction, such as the high seas and atmosphere above.[98]

3.2.2 Common Concern of Humankind

Another figure that has been applied in IEL is the CCH. It was for the first time introduced by the General Assembly Resolution 43/53, where it was stated that climate change is a CCH. According to Shelton[99], the references of the importance of a Common Concern towards the environment occurred twice in the ICJ.

In 1996 in the Advisory Opinion of the Threat of Use of Nuclear Weapons it was referred that:

"the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and

[97] Further development on the State's responsibilities, internationally and nationally will be analyzed in Chapter 3.

[98] FITZMAURICE, Malgosia A. – International Protection of the Environment, p.159

[99] SHELTON, Dinah- Common Concern of Humanity. p.33

control respect the environment of other States or of areas beyond national control is now part of the corpus of IL relating to the environment"[100].

In 1997 in the *Case Gabcikovo-Nagymaros* the Vice-President Weeramantry asserted on his separate opinion that:

"We have entered an era of international law in which international law subserves not only the interests of individual States but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare (…) International environmental law will need to proceed beyond weighing the rights and obligations of parties within a closed compartment of individual State self-interest, unrelated to the global concerns of humanity as a whole."[101].

In the opinion of Fitzmaurice, the CCH is more a political concept than a legal one[102]. In the words of Birnie et al.[103] this term was defined after the opposition that arose with the initiatives to use the term CHH for climate change and biodiversity. References to the CCH in legal texts were firstly made on the International Convention for the Regulation of the Whales that was concluded on the 2nd of December 1946. The whales were considered protected species, and, in the Convention's preamble is written that "interest of the world in safeguarding for future generations the great natural resources represented by the whale stocks."[104] Later, in 1979, the Bonn Convention on the Conservation of Migratory Species of Wild Animals recognized that animals need to be conserved for the good of mankind. The 1992 Convention on Biological Diversity has a model to qualify the environmental goods as goods of common concern, however, there is no provision that such institutional organ will exist to decide upon the qualification. Annex I to the Convention has the list of the clauses that characterize a good as good of common concern. These clauses are very broad, and the States are the ones that decide which goods must be considered as of common concern. Therefore, the clauses leave the margin of appreciation on States.

The definition of CCH is quite similar to the description that surrounds the CHH; nevertheless, a line can be drawn between the two concepts. Whilst the CHH entails

[100]Advisory Opinion 1996 the Threat or Use of Nuclear Weapons, p.29
[101]Separate Opinion of Vice-President Weeramantry, Case Gabcikovo-Nagymaros, 1997, p.115
[102]FITZMAURICE, Malgosia A. – International Protection of the Environment, p.162
[103]BIRNIE, Patricia et al.- International Environmental Law, p.129
[104]International Convention for the Regulation of Whaling, Washington, 2nd December, 1946

shared ownership of the areas and resources, underlying that the control of the area does not belong to any specific State, and it relates with the exploitation of resources, the CCH is related with the responsibility to protect. As Shelton refers the common concern is not spatial, it can occur inside or outside a State's territory.[105] Besides, CCH, in general, will relate to the issues that concern globally the earth's inhabitants. It will be a shared problem and a shared responsibility, applying in territorial terms, to goods inside or outside the State's territory. Therefore, the common concern does not deny the sovereignty of the State over their resources but recognizes that the international community has a common responsibility to assist in the sustainable development of those goods considered as a common concern.

For Pureza this concept is a sub-specie of the CHH, it keeps the notion of community, but it innovates with the shared responsibilities, and not only shared benefits[106]. Above and beyond the responsibilities, those shall be equitable, which means that it will be a bigger burden for the developed countries, following the principle of common but differentiated responsibility. Although the CCH does not establish specific rules and behaviors to comply with, as the CHH does, it imposes a responsibility on each member of the society to act upon the protection of the environment. One of the consequences of the recognition of the CCH concept as creating common responsibilities is that it will open the debate for the existence of obligations *erga* omnes. Hence, if a State causes a breach of the international obligation in respect of good of common interest, all States are considered as an injured State. The reference to the obligations *erga omnes* was made by the ICJ in the *Barcelona Traction Case*, where it stated that the violations of human rights law would allow the claim to be brought by any State if wanted.

Although the concept of CCH is still in development, it is already present in treaties and jurisprudence. As mentioned by Cottier et al., the CCH "gives the international communities of states both a legitimate interest in resources of global significance and a common responsibility to assist in their sustainable development".[107] CCH and CHH are

[105]SHELTON, Dinah- Common Concern of Humanity, p.35

[106]PUREZA– O Património Comum da Humanidade… p.278

[107]Thomas Cottier et al. – The Principle of Common Concern and Climate Change. NCCR Trade Regulation, Working Paper No 2014/18, June 2014, p.24; [Em linha] [Consult. 5th July 2021]. Available at: https://www.wti.org/media/filer_public/0d/a9/0da93bab-02b6-49f3-a789d8f4a0ab3982/cottier_et_al_common_concern_and_climate_change_archiv_final_0514.pdf

of extreme importance for the protection of natural resources and pose significant weight on the notion that the environment must have higher protection.

3.2.3 Environmental Goods

As previously referred[108], the common goods (global commons) are those areas that are not subject to the jurisdiction of any State, and which are protected under the concept of CHH. For some authors, biodiversity and climate change are covered by the figure of CCH.[109] Another concept that has been explored for the protection of environmental goods beyond the CCH and CHH is the concept of GPG, a concept created in the economy. The GPGs are defined by non-rivalry and non-excludability, meaning that one person (State in this case) can use the good without such utilization diminishing its availability to others, and no one can be excluded from using the good. IL does not recognize this category of "global public goods", but according to Bodansky[110], some concepts already recognized by IL such as the CCH are related to GPG. For this author, CCH is the closest concept to GPG, because the examples of common concerns such as climate change, can provide non-excludable and non-rival benefits, which does not occur with the goods under the CHH concept.

The GPG can be supplied in two different ways: aggregate-efforts or single-best-effort.[111] The aggregate-effort means that the international community must work together to achieve the goal of protecting the good. Single-best-effort will imply that a small number of States will operate together to achieve a goal, which could be achieved by all, and may lead the other States to then follow the example. The fight against climate change is an example of an aggregate-effort that all communities must accomplish. In the view of Morgera, the concept of GPG puts merit in IEL as it allows an incentive of compliance[112]. The IEL should be developed to create a logic where there are responsibilities for not complying with the rules and where there is implemented a control mechanism to verify those responsibilities.[113] Moreover, incentives should be made to make participation in environmental protection attractive. This would mean that more States would apply green measures. Such incentive could be the support that the

[108] §3.2.1

[109] FITZMAURICE, Malgosia A. – International Protection of the Environment, p.162

[110] BODANSKY, Daniel – What's in a Concept? Global Public Goods, p.654

[111] MORGERA, Elisa – Bilateralism at the Service of Community Interests? Non-judicial Enforcement of Global Public Goods in the Context of Global Environmental Law, p.749

[112] MORGERA, Elisa – Bilateralism at the Service of Community Interests?..., p.749

[113] MORGERA, Elisa – Bilateralism at the Service of Community Interests?..., p.749

developed States may give to the developing States to help those to be able to become sustainable and to protect their natural resources. It would as well, following the North-South discussion, create further responsibility on the developed States to be even more sustainable. As previously referred[114] the developed countries were and still are the main polluters of the world. The USA is responsible for 25% of global CO2 emissions, the countries of the EU are responsible for 22% of those emissions, China contributed with 12,7%, while the entire African continent contributed 3%.[115]

3.3. Human Right to a Healthy Environment?

In the wake of the two approaches previously explored one matter must be tackled, the existence and recognition of a human right to a healthy environment. The debate around its formal recognition is extended, and, in this study, one will address the importance of such recognition. From the moment that the Stockholm Declaration proclaimed the rights of humankind to an environment of quality, the inquiry about the possible existence of a human right to a healthy environment intensified. Does humanity have a right to not live in a polluted area or to not suffer from climate change?

An important development that arose for the defense of an existing human right to a good environment occurred in 1990 when a Special Rapporteur (Ms. Fatma Zohra Ksentini) submitted several reports acknowledging the importance of a recognition of a human right to a satisfactory environment[116]. Following the reports, the Special Rapporteur asked a group of experts who were convened by the Sierra Club to prepare the Draft Principles on Human Rights and the Environment. These articles are reflected as a corollary of the right to a healthy environment, the right to be free from pollution and environmental degradation, and the right to protection of air, soil, water, biological diversity, and ecosystems.[117]

The human right being discussed herein is substantive, as the recognition of the procedural human rights to the environment is already ensured in the international, regional, and national environmental law, such as the right to public information and the

[114] §2.2

[115] RITCHIE, Hannah - Who has contributed most to the CO2 Global Emission. Our World In Data, 2019. [Em linha] [Consult. 5th July 2021] Available at: https://ourworldindata.org/contributed-most-global-co2

[116] ATAPATTU - The Right to a Healthy Life or the Right to Die Polluted?... p.80

[117] ATAPATTU - The Right to a Healthy Life or the Right to Die Polluted?... p.82

right to participation that is ensured to the citizens. As Shelton[118] refers the procedural rights have been widely recognized in environmental treaties, such as the Convention in Civil Liability for Damage Resulting from Dangerous Activities to the Environment. Whereas procedural rights are interconnected with the environment, the substantive right of a human right to a healthy environment has not been agreed upon.

A recent case brought in the ECtHR is a case filed by Portuguese youth. This case has paramount importance in the growing recognition of the human right to a healthy environment, aiming to create a discussion on the ECtHR around this theme and creating jurisprudence regarding this right. The outcome of this case might help to robust this substantive right. The case has 33 States as defendants (27 of the EU and the United Kingdom, Turkey, Switzerland, Norway, Ukraine and Russia) who are considered responsible for the global warming that the planet is witnessing. The case began on the 30th of November 2020 and the plaintiffs refer that they feel their generation will suffer negative environmental consequences due to the negligence that the States had by not fulfilling their obligations of the Paris Agreement to reduce their emissions. They state that their anxiety and fear of the future are enormous, and they are already suffering from global warming, for the forest fires have intensified in Portugal. They claim that the countries are breaching articles 2, 8, and 14 of the European Convention of Human Rights and want justice to be made[119].

