Environmental Intervention: an Activist Idea or Legal Tool?

An analysis of the possibilities of environmental protection under the principle of non-intervention.

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Table of Contents

Chapter 1. Introduction

"Our house is burning."

With this sentence the French President Emmanuel Macron started a tweet on 22 August 2019 about fires in the Amazon rainforest, which he called "an international crisis".[1] What caused Macron to use this alarming language?

In the fall of 2019, the world had its eyes on the destruction of the Brazilian Amazon due to immense fires. Brazil's National Institute for Space Research (INPE) sounded the alarm bell concerning the 30 percent increase of the destruction relative to 2018.[2] Although the Amazon is spread over eight States and one overseas territory, an estimated 64 percent lies in Brazilian territory.[3] It enjoys worldwide importance for its role in conserving biodiversity and storing carbon dioxide.[4] This is threatened by deforestation while the Brazilian Amazon has the highest rate of forest destruction across the world.[5] Nonetheless, the Brazilian Government suspended penalties for illegal logging, which, according to Human Rights Watch, clashes with Brazil's obligation to act against environmental harm.[6] Jonas Ebbesson - Professor of Environmental Law at Stockholm University - has even been reported to observe that the deforestation can lead to violations of international law, like the Convention on Biological Diversity (CBD)[7] and the no-harm principle.[8]

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[1] Ney Hayashi Cruz, 'Macron calls on G7 countries to discuss Amazon forest in Summit' (*Bloomberg*, 22 August 2019) <https://www.bloomberg.com/news/articles/2019-08-22/macron-calls-on-g7-countries-to-discuss-amazon-forest-in-summit> accessed on 12 July 2020.

[2] Brazil's National Institute for Space Research, 'The estimate of the rate of clear-cut deforestation for the Legal Amazon in 2019 is 9,762 km²' (*INPE*, 18 November 2019) <http://www.inpe.br/noticias/noticia.php?Cod_Noticia=5294> accessed on 12 July 2020.

[3] Beatriz Garcia, *The Amazon from an international law perspective* (Cambridge University Press 2011) 23.

[4] ibid 1-2.

[5] ibid 36, 38: It should be noted that the deforestation in Brazil is better monitored than in other Amazon States.

[6] Human Rights Watch, 'Brazil: Amazon penalties suspended since October' (*Human Rights Watch*, 20 May 2020) <https://www.hrw.org/news/2020/05/20/brazil-amazon-penalties-suspended-october> accessed on 12 July 2020.

[7] Convention on Biological Diversity, adopted 5 June 1992; entered into force 29 December 1993; UNTS Vol. 1760, No. 30619 ("CBD").

[8] Beatrice Crona and Victor Galaz, 'Politics is failing to protect the Amazon. It's time for finance to step up instead' (*World Economic Forum*, 14 December 2018) <https://www.weforum.org/agenda/2018/12/politics-are-failing-to-protect-the-amazon-its-time-to-use-finance/> accessed on 12 July 2020.

Consequently, it is not difficult to see why Macron designated the fires "an international crisis". As a result of the Amazon's global importance, the deforestation is not Brazil's concern only. Could this lead to a legal interest of other States in the Amazon's protection and conservation, even regarding parts within Brazilian territory? At the G7 Summit in August 2019, the G7 States seemed to accept this interest when agreeing to support Brazil by releasing a fund to fight the fires.[9] The Brazilian President Jair Bolsonaro accused the G7 States of "interfering in Brazil's national sovereignty."[10] According to the Brazilian Government, "[t]he Amazon is Brazilian, the heritage of Brazil and should be dealt with by Brazil for the benefit of Brazil."[11]

1.1 Problem statement and research question

This example demonstrates the problem this thesis will research. States wish to act when faced with environmental emergencies of international concern, but the wrongdoing States enjoy sovereignty and use this to invoke the principle of non-intervention. Although sovereignty remains important, the question is whether States can rely on the principle of non-intervention if not adequately protecting the object of its sovereignty.

These environmental emergencies trigger a debate, which in the past occurred concerning human rights violations, like the 1994 Rwandan genocide.[12] Faced with tensions between human rights protection and the principle of non-intervention, the Responsibility to Protect (RtoP) was created to provide the international community with a tool to respond to such situations.[13] The principle of non-intervention was to yield to the RtoP.[14] Would the international community be willing to take a similar step for environmental emergencies? The United Nations Secretary-General (UNSG) asked if, "sovereignty, [...] [could] be misused as a shield behind which mass violence could be inflicted on populations with impunity?"[15] Yet, the same question can be asked regarding environmental emergencies, "[does] sovereignty entitle a nation to destroy resources

[9] 'Amazon fires: G7 to release funds for fire-fighting planes' (*BBC*, 26 August 2019) <https://www.bbc.com/news/world-latin-america-49469476> accessed on 12 July 2020.
[10] ibid.
[11] Samy Adghirni, 'Brazil Tells the World: The Amazon Rainforest Is Ours, Not Yours' (*Bloomberg*, 10 May 2019) <https://www.bloomberg.com/news/articles/2019-05-10/amazon-rainforest-is-ours-and-not-yours-brazil-tells-the-world> accessed on 12 July 2020.
[12] International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect' (December 2001) available at <http://www.iciss.ca/pdf/Commission-Report.pdf> ("ICISS Report") 1.
[13] UNGA, *2005 World Summit Outcome*, A/RES/60/1 (16 September 2005) [138].
[14] ICISS Report (n12) xi.
[15] UNGA, *Implementing the responsibility to protect: report of the Secretary-General,* A/63/677 (12 January 2009) [5].

within its territorial control, when this destruction has global environmental consequences?"[16] These questions relate to the principle of non-intervention, which is a corollary of the principle of sovereignty and often invoked in international relations.[17] The principle entails a prohibition of States intervening directly or indirectly in the affairs of other States.[18] Yet, its exact meaning, scope and functioning remains somewhat unsettled. This thesis sets at its heart the principle of non-intervention and aims to research the possibilities to provide States with a tool to respond to environmental emergencies. Therefore, the following research question is formulated:

> *Under which circumstances can States lawfully intervene in the domestic sphere of another sovereign State in response to environmental emergencies?*

The lawfulness of environmental intervention depends on two bodies of international law. First, the law prohibiting the specific means by which the intervention is done, the *lex specialis.* For example, economic measures can be means of environmental intervention, which could be prohibited under international trade law, a *lex specialis*. Second, these measures can also be prohibited under the principle of non-intervention, the *lex generalis*.[19] This thesis is solely concerned with the lawfulness of environmental intervention under the principle of non-intervention. This principle prohibits intervention using force, like physical (armed) acts, and intervention not using force, like economic and diplomatic measures.[20] This latter type of intervention is the focus of this thesis due to the unlikelihood of armed troops being sent to another State in protection of the environment and the undesirable aggravating effect.

The question arises what we should understand under environmental intervention not using force. The answer can be provided by using the Amazon fires as an example. These fires present an accurate case study because Brazil likely committed an internationally wrongful act as a result or as the cause of the fires. Moreover, States declared themselves ready to impose measures, while Brazil fiercely opposed any foreign meddling. It is in these situations that environmental intervention is envisioned to appear as a legal tool. The fires created an environmental emergency for other States, which unfolded within Brazil's borders but had global environmental consequences. These consequences can provide other States with a legal interest in the protection

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[16] Lawrence Douglas, 'Do the Brazil Amazon fires justify environmental interventionism?' (*The Guardian*, 31 August 2019) <https://www.theguardian.com/commentisfree/2019/aug/31/brazil-amazon-fires-justify-environmental-interventionism> accessed on 12 July 2020.
[17] ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Judgment of 27 June 1986, ICJ Reports 1986 ("*Nicaragua*") [202].
[18] Marcelo Kohen, 'The Principle of Non-Intervention 25 Years after the Nicaragua Judgment' (2012) 25(1) LJIL 161-164.
[19] Mohamed Helal, 'On Coercion in International Law' (2019) 52(1) NYUJIntlL&Pol 82.
[20] Vaughan Lowe, *International law* (Oxford University Press 2007) 105.

and conservation of the Amazon. To that end, environmental intervention can be used by States to resort to taking measures short of force. Examples are imposing a temporary import ban on products from the Brazilian Amazon, placing restrictions on the movements of Brazilian nationals or imposing a complete trade embargo. This would undoubtedly be perceived by Brazil as an unlawful intervention. But is this correct?

This leads to the following sub-questions in order to answer the research question. The first sub-question relates to the scope of the principle of non-intervention. What forms of intervention, and intervention in which issues, are prohibited under the principle? This results in the second sub-question concerning the relationship between sovereignty and the principle of non-intervention. To what extent enjoy States sovereignty to handle environmental issues as they wish, even if its consequences affect other States or the international community as a whole? How does this affect their reliance on the principle of non-intervention? It will be researched if environmental issues with transboundary or worldwide importance might provide other States with a legal interest in its conservation and protection. The third sub-question tries to bind all issues together in asking which forms environmental intervention can take to be justified in light of the principle of non-intervention.

1.2 Terminology

Several terms require clarification in order to understand the scope of the research question. The term 'intervention' in this thesis encompasses any type of unilateral intervention, act or omission, not using force, by a State in matters concerning another State. The author acknowledges the discussion on the terms 'intervention' and 'interference',[21] but within this thesis these terms are equated in meaning. Further, 'unilateral' means enforced by a single State or a group of States, but without United Nations Security Council (UNSC) authorization.