Following the recent steps on the recognition of this right, UNEP in collaboration with the UN Office of the High Commissioner for Human Rights (OHCHR) issued in September 2020 the first Human Rights Bulletin, which aims for cooperation between both agencies, through an exchange of experiences. The goal of this collaboration is to enhance the protection of environmental human rights defenders, to integrate human rights, including the right to a healthy environment in the UN process and to enhance State´s and other actor's ability to promote and protect such rights.[120] This first Bulletin focuses on different aspects in which there is visible the interconnection between

[118] SHELTON, Dinah, "Developing Substantive Human Rights", Journal of Human Rights and the Environment, 1 p. 89 (March 2010) p.90;

[119] Global Legal Action Network: An Emergency Like no Other. [Em linha] [Consult. 11th January 2021]. Available at: https://youth4climatejustice.org/

[120] UN Environmental Rights Bullet: September 2020 Edition. [Em linha] [Consult. 11th January 2021]. Available at: https://spark.adobe.com/page/djLcWfUOGl02P/?fbclid=IwAR2b-B1X-8aIRlTBg1qf-GOv7lGpeDe_3Kvshv3prX7KPoUvsY4T3j26yfI

environment depletion and the impact on human rights, by analyzing specific situations in countries, and vulnerable people such as children and elder people.

The most obvious practical importance that will come with the recognition of such a human right is the possibility that individuals will have to bring actions against the State that might create a violation of his/her right, either directly or by not regulating properly certain gases emission or discharges into rivers and seas. Moreover, being the protection of the environment a consequence for a human right, the States would have a global and *erga omnes* obligation to cooperate internationally to avoid any damage, that would affect humanity. These practical and essential consequences would help to ensure that the environment was protected from further depletion. Although the advantages of such recognition may be strongly appealing, one considers that it also has disadvantages. The first and most strong critic and disadvantage is the connection automatically created between such a human right and the way to protect the environment leaning to an *anthropocentric* perspective rather than an *ecocentric* or an intermediate one. In the view of Atapattu[121] the defense of a possible human right to a healthy environment does not aim to advocate the *anthropocentric* approach to environmental protection, although it is related to human rights. Another criticism is that the existing range of texts and legal documents to protect the environment will not become more comprehensible and easier to comply with if the human right to a good environment is recognized, for the number of legal texts will not diminish but rather increase. This will have an impact on the effectiveness of the legal texts, probably increasing the non-appliance by States.

Taking both sides into consideration and looking at the counterbalances the recognition of such a right would have a positive impact on the international path to the protection and defense of the environment as it would not weaken the desired result but strengthen it. The argument that this would focus the environmental protection on an *anthropocentric* view is not incorrect, yet one considers that, the aim of recognizing such a right is not to abolish the already existing rules to protect the environment, nor to contradict the *ecocentric* approach. The human right to a good environment would be complementary, allowing both parts- humankind and nature- to be protected and to ensure that the State and the companies start cooperating and stop committing environmental

[121] ATAPATTU - The Right to a Healthy Life or the Right to Die Polluted?... p.67

disasters. However, the creation of the legal documents would have to be considered meticulously to avoid an overload of documentation.

3.4. Obligations *Erga Omnes*

One should explore, above and beyond the obligations laid down on the treaties, the *erga omnes* obligations existence in IEL, as briefly mentioned previously. These obligations require the full participation of the States based on the principle of equality. The ICJ only stated to *erga omnes* obligations in defense of the environment in the *Nuclear Weapons Case* and the *Gabčikovo-Nagymaros Case*. The *Nuclear Weapons Case* opposed New Zealand and France. The French government decided to conduct underground nuclear tests and New Zealand considered that its rights, mainly the territorial ones, were being violated due to the testing. The court considered that both New Zealand and France, as well as all States, had an obligation to respect and protect the natural environment, which configures a recognition of an *erga omnes* obligation.

The obligations *erga omnes* allow the States to stand before the ICJ and create a complaint against another State. However, the State will only be able to do it, if it has a general legal interest in the protection of a good, in this case, the environment. Beyond the *erga omnes* obligations which allow such actions by the States, there is another figure, the *actio popularis*. This allows the exercise of the rights on behalf of the whole community. Sands[122] and Fitzmaurice[123] state that the *actio popularis* and the obligations *erga omnes* are related. Sands considers that the first would be applicable for the cases of goods that are protected under the CHM or CCM since any damage to those goods affects the community.

Notwithstanding, these two references by the ICJ were not strong enough to create a precedent for the existence of such obligations. Even though some authors consider that States have these obligations concerning the upholding of the environment it has not been widely recognized as such. One highlights that the recognition of these obligations would allow the safety of the environment by the whole community, aiming to preserve a common interest. Such obligations if recognized by the ICJ or as customary law would be a step forward in the duty to protect at all costs the environment allowing other States

[122]SANDS- Principles of International Law, p.149
[123]FITZMAURICE, Malgosia A. – International Protection of the Environment, p.169

to intervene to prevent further damage in one's territory, a possibility that will be examined deeply in Chapter 5.

4. Liability for Environmental Damage

This chapter will focus on the responsibilities of the States that may arise when an obligation of IL is breached, whether such obligation is expressed in legal texts or as customary law. Still, as briefly analyzed, the obligations are not wholly defined and ascertained, and consequently, there is a lack of sanctioning power, since the secondary rules that would deal with the legal consequences of a breach of law, depend on the primary rules (obligations). Throughout this chapter one will describe the already disposed norms on liability[124] and confirm whether those are effective to create a complete IEL - a system that contains duties and sanctions in case of breaches of duties either by action or omission.

This analysis is paramount for the conclusions to be reached regarding the possibility of intervention, as the liability of States, as well as other legal and private persons regarding damage to the environment, demonstrates the level of protection towards it in all its features, for a wider approach. In the quest for alternatives and solutions, considerations about the possible applicability of criminal law to punish environmental damages will be outlined.

4.1. Threshold of Damage

As previously elaborated[125], there is not a clear definition of damage, for it will depend on the circumstances, and can differ according to the different legal texts. Damages to the environment, performed by a State, do not always and immediately create international breaches which should be legally settled. The settlement of breaches in IEL

[124]Boyle has prepared a study in 1990 about Responsibility and Liability and where the author studies the differences between those concepts, due to the works prepared by the ILC on the "International Liability for the Injurious Consequences of Acts Not Prohibited by International Law". As mentioned by the author on pages 8 and 9, in the first analysis made by the ILC responsibility would mean a breach of an obligation, and liability would be used about those activities that are lawful or that involve no wrongful acts. While this is the understanding of the ILC, Boyle mentions that in treaties and judicial practice the responsibility term refers to the obligations of States and liability refers to consequences which follow from a breach of the obligation of the States. Boyle, Alan - State Responsibility and International Liability for Injurious Consequences of Acts not Prohibited by International Law: A Necessary Distinction.
The International and Comparative Law Quarterly, Vol. 39, No. 1 (Jan. 1990). [Em linha] [Consult. 7th July 2021]. Available at: https://www.jstor.org/stable/760317?seq=21#metadata_info_tab_contents

[125]§2.4.

aims to prevent further damage and to allow the injured party, when there is a case of transboundary harm to a State, to be repaired.

Hence, to consider that the damage creates a legal breach, it must produce a certain level of damage, reaching a threshold. The limit is, however, not solidly defined and agreed upon, by the international actors, having been ascertained that the damage shall have a specific qualification to be considered as a trigger for State liability. The President of the ICJ at the time of the *Nuclear Tests case* referred that not every transmission of fumes or other emissions to another's State territory will automatically create and be considered as a legal cause of action in IL[126]. The ILC has initially referred that the damage should be "appreciable" and later acknowledged that the best description would be "significant"[127].

The reality is that the task to accurately define the threshold of damage will be relative and depend on several events such as regional matters, national implications, policies, and different legal texts. Nonetheless, the vagueness and imprecision for the threshold of damage have already caused terrible consequences. The Chernobyl accident is living proof of it, where no liability for the damage was upheld and one of the reasons for that, was the absence of definitions for harmful levels of radioactivity[128]. A manner to create a threshold would be if the protection of the environment were generally based on qualitative standards which could be measured, in the same way, as the emission levels for the Paris Agreement were established. Instead, the present situation is that States can autonomously define their goals and standards internally, which does not create harmonized guidelines.

The conclusion that few efforts have been done to harmonize the definition of threshold must be drawn, which subsequently poses difficulties in establishing liability for environmental damages caused by human hands. One must recognize that one of the main reasons for the lack of attention to this matter is that international actors have been keener to develop the prevention of the damage, not allowing the pollution to further

[126]Apud, SANDS [et al.]- Principles… p.709

[127]SANDS [et al.]- Principles…p.709

[128]SANDS-Principles of International Law p.710. The lack of precision regarding the threshold of damage to the environment was not the only reason for the Chernobyl accident to be considered as an unfortunate example of lack of liability to be attributed to the responsible for the occurrence. The truth is that political reasons also weigh heavily in the balance of pros and cons as well as the legal uncertainty that did surround and still surrounds the question of State liability for environmental human-induced errors.

spread, (which is an excellent mechanism) but regrettably have left aside the mitigation measures. When environmental damage ensues, it is almost impossible for restitution *in natura*, although in some cases like deforestation, trees can be replanted. For that reason, the State who has suffered the loss or in the case of the common goods, the good that has been damaged, should be somehow recovered or some compensation should be received, in what is feasible, to preserve once again the environment. IEL has to this point failed to create robust mechanisms that would allow restoration and compensation.

Another question to be answered is State liability when breaching the IEL internally, *i.e* when a State through its public administration or by allowing certain conducts by private actors, creates environmental damage affecting its people, therefore posing risks, and jeopardizing nature and the citizens. In those cases, the citizens that saw their rights being injured might act, as in the case of Europe where the citizens can, when the national judicial remedies have been exhausted, present a claim in the ECtHR for violation of the environment. The claim is not based directly on the environment but on the rights to life, or right to private life and family, that are interconnected with the environment. In such cases, when hazardous activities take place and imagining that it occurs continuously, creating emergencies, should the other States take a position? These questions will be answered further on.

4.2. Liability in IEL

Referring to the basis of IEL the Stockholm and Rio Declaration did mention the need for States to create supplementary measures and norms regarding liability and the compensation for the victims of pollution and environmental damage.[129] Almost 30 years have passed since the Rio Declaration and the fact is that the liability regime in IEL has proven modest effectiveness, even though its presence on international legal texts is almost null.

One great example of advancement on State liability for environmental damage can be found in the decision from the SC of the UN on the Iraq invasion of Kuwait. Between 1990 and 1991 during the Gulf War, Iraq decided to occupy Kuwait and during such occupation, devastating damages to the environment took place, when 600 oil wells were set on fire. In the presence of such intolerable conduct, the SC issued Resolution 687, the first resolution that addressed environmental issues. The Resolution affirms Iraq's

[129]Respectively Stockholm Declaration article 22 and Rio Declaration article 13

liability for environmental damage "Reaffirms that Iraq (…) is liable under international law for any direct loss, damage- including environmental damage and depletion of natural resources (…)".[130] With Iraq's liability settled the SC decided to establish a compensation commission, the UN Compensation Commission (UNCC) to manage the fund created for the claims that could arise due to the war. The Compensation fund would be financed out a 30% percentage of Iraq's oil export revenues.[131] The Governing Council of the UNCC has adopted numerous decisions regarding the claims that could be brought. Among many other claims, the ones related to environmental damage and depletion of natural resources were admissible, mainly when incurred by governments and IOs. Even though this resolution and the consequent creation of the UNCC should be applauded as it designed the basis for State responsibility regarding environmental damage, some questions did remain not addressed such as the threshold of damage. In the view of Birnie et al. the Resolution of the SC was unprecedented as it helped to sediment the bases for international liability of States in the protection of the environment, however, they argue that this only had this scale because Iraq was considered liable[132], and this is an exceptional case in the whole IEL[133].