The term 'environmental emergencies' covers all events, directly or indirectly man-made or not, taking place within the State's borders, due to or leading to an international wrongful act by that State, which has a significant impact on the natural environment, including non-human species.[22] These impacts are either transboundary, affecting at least one or more State(s), or

[21] See Philip Kunig, 'Prohibition of Intervention' (2008) MPIL, para. 6; Maziar Jamnejad and Michael Wood, 'The Principle of Non-intervention' (2009) 22(2) LJIL 347 (fn 7); Antonios Tzanakopoulos, 'The Right to be Free from Economic Coercion' (2015) 4(3) CILJ 620-621 (fn 21).

[22] This definition leans on the definition in Polly Higgins and others, 'Protecting the planet: a proposal for a law of ecocide' (2013) 59(3) Crime, Law and Social Change 257: "*Ecocide is the extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished.*"

endanger a global environmental issue. Accordingly, this thesis will focus on the possibility of environmental intervention by invoking the no-harm principle or the common concern of humankind (CCH). The CCH even covers crucial threats to the natural environment, like climate change and the deterioration of biological diversity.[23]

1.3 Methodology

In order to answer the research question, the following methodology is adopted. This thesis aims to analyse the principle of non-intervention, sort its characterizations and to seek how environmental intervention fits into this framework. To this end, doctrinal research describes the rule established by the principle of non-intervention and how this should be applied.[24] Jurisprudence and other primary legal documents will be collected and analysed, while supported with secondary sources as academic literature, separate opinions of judges and commentaries on jurisprudence and legal documents.[25] Predominantly recent sources will be used since the principle of non-intervention is prone to change and the aim is to capture its contemporary understanding. This doctrinal research will be used for a discussion on the characterizations and underlying values of the principle.[26]

From this point, the research can be characterized as a hermeneutical discipline. Different sources and arguments will be interpreted to deduce the circumstances under which environmental intervention could be lawful.[27] Within this analysis, it will be researched whether there has been a shift in meaning of the principle of non-intervention in favour of environmental emergencies. It will take into account the global importance of the natural environment and specifies its research to the no-harm principle and the CCH. What are the consequences of the acknowledgement of other States' interests in the protection of the natural environment? Van Hoecke describes the methodology of the hermeneutical disciple as the collecting of empirical data, like the sources mentioned above, constructing word hypotheses on their meaning, which are then tested.[28] This thesis will follow this methodology by interpreting the understanding of the principle of non-intervention, constructing hypothesis on its characterizations and underlying

[23] CBD, Preamble; United Nations Framework Convention on Climate Change, adopted 9 May 1992; entered into force 21 March 1994, UNTS Vol. 1771, No. 30822 ("UNFCCC"), Preamble.
[24] Ian Dobinson and Francis Johns, 'Qualitative legal research' in Mike McConville and Wing Hong Chui (eds), *Research methods for law* (Edinburgh University Press 2007) 18-19.
[25] ibid 19; Mark van Hoecke, 'Legal doctrine: which method(s) for what kind of discipline?' in Mark van Hoecke (ed), *Methodologies of legal research: which kind of method for what kind of discipline?* (Hart Publishing 2011) 11.
[26] Dobinson and Johns (n24) 20.
[27] van Hoecke (n25) 4.
[28] ibid 11.

values regarding environmental intervention, and then seek forms environmental intervention can take to fit the hypothesis.

The hermeneutic discipline leans on the argumentative discipline. Arguments are needed to substantiate or refute the interpretation from the principle of non-intervention.[29] The research will probably come across opposing views which could equally be sustained by using the same sources.[30] The author is aware of the subjectivity underlying the research. Dobinson and Johns recognize that doctrinal research includes selecting and weighing legal materials in light of authority, background and interpretation. The understanding of principle of non-intervention is reasoned rather than found.[31] Valid argumentation is needed to combat the subjectivity, especially since it is likely that States will hold different views on the meaning of intervention and the importance of the natural environment.

Ultimately, the importance of this thesis is twofold. First, it provides a new perception to the principle of non-intervention because the general focus of academic literature has been on its relation to other areas of international law, mostly human rights.[32] Second, if authors focused on environmental intervention, often the research related to intervention using force, like military force to ensure environmental protection.[33] Eckersley sketches the example of a response by multilateral forces to protect mountain gorillas from illegal poaching.[34] This thesis aims to contribute to the current academic literature in researching the relation between the principle of non-intervention and international environmental law, whilst focusing on forms of intervention not using force.

1.4 Structure

The second chapter will provide the conceptual and theoretical legal framework by analysing the principle of non-intervention. An introduction to the principle will be given, which leads to a discussion on the theoretical perspectives on the principle. This perspective will provide the lens through which to perceive further research. Afterwards, academic literature and case law will be used to deduce and discuss the defining elements of intervention as prohibited under the principle

[29] ibid 4.
[30] ibid 5.
[31] Dobinson and Johns (n24) 21-22.
[32] See Russell Buchan and Nicholas Tsagourias, 'The Crisis in Crimea and the Principle of Non-Intervention' (2017) 19(2-3) ICLR; Stacey Henderson, 'The Evolution of the Principle of Non-intervention? R2P and overt assistance to opposition groups' (2019) 11(4) GR2P.
[33] See Robyn Eckersley, 'Ecological Intervention: Prospects and Limits' (2007) 21(3) Ethics & International Affairs 294-295.
[34] ibid 296.

of non-intervention. Furthermore, different forms of intervention important for or related to environmental intervention will be discussed before ending in an analysis on the changing perception of the principle of non-intervention. Subsequently, both the third and fourth chapter will focus on the practical application of the defining elements to environmental intervention.

As a result, the third chapter will continue to research the element of the reserved domain. The relationship between sovereignty and the reserved domain will be highlighted, before turning to a discussion on the increasing relative understanding of sovereignty. This understanding provides the foundation to research the reserved domain since it has been argued that the matters falling within the reserved domain are eroding.[35] This possible reduction will be researched through two lenses: the normative development of international environmental law and the enforcement of these developments. The focus will be on the no-harm principle and the CCH.

The fourth chapter researches the forms environmental intervention can take and how these can be justified. The chapter will start by providing some examples of environmental intervention in State practice. These examples demonstrate the main forms environmental intervention can take with its corresponding justification. These forms will be analysed to understand the circumstances under which environmental intervention can be lawful. At the end of the chapter, the Amazon fires will be used as a case study to illustrate the matters researched.

Lastly, the conclusion will summarize the main findings and provide an answer on the research question.

[35] Eric Corthay, 'The ASEAN Doctrine of Non-Interference in Light of the Fundamental Principle of Non-Intervention' (2016) 17(2) APLPJ 13.

Chapter 2. The principle of non-intervention

This chapter will provide a conceptual analysis of the principle of non-intervention. It will start by giving an introduction to the principle (2.1) before moving to theoretical perspectives on its understanding (2.2). There exist different understandings on the meaning of the principle of non-intervention. A discussion on two theories of international law can clarify these varying understandings, while providing a theoretical lens for further research. From there, it will be attempted to analyse general elements defining intervention as prohibited under the principle of non-intervention (2.3). This is vital in order to distinguish between lawful and unlawful intervention. The relationship between these elements (2.3.1) will be discussed, followed by an analysis on the elements separately (2.3.2-2.3.3). Subsequently, the focus will switch to four forms relevant for environmental intervention (2.4): diplomatic intervention (2.4.1), economic intervention (2.4.2), political intervention (2.4.3) and humanitarian intervention (2.4.4). The chapter ends in an analysis on the changing perception of the principle of non-intervention (2.5) and some concluding thoughts (2.6).

2.1 An introduction to the principle of non-intervention

Traditionally, the State has been understood as a sovereign entity enjoying absolute authority over its territory. This is famously referred to as 'the Westphalian concept' of sovereignty and statehood. According to this concept, international law is not concerned with the State's domestic affairs; the State enjoys sovereignty.[36] The principle of non-intervention is a corollary of the principle of sovereignty.[37] After all, respect for a State's sovereignty requires non-intervention in its affairs. This acknowledgement itself detracts from an absolute understanding of sovereignty by limiting the enjoyment of sovereignty to, at least, the other States' sovereignty.

The principle of non-intervention long remained absent in State practice, but started appearing in United Nations General Assembly (UNGA) Resolutions in the twentieth century.[38] Although these resolutions are not a formal source of international law, as not mentioned under Article 38 Statute of the International Court of Justice (ICJ Statute),[39] they are authoritative regarding the

[36] Henderson (n32) 366-367.
[37] *Nicaragua* [202].
[38] Jamnejad and Wood (n21) 349-351.
[39] Statute of the International Court of Justice, adopted 26 June 1945; entered into force 24 October 1945; 15 UNCIO 355 ("ICJ Statute").

development of international law as expressing *opinio juris*.[40] Hence, they provide a good starting-point for research. In 1965, the UNGA adopted a resolution containing a formulation considered to be the principle of non-intervention, "[n]o State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State."[41] Subsequently, its main points were confirmed in the 1970 Declaration on Principles of International Law Friendly Relations and Co-operation among States (Friendly Relations Declaration), which also contained the duty not to intervene in a State's affairs.[42] The relevance of the Friendly Relations Declaration lies in the *opinio juris* deductible from the States' attitude towards its text.[43] Furthermore, it codifies basic principles of international law, of which some are currently customary international norms.[44] The principle of non-intervention is such a basic principle of international law and its customary status is confirmed by the International Court of Justice (ICJ) in the *Military and Paramilitary Activities in and against Nicaragua* case (*Nicaragua* case).[45]

2.2 Theoretical perspectives

As we set out to research the exact meaning of the principle of non-intervention, theory can shed an exploratory light on the difficulties surrounding the principle. The content of the principle does neither enjoy consensus among States, nor is it clear from international law. In this respect, realism and liberal internationalism are two useful theoretical lenses.

According to realists, not international law but power relations steer State behaviour. Interventions aim to achieve security and to create a certain power balance. Legal norms are irrelevant because intervention will be based on the State's capabilities.[46] Within this theoretical framework, environmental intervention is guided by political motives instead of the principle of non-intervention.

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[40] Gleider Hernández, *International law* (Oxford University Press 2019) 54.
[41] UNGA, *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, A/RES/2131(XX) (21 December 1965).
[42] UNGA, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, A/RES/2625(XXV) (24 October 1970) ("Friendly Relations Declaration").
[43] *Nicaragua* [188].
[44] *Nicaragua* [203]; Friendly Relations Declaration (n42): "considering that the progressive development and codification of the following principles."; ICJ, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005, ICJ Reports 2005 ("*DRC v. Uganda"*) [162]: The ICJ declares the first principle, ninth point and the third principle, second point of the Friendly Relations Declaration customary international law.
[45] *Nicaragua* [202]: "part and parcel of customary international law."; [209]: "the customary principle of non-intervention"; [245]: "the customary law principle of non-intervention".
[46] Eliav Lieblich, *International Law and Civil Wars: Intervention and Consent* (Routledge 2013) 40.

To the contrary, liberal internationalists argue that intervention does not relate to power structures and that the need for intervention has been reduced due to increasing interdependence among States. Not power structures, but fairness and legitimacy are emphasized in the international community.[47] According to liberal internationalists, the international community is built on concepts as the rule of law and Western democracy.[48] Intervention aims to protect these values, which sometimes invites criticism.[49]

This discussion demonstrates the possible positions towards the principle of non-intervention. If the realist position is adopted, the principle of non-intervention poses an inaccurate way to restrain State behaviour, and especially powerful States can intervene as they wish. This view reflects the current world order only to a certain extent as it underestimates the power international law holds in changing State behaviour. Liberal internationalism can help understand the meaning of intervention due to its recognition of interdependency and certain values. Consequently, this thesis adopts a liberal internationalist approach.

2.3 The defining elements

The precise definition of the principle of non-intervention is complicated by the lack of a clear articulation in international law.[50] Article 2(7) of the Charter of the United Nations (UN Charter)[51] is often offered as containing the definition, but this article does not represent a principle of international law. It is addressed to the UN and determines its competences.[52] Also State practice fails to clarify the meaning of the principle. It has been inconsistent and interventions take place too frequent for the international community to grasp its precise content.[53] This is even more complicated by the disparities between States on the value of the principle of non-intervention. For example, Corthay explains that Southeast Asian States highly value the principle due to domestic security concerns and their colonial past.[54] Fortunately, the ICJ delivered the landmark *Nicaragua* case in 1986, which contained several remarks on the principle of non-intervention. This case is a subsidiary source of international law, but highly

[47] ibid 41.
[48] Daniel Joyce, 'Liberal internationalism' in Anne Orford, Florian Hoffmann and Martin Clark (eds), *The Oxford handbook of the theory of international law* (Oxford University Press 2016) 473.
[49] ibid 472.
[50] Jamnejad and Wood (n21) 347.
[51] Charter of the United Nations, adopted 26 June 1945; entered into force 24 October 1945; 892 UNTS 119.
[52] Jamnejad and Wood (n21) 362; Kunig (n21), para. 11-12.
[53] Sean Watts, 'Low-Intensity Cyber Operations and the Principle of Non-Intervention' (2015) 14(1) BaltYIL Online 140; Kunig (n21), para. 1.
[54] Corthay (n35) 6-7.

influential and authoritative for the development of international norms, like the principle of non-intervention.[55] Therefore, the research will rely on this judgment while being supplemented with academic literature due to the lack of a codification and the inconsistency in State practice. These sources result in the following observations.

In the *Nicaragua* case, the ICJ formulated the principle of non-intervention as "the right of every sovereign State to conduct its affairs without outside interference".[56] The principle is addressed to individual States, groups of States or international organizations[57] and "forbids [...] to intervene directly or indirectly in internal or external affairs of other States."[58] According to the ICJ, an intervention is unlawful when coercive methods are used regarding choices reserved for the State.[59] We begin to see the contours of the defining elements, which are confirmed in academic literature. According to Watts, intervention involves coercion by the intervening State to obtain an outcome in a matter reserved for the intervened State. He refers to Kunig when stating that intervention tries to force a sovereign State to act in a certain way.[60] Similarly, Kunig and Helal define a prohibited intervention as the dictatorial or unlawful intervention in another State's affairs in which the sole responsibility lies with that State.[61] Jamnejad and Wood distinguish two elements of an unlawful intervention: the intervention must be into the affairs of another State and these affairs are matters in which the States is free to decide.[62] However, Buchan and Tsagourias more accurately distinguish the element of coercion and the element of sovereignty.[63] Jamnejad and Wood fail to acknowledge the importance of coercion. The defining elements, as properly summarized by Buchan and Tsagourias, are supported by the other cited scholars, the Friendly Relations Declaration[64] and the *Nicaragua* case. Most of these sources, including the scholars, refer to each other and all sources acknowledge the cumulative character of the two elements. Accordingly, despite the different understandings of the principle of non-intervention, two cumulative elements of a prohibited intervention can be distinguished: the

[55] ICJ Statute, Article 38(1)(d); Hernández (n40) 51.
[56] *Nicaragua* [202].
[57] Kunig (n21), para. 8; *Nicaragua* [205]: "All States or groups of States".
[58] *Nicaragua* [205].
[59] ibid [205].
[60] Watts (n53) 145.
[61] Kunig (n21), para. 1; Helal (n19) 47.
[62] Jamnejad and Wood (n21) 347.
[63] Buchan and Tsagourias (n32) 171.
[64] Friendly Relations Declaration (n42), third principle, second point.

element of the reserved domain[65] and the element of coercion. First, the relationship between the two elements will be discussed, followed by an analysis on the elements separately.

2.3.1 The relationship between the reserved domain and coercion

The interplay between the defining elements should be explained properly because it underlies further research in this thesis. On the one hand, it could be argued that coercion *equals* intervention in the reserved domain. Accordingly, any interference in the reserved domain will violate the principle of non-intervention. This understanding is supported by Corten, as mentioned by Helal,[66] and Tzanakopoulos.[67] On the other hand, coercion could be separated from interference in the reserved domain as supported by Ronzitti and Hofer.[68] Also, Helal himself offers this view when defining prohibited intervention as "the pursuit of unlawful ends through unlawful means". Unlawful ends being matters in the reserved domain and unlawful means being coercive instruments.[69] He arrives at this conclusion by recent research on the opinions of different authors, of which some are mentioned above, and supports it with convincing arguments.[70] Among others, these arguments lead this thesis to adopt the latter understanding. It fits the cumulative character of the defining elements and allows differentiation between lawful and unlawful coercion.[71] For example, Macron's tweet expressing concern about the Amazon fires is unlikely to violate the principle of non-intervention even though interfering in Brazil's reserved domain. The regular exercise of diplomatic power and foreign policy is indispensable in the decentralized international legal order.[72]

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[65] The author prefers to refer to the 'matters in which a State can decide freely' as the element of the reserved domain. This term originates from the French term *domaine réservé* and describes more accurately the meaning of the element. (See Katja Ziegler, 'Domaine Réservé' (2013) MPIL, para. 1; Watts (n53) 153-154).

[66] Helal (n19) 61 citing Olivier Corten, *Article 52: Convention of 1969, in* 2 THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY 1201, 1209 (Olivier Corten & Pierre Klein eds., 2011).

[67] Tzanakopoulos (n21) 623.

[68] Natalino Ronzitti, 'Sanctions as instruments of coercive diplomacy: an international law perspective' in Natalino Ronzitti, *Coercive diplomacy, sanctions and international law* (Brill Nijhoff 2016) 6; Alexandra Hofer, 'The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?' (2017) 16(2) ChineseJILaw 182.

[69] Helal (n19) 47.

[70] Helal (2019) (n19) 61-65.

[71] UN International Law Commission, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) 2 (part 2) UNYBILC ("ILC ARSIWA commentaries") 70: The ILC indicates a difference between lawful and unlawful coercion when it writes that coercion in Article 18 ARSIWA is "not limited to unlawful coercion" but most coercion under the Article will be unlawful because either breaching the prohibition of the use of force or the principle of non-intervention.

[72] Thomas Giegerich, 'Retorsion' (2011) MPIL, para. 6.

2.3.2 The element of the reserved domain

The element of the reserved domain determines that an intervention is only prohibited when it intervenes in matters in which the State is free to decide by virtue of its sovereignty.[73] Supposedly, there is a distinction between affairs in which the State is the sole entity to decide and affairs in which other States also have an interest. This might facilitate environmental intervention and will be discussed in Chapter 3.