International liability is a result of a breach of an international obligation by an IL actor, such as a State, an IO or, an individual. A State can only be considered liable under a Court, and in the international arena, the only court will be the ICJ. The other settlement mechanisms will be the arbitral courts and the diplomatic negotiations between States. Factually, it is widely recognized that any unlawful action at the international level will generate international liability of that State, however, such recognition has not yet been truly anchored in the case of environmental damage. One clear obligation that is referred to in several legal texts is the obligation to not cause transboundary environmental harm. The breach of such obligation can lead to State liability. That breach has been the most analyzed in the courts, however, few cases have been decided. According to a report from UN 2018[134] which explores the gaps of IEL, the regime of transboundary environmental law attends various objectives: "first it serves as an instrument for the internalization of

[130]Security Council Resolution 687 p.16

[131]MACKENZIE, Ruth, KHALASTCHI- Liability and Compensation for Environmental Damage in the Context of the Work of the United Nations Compensation Commission, p.282

[132]BIRNIE-International Environmental Law… p.231 and 232

[133]GOMES- Direito Internacional do Ambiente… p.271

[134]UN Report - Gaps in international environmental law and environment-related instruments: towards a global pact for the environment. 2018 [Em linha] [Consult. 6th July 2021] Available at: https://digitallibrary.un.org/record/1655544?ln=en

environmental costs of polluting activities by making the polluters pay; second it incentives the implementation of the precautionary and preventive principles and finally it ensures the redress of environmental damage through the implementation of restorative measures." It is, subsequently, extremely important that the State liability occurs and that IEL becomes complete.

For a comprehensive analysis one should note that even though States can through their public administration, create environmental damage, either when acting diligently and an error occurs or by not complying with their obligations, the private actors are the biggest transmitters and creators of the environmental damage. Companies, such as industries, the corporations responsible for the transport of oil, the managers of the nuclear plants amid many other private actors that in their activities may produce significant damage to the environment, should be held responsible for their actions. In fact, what is more frequent is for privates to be considered liable, as the State liability system is fragmented. In the point of view of Mackenzie and Khalastchi[135], the States have opted to create rules which channel liability to private operators of potentially hazardous activities, due to their reluctance to accept strict liability. This has to do with civil responsibility and further comments will be addressed in the next pages.

For a State to be considered responsible, several requirements need to ascertain. The first item to be questioned is if there is an obligation to prevent damage, which is the standard of care? For Sands et al.[136] and other scholars, the standard of care can depend on the obligation posed. In the case of obligations involving ultrahazardous activities, the liability would be benchmarked by strict or absolute liability, as the level of danger of such activities is extreme and would incentive States and privates to be compliant. Strict liability is however a dangerous path, since the application on every national jurisdiction may differ, as perhaps in the case of some national systems that do not recognize the legal concept of strict liability. Anyway, it was considered in some legal texts and was disposed of in the 2006 ILC Draft Articles. Due diligence is a standard of care that has been observable to ascertain liability from States. In the *Pulp Mills case*, the ICJ specified that to act with due diligence will be the adoption of "appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercises of administrative control applicable to public and private operators, such as the monitoring of activities undertaken

[135]MACKENZIE, - Liability and Compensation for Environmental Damage…, p.281
[136]SANDS [et al.]- Principles… p.711

by such operators"[137]. Due diligence requires therefore the introduction of policies and legislation that apply to the public and private sector. The conduct of actors that incur in possibly dangerous activities must be one that can prevent or minimize the risk of transboundary harm to other States or the global environment. For the due diligence to be assessed certain circumstances should be considered, for it impacts the proportionality. Thus, if there is an activity that results in ultra-hazardous risks such as a nuclear plant, the standard of care is much higher. The measures to be adopted to prevent and mitigate the risk must be more carefully carried out. In the special case of climate change, the due diligence posed by States should be to prevent any further damage on the planet, which will reduce substantially gas emissions. In the 2001 ILC Draft Articles, it is strongly affirmed that States should behave diligently.[138] For an injured State to prove that the State who created the damage acted without due diligence is extremely difficult and the burden of proof is on its side, as there are no general standards defined for the due diligence.

4.3. ILC Draft Articles

In the present dissertation, one is aiming to understand how the international actors should and can act upon a climate emergency and for that reason, it is necessary to analyze the liability regime established. State liability is of extreme importance in the cases of environmental damage and should be enhanced. Therefore, the regime proposed by the ILC on the Draft Articles will be studied, as it creates innovative suggestions on State and private's liability.

The ILC has issued in 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles on Responsibility of States)[139], a document which does not have binding force; yet it is widely recognized by scholars. As referred to in article 2, where the constitutive elements of the wrongful act are identified, a wrongful act arises when a State conducts an action or omission that is attributable to it under IL. Such action or omission must configure a breach of an obligation that the State has under IL. Under these draft articles, and applying it to IEL, States would be responsible for any breach, conducted by organs of the State, i.e, the municipal power. The victim, which is

[137]ICJ Pulp Mills Case, p.69. [Em linha] [Consult 1st February 2021]. Available at: https://www.icj-cij.org/public/files/case-related/135/135-20100420-JUD-01-00-EN.pdf

[138]The number of references to due diligence throughout the text demonstrates the affirmation.

[139]UN: ILC Responsibility of States for Internationally Wrongful Acts. [Em linha] [Consult. 3rd February 2021]. https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf

the injured State, that suffered from the transboundary harm, would be compensated by the harmful State. The injured State could be either restituted, compensated, satisfied or to have a contribution to the injury from the harmful State. Unlike previously discussed the Draft Articles on Responsibility of States do not require that the breach of international obligation entails a subjective feature, not mentioning due diligence or fault. Regarding the invocation of responsibility of the harmful State, it can only be done by a State that has individual interests upon it. Another hypothesis of invocation occurs when the whole community feels especially affected by that breach- Article 42. This mention to the whole community in Article 48 was considered by Bratspies, as recognizing the existence of *erga omnes* obligations.[140]Furthermore, in article 48 it is permitted for other States than the injured States to invoke responsibility.

Examining the Draft Articles on Responsibility of States, one considers that one way to improve the rule of law of IEL would be to turn the ILC Drafts into binding legislation. However, one believes that the ILC Drafts could have a few amendments. One change could be to allow other international actors to invoke State responsibility, such as the IOs. That solution would create a comprehensive liability regime, that would allow further participation by the international community besides States[141].

Following the liability analysis, another question strongly addressed by scholars is that States should not be considered liable for actions that they did not cause, as might occur with the Draft Articles on Responsibility of States. Such a case would occur when a State that acted with due diligence would be considered responsible for the environmental damage created by a private operator. If the State is considered liable it must bear the costs to compensate the victim and, in the end, the original act is from a private actor who decided to not comply with the rules or just did not act with all diligence. Few regimes already perceive the operators' liability such as the Paris and Vienna Conventions[142] that provide for nuclear energy regime. In those conventions the States are called supplementary, to ensure that the private pay the due compensation to the injured party.

[140]BRATSPIES, Rebbeca M.- State Responsibility for Human-Induced Environmental Disasters, p. 22

[141] GOMES – Direito Internacional do Ambiente…, p.282

[142]GOMES – Direito Internacional do Ambiente…, p.272

For that reason, the ILC issued in 2006 the Draft Principles on the allocation of loss in case of transboundary harm arising out of hazardous activities (2006 ILC Draft Articles), for the cases where there is an assumption that the State of origin of the damage would have performed fully according to its obligations from hazardous activities. As a result, the articles regard civil responsibility of the operator, defined as "any person in command or control of the activity at the time the incident causing transboundary damage occurs" in cases of hazardous activities, recalling the draft articles 2001 on Prevention of Transboundary Harm. Principle 2 of the 2006 ILC Draft Articles distinguishes the damage, caused to persons, property, or environment, and therefore defines the environment in item b). To better establish a thorough text, item c), defines a hazardous activity as any activity that involves a significant risk of causing harm. Corresponding to the commentaries on the 2006 ILC Draft Articles "the threshold of damage is designed to prevent frivolous or vexatious claims".[143] The reference to damages to the environment autonomous to the damages to people or property aims to create a regime where liability for damage solely to the environment is unleashing legal action. In item a) iii) it is asserted that the damage in the environment would be of loss or damage by impairment, being impairment defined in the commentaries as "injury, modification, alteration, deterioration, destruction or loss".

Hence, the purposes of the 2006 ILC Draft Articles were to ensure prompt response to victims of transboundary damage and to preserve and protect the environment, as Stated in principle 3. Draft Articles require States to have a function of promoting the legal regime for reparation, through the operator's patrimony. The idea embodied in the commentaries is not that the State will pay the compensation, rather it will ensure the compensation is paid. The operator or other person or entity will be considered liable without the need to be proven fault in the conduct which led to the hazard, and they will be held responsible under the strict liability.

Quite a few authors, including the author of the present study, contemplate that both systems (the 2001 and 2006 ILC Draft Articles) should be complementary to allow, in any case, the compensation of the victims or reparation of the environmental damages. States should be complementarily responsible for environmental damages. Notwithstanding that both texts have significant norms as well as some gaps to be

[143] 2006 ILC Draft Articles Principle 2 (g)

fulfilled, they remain as drafts, because States have not shown consensus on their approval. Currently, the liability that States can be under is present in some articles such as UNCLOS, and in some cases, the responsible is the private operator, but there is not a harmonized scheme, leading to the fragmented IEL.

4.4. Remedies

In IL there are various remedies applicable to compensate a victim and even though IEL is a very precise field of law that requires detailed conditions regarding the compensation, the common practice has been to apply the same remedies applicable to any other situation in IL. On the State's responsibility, whenever it is considered liable, it must first stop the damage, secondly ensure that it will not happen again and third it should make reparations.

The remedies as mentioned in the Draft Articles on Responsibility of States include restitution. Yet, considering what damage to the environment might destroy and alter, and especially the climate change consequences, how could restitution be possible? In the Draft Articles on Responsibility of States, restitution is defined as "the situation which existed before the wrongful act was committed". In the case of climate change, it can almost be impossible to return the environment to how it was before the wrongful act. As restitution can be difficult and even impossible, compensation becomes almost the primary resort for remedies. The compensation will permit covering the costs associated with the environmental damage *per se*. The costs may be to replant trees or clean a river, (pure environmental damage) or to pay medical expenses for people (consequential environmental damage). As the environment is not easily quantifiable in identical terms of what was previously formed for civil remedies, it will be challenging to establish the amount for environmental compensation. Mainly contemplating only pure environmental damage. Gladly the UNCC has now certain highlights over the compensation amounts, due to the fund that was constituted to compensate the natural and environmental damages.