The matters in which the State is free to decide are known as the reserved domain. Examples are the "choice of a political, economic, social and cultural system, and the formulation of foreign policy."[74] However, the matters within the reserved domain are neither written down nor exhaustive.[75] In 1923, the Permanent Court of International Justice (PCIJ), the predecessor of the ICJ, decided that matters within the reserved domain are those unregulated by international law.[76] Therefore, what is in the reserved domain, is a relative question. It depends on the development of international relations and international law since States are restricted by the obligations they have towards each other.[77] The many ties that States have due to international treaties and the growing body of customary norms has reduced the matters included within the reserved domain.[78] The reduction of the reserved domain as a result of the no-harm principle and the CCH will be discussed in Chapter 3.

2.3.3 The element of coercion

The element of coercion represents the core of the difference between lawful and unlawful intervention.[79] Although intervention using force is a "particularly obvious" form of coercion,[80] also intervention not using force can be coercive and violate the principle of non-intervention.

A starting-point for research is Article 18 Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), "coercion of another State".[81] This article holds the State, coercing another State to commit an international wrongful act, responsible for that act under certain conditions. The International Law Commission (ILC) equates the meaning of

[73] *Nicaragua* [205].
[74] ibid [205].
[75] Buchan and Tsagourias (n32) 172.
[76] PCIJ, *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion of 7 February 1923, PCIJ Series B, No. 04 ("*Nationality Decrees*"), p. 23-24.
[77] ibid, p. 24.
[78] Kunig (n21), para. 3.
[79] Friendly Relations Declaration (n42), third principle, second point; *Nicaragua* [205].
[80] *Nicaragua* [205].
[81] International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts, adopted 31 May 2001 ("ARSIWA").

coercion under this article with the understanding of *force majeure* under Article 23 ARSIWA.[82] Accordingly, coercion is "an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation."[83] Indeed, the ILC describes coercion as forcing "the will of the coerced State" and "giving it no effective choice but to comply".[84] Coercion under the principle of non-intervention adopts a similar meaning. The core is the subordination of the State's free will.[85] This requires a coercive power which cannot reasonably be resisted.[86]

This directs us to a factor to determine coercion, namely the intensity of the measure.[87] The coerciveness of an intervention needs to reach a certain threshold to give a State "no effective choice but to comply". Only those acts reaching the threshold will be unlawfully coercive as prohibited under the principle.[88] It is unclear how to determine the threshold and who bears authority for the determination. The ICJ refrained from officially discussing this threshold and restrictively applied the principle of non-intervention.[89] Nonetheless, the ICJ implicitly seems to have set a high threshold when determining that the severe measures imposed by the US against Nicaragua did not amount to prohibited intervention.[90]

The intensity coheres with its impact on the intervened State, which is a controversial factor.[91] Helal disapproves of this factor by arguing that the same behaviour can be considered lawful and unlawful depending on the impact. Moreover, even minimal pressure could be considered unlawful.[92] This is also recognized by Ruys, who mentions the "odd implication" that more effective measures are more likely to violate the principle of non-intervention.[93] Nonetheless, the impact is a factor which needs to be taken into consideration, with caution, in assessing coercion.

Another factor is the intention of the intervening State.[94] However, States often have several reasons, usually kept secret, which makes it difficult to determine their true intention.[95] Intention

[82] ILC ARSIWA commentaries (n71) 69.
[83] ARSIWA, Article 23.
[84] ILC ARSIWA commentaries (n71) 69.
[85] Friendly Relations Declaration (n42), principle 3, point 2.
[86] Christopher Joyner, 'Coercion' (2006) MPIL, para. 1; Jamnejad and Wood (n21) 348.
[87] Kunig (n21), para. 25; Watts (n53) 146; Lieblich (n46) 42-45.
[88] Jamnejad and Wood (n21) 348.
[89] Hofer (n68) 181; *Nicaragua* [244-245].
[90] Jamnejad and Wood (n21) 370; Hofer (n68) 183; *Nicaragua* [244-245].
[91] Kunig (n21), para. 25.
[92] Helal (n19) 79.
[93] Tom Ruys, 'Sanctions, retortions and countermeasures: concepts and international legal framework' in Larissa van den Herik (ed), *Research handbook on UN sanctions and international law* (Edward Elgar Publishing Limited 2017) 27.
[94] Kunig (n21), para. 25; Helal (n19) 63-64.
[95] Lowe (n20) 109.

is not a decisive factor, as derived from the jurisprudence. The ICJ decided in the *Nicaragua* case that the US' actions amounted to an intervention regardless "whether or not the political objective of the State giving support and assistance is equally far-reaching."[96] This was reaffirmed in the *Armed Activities on the Territory of the Congo* case *(DRC v. Uganda* case), where the ICJ considered that Uganda breached the principle of non-intervention "even if the objectives of Uganda were not to overthrow President Kabila."[97]

These factors are merely indications for the coerciveness of an intervention but do not provide conclusive answers. It remains a case-by-case assessment weighing all the factors. The element of coercion determines the form environmental intervention can take, which will be discussed in Chapter 4.

2.4 The different forms of intervention

So far, we have established that an unlawful intervention is coercively intervening in a State's affairs in which it is free to decide. The next question concerns the different forms intervention can take. Intervention can be divided in intervention using force and intervention not using force. The former is dealt with by different set of rules in international law, which analysis goes beyond the scope of this thesis.[98] The latter can, on its turn, be divided in different forms, although not always easy to separate. In this paragraph four forms of intervention related to environmental intervention will be discussed: diplomatic intervention, economic intervention, political intervention and humanitarian intervention. The first two forms vary in lawfulness, and thus can accommodate environmental intervention. The last two forms are more controversial and environmental intervention should be aware not to amount to these forms of intervention.

2.4.1 Diplomatic intervention

Jamnejad and Wood cite Verzijl, who writes that the line between diplomatic pressure and intervention violating the principle of non-intervention is "entirely fluid".[99] Examples of lawful diplomatic pressure are the declaring of a diplomatic or consular agent as *persona non grata*, the

[96] *Nicaragua* [241].
[97] *DRC v. Uganda* [163].
[98] Article 2(4) UN Charter forbids a particular form of intervention, but the principle of non-intervention is wider in scope (Lowe (n20) 105). Intervention using force, if not in self-defence or authorised by the UNSC, will breach both the principle of non-intervention and the prohibition on the use of force. (*Nicaragua* [209]).
[99] Jamnejad and Wood (n21) 374-375, citing J H W Verzijl, *International Law in Historical Perspective* (1968), I, 236-237

severance of diplomatic ties or the recalling of the own ambassador.[100] These examples are measures of retorsion and lawful,[101] despite their aim to coerce and change the other States' behaviour. Diplomacy is used as an acceptable communication form.[102] Arguing otherwise, would deprive States of the option to develop a foreign policy. Accordingly, environmental intervention can take a form similar to diplomatic intervention because these are likely to stand the test of the principle of non-intervention while having the opportunity to steer State behaviour.

2.4.2 Economic intervention

Economic intervention is a highly debated form of intervention due to the difficulty in distinguishing between unlawful coercion by economic measures and the legitimate use of a State's economic interest.[103] The Friendly Relations Declaration determines that economic measures are prohibited from coercing a State in subordination of its sovereign rights or to obtain advantages.[104] However, every economic act can pressure a State due to increasing globalization.[105] Therefore, the factual circumstances of the case and the factors of coercion determine whether economic intervention is prohibited under the principle of non-intervention.[106]

Views on these factors differ per State and region. Latin American States perceive almost all economic measures as violations of the principle of non-intervention due to their experiences with interventions by the United States (US) and European States.[107] Another point of controversy concerns the compatibility of economic intervention with the prohibition on the use of force. Most developed States hold the view that the use of force means military force and that economic measures do not violate the prohibition on the use of force. On the contrary, most developing States argue that Article 2(4) UN Charter also prohibits economic coercion.[108] It is the author's view that economic measures do not amount to a prohibited use of force.

In the end, there is no fundamental non-derogable right to be free from economic coercion (intervention).[109] Tzanakopoulos arrives at this conclusion after a well-executed, recent research. The absence of this right increases the possibility for environmental intervention in the form of economic measures. Such an environmental intervention will be in response to a specific

[100] Giegerich (n72), para. 10.
[101] ILC ARSIWA commentaries (n71) 128.
[102] Jamnejad and Wood (n21) 375.
[103] Lieblich (n46) 42.
[104] Friendly Relations Declaration (n42), third principle, second point.
[105] Kunig (n21), para. 25.
[106] Jamnejad and Wood (n21) 371.
[107] Barry Carter, 'Economic Coercion' (2009) MPIL, para. 5
[108] ibid, para. 6.
[109] Tzanakopoulos (n21) 633.

environmental emergency and against the responsible State. For example, if a State is faced with severe overfishing of a fish stock by another State to the point this constitutes an international wrongful act, that State could impose an import ban on the fish stock against the responsible State. In this respect, environmental intervention by economic measures distinguishes itself from economic measures seeking to prevent any environmental damage, for example by demanding that a product is produced environmentally friendly.

2.4.3 Political intervention

Political intervention is the situation whereby the intervening State is involved in the political processes of the intervened State.[110] Political intervention can use force, thereby also breaching the prohibition on the use of force, or can take place without using force. For example, the arming and training of opposition groups can be political intervention using force, while the supplying or funding of these groups only violates the principle of non-intervention.[111] Other, although controversial, forms of political intervention not using force are the funding of political parties or the supporting of such parties on election day.[112]

Political intervention is problematic because it infringes on the right to self-determination. This is the right of the peoples of the intervened State to freely determine their political status and pursue their own development.[113] The clash with political intervention is evident but the principle of non-intervention forbids a State to intervene, with or without using force, to support the internal opposition in another State.[114]

Additionally, political intervention is difficult to reconcile with the State's free choice of a political system; a matter within the reserved domain.[115] Theoretically, international law does not prescribe a specific political system to States.[116] Therefore, the State's adherence to a certain political system does not violate any customary international rule and thus does not justify an intervention.[117] However, van den Driest correctly notes that certain international rights do favour a democratic system.[118] This causes a tendency in international law to condemn non-democratic regimes, which could lead to pro-democratic interventions in disguise. This can also be the case

[110] Jamnejad and Wood (n21) 368.
[111] *Nicaragua* [228].
[112] Jamnejad and Wood (n21) 368-369.
[113] Simone van den Driest, ''Pro-Democratic' Intervention and the Right to Political Self-Determination: The Case of Operation Iraqi Freedom' (2010) 57(1) NILR 32-33.
[114] *DRC v. Uganda* [164], referring to *Nicaragua* [206, 209].
[115] *Nicaragua* [205].
[116] van den Driest (n113) 37.
[117] *Nicaragua* [263]; Corthay (n35) 21.
[118] van den Driest (n113) 37.

for environmental intervention. Undemocratic States are prone to environmental intervention since they are often developing or Southern States and hold the richest biodiversity on their territories.[119] This may lead to the situation where States in practice aim to change the political system under the guise of environmental intervention. Environmental intervention should be attentive about this possible misuse.

2.4.4 Humanitarian intervention

Strictly speaking, humanitarian intervention is an intervention using force to protect citizens from human rights violations or other abusive treatment.[120] Although this thesis focuses on intervention not using force, humanitarian intervention is relevant because it has challenged the principle of non-intervention. Its undecided status, as Kunig mentions, has led to the RtoP.[121] Here, we see the stretch that the principle of non-intervention contains. According to many authors, the RtoP has not left the principle unchanged.[122] The international community wanted to put a halt to the possibility of using the principles of sovereignty and non-intervention as a shield behind which mass atrocities could take place.[123] Notwithstanding, the great controversy still surrounding the RtoP,[124] it did alter the understanding of the principle of non-intervention. This is an intriguing opening for environmental intervention, which will be analysed in Chapter 3.

2.5 A changing perception of the principle of non-intervention

So, what remains of the principle of non-intervention? As Lieblich argues, our current understanding of the principle of non-intervention heavily relies on the *Nicaragua* case dating back to 1986; a time coloured by the Cold War.[125] Since then, the world has changed significantly and the absolute understanding of sovereignty has diminished. Kohen even argues that it is not so much the principle of non-intervention that has evolved since the *Nicaragua* case, but the reserved domain.[126] Currently, States are bound by rules and institutions, and express their sovereignty through creating these interdependencies.[127] Think about States wishing to become members of the United Nations (UN) or any other international or regional organization. These

[119] Eckersley (n33) 308.
[120] Kunig (n21), para 37.
[121] ibid.
[122] Lieblich (n46) 42-43; Henderson (n32) 369-371; Jamnejad and Wood (n21) 349; Eckersley (n33) 293-294.
[123] Henderson (n32) 369.
[124] Lowe (n20) 108.
[125] Lieblich (n46) 42.
[126] Kohen (n18) 160.
[127] Martti Koskenniemi, 'What Use for Sovereignty Today?' (2011) 1(1) AsianJIL 61-63.

linkages between States increase the likelihood of, especially economic and political, intervention. Trade and economic progress is facilitated but the downside is that almost every economic act can lead to unlawful economic intervention. The same can be argued about political intervention, especially since States have joined regional political organizations, like the European Union (EU). The principle of non-intervention tries to distinguish between those interventions violating the principle and those interventions which should be allowed for the normal functioning of international relations. This is especially important regarding diplomatic intervention because diplomacy is important for the communication between States.

Humanitarian intervention and RtoP led to an acknowledged change in the perception of the principle of non-intervention. The idea was that States could only rely on their sovereignty, and thus on the principle of non-intervention, if they properly performed their function of protecting their citizens.[128] A functional notion of sovereignty is rising, which can lead, as Koskenniemi writes, to

> "functional interventionism [which] underlies all human rights law, trade law, and environmental law so that lawyers in all of these fields are in the business of lifting the veil of sovereignty so as to grasp international problems by the skin."[129]

2.6 Concluding thoughts

This chapter tried to clarify the defining elements of the contemporary meaning of the principle of non-intervention and its different appearances. As seen, the element of the reserved domain and the element of coercion are the relevant circumstances to take into account for environmental intervention. That being said, the principle of non-intervention and the elements have changed over the years. The same considerations underlying the development of the RtoP, apply to environmental emergencies resulting in the need for environmental intervention. As Kunig writes, "[i]n order to find ways to react to new challenges while upholding the principle of non-intervention, new mechanisms must be found."[130] Environmental intervention can be such a new mechanism.

Several authors recognize the ongoing process international law represents and the eroding sphere of the reserved domain.[131] Moreover, some forms of intervention seem allowed as being

[128] Hans-Georg Dederer, ''Responsibility to Protect' and 'Functional Sovereignty'' in Peter Hilpold (ed), *Responsibility to protect: a new paradigm of international law?* (Brill Nijhoff 2014) 157.
[129] Koskenniemi (n127) 64-65.
[130] Kunig (n21), para. 50.
[131] Lowe (n20) 13; Corthay (n35) 13.

lawful pressure. These considerations offer a changing perception of the principle of non-intervention. The liberal internationalist view poses an accurate lens through which to perceive this evolving interpretation. Treaties lead to common concerns and create interdependencies, begging the question whether matters previously part of the reserved domain have now moved to the international domain. This could provide an opening for environmental intervention and will be the subject of the next chapter.

Chapter 3. The eroding effect of international environmental law

This chapter will focus on the reserved domain, which is the first element of an intervention as prohibited under the principle of non-intervention. It will be researched if the no-harm principle and the CCH, and its enforcement mechanisms, have reduced the reserved domain. If so, environmental intervention invoking either will be lawful because the State fails to meet one of the elements characterizing prohibited intervention. The relationship between sovereignty and the reserved domain will be discussed (3.1) in order to research to what extent sovereignty has been reframed (3.1.1). This leads the discussion to the dimension through which the reserved domain reduces (3.1.2). This dimension can be split into two categories. First, the normative development of international environmental law (3.2), which will focus on the no-harm principle (3.2.1) and the CCH (3.2.2), before providing a sub-conclusion (3.2.3). Second, the enforcement of these normative developments (3.3) through judicial proceedings (3.3.1), port State jurisdiction (3.3.2), environmental *erga omnes* obligations (3.3.3). Again, a sub-conclusion will be provided (3.3.4). Finally, concluding thoughts will be given (3.4).

3.1 The role of sovereignty and international environmental law in reducing the reserved domain

The reserved domain is described as those matters in which the State is free to decide by virtue of its sovereignty. Consequently, the reserved domain and the principle of sovereignty are linked. Sovereignty in its external meaning, requires that States do not undermine the sovereignty of each other.[132] It appears that a reduction of the reserved domain regarding certain international environmental norms, would infringe on the State's sovereignty. However, it is precisely this sovereignty, which allows a State to consent to environmental norms limiting the exercise of sovereignty.[133] Accordingly, the increasing acceptance of international environmental norms leads to a relative understanding of sovereignty. This reframing of sovereignty will be discussed (3.1.1), followed by a discussion on the influence of international environmental law on the reserved domain (3.1.2).

[132] Hernández (n40) 22.
[133] PCIJ, *Case of the S.S. "Wimbledon"* (France, Great Britain, Italy, and Japan v. Germany), Judgment of 17 August 1923, PCIJ Series A, No. 01, p. 25; Koskenniemi (n127) 62.

3.1.1 Reframing sovereignty

Over the years, sovereignty has been paired with adjectives like 'relative' or 'functional',[134] leading to a relative understanding of sovereignty. This reframing of sovereignty indicates a reduced reserved domain because the reserved domain are those matters in which the State can decide freely *by virtue of its sovereignty*. Putting in perspective of sovereignty, likewise puts in perspective the reserved domain.