4.5. Liability for Damage on Common Goods

In Chapter 2 the common goods under the CHH principle were studied. It was analyzed that there are specific regimes for these goods, which then entail specific obligations and responsibilities by States. The marine environment falling under the UNCLOS is protected by the International Seabed Authority. In the Convention, there are

two references to liability under marine environment protection, article 139 and article 235. Article 139 involves the protection of the Area[144], demanding State parties and IOs part of the Convention to ensure that the obligations are complied with, in the Area, by the States' nationals and those controlled by them. Article 235 of the Convention maintains the rules of the protection of the marine environment, even though, the type of damage to the marine environment is not established. The UNCLOS does not explain which measures would need to be taken to compensate for the damage, but it does define marine pollution.[145] The International Tribunal for the Law of the Sea (ITLOS) has issued an Advisory Opinion regarding liability for questions posed in 2011 about companies sponsored by States exploring the Area[146]. The first question was which are the responsibilities of State parties to the convention when exploring the Area? ITLOS answered that the State must ensure compliance with the Convention and to ensure that the sponsored company has all the mechanisms and measures to perform the exploitation with respect and protection for the marine environment. There was a second question regarding the extension of State responsibility when the sponsored company breaches due diligence obligations. The Court alleged that the State as a contracting party must be aware and conscious of the company's movements, and if the State has not adopted all the necessary measures to prevent the company from causing damage, it will be subsidiarily considered responsible. Therefore, regarding the marine environment, the protection of it under the UNCLOS is ensured by the State parties, their nationals, IOs, and the sponsored companies contracted to explore the sea. A duty of prevention is evident in this responsibility scheme.

4.6. Alternative Solutions

The protection of the environment is imperative and as one clarified, steps have been taken to shield it, but the gap and fragmentation in the liability for environmental damage still needs vast progress. There are few exceptions regarding the State's responsibility as in the case of the Montreal Protocol[147] where there are specific non-compliance mechanisms in place. As the present reality is far from perfect, some

[144]The area is the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction, as stated in Article 1 (1) (1) UNCLOS.

[145] SANDS [et al.]- Principles…p.730

[146]GOMES- Direito Internacional do Ambiente…, p.296-297

[147]Montreal Protocol on Substances that Deplete the Ozone Layer. [Em linha] [Consult. 10th March 2021]. Available at: https://treaties.un.org/doc/publication/unts/volume%201522/volume-1522-i-26369-english.pdf

alternatives may be considered for the responsibility towards environmental damage. The system of liability of IEL has failed for numerous reasons, among them is the fact that States are not implementing in their national jurisdiction, the measures they agreed and ratified internationally. The reason behind the lack of implementation could be that States do not have the means to execute the measures, either for technological or financial[148] reasons.

In 2010 the largest marine oil spill in history took place, the Deepwater Horizon disaster by British Petroleum took place in the Gulf of Mexico. Even if it was clear that States had failed in the enforcement of due diligence in oil industry legislation, the disaster led to no State responsibility. As discussed, the same happened with the Chernobyl disaster so, the question is whether the State liability that has been almost inexistent is still helpful. In line with Bratspies's arguments, one must recognize nonetheless the importance that the State responsibility stands and how it should continue to be improved because it allows compliance with the environmental norms[149]. The complementarity between the liability on the private parties and the State responsibility is valid, as the ILC Draft Articles demonstrate, and that should be the model for the future. As Bratspies mentions "(…) State responsibility is about holding States accountable for their own failure to act- in this case, the failure to appropriately regulate the actions of private persons within their jurisdiction."[150]. Hence, the State responsibility should be allied with the civil responsibility and altogether ensure reparation and compensation. Nevertheless, as mentioned, some areas of the environment such as climate change and biodiversity are not materially countable, consequently, the best way to allow their protection is by preventing damage at most.

4.6.1. Ecocide

A solution considered by scholars and civil society that could create a stronger mechanism of protection of the environment would be the construction of an international crime of ecocide, to be disposed of in the Rome Statute of the ICC. Currently, the only existing crime regarding the environment is the environmental damage in the context of an armed conflict. The conditions to recognize the criminal offence are that it must be widespread, severe, and long-term, as stated in article 8 (2) (b) (iv). No provision for the

[148]UN Report - Gaps in international environmental law (…) para. 85 and 86
[149]BRATSPIE- State Responsibility… p.37 and 38;
[150]BRATSPIES- State Responsibility… p.37;

damage to the environment during peacetime has been an object of punishment under international criminal law. Numerous people have been supporters of such provision, as Polly Higgins and Jojo Mehta that created the organization "Stop Ecocide"[151], to generate awareness regarding the topic. As explained on the website, ecocide will be the mass damage and destruction of ecosystems. The creation of such crime would guarantee that individuals would be considered criminally responsible for environmental harm, such as oil spills, deforestation, etc. In 2020 the Stop Ecocide Foundation convened 12 lawyers from around the world to prepare a definition of ecocide, and the final report was released in June 2021[152]. Moreover, in 2019, the States of Maldives and Vanuatu (Island Stares at risk of being drowned by the sea-level rise) asked 123 nations in the Assembly of the State Parties to the ICC to enlarge its jurisdiction, to comprehend the ecocide[153].

The concept of ecocide was introduced during the Vietnam War, in the Conference of War and National Responsibility in 1970[154], due to the usage of Agent Orange. The reference at the time was to consider ecocide as a war crime. Presently the objective is to consider ecocide as a crime during peacetime, for the depletion of the environment can and will occur either in peace or wartime. The ILC was asked to create a project for the Code of Crimes against the Peace and Security of Mankind, and several reports were drafted. In 1986 in the Fourth Report on the draft of offences against the peace and security of Mankind[155], article 12 contained a reference to the crime against the environment. However, the Fourth Report had no reference to the type of environmental damage nor the intention behind the action, which for some States was the target of criticism, and no conclusion was reached for its introduction as a crime. In 1995 a Document on crimes against the environment was prepared by Tomuschat[156] to identify

[151]Stop Ecocide: Change the Law, protect the Earth. [Em linha] [Consult. 12th March 2021]. Available at: https://www.stopecocide.earth/

[152]Panel of 12 practitioners- Independent Expert Panel for the Legal Definition of Ecocide. Stop Ecocide Foundation: June 2021. [Em linha] [Consult. 6th July 2021] Available at: https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d7479cf8e7e5461534dd07/1624721314430/SE+Foundation+Commentary+and+core+text+revised+%281%29.pdf

[153]Newsletter- Stop Ecocide. 2019 [Em linha] [Consult. 6th July 2021] Available at: https://www.stopecocide.earth/newsletter-summary/sovereign-states-call-on-icc-to-seriously-consider-ecocide-crime-

[154]Ecocide Law: History. [Em linha] [Consult. 12th March 2021]. Available at: https://ecocidelaw.com/history/

[155]UN: Fourth report on the draft code of offences against the peace and security of mankind, by Mr. Doudou Thiam, Special Rapporteur. [Em linha] [Consult. 14th March 2021]. Available at: https://legal.un.org/ilc/documentation/english/a_cn4_398.pdf

[156]Document on crimes against the environment, prepared by Mr. Christian Tomuschat, member of the Commission. [Em linha] [Consult. 14th March 2021]. Available at: https://legal.un.org/ilc/documentation/english/ilc_xlviii_dc_crd3.pdf;

the reason to consider the damage to the environment as a crime. Out of this document, many conclusions were made, such as the importance of protecting the environment due to its nature as a legally protected interest and that it should be protected during armed conflicts and peacetime. The projects were not accepted even with all the efforts done. In the end, the crime was typified in the Rome Statute under the war crimes.

The amendment of the Rome Statute proposed by the Stop Ecocide Foundation, to include a new crime of ecocide entails a truly *ecocentric* approach. As it was studied previously[157] the *ecocentric* approach is reflected on the ecocide for the aim of the codification of this crime is to punish the individuals who injured the environment. The objective is to protect the environmental goods, the environment in all its entirety, considering it as a legally protected interest deemed of criminal protection. Such possible review would allow for the enhanced protection of the environment. Likewise, it would enhance the legitimation of the environmental intervention, as no doubts would exist that the environment was also criminally protected, which would legitimate subsidiary means to prevent the creation of crimes. This amendment to the Rome Statute to include the ecocide could occur by inserting it in the crimes against humanity or as the Stop Ecocide association defends, to create a fifth crime. The list of crimes: the crimes against humanity, the genocide, war crime, and crimes of aggression (which was recently added) would include a fifth crime, the ecocide.

The Panel created by the Stop Ecocide Foundation defined that the ecocide would be based on "unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damaged to the environment being caused by those acts".[158]As reflected on the provision the proposed definition of the crime sets out two thresholds, the conduct must cause severe and widespread or severe damage and the acts must be unlawful or wanton. This way the crime does not become too wide encompassing every action that causes severe or long-term damage but analyses it altogether with the individual's subjective feature in the action. In the event of it being incorporated within the crimes against humanity the damage to the environment would have to be directed to create damage on the civilian population on basis of a widespread and systematic attack. One considers that even if there may be cases where the environmental damages aim to injury the civilian population

[157]§3.1.

[158]Panel of 12 practitioners- Independent Expert Panel for the Legal Definition of Ecocide… p.5

as in the Cambodia case[159], the environmental damages will not always have those features.

An extensive work would have to be performed to create the crime of ecocide. It would have to consider all types of environmental damages, including the pure environmental damage, and the environmental damage that displaces and affects the life and health of people and their property. Requirements to define the level of damage would have to be disposed and care would have to be considered regarding the subjective feature, whether fault, *dolus eventualis,* or another legal concept.

For the amendment to happen in the Rome Statute, one signatory State must present the proposal, as mentioned in article 121, to the Secretary-General of the UN, who circulates it to all the other States. Then it needs to be considered as admissible and to be approved by 2/3, which out of 123 States are 82. After an amendment, the ICC only has jurisdiction over the nationals of the State parties who committed a crime, after that State has ratified the amendment, as states in Article 121 (5) Rome Statute. Even when ratified by the State the ICC only can have jurisdiction one year after the ratification.[160]

However, to understand whether such amendment would be suitable under the ICC one should examine its jurisdiction. The ICC was created with the intention that it would address human rights abuses, being mainly focused on humanity and in the grave crimes towards people[161]. The ICC exercises jurisdiction in the situations of the 4 crimes present in article 5, which are related to human rights. Therefore, would it make sense to adapt the Rome Statute to cover a crime that considers the environment *per se* a criminally protected interest? Since the ICC is composed of States and that it only applies to the state parties to the Statute, it is difficult to create such a change without making the route of the ICC even more turbulent. The ICC origins out of the need to affirm peace and security

[159] In Cambodia lands are being delivered to be exploited by companies, leading to deforestation, and involving thousands of civilian populations. Mongabay: 'What other country would do this to its people?' Cambodian land grab victims seek int'l justice" [Em linha] [Consult. 20th March 2021]. Available at: https://news.mongabay.com/2021/04/what-other-country-would-do-this-to-its-people-cambodian-land-grab-victims-seek-intl-justice/

[160] Global Rights Compliance- The Netherlands accepts Starvation Amendment: One Year On. 2020. [Em linha] [Consult. 6th July 2021]. Available at: https://starvationaccountability.org/news-and-events/the-netherlands-accepts-starvation-amendment-one-year-on

[161] SHARP, Peter- Prospects for Environmental Liability in the International Criminal Court. P.218; [Em linha] [Consult. 6th July 2021] Available at: https://www.jstor.org/stable/24785960?seq=2#metadata_info_tab_contents

after World War II and it is in the view of Greene, a document mostly *anthropocentric*[162]. Is then, the ICC the suitable court to judge environmental crimes? Are the State parties ready to allow such a change?

Even changes within the human rights protection have created difficulties for adoption lately, as the case of recognition of starvation as a war crime also in Non-International Armed Conflicts (NIAC). The amendment regarding starvation was proposed by Switzerland and while in the Assembly of State Parties the proposal was highly accepted, some delegations mentioned that the amendments to the Rome Statute might lead to its fragmentation.[163] Those delegations considered that the continuous amendments would "impair the universality and the unity of the Statute system as a whole". While these views were expressed the Chair of the Working Group on the Amendments mentioned that the Rome Statute was "designed to accommodate the progressive nature of international criminal law (…)".[164]

Thus, one must establish that it will be extremely challenging to amend the Rome Statute to create a fifth crime in ICC's jurisdiction or even a crime against the environment in the crimes against humanity. Despite this, it is important that such movements are occurring and that countries such as the Maldives are demonstrating the will to make proposals in the Assembly of State Parties, for it shows that international actors desire to find new solutions for the protection of the environment. Even if this possibility will never come through, it already poses strength in the *ecocentric* approach and in the urgency to protect the environmental goods from human action that with or without direct intent cause damage to the environment.

5. Environmental Intervention

The present study has developed a methodology for analyzing IEL and all the solutions available for the protection of the environment. It intends to demonstrate the damages that have been caused to the environment, their disastrous level, and how IEL is

[162]GREENE, Anastasia - The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative? P.37 [Em linha] [Consult. 6th July 2021]. Available at: https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1814&context=elr

[163]International Criminal Court-Assembly of the Parties- Report of the Working Group on Amendments. Hague: 2019. [Em linha] [Consult. 7th July 2021] Available: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-32-ENG.pdf P.3 ;

[164]International Criminal Court-Assembly of the Parties- Report of the Working Group on Amendments (…) P.3 ;

not yet in a mature state. The *anthropocentric* and *ecocentric* approaches were discussed to better comprehend how should the rule of law apply to be more focused on protecting the environment. Solutions were considered throughout the present work to enhance the system, such as the codification of ecocide as an international crime on the Rome Statute. Other solutions were drafted such as the development of an environmental human right, and the protection of the environment through the legal concepts of CCH and CHH. Furthermore, the study has been focusing on the possibility of the existence of an intervention when an ecological emergency occurs in a State's territory, drawing the necessary path to achieve the construction of such a concept. Considering the *ecocentric* approach, altogether with the CCH and CHH one has begun to find a prospect for this intervention, as it was mentioned in the previous chapters, the environment has turned out to be a question of common concern and in some countries, a legal personality has already been created for the natural resources. Aiming to explore such possibility and with basis on the writings of the previous chapters, this one will focus on analyzing the emergency environmental cases that might occur and how could States and other international actors act upon them. The main question to be addressed is to understand whether, in case of an environmental emergency occurring in a State's jurisdiction, the international community should and must intervene? To explore such a possibility and disruptive solution, one will address the concepts of environmental emergency, sovereignty, responsibility to protect, and based on the current state of art describe the best possible solution.

5.1. Environmental Emergencies

A catastrophe or environmental disaster has been defined by several authors and institutions. According to the joint work of UNEP and OCHA (UN Office for the Coordination of Humanitarian Affairs), an environmental emergency is "a sudden-onset disaster accident resulting from natural, technological or human-induced factors, or a combination of these, that cause or threat to cause severe environmental damage as well as harm to human health and/or livelihoods."[165] Another definition was given by Perez and Thompson[166] that defined disaster as "widespread extensive damage that is beyond

[165]UN: UNEP and OCHA Guidelines for Environmental Emergencies Version 1, p.1; [Em linha] [1st May 2021]. Available at: https://reliefweb.int/sites/reliefweb.int/files/resources/Guidelines_for_Environmental_Emergencies_Version_1.pdf

[166]Apud, IASSW- Sustainability, Climate Change, Disaster Intervention Committee. [Em linha] [Consult. 1st May 2021]. Available at: https://www.iassw-aiets.org/sustainability-climate-change-disaster-intervention-committee/

the coping capacity of any community and therefore requires external action". Malone has also provided a definition referring to it as "any action which creates or threatens significant transboundary environmental damage or loss of a vital global resource which cannot be adequately addressed to ensure a safe and healthful environment by any other organization due to time or authority constraints".[167]

Taking all these definitions into respect the assumption is that to consider an environmental disaster as a disaster it will have to bear significant/severe damages and to create a situation that is beyond the capabilities of the affected States to solve the situation. Contemplating the inability of the affected State to react to the situation that may pose dangers to the natural resources but as well to the population, disaster relief solutions need to be ensured. The aid to States has been provided by IOs such as the UN through the Joint Environment Unit (JEU) of UNEP and OCHA. JEU has been responsible for responding to environmental disasters for the past 25 years.[168] The International Federation of Red Cross and Red Crescent Societies (IFRC) is another intervenient in disaster relief situations, besides being the most important organization regarding International Humanitarian Law. The IFRC provides relief by delivering food, water, shelter, and medical supplies on a non-discriminatory basis, and recently it has added to the support given, the Green Response[169]. The IFRC decided that natural disasters or human-induced disasters with an impact on the environment would also directly affect the natural resources. Whilst it was paramount to ensure that human lives are safe in such situations, it would also be exceedingly crucial to minimize the adverse impacts that may occur in the ecosystems[170].

Although there are organizations prepared to respond to a catastrophe, one must acknowledge that the destructive environmental impact that may arise out of such events has not been yet a target of development and discussion. The SC has, in the past years, started to address the dangers of climate change. The first meeting regarding the topic

[167]MALONE, Linda A. - "Green Helmets": A Conceptual Framework for Security Council Authority in Environmental Emergencies, Michigan Journal of International Law, Volume 17, Issue 2 (1996), p.523

[168]OCHA: Environmental Dimensions of Emergencies. [Em linha] [Consult. 7th May 2021]. Available at: https://www.unocha.org/es/themes/environmental-dimensions-emergencies

[169]IFRC: Disaster and Crisis Management. [Em linha] [Consult. 9th May 2021]. Available at: https://www.ifrc.org/en/what-we-do/disaster-management//

[170]IFRC: Green Response. [Em linha] [Consult. 9th May 2021]. Available at: https://media.ifrc.org/ifrc/green-response/

happened in 2007[171], and recently in February 2021, the SC gathered to address the climate-related security risks to international peace and security. According to the statements of the Secretary-General of UN, climate change is a threat multiplier, because "Where climate change dries up rivers, reduces harvests, destroys critical infrastructures, and displaces communities, it exacerbates the risk of instability and conflict."[172]. Some examples of interconnection between climate change and security are given as the case of West Africa and the Sahel where "more than 50 million people depend on rearing livestock for survival. Changes in grazing patterns have contributed to growing violence and conflict between pastoralists and farmers"[173]. As the acknowledgment of climate change and environmental depletion as a threat to security grows, more mechanisms will be created to avoid damages to the environment. Those mechanisms will protect the environment itself and populations and prevent conflicts that may exacerbate the already dangerous situation.

The ILC issued in 2016 the "Draft Articles on the protection of persons in the event of disasters" (ILC Draft Articles on Disasters). This document expresses the cooperation principle, aiming to create a mechanism that would allow for an affected State (as defined in the articles an affected State will be "state in whose territory, or in territory under whose jurisdiction or control, a disaster takes place") by a disaster to have available instruments, besides the ones of JEU and IFRC. The ILC Draft Articles define what disaster means, by including a reference to environmental damage, however, as referred to in the Commentaries, the mention of environmental damages would not trigger the necessity of protection of the environment *per se*. The objective of these ILC Draft Articles was to protect the people from loss[174]. In the cooperative spirit of the document, Article 7

[171]UN News: Climate change recognized as 'threat multiplier', UN Security Council debates its impact on peace. [Em linha] [Consult. 10th May 2021]. Available at: https://news.un.org/en/story/2019/01/1031322

[172]United Nations Secretary- General: Secretary-General's remarks to the Security Council - on addressing climate-related security risks to international peace and security through mitigation and resilience building. [Em linha] [Consult. 21st July 2021]. Available at: https://www.un.org/sg/en/content/sg/statement/2021-02-23/secretary-generals-remarks-the-security-council-addressing-climate-related-security-risks-international-peace-and-security-through-mitigation-and-resilience-building

[173]United Nations Secretary-General: Secretary-General's remarks to the Security Council - on addressing climate-related security risks to international peace and security through mitigation and resilience building. [Em linha] [Consult. 21st July 2021]. Available at: https://www.un.org/sg/en/content/sg/statement/2021-02-23/secretary-generals-remarks-the-security-council-addressing-climate-related-security-risks-international-peace-and-security-through-mitigation-and-resilience-building

[174]Commentary 9, on Article 3 subparagraph a).

declares that States shall cooperate with the UN and other IOs such as IFRC. According to Article 10, the affected State must ensure the protection of persons and provisions of disaster relief assistance in its territory or territory under its jurisdiction. Article 11 creates a duty for the affected State to seek external assistance every time it cannot answer to the disaster. It occurs because the disaster manifestly exceeds the means available in the State to provide aid for the population. The ILC Draft Articles did not mean, however, to create a disaster response that would configure an intervention. Accordingly, article 13 mentions in paragraph (1) that the provision of external assistance requires the consent of the affected State. It configures humanitarian assistance, which is to provide help without interfering with State's sovereignty.[175] The state that requires external assistance shall inform the other States and allow help in its territory.