As seen in paragraph 2.5, sovereignty is often reframed as functional sovereignty, according to which the State enjoys sovereignty to exercise its functions. These functions extend to the protection of common interests of the international community.[135] The protection of the natural environment can be considered a common interest, as recognized in the CCH. Also the principle of permanent sovereignty over natural resources (PSNR) is reframed as functional sovereignty, which leads to a sustainable, instead of absolute, use of the State's natural resources.[136] It is currently widely accepted that PSNR is not absolute and a source of duties and responsibilities.[137]According to Dederer, functional sovereignty has the power to remove matters from the reserved domain.[138] This understanding is supported by Scholtz' concept of custodial sovereignty in which the State is the custodian over its natural resources. Other States expect respect towards those resources and are obligated to provide support.[139]

Concluding, a relative understanding of both the principle of sovereignty and PSNR has been established, which leads to a relative understanding of the reserved domain. The reserved domain cannot be used as a shield for full areas of law because "[t]his would be reminiscent of times when sovereignty was thought to be absolute."[140] The relative understanding of sovereignty will pose conditions for the exercise of sovereignty and only by fulfilling these requirements can a State rely on the principle of non-intervention.[141]

3.1.2 The reduction of the reserved domain

The relative understanding of sovereignty derives from the acceptance and incorporation of duties and responsibilities in international environmental law. For example, the RtoP reframed

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[134] "Custodial sovereignty" (Werner Scholtz, 'Custodial Sovereignty: Reconciling Sovereignty and Global Environmental Challenges amongst the Vestiges of Colonialism' (2008) 55(3) NILR 336-337); functional sovereignty (Koskenniemi (n127) 64); "'functional sovereignty'" (Dederer (n128) 157).
[135] Dederer (n128) 157-158.
[136] Amado Tolentino, 'Sovereignty over Natural Resources' (2014) 44(3) EnvtlPolyL 302.
[137] ibid 300.
[138] Dederer (n128) 164.
[139] Scholtz (n134) 336-337.
[140] Ziegler (n65), para. 30.
[141] Dederer (n128)169-170.

sovereignty because States had voluntarily accepted responsibilities flowing from their UN membership when accepting the UN Charter.[142] Accordingly, the development of international environmental law is a dimension through which the reduction of the reserved domain takes place.[143] Ziegler classifies this dimension in two categories: 1) the normative development of international environmental norms and 2) its enforcement mechanisms.[144] The first category reduces the reserved domain by regulating and limiting the State's freedom to manage environmental matters. Issues previously regulated by the State become increasingly determined by international law and move out the reserved domain.[145] However, currently almost every matter is somehow regulated by international or regional agreements. The second category provides a yardstick to measure the support behind the reduction as a result of the normative developments. If the environmental norms are backed by adequate enforcement mechanisms, it proves acceptance of the reduced reserved domain by allowing a third party to enforce the matter on the sovereign State. The subsequent part of this chapter will focus on these categories, which will be considered in light of the no-harm principle and the CCH. The observations made only apply in general since the scope of the reserved domain is not the same for every State. It depends on the States' international obligations.[146]

3.2 The normative development of international environmental law

The influence of the normative development of international environmental law on the reserved domain is recognized in jurisprudence[147] and academic literature.[148] International environmental norms restrain the States' freedom to decide on those norms, thus reducing the reserved domain. As a result, environmental intervention invoking these norms will not be prohibited under the

[142] ICISS Report (n12) 13.
[143] Ziegler (n65), para. 8.
[144] ibid, para. 11.
[145] ibid, para. 13: Ziegler refers to the regulation of nationality as an example of an issue becoming increasingly regulated by international law.
[146] Helal (n19) 67.
[147] *Nationality Decrees*, p. 23-24; PCIJ, *The Case of the S.S. "Lotus"* (France v. Turkey), Judgment of 7 September 1927, PCIJ Series A, No. 10, p. 19: "all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction."; Arbitral Tribunal, *Lake Lanoux Arbitration* (France v. Spain) (1957) 12 R.I.A.A. 281 ("*Lake Lanoux*"), p. 16; "Territorial sovereignty plays the part of a presumption. It must bend before all international obligations, whatever their origin, but only before such obligations."
[148] Thomas Cottier and Sofya Matteotti-Berkutova, 'International environmental law and the evolving concept of 'common concern of mankind'' in Thomas Cottier, Olga Nartova and Sadeq Z Bigdeli (eds), *International trade regulation and the mitigation of climate change: World Trade Forum* (Cambridge University Press 2009) 21; Dederer (n128) 171; Tolentino (n136) 302.

principle of non-intervention. This paragraph will focus on the influence of the no-harm principle (3.2.1) and the CCH (3.2.2) on the reserved domain, before providing a sub-conclusion (3.2.3).

3.2.1 The no-harm principle

The no-harm principle stems from a time in which environmental harm only mattered when damaging another State's territory, thus infringing on its sovereign rights.[149] These considerations led to the recognition of the no-harm principle, which exemplar formulation derives from the *Trail Smelter* case:

> "No State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."[150]

Although the *Trail Smelter* case dealt with transboundary air pollution, currently the no-harm principle applies to all transboundary harm, but *only* transboundary harm. As a result, it focuses on the protection of the injured State's sovereign rights instead of the environment.[151]

The no-harm principle has developed into customary international law,[152] binding all States involved in the environmental intervention, irrespective of their acceptance of an environmental treaty containing the principle. It could be argued that the characterization as customary international law alone already reduces the reserved domain because States do not have the freedom to renounce the bindingness of the rule.[153] In any case, the no-harm principle embodies the idea of relative sovereignty and can be regarded as a corollary of PSNR. The exploitation of natural resources is limited by the duty not to harm the other State's environment.[154] An early recognition of this embodiment featured in Principle 21 Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration),[155] as reaffirmed by Principle 2

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[149] Leslie-Anne Duvic-Paoli and Jorge Viñuales, 'Principle 2' in Jorge Viñuales (ed), *The Rio Declaration on Environment and Development: a commentary* (Oxford University Press 2015) 108.
[150] Arbitral Tribunal, *Trail Smelter case* (United States/Canada), 16 April 1938 and 11 March 1941, 3 R.I.A.A. 1905 ("*Trail Smelter*") p. 1965.
[151] Duvic-Paoli and Viñuales (n149) 113-114.
[152] ICJ, *Corfu Channel* (United Kingdom of Great Britain and Northern Ireland v. Albania), Judgment of 9 April 1949, ICJ Reports 1949 ("*Corfu Channel*"), p. 22.
[153] Ziegler uses this argumentation in favour of *jus cogens* norms, but the same can be said about customary norms (Ziegler (n65), para. 14). The author recognizes the concepts of persistent and subsequent objection, yet these are rarely used. (Hernández (n40) 42-43).
[154] Duvic-Paoli and Viñuales (n149) 109; Pierre-Marie Dupuy and Jorge Viñuales, *International environmental law* (2nd edn, Cambridge University Press 2018) 64.
[155] UN Conference on the Human Environment, *Declaration of the United Nations Conference on the Human Environment*, A/CONF.48/14/Rev.1 (16 June 1972).

Rio Declaration on Environment and Development (Rio Declaration).[156] However, both principles go beyond the mere affirmation of the no-harm principle and expand their scope to areas beyond national jurisdiction.[157] This extended scope fits the prevention principle, but the no-harm principle only applies to transboundary environmental harm. This thesis focuses on the no-harm principle because it can be used to establish State responsibility for an internationally wrongful act, which is needed for environmental intervention.[158]

The embodiment of relative sovereignty also features in several environmental treaties, like Article 3 CBD and Article 6(1) Convention Concerning the Protection of the World Heritage and Natural Heritage (WHC).[159] Both articles initially reaffirm the State's sovereignty, but immediately qualify its exercise with the no-harm principle, thus placing a limitation with the obligation not to harm the other State's territory.[160] The no-harm principle restrains the exercise of sovereignty to the point that it is not a matter in which the State is free to decide.[161] States are forced to take into account possible transboundary environmental harm. This does not imply that a State may never cause environmental harm. The no-harm principle only prohibits environmental harm above a certain threshold. The harm is qualified with terms like "serious"[162] or "significant".[163] Since Principle 21 Stockholm Declaration and Principle 2 Rio Declaration do not qualify the damage, Dupuy and Viñuales argue that this damage must be assessed "*in concreto*".[164] However, it is generally recognized that only qualified harm can violate the no-harm principle, especially in its customary form.[165]

Even when the threshold for damage is reached, the wrongdoing State could have complied with the no-harm principle. The reason lies in the relative obligation the principle places on States.[166] It is an obligation of conduct, which implies a duty of due diligence. As part of that due

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[156] UN Conference on Environment and Development, *Rio Declaration on Environment and Development*, A/CONF.151/26 (vol. 1) (12 August 1992).
[157] Dupuy and Viñuales (n154) 65-66.
[158] Duvic-Paoli and Viñuales (n149) 113-114.
[159] Convention Concerning the Protection of the World Heritage and Natural Heritage, adopted 16 November 1972 ("WHC").
[160] CBD, Article 3; WHC, Article 6(1), (3).
[161] Duvic-Paoli and Viñuales (n149) 116; Virginie Barral, 'National sovereignty over natural resources: Environmental challenges and sustainable development' in Elisa Morgera and Kati Kulovesi (eds), *Research handbook on international law and natural resources* (Edward Elgar Publishing Limited 2016) 16.
[162] *Trail Smelter*, p. 1965.
[163] ICJ, *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgement 20 April 2010, ICJ Reports 2010 ("*Pulp Mills*") [101]; UNFCCC, Article 1(1); CBD, Article 14(1)(a).
[164] Dupuy and Viñuales (n154) 64-65. Original emphasis.
[165] Duvic-Paoli and Viñuales (n149) 116.
[166] Barral (n161) 16.

diligence obligation, a State has to use all means at its disposal, including an environmental impact assessment, to prevent damaging other States' territories.[167] This reduces the reserved domain in requiring the State to take preventive measures, yet leaving the State with a certain amount of freedom by not establishing strict responsibility. If the State exercises its due diligence, the invocation of the no-harm principle will be unsuccessful and States should refrain from environmental intervention due to the absence of an internationally wrongful act.

Notwithstanding the threshold for harm and the relative obligation, the no-harm principle reduces the reserved domain by restricting the State's freedom as not to undertake activities which cause significant transboundary damage. Consequently, the invocation of the no-harm principle can be a circumstance allowing lawful environmental intervention because one of the elements of prohibited intervention under the principle of non-intervention will remain unfulfilled.