One must acknowledge that the solution present by the ILC is admirable and would allow for cooperation between States and IO's while respecting State's sovereignty. Whilst respecting the State's sovereignty it creates a duty to seek help whenever it is not possible to protect the population, creating double safeguards. However, this dissertation aims to find a specific mechanism to aid and relieve not only people affected by an environmental disaster but also the natural resources, the ecosystems. Therefore, the next points will address environmental intervention.

5.2. State Sovereignty and Responsibility to Protect

The State's sovereignty principle is one of the pillars of IL. Sovereignty became a solid and undeniable concept in the Westphalia treaty, it was one of the bases of IL. The CUN Article 2 (1) recognizes the sovereign equality of all States, which is a statement of extreme importance for it considers that every State, independent of its size, or power is equal to others. Sovereignty signifying equality between States similarly implies that no State can attack another State's territory without its consent. The prohibition of the use of force is expressed in Article 2 (4), and in 2 (7) it is stated the principle of non-intervention. Such principle has an exception of the possibility of the SC intervention in the matters of Chapter VII[176] of the CUN.

[175]PEREIRA, Maria de Assunção Vale- A Intervenção Humanitária no Direito Internacional Contemporâneo, p.26-34

[176]Chapter VII of the Charter of the UN regulates the situations where the Security Council determines the existence of a threat to security or peace may act upon it, using military force if necessary.

Associated with the general sovereignty principle is the permanent sovereignty over natural resources which was officially recognized by the General Assembly of the UN in 1968, in Resolution 1803 (XVII) of 14 December 1962[177]. It was adopted following the recommendations of the Commission on Human Rights that concerned the rights of people to self-determination, in a period where decolonized States were becoming independent. The resolution recognized the right of the States to "choose its economic system and to exercise sovereignty over natural resources"[178]. It relates to the exploitation of the resources that States can do. The sovereignty principle has, nevertheless, in the past years been considered as of less vital significance, due to other values and important principles of *ius cogens*, such as the protection of human rights. As a result, humanitarian intervention began to ensue, when States started to intervene in other State's territories to protect the people from genocides, for example.

Based on the intervention allowed by Chapter VII for matters of peace and security, the SC has intervened in several situations. SC's main active years were years between 1989 and 2000 where 40 interventions occurred, in Iraq, Yugoslavia, Somalia, Libya, Rwanda, Afghanistan, among other States.[179] The wider recognition of human rights on The Universal Declaration of Human Rights and the treaties and conventions that arose after it created a logic of international accountability. Such accountability was enhanced with the creation of the *ad hoc* criminal courts to penalize people for war crimes and genocide (which was considered in 1947 in the GA of the UN as a crime, under the Genocide Convention) in the Yugoslavia armed conflict and then in Sierra Leone armed conflict (based on the former Nuremberg Tribunal and in the Tokyo Tribunals). Following the Genocide Convention, the ICJ ruled that all States have a responsibility to do what is in their power to prevent genocide, which was, at a certain point, opening the doors for intervention.

Due to all these interventions of the SC and the recognition that State sovereignty also means responsibility, in 1999 Kofi Anan the UN Secretary-General at the time stated

[177]United Nations: Human Rights Office of High Commissioner- General Assembly resolution 1803 (XVII) 14 December 1962, "Permanent sovereignty over natural resources". [Em linha] [Consult. 21st July 2021]. Available at: https://www.ohchr.org/EN/ProfessionalInterest/Pages/NaturalResources.aspx

[178]PEREIRA, Ricardo, GOUCH, Orla-Permanent Sovereignty over Natural Resources in the 21st century: Natural Resource Governance and the Right to Self-determination of Indigenous Peoples under International Law. Melbourne Journal of International Law, Vol.14 (2013), p.6

[179]VARELLA, Marcelo Dias- Droit d'ingérence et droit d'ingérence écologique: nouvex sujets dans une nouvelle réalité, 2003, p.2 and 3

that sovereignty was changing. It was changing not only because the SC was becoming more interventive, but also because States were also taking such a role, such as the United States on Iraq. In the words of Anan, "States are now widely understood to be instruments at the service of their peoples, and not vice versa.".[180] Annan mentioned the Rwanda genocide and recalls the failure of the international community to intervene, referring that the States should reach a consensus about intervention and reach a balance between intervening or not, and witnessing mass atrocities. Annan also referred that intervention should not only be seen as the use of force, calling the States to acknowledge that it is possible to have an effective intervention in a grave situation without always using military intervention. The humanitarian intervention, however, still quite uncertain in legal terms, has been the legitimacy for the interventions that occurred in the past years.

Many theories started to be drawn to reconcile the States' sovereignty with humanitarian intervention. Out of the questions raised by Annan and contemplating the instability that the world was facing at the time, the Canadian Government decided to create a commission, the International Commission Intervention and State Sovereignty (ICISS). The ICISS issued in 2001 a report called "Responsibility to Protect" which Annan described as "the most comprehensive and carefully thought-out response [to the dilemma of human protection] we have seen to date".[181] The report asserts several important details such as recognizing that the R2P implies a responsibility to prevent, to react, and to rebuild. One of the proposals of the report was to reconceptualize the concept of "right to intervene" to the concept of "responsibility to protect". The R2P theory is interconnected with the responsibility of States towards their legal obligations. The report envisioned to ascertain the idea that "sovereign States have a responsibility to protect their own citizens from avoidable catastrophes- from mass murder and rape, from starvation- but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of States"[182]. According to the authors of the report whenever the responsibility to prevent is not sufficient and the State where the disaster takes place is unable or unwilling to protect its people, the international community has

[180]ANNAN, Kofi - United Nations Secretary-General: Two concepts of sovereignty. [Em linha] [Consult. 13rd May 2021]. Available at: https://www.un.org/sg/en/content/sg/articles/1999-09-18/two-concepts-sovereignty

[181]Apud, BELLAMY, Alex J., DUNNE, Tim – The Oxford Handbook of Responsibility to Protect. p.6

[182]Report of International Commission on Intervention and State Sovereignty – The Responsibility to Protect, December 2001. p.VIII

the responsibility to react, using interventional measures, that include "political, economic or judicial measures, and in extreme cases- but only extreme cases- they may also include military action."[183]. In the 2005 World Summit, 150 heads of State embraced unanimously the R2P as a principle[184].

Could the R2P theory and the intervention that has been made on human rights protection be applied to an environmental intervention? So far, the environment has not been judged as a reason for intervention. Nonetheless, the last meeting of the SC in February which was focused on climate change may alter the present tense, as the final words were spoken were "2021 is a make-or-break year for collective action against the climate emergency". The SC decisions regarding the Iraq invasion of Kuwait also demonstrate a concern with the environment. A report of the UN High-Level Panel on Threats, Challenges and Change of 2004, entitled "A more secure world: our shared responsibility", identifies, following the report on R2P from ICISS, that one of the threats to peace and security that may trigger the necessity of international action, is the environmental degradation.[185]

5.3. Intervention and Responsibility to Protect in an Environmental Crisis?

As it was asserted, the environmental protection shall be of paramount importance in all States' national jurisdictions, in international and regional organizations, and as well in NGOs. The environment represented by all its diversity, is in danger, although several efforts have been made to repair the damages. Hence, should the international community allow that perhaps a major oil spill that occurs in a State that is unable or unwilling to clean it, to kill thousands of marine species, and to possibly have effects on the population's health?

Intervention in IL is a very broad concept. For some authors, as Bettati[186], it must be understood in general terms as an intrusion in the internal affairs of a State. An

[183]Report of International Commission on Intervention and State Sovereignty – The Responsibility to Protect, December 2001 p.29

[184]United Nations General Assembly-Resolution adopted by the General Assembly on 16 September 2005 [Em linha] [Consult. 14th May 2021]. https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf and EVANS, Gareth- The Responsibility to Protect in Environmental Emergencies [Em linha] International Crisis Group. [Consult. 11th June 2021]. https://www.crisisgroup.org/global/responsibility-protect-environmental-emergencies;

[185] UN Report "A more secure world: our shared responsibility", p.19

[186]BETTATI, Mario- O Direito de Ingerência, Mutação na Ordem Internacional. Instituto Piaget: Lisboa, 1996. ISBN- 972-8407-08-4. p.39

intrusion could be when other States or a single State discuss a situation regarding a State's decision on human rights affairs. Bachelet mentions that intervention can have two legal approaches. One is the approach of interference and meddling with the State's decisions, which configures the prohibition stated in Article 2 (7) CUN. The other approach is the view that there is a right or a duty of the community of States or even only one State to examine a situation in a certain State's territory without having been asked to do it[187]. The intervention can occur through military means (use of force) or can be achieved by economic sanctions, or even through aid, with planning and teams focused on recovering the damages. The most common definition of intervention is that it will be the "interference in the territory or domestic affairs of another state with military force, typically in a way that compromises a sovereign government's control over its own territory and population.".[188] This definition mirrors the strict concept of intervention that is the military one. The concept of humanitarian intervention was created out of the recognition that to render humanitarian assistance to victims in another State's territory, such State would have to consent with such assistance, and their sovereignty would be respected.[189]

As already mentioned, until today intervention has been mostly conceived and put into practice with regards to humanitarian questions. However, it is a reality that stands in the field of possibilities, for now. The humanitarian intervention was after a period of research, thought as being based on the R2P that States have regarding human rights, and in special to avoid specific crimes to be committed. For the construction of the ecological intervention figure and to better robust its foundations, one should explore the possibility of the R2P to be also applicable to it. One of the authors of the Canadian Report on Responsibility to Protect examined that question. Evans has presented in 2009 an opinion regarding this matter[190], where initially he states that R2P was drafted and created to cover situations like Rwanda and Cambodia cases, where terrible atrocities took place, and where the international community just witnessed it. Consequently, the R2P results in a solution for allowing a reaction from other States in those specific situations. Evans

[187]BACHELET- Ingerência Ecológica, p.272

[188]Oxford Bibliographies- Sovereignty. [Em linha] [Consult. 8th May 2021]. https://www.oxfordbibliographies.com/view/document/obo-9780199743292/obo-9780199743292-0047.xml

[189]PEREIRA- A Intervenção Humanitária... p.48

[190]EVANS, Gareth- The Responsibility to Protect in Environmental Emergencies [Em linha] International Crisis Group. [Consult. 11th June 2021]. https://www.crisisgroup.org/global/responsibility-protect-environmental-emergencies;

mentions that R2P has three pillars of action, (i) the responsibility of each State to individually protect its individuals from the genocide, crimes against humanity, war crimes, and ethnic cleansing, (ii) the responsibility of other States to assist such State to protect the individuals (iii) the responsibility of States to take collective action. For Evans, the R2P should not be used in situations that are considered as of "human security" such as a climate emergency or a pandemic. In his opinion, it would expand the concept to the point where it would cover everything and would end up not protecting anything. Bellamy has written about the application of R2P to the environment. He mentions that R2P covers four crimes, and it was particularly challenging to reach that point of consensus. Thus, to widen the principle to other matters, such as the environment, would need discussion of States again, which in his opinion, would lead to years of debate. In the worst-case scenario, the States that agreed with the R2P would withdraw their support[191].

Simon Adams, the Director of the Global Centre for the Responsibility to Protect, has addressed this "refusal" to broaden the concept of R2P of the two previously mentioned authors. Adams has written that climate change can be understood as a mass atrocity because "Where governance is weak, the threat posed by climate change looms largest. There are predictions that accelerating climate change could potentially displace between 50 and 250 million people globally. It will also increase global hunger and the regularity of catastrophic environmental events."[192]. Hence, climate emergencies that trigger conflicts and that could lead to mass atrocities should be addressed through the R2P figure, allowing the protection of people and places. As referred to in the Atrocity Alert No. 173 by the Global Centre for the Responsibility to Protect, climate change is a threat multiplier and poses risks to everyone. For that reason, the "collective responsibility to protect vulnerable populations from the threat of mass atrocities",[193] should be enhanced.

[191]Apud, FISHEL, Stephanie- Is Climate Change a Threat Multiplier? R2P and Environmental Disasters. [Em linha] E-International Relations. [Consult. 11th June 2021]. Available at: https://www.e-ir.info/2018/04/24/is-climate-change-a-threat-multiplier-r2p-and-environmental-disasters/.

[192]ADAMS, Simon- From Global Warming to Genocide Warning: Climate Change and Mass Atrocities. [Em linha] Relief Web [Consult. 12th June 2021]. Available at: https://reliefweb.int/report/world/global-warming-genocide-warning-climate-change-and-mass-atrocities

[193]Global Centre for the Responsibility to Protect- Atrocity Alert No. 173: Climate Change and the Responsibility to Protect. [Em linha] [Consult. 12th May 2021]. Available at: https://www.globalr2p.org/publications/atrocity-alert-no-173-climate-change-and-the-responsibility-to-protect/

5.4. Ecological Intervention

Before exploring the possibilities of legal figures to apply to the ecological intervention, the concept should be clarified. Bachelet understands that environmental intervention is not just a right, but a duty to protect the environment from destructive threats. Bachelet mentions that "we are led to establish rules of protection and, in particular, the right to intervene that States should be able to have at their disposal systematically in the event that one of them fails to respect the environment or is not in a position to ensure that the nationals on its own territory respect it."[194] In the view of Defarges, the event of an ecological disaster altogether with the lack of rules on how to manage such disaster would imply necessarily a right and a duty from the States to act.[195] For Eckersley, ecological intervention is the "threat or use of force by a State or coalition of States within the territory of another State and without the consent of the State in order to prevent grave environmental damage[196]". Eckersley also mentions that the ecological intervention can also include nonmilitary coercive measures, "such as sanctions, or ecological peacekeeping, which is usually carried out without consent".[197] Although the concept of ecological intervention is almost "new", in the Kosovo intervention Annan sent one letter to the President of the SC stating amongst other topics the dangers posed to the environment. It reads as follows: "Given the gravity of potential environmental consequences of the conflict and NATO bombing in the Federal Republic of Yugoslavia (…) a more detailed assessment of the full extent of the environmental impact is urgently required."[198] It is stated that for such assessment the UNEP and other UN Agencies should develop the protection of the environment. In paragraph 56 Annan mentioned that the damages caused to the environment "may pose a serious threat to health in the region, as well as to ecological systems in the broader Balkans and European region"[199].

The ecological intervention will be the intervention by the international community, conducted under Chapter VII of CUN, with the authorization of the SC. Such reaction may or may not be requested by the affected State and that will depend on

[194]BACHELET- Ingerência Ecológica. (Free Translation), p.51

[195]Apud- MOURA, Luiza Diamantino- Ingerência Ecológica: Um Instrumento de Salvaguarda Ambiental Justificado pela Ausência pela Proteção aos Direitos Humanos. p.173

[196]ECKERSLEY, Robin – Ecological Intervention: Prospects and Limits. Ethics & International Affairs (2007), p.293

[197]ECKERSELY- Ecological Intervention… Note 1, p.313

[198] Letter 9 June 1999 from the Secretary-General addressed to the President of the Security Council, p. 10

[199]Letter 9 June 1999 (…), p.24

circumstances. If requested by the State, giving it the consent for the intervention, the SC does not need to authorize the action. But, for it to be considered as an intervention, the affected State suffers from "intrusion" of other States, without consenting to it. The intervention can only exist after an international obligation was breached, in the studied case, when an obligation is breached that has effects on the protection of the environment. One considers that for an ecological intervention to be materialized, the disaster would have, as well, to affect people and not only the environment *per se*. The damage would have to be significant. Even though the States recognize widely the need for protecting biodiversity and to stop polluting for protecting the planet itself, these precautions also imply the protection of humanity. The two approaches (*anthropocentric* and *ecocentric*) previously explored have an important role in the configuration of ecological intervention. The fact is that the ecological intervention can be solely based on the protection of people, of their human rights when an environmental crisis occurs. But it can also be directed to protect the natural resources themselves. However, one believes that a solution covering both approaches could be created. The ecological intervention would safeguard the natural resources and by doing it would consequently protect people who suffered and will suffer from the disaster. As Colombo declares the ecological intervention has its legal grounds on the protection of human rights and in the breaches of the States' responsibilities regarding the safety of the environment.[200]

The ecological intervention should arise when there is a significant case of environmental disaster, that creates damage beyond the capabilities of the State where it occurs to handle. However, the environment poses some difficulties regarding the definition of significant damage, for example, pollution that occurs once is not considered extreme. Yet, if pollution occurs uninterruptedly, it will generate damage resulting from a cumulation of the pollutants either in the air, soil, or water. In the cases of pollution, it will be problematic to determine when that intervention should happen, but perhaps, if pollution creates an intense fog, killing species, leading to unavailability of resources and the creation of poor health conditions on people, there might be a position where the community of States should intervene.

Whether the ecological intervention is a right or a duty has been a question that arose by several authors, and in the view of Bachelet, it is a right and a duty[201]. Colombo

[200]COLOMBO, Silvina - O Direito de Ingerência Ecológica dos Estados. p.115
[201]BACHELET- Ingerência Ecológica, p.34

affirms that it is a right that arises out of the people who suffer from the disaster and duty from the States because the protection of the environment demands a collective action[202]. The environmental intervention should be effectively considered as a right of the environment *per se* and for the people affected by the consequences of the disaster[203] to be protected, repaired (when the possibilities of reparation), and when possible, to prevent damage. A duty is also present on the environmental intervention as States and international subjects must intervene to protect the Planet.

5.4.1. Foundations of Ecological Intervention

As previously mentioned, the intervention would take place when there is significant damage. When the damage occurs solely inside one State's territory, because that State due to action or omission was not able to prevent serious damage, the CCH concept connected with the CHH will be the foundation for the intervention. "When the environment is destroyed the international community may lawfully exercise pressure, for that destruction may have direct and indirect effects over the global environment."[204]. If a State does not comply with its obligations, for example, the ones from the Paris Agreement and does not reduce the emissions of the CFCs, and somehow, due to several factors combined, grave environmental damage arises, States should intervene. Why? For that damage will cause impairment to the global environment. The environment is composed of ecosystems and if piece by piece it is destroyed, there will be few pieces left, and the puzzle will cease to exist.

The principle of cooperation and the recognition that climate change respects no borders and affects all resources and all citizens are the mottos to be recalled. Every State aims to protect the environment, to preserve the forests, the seas, the wildlife, but not every State interprets and acts towards such protection in the same way and with the same means. The R2P should not be applied to the environmental intervention, as one considers in the same view as Evans and Bellamy, that the concept was specifically designed for the cases of the specific mass atrocities of the four crimes mentioned. To allow such a concept to be applied to the environment would open it to a point where all possible

[202]COLOMBO- O Direito de Ingerência Ecológica (…) p.105

[203]Regarding the people affected by the environmental degradation, one might even say that even though some specific group of people will be more affected as the direct effects are felt by them, the whole of humanity will indirectly feel the effects as well, for the chain of environmental depletion worsens the climate change, leading to the destruction of the Planet Earth.

[204] VARELLA- Droit d'ingérence… p.38 and 39 (Free Translation).

matters of "responsibility" would fit. Likewise, the question of having to readdress the concept with the States that decided to support it in the first place would distort the concept. As Adams suggests and as the SC has already recognized, climate change is a threat multiplier, which will be a trigger to armed conflicts and conflicts in general. Thus, to prevent mass atrocities that would (possibly) arise out of conflicts for water scarcity due to intense droughts, it would be possible to consider the figure of R2P. The question is that in that case, R2P would be the basis for intervention for the protection of people due to mass atrocities, and not focused on the environment which is not the aim of this study. The ecological intervention is a winding path to trace, still, a starting point could be to recognize that significant ecological events should be intervened upon when it would trigger mass atrocities because in any case the environment would be protected.

5.4.2. How to Ecologically Intervene?

Taking into consideration that intervention has several means, it is necessary to dissert about those that should be suitable for the ecological intervention and under which body of regulation it would be possible. An intervention can occur through economic sanctions, by imposing assistance to the State, or by military means. The assistance can occur on the field or by donating means and money for the State to use and manage the situation.

In her article, Eckersley explores and defends ecological military intervention. At the beginning of the article, the author mentions that the use of force in ecological terms should be considered with much caution[205]. Eckersley refers that ecological military intervention should be for specific situations, such as when a grave nuclear accident may occur, in the same terms as Chernobyl. If the State where the nuclear plant is situated refuses any technical help or assistance, military intervention should occur[206]. Such intervention would occur under Chapter VII, however, if there was a veto among the 5 permanent members of the SC, the States and NATO could intervene in self-defense. In the opinion of Eckersley pollutions and hazardous substances that can affect neighboring countries could be judged as an "armed attack". The author also ponders the military intervention when human rights are in danger and considers with a "big if" whether the military intervention would be legitimate and fair when the damage only affects the biodiversity, a crime against nature. A few critiques have been written about the opinion

[205]ECKERSLEY- Ecological Intervention… p.296
[206]ECKERSLEY- Ecological Intervention… p.296-297

of Eckersley regarding military intervention. The most prominent comment is that allowing military intervention to take place in ecological emergencies would create "one more reason" for States to have armed conflicts. That is the "pretext problem"[207], which has also been argued in humanitarian intervention. The purpose is to stop and prevent damage from arising out of an environmental disaster. To perform it through military means could instead enlarge the problem and generate more ecological problems altogether with humanitarian ones. Eckersley mentions that the ecological intervention would only be able to be performed by use of force if there was a just cause and if it was seen as legitimate by most States. One believes that military intervention should not be considered for ecological intervention. Even if the State where the ecological emergency occurred is creating more damage, one believes that it would not be proportional to perform a military intervention. The result wanted out of the intervention on the environment is to preserve the resources which a military intervention that may become an armed conflict, will not guarantee. Therefore, ecological intervention should help to restore, rebuild, and whenever possible to prevent more damage, diminishing the already existing impacts. Cooperation among the States should be the most important value. As Varella mentions "the cooperation between the countries that can prevent the expansion of a right to military intervention, based on the protection of the environment".[208]

Applying economic sanctions in environmental disasters could be considered when a State allows privates or its governmental organs to act recklessly regarding the environment. It could also occur when a State is not complying with its international environmental obligations. For those sanctions to be deployed, care should be taken and the requirements for applying the sanctions should be extremely accurate.