3.2.2 The common concern of humankind

CCH was intended to facilitate international cooperation in response to the increasing awareness of the environment's interrelatedness and the global interest in those issues.[168] The CCH's object of protection is not a specific area or resource, but rather environmental processes, like the "*change* in the Earth's climate and its *adverse effects*",[169] or protective actions, like "the *conservation* of biological diversity".[170] These objects of protection do not solely reside within the State's jurisdiction, according to which the scope of CCH extends to areas within and beyond national jurisdiction.[171] If the object does reside within the State's jurisdiction, that State still holds sovereignty over the object. The environmental issues marked as a CCH transgress the individual State's domain and lay a foundation for joint responsibility.[172] Moreover, it shifts the perception of sovereignty into acknowledging community interests.[173] Although respecting the sovereignty, it restricts the State's freedom of action, even in the absence of transboundary

[167] *Pulp Mills* [101, 204].
[168] Krista Nakavukaren Schefer and Thomas Cottier, 'Responsibility to Protect (R2P) and the Emerging Principle of Common Concern' in Peter Hilpold (ed), *Responsibility to protect: a new paradigm of international law?* (Brill Nijhoff 2014) 127.
[169] UNFCCC, Preamble.
[170] CBD, Preamble; Jutta Brunnée, 'Common Areas, Common Heritage, and Common Concern' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford handbook of international environmental law* (Oxford University Press 2008) 565. Original emphasis.
[171] Brunnée (n170) 564.
[172] Nakavukaren Schefer and Cottier (n168) 129, 137-138.
[173] Laura Horn, 'Globalisation, Sustainable Development and the Common Concern of Humankind' (2007) 7 MLJ 55-56.

harm.[174] This recognition of other States' interests, even in matters solely within State jurisdiction, reduce the reserved domain. The State is not free to decide on a matter which can cause harm to a CCH, but it has to acknowledge the community and other States' legal interest in its protection.

It is certain that the CCH influences the reserved domain, yet it remains uncertain to what extent. The CCH is only recognized in the preambles of the CBD and the United Nations Framework Convention on Climate Change (UNFCCC)[175] or implied in legal regimes, like the WHC and the Montreal Protocol on Substances that Deplete the Ozone Layer.[176] It mostly lacks operationalization in the treaties' operative parts. Moreover, the concept in itself does not require international action, but it pushes for authorities to create such binding obligations.[177] These uncertainties leave the exact effect on the reserved domain ambiguous. Nonetheless, many authors support the conclusion that the CCH holds the potential to limit the exercise of sovereignty.[178] Shelton even argues that, at the very least, agreement that a topic is a CCH must reduce the reserved domain.[179] Nakavukaren Schefer and Cottier affirm this possibility by recognizing that CCH has the capacity to bring a paradigm shift similar to the RtoP.[180] Also Biermann acknowledges the ability of the CCH to reduce the reserved domain. He supports his argument with UNGA Resolution 43/53 which recognizes that matters causing climate change or harming the ozone layer "will not be considered as solely internal affairs protected by [Article 2(7) UN Charter]."[181] To the contrary, French argues that just because something is considered a common concern, does not justify intervention. He refers to the CBD where the CCH is not coupled with collective oversight or implementation, but relies on State sovereignty.[182] He is correct and the CBD is not the only treaty suffering this faith.[183] Many environmental treaties rely on State sovereignty for the enforcement of environmental norms, making the incorporation of sovereignty within these treaties indispensable. Within this context, French's argument cannot be denied. However, the understanding of sovereignty, even in these treaties, is becoming

[174] Brunnée (n170) 566.
[175] Nakavukaren Schefer and Cottier (n168) 123.
[176] Brunnée (n170) 565.
[177] Nakavukaren Schefer and Cottier (n168) 136.
[178] ibid 138; Horn (n154) 55-56.
[179] Dinah Shelton, 'Common concern of humanity' (2009) 39(2) EnvtlPolyL 86.
[180] Nakavukaren Schefer and Cottier (n168) 123.
[181] Frank Biermann, '„Common Concern of Humankind": The Emergence of a New Concept of International Environmental Law' (1996) 34(4) Archiv des Völkerrechts 449.
[182] Duncan French, 'A reappraisal of sovereignty in the light of global environmental concerns' (2001) 21(3) Legal Studies 395.
[183] Among others, the WHC relies firmly on State sovereignty.

increasingly qualified. Especially if the CCH is given binding obligations by national authorities, its case for environmental intervention becomes much stronger. After all, the CCH provides the international community with a legal interest in protection due to the characterization of a common concern.[184] At least, States are provided with custodial sovereignty. The State is a custodian over common concerns and is expected to respect those, while other States should assist the custodial State in protecting these concerns.

3.2.3 Sub-conclusion

This paragraph aimed to research if the no-harm principle and the CCH reduced the reserved domain. It is demonstrated that the no-harm principle has this effect by limiting sovereignty, and thus the reserved domain, to matters not harming other States. If a State does not meet these conditions set by the no-harm principle for sovereignty, the State cannot rely on the principle of non-intervention.[185] Accordingly, environmental intervention would not be prohibited under the principle of non-intervention because it is not an intervention in a matter *in which the State is free to decide by virtue of its sovereignty*. To the contrary, it remains dubious to what extent the CCH influences the reserved domain, although any influence cannot be denied. It recognizes the legal interest of other States in protection and provides it with the custodial role to protect. Whether environmental intervention in a CCH might be lawful, depends on its enforcement mechanisms and the form of intervention.

3.3 The enforcement mechanisms of international environmental law

The eroding effect of the normative development of the no-harm principle and the CCH can be strengthened by enforcement mechanisms. These ensure their application, and pushes the reduction beyond a mere theoretical idea. By providing a third party with the power to enforce, it is demonstrated that the enforceable norms are outside the reserved domain. Consequently, diminishing the States' protection against intervention. Moreover, the enforcement itself could be seen as an intervention, which indicates the forms environmental intervention can take.[186]

Enforcement in international environmental law can take different forms, both judicial and non-judicial. Judicial enforcement can reduce the reserved domain through an increasing acceptance of jurisdiction of judicial bodies (3.3.1). Judicial and non-judicial enforcement can reduce the reserved domain through allowing extensive exercise of national jurisdiction, like port

[184] Nakavukaren Schefer and Cottier (n168) 38-39.
[185] Dederer (n128)169-170.
[186] Ziegler (n65), para. 15.

State jurisdiction (3.3.2).[187] Both these extensions remove the sovereign State as a mediator in the application of the no-harm principle and the CCH.[188] Additionally, the recognition of environmental *erga omnes* obligations can reduce the reserved domain because these norms contain an enforcement aspect (3.3.3).[189] These obligations broaden the category of legal standing, which reduces the reserved domain by providing other States with an enforceable legal interest. At the end, a sub-conclusion will be provided (3.3.5).

3.3.1 Acceptance of jurisdiction of judicial bodies

An increasing acceptance of jurisdiction can reduce the reserved domain by allowing a third party to decide on the matter. After all, States often challenge the jurisdiction of a judicial body by pleading the reserved domain.[190] Furthermore, if the complaining State's legal standing is accepted, this further reduces the reserved domain because the other State's legal interest is formally acknowledged.

An increasing acceptance of jurisdiction is visible in the incorporation of dispute settlement clauses in several environmental treaties.[191] These clauses can be consensual in nature, as in the CBD[192] and the UNFCCC[193] or compulsory in nature, as in the United Nations Convention on the Law of the Sea (UNCLOS).[194] However, consensual clauses suffer from a low rate of acceptance, e.g. only four States have consented to the CBD and the UNFCCC.[195] It turns out that the treaties containing the consensual clauses are those characterized as a CCH regime, although the CBD also contains the no-harm principle in Article 3.

Nonetheless, States can resort with disputes containing environmental elements to courts or tribunals specialized in other areas of international law than environmental law.[196] Here again, the profound support for the no-harm principle is visible. The principle features in many of the international courts' and tribunals' decisions.[197] On the contrary, to the author's knowledge,

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[187] ibid, para. 15, 20.
[188] ibid, para. 17.
[189] ibid, para. 22.
[190] ibid, para. 29.
[191] Dupuy and Viñuales (n154) 301.
[192] CBD, Article 27(3).
[193] UNFCCC, Article 14(2).
[194] United Nations Convention on the Law of the Sea, adopted 10 December 1982; entered into force 16 November 1994; UNTS Vol. 1833, No. 31363 ("UNCLOS"), Article 287.
[195] Dupuy and Viñuales (n154) 301; 'Declarations by Parties' <https://unfccc.int/process/the-convention/status-of-ratification/declarations-by-parties> accessed on 12 July 2020.
[196] Dupuy and Viñuales (n154) 300.
[197] For example *Trail Smelter*, p. 1965, *Corfu Channel*, p. 22, *Lake Lanoux*, p. 197; *Pulp Mills* [101]; Seabed Disputes Chamber of the ITLOS, *Responsibilities and obligations of States sponsoring*

judicial enforcement of the CCH specifically has never occurred. There have been cases referring to principles and concepts similar to CCH, however none directly enforced CCH itself.[198]

3.3.2 Port State jurisdiction

Port States have a special role in the protection of the marine environment. Article 218 UNCLOS relies on port States for the enforcement of international environmental norms, which is viewed as an exception to flag State jurisdiction on the high seas.[199] If a vessel is voluntarily within a port, the port State may investigate, and where evidence permits, start proceedings regarding violations of marine pollution norms on the high seas.[200] The port State is even allowed to start proceedings, under certain conditions, against a vessel regarding any pollution taken place within the jurisdiction of another State.[201]

Port State jurisdiction is an exceptional way to enforce the no-harm principle, but more significantly the CCH. It provides the port States with extraterritorial jurisdiction in the enforcement of community interests.[202] This reduces the reserved domain by allowing a non-injured party, the port State, to enforce environmental obligations occurring under flag State jurisdiction or within a maritime zone of another State. It especially endorses the reduction of the reserved domain towards the CCH, although only in the context of the law of the sea.