Several questions were raised regarding the construction of the ecological intervention, mainly the question of environmental justice, regarding the difference between the South and the North countries.[209] "Developing countries have rightly argued that the developed world has achieved its relative affluence by exploiting the environment and fossil fuel (…) yet it is now seeking (…) to deny the South the same easy route to

[207]HUMPHREY, Mathew- On Not Being Green about Ecological Intervention. [Em linha] Ethics & International Affairs (2007). [Consult. 15th May 2021]. Available at: https://www.ethicsandinternationalaffairs.org/2007/on-not-being-green-about-ecological-intervention-full-text/

[208]VARELLA- Droit d'ingérence… p.37 (Free Translation).

[209]Environmental Justice theory was analyzed briefly in §2.2

affluence without providing sufficient institutional capacity, resources and technologies to make a genuinely alternative development path possible for the South"[210]. The ecological intervention may end up being conducted always in the South countries as those are the ones with fewer means to protect their natural goods. Yet, it does not imply that every emergency that will require an ecological intervention will solely occur in the developed countries. Anyway, a consensus should be reached in this matter for both North and South States to find themselves in a comfortable position in their general responsibilities towards the environment. Based on the common but differentiated responsibility, all States should work together and while respecting environmental justice, protect natural resources.

Other problems arise when considering the ecological intervention such as the political and economic interests, which can misrepresent the construction of this intervention. The political interests may lead certain States to abstain from intervening to protect the natural goods and the possible human victims. Those political interests may as well create stronger interventions by States, such as posing disproportional sanctions for a State that created overwhelming pollution.[211] The ecological intervention will also face obstacles due to the existence of economic interests in exploiting natural resources. Those interests surpassing the protection of the environment may arise not only from the country where the good is located but also from other countries, leading to an omission of protection.

Challenges will also occur when the ecological intervention is based on aid and the State where the emergency occurred decides to not allow the assistance. It may refuse assistance expelling the intervenient parties or it may begin an armed conflict with them. The question of not accepting aid is also associated with the sovereignty principle. The intervention will always disregard a State's sovereignty over its territory, and such a State may not agree with it. It is a very sensitive question, to consider intervention and to open the possibility to intervene when the environment is at risk, mainly because the environment itself is an extremely broad figure. It is particularly important to delimit the ecological intervention figure, to thwart it from becoming too wide, where any "failure"

[210]ECKERSLEY, Robin – The Green State, Rethinking Democracy and Sovereignty. Massachusetts Institute of Technology: Cambridge Massachusetts: 2004, p.223

[211]The veto power that one of the 5 permanent members of the SC may exercise is also a representation on some occasion of political interests.

of a State in protecting its natural resources and the environment in general, will entail a possible intervention.

5.4.3. Attempt of Intervene Ecologically

After the previous acknowledgments and discussion, this subchapter will focus on the trial version of the ecological intervention. It reflects the state of art and pretends to explore beyond what has already been drafted. As declared, one of the bases that would legitimate the ecological intervention is the consideration of the ecological goods as goods that are of concern to all humanity. CCH is a more flexible concept than the CHH to apply to the situation in the analysis, and as Pureza considers, the CCH should be ascertained as part of the CHH[212]. With that respect, one could establish a solution where the environment would be protected under a more structured figure which is the CHH but in an actualist approach (through CCH). Consequently, the States would have a shared benefit on the exploitation of the goods and a shared burden. This solution would allow natural goods inside State's territory to be protected by all States. States would be responsible for the environment collectively and individually. If the ecocide were considered a crime, either independent or within the crimes against humanity, it would also enhance the legitimacy of the ecological intervention.

The ecological intervention herein described would occur when environmental damage would reach an out-of-control level, such as a wildfire consuming for days a forest and with-it killing people and wildlife. The out-of-control level would mean that the State where such damage is occurring cannot, for it has no means to control it, or does not want to stop it and control the consequences. A forest provides oxygen and is essential for the environment and the fewer forests available the more climate change evolves.

The type of intervention that would be the most appropriate in the environmental cases would be to impose aid to the State. That assistance could be employed as the ILC Draft Articles on Disasters refer to in Article 8. Making available personnel and means (scientific, technological, etc.) that would have a positive impact in the prevention of the effects in long term on the environment, as it would at least mitigate the already created harm. It would be different from what is described in the ILC Draft Articles, as this ecological intervention would firstly focus on the environmental damage *per se*, and secondly would not need the consent of the affected State to intervene. Having this sketch

[212]PUREZA– O Património Comum da Humanidade… p.278

in mind, one should clarify that it would be paramount that the decision to intervene by imposing assistance, should be considered, and decided in cooperation. It could even be more legitimate and in a cooperative spirit, to do it with the support of the UNEP and always with the SC authorization. However, as mentioned there are always political interests weighing on those decisions, and if not approved by SC, at least a group of States (3 or more) should on a cooperative basis decide to act upon it. Though, with the consciousness of helping and never to create more destruction.

Even if the military intervention is not being discussed here, it is always possible that States will aid the affected State with different interests and take advantage of being in that State's territory to create more disruption. Military intervention should not be contemplated for the ecological intervention as it is challenging to defend a good by destroying others, mainly taking lives. If at any point ecological disasters or damages are leading to mass atrocities, such as genocide (when a whole ethnicity is left without water or food supplies) that could be a question of humanitarian intervention. In an extreme case, military intervention could be imposed.

One must highlight that ecological intervention should protect human rights. If harmful environmental behavior occurs continuously, having significant effects on people's rights, it could be thought of as a possible reason for an ecological intervention. In any case, the application of the ecological intervention into practice must be thought carefully to avoid that it becomes a justification for intervening in other State's territory for any reason. As Varella mentions the responsibility reflected on the duty to protect the environmental goods is based on prevention. The prevention of environmental damage is the key because even if all efforts are made to restore the previous situation, it will have long-term effects, causing a chain reaction. The sovereignty principle over natural resources is consolidated, however, it is limited by a common concern, and therefore, the intervention aims to prevent damages to the global environment[213].

The ecological intervention should be limited in time, space, object, and actions that can be taken. Hence, the intervention should occur only until when it is necessary, and only where it is necessary. For example, in the case of a tropical forest that is on fire and has been for 15 days, the possible intervention should end as soon as the fire extinguishers and when the rescues finish, and in general when the situation becomes

[213]VARELLA- Droit d'ingérence…p.38 and 39;

manageable by the affected State. Such intervention shall only occur where the fire is happening and not expand to the whole State's territory. The actions taken shall constantly be the ones necessary to achieve the objective. Every action that goes beyond these limits can be considered disproportional and cause an extreme violation of the State's sovereignty.

The ecological intervention herein constructed does not aim to deny the sovereignty that each State has, yet it aims, in line with the *ecocentric* approach to elevate the environment as a common good, while sidelining State sovereignty. It does not pretend either to deny that the general principle of non-intervention is applicable, even though some exceptions, as the one here constructed, allow for its derogation. The world is reaching a point where States, companies, and individuals, in general, must take responsibility for their actions and preserve the environment. Otherwise, more extreme measures will need to be taken. Environmental intervention is an extreme measure but presently, the environment is on an emergency level. Without effective measures that allow for robust prevention of depletion, Planet Earth may continue a downward spiral, for other values will continue to be more relevant than to save the Planet.

6. Conclusion

This study has allowed for answers to be drawn about the questions raised in the Introduction. The conclusion about the environment as a protected legal interest is that it is recognized as such. However, a debate around the best approach to follow in the protection remains present. The author of the present study has reaffirmed, concerning the debate, that the *anthropocentric* approach and the *ecocentric* approach should be combined to enhance the protection of the environment. It would allow for the environment to be protected *per se* and humanity to be safe from the depletion that the Planet may suffer. As this conclusion was reached the concepts of CCH and CHH were proven as the necessary step to be taken for the global protection of the environment. Regarding the current state of IEL rule of law, one has acknowledged, that liability has not been much effective, and that more robustness is necessary. Damage to the environment takes place and yet States and privates are still not being held accountable, in general. Nevertheless, IEL is improving, and Paris Agreement is good proof of it.

The answer to the question of the possibility to intervene when a natural resource is facing significant damage was positive. The study demonstrates that with features of

humanitarian intervention and with a basis of humanitarian assistance along the lines of ILC Draft Articles on Disasters, intervention could exist. It should always be based on SC authorization. The shortcomings that may arise with this intervention are varied, such as States taking the intervention as a way of creating conflicts based on political or economic interests. Yet, as mentioned, if cooperation and values of good faith are inspirations for this intervention the shortcomings may reduce. Innovation and evolution always take risks, and this would not escape that same faith, however, one believes that the results for the environment, always only when in cases of emergency, would be better than the risks of the intervention.

For the sake of this study, one should concretize whether currently, such theoretical ecological intervention would be feasible. Applying it to practice would require that SC would recognize the damage to the environment as a threat to security and peace, to allow a legitimate intervention through Chapter VII. For the intervention to be possible, all States should consider the environment as a common concern, which would create the duty to protect it, and obligations *erga omnes*. For these steps to be taken, several years of discussion and agreements would have to take place. One recognizes that these steps will be challenging to take and that it is audacious to suggest that the sovereignty might suffer a downgrade to protect natural resources in danger. Yet the environment itself is not the property of any country or person, and its effects, either positive or negative will impact all humanity, all species, all ecosystems.

Should the ecological intervention exist in practice, more prevention and care in States' and privates' actions would exist. The international community would be more aware of the breaches and harms created in the environment and would be willing to diminish the possible impacts. By creating a preventive behavior less damage would occur. Moreover, in case of a necessity to intervene, the essential means would be used (intervention by imposing assistance) to reduce the outcomes of the depletion. States, IO´s and other international actors should cooperate to "take care of the planet".

This study aimed to demonstrate the development of IEL, and how the existent rules even if creating obligations and consequent responsibilities have not proven enough results. Companies continue to pollute and damages to the environment have not been reduced on the necessary scale, considering the emergency that Planet Earth is living. All in all, the study wishes that a small contribution to the discussion around ecological

intervention is made. The clock is ticking and the world, the people in it, and all the species are ultimately in danger. There is urgency but there is hope and humanity has had in all its existence means to improve their conditions, why not now improve the Planet itself?

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