3.3.3 Environmental *erga omnes* obligations

Broadening the category of legal standing via obligations *erga omnes* reduces the reserved domain because it provides more States with an enforceable legal interest. This is needed for any type of enforcement. Legal standing in case of a violation of the no-harm principle is relatively straightforward because there is an injured State.[203] On the contrary, legal standing towards the CCH is more difficult. Therefore, obligations *erga omnes* are useful. They affect the rules of

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persons and entities with respect to activities in the Area, Advisory opinion of 1 February 2011, ITLOS Reports 2011 ("*AO Responsibilities in the Area*") [111-113].

[198] See *AO Responsibilities in the Area* [226]: "the common interest of all States in the proper implementation of the principle of the common heritage of mankind"; ICJ, *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), Judgment of 25 September 1997, ICJ Reports 1997 (Separate opinion of Vice-President Weeramantry) p. 115, at p. 118: "global concerns of humanity as a whole."

[199] Christian Tams, 'Individual States as Guardians of Community Interests' in Ulrich Fastenrath and others (eds), *From bilateralism to community interest : essays in honour of Bruno Simma* (Oxford University Press 2011) 397-398.

[200] UNCLOS, Article 218(1).

[201] Mary Ellen O'Connell, 'Enforcing the new international law of the environment' (1992) 35 GYIL 298; UNCLOS, Article 218(2).

[202] Tams, 'Individual States as Guardians of Community Interests' (n199) 398.

[203] ARSIWA, Article 42.

standing and influence which State can invoke responsibility.[204] Further, they provide a yardstick which can be used to assess the permissibility of responses to international wrongful acts, and thus to assess environmental intervention.[205]

As derived from the *Barcelona Traction, Light and Power Company, Limited* case, obligations *erga omnes* are obligations owed to the international community as a whole in which all States have an interest in protection.[206] If the obligation is owed to all States Parties to the treaty containing the environmental obligation, it is an obligation *erga omnes partes*.[207] Both variations broaden the possibility of enforcement by providing more States with a legal interest as confirmed by Article 48(1) ARSIWA.[208] Accordingly, obligations *erga omnes* reduce the reserved domain by obliging the State to acknowledge the other State's interest while providing those other States with legal standing for environmental intervention and the possibility to invoke the responsibility of the wrongdoing State in an environmental emergency.

There is support to consider the obligation to protect the environment as an obligation *erga omnes*.[209] In the *Gabčíkovo-Nagymaros Project* case (*Gabčíkovo-Nagymaros* case), the ICJ called the environment "an essential interest" and emphasized the importance of the environment for humankind.[210] Additionally, Vice-President Weeramantry considered the need for international environmental law to weigh "the global concerns of humanity as a whole."[211] Brunnée argues that the CCH can widen the scope of environmental *erga omnes* obligations as all States have a legal interest in the protection of the CCH due to the common concern status.[212] The possible characterization of the CCH as an obligation *erga omnes* is supported by other authors.[213]

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[204] Christian Tams, *Enforcing obligations erga omnes in international law* (Cambridge University Press 2005) 99.
[205] ibid 30.
[206] ICJ, *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), Judgment 5 February 1970, ICJ Reports 1970 [33].
[207] ICJ, *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), Judgement of 20 July 2012, ICJ Reports 2012 [68].
[208] This article was meant to give effect to the *Barcelona Traction, Light and Power Company, Limited* case (ILC ARSIWA commentaries (n71) 127).
[209] Dupuy and Viñuales (n154) 53-54; Yasuhiro Shigeta, 'Obligations to Protect the Environment in the ICJ's Practice: To What Extent Erga Omnes' (2012) 55 JapYBIntlL 178, 200; ILC ARSIWA commentaries (n71) 126.
[210] ICJ, *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), Judgment of 25 September 1997, ICJ Reports 1997 ("*Gabčíkovo-Nagymaros*") [53].
[211] *Gabčíkovo-Nagymaros* (Separate opinion of Vice-President Weeramantry), p. 115, at p. 118.
[212] Brunnée (n170) 566.
[213] Biermann (n181) 451; Horn (n173) 77; Barral (n161) 86.

Although judicial enforcement of an obligation *erga omnes* is rare,[214] they are often enforced via countermeasures.[215] Tams concludes that such countermeasures are mostly taken alongside retorsion.[216] These measures can be characterized as self-help measures.[217] Tams and O'Connell - after extensive research on State practice - contradict the view that only the injured State can resort to self-help measures and emphasize the relevance of obligations *erga omnes*.[218] Accordingly, self-help measures can be used for the enforcement of the no-harm principle – as there is an injured State - and the CCH – with help of environmental *erga omnes* obligations.

Furthermore, self-help measures are an indispensable form of enforcement of any international norm.[219] The international legal order lacks centralized enforcement mechanisms, which allows States to impose self-help measures to coerce compliance with environmental norms.[220] O'Connell argues that self-help measures can enforce international environmental norms and that States frequently use such measures for environmental violations.[221] These measures can be seen as forms of intervention and their acceptance among States indicates that environmental intervention can take place with such measures. Accordingly, environmental intervention can be justified as self-help measures.

3.3.4 Sub-conclusion

The preceding paragraphs sought to demonstrate enforcement mechanisms for international environmental obligations, specifically the no-harm principle and the CCH. These mechanisms reduce the reserved domain by allowing third parties to enforce environmental norms, while possibly being an intervention themselves. A reduced reserved domain is relevant for environmental intervention because it is one of the elements of a prohibited intervention.

The no-harm principle appears to be enforced by all the enforcement mechanisms discussed. A violation of the CCH is most likely to be enforced by port States or in the form of self-help measures via environmental *erga omnes* obligations. It appears as if States are willing to even endorse an obligation which influence on the reserved domain is somewhat unclear, like the

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[214] Shigeta (n209) 205; Tams, 'Individual States as Guardians of Community Interests' (n199) 387.
[215] Tams, 'Individual States as Guardians of Community Interests' (n199) 391-392.
[216] Tams, *Enforcing obligations erga omnes in international law* (n204) 229.
[217] Joyner (n86), para. 2.
[218] Tams, *Enforcing obligations erga omnes in international law* (n204) 231, 241; Mary Ellen O'Connell, *The power and purpose of international law: insights from the theory and practice of enforcement* (Oxford University Press 2011) 247.
[219] O'Connell, *The power and purpose of international law: insights from the theory and practice of enforcement* (n218) 264.
[220] O'Connell, 'Enforcing the new international law of the environment' (n201) 294.
[221] ibid 318.

CCH. These enforcement mechanisms demonstrate an acceptance of the reduced reserved domain regarding the CCH. The popularity of self-help measures, for both *erga omnes* obligations as other obligations, provide a basis for research on the form and justification of environmental intervention. This will be the subject of Chapter 4.

3.4 Concluding thoughts

The beginning of this chapter demonstrated a relative understanding of sovereignty deriving from the increasing international environmental obligations States have consented to. These developments of international environmental law are a dimension through which the reduction of the reserved domain takes place. The matters in which the State is free to decide are limited by the duties and responsibilities flowing from international environmental law. This is relevant for environmental intervention because the reserved domain is an element of an intervention as prohibited under the principle of non-intervention. If environmental intervention invokes an environmental norm outside the reserved domain, the intervened State cannot rely on the principle of non-intervention.

It has been established that environmental intervention under the circumstance of invoking the no-harm principle could succeed due to the clear reduction on the reserved domain, which is supported by the possibilities of enforcement. Also the CCH holds great potential to reduce the reserved domain, but the extent of the reduction remains somewhat theoretical. This is, however, compensated by the acceptance of its enforcement by port States and *erga omnes* obligations via self-help measures. These self-help measures seem to be an accepted practice among States and can provide the form of environmental intervention.

This chapter has researched environmental intervention in light of the element of the reserved domain. Chapter 4 will deal with the form of environmental intervention, which is shaped by its justification under the element of coercion.

Chapter 4. Towards establishing a legal tool: environmental intervention

This chapter arrives at the core of the research, namely the form of environmental intervention and its justification. Since it has been indicated that self-help measures can provide these forms, this chapter will start with examples of environmental intervention in practice (4.1). These examples will guide research towards a discussion on the forms and justifications of environmental intervention (4.2). The discussion will be concerned with two self-help measures: countermeasures (4.2.1) and retorsion (4.2.2). The legal framework of both forms will be discussed and subsequently researched in light of the element of coercion. After all, these forms are only justifiable if not coercive under the principle of non-intervention. At the end, the question will be answered whether environmental intervention by these self-help measures is exhaustive, or if there are other forms which environmental intervention can take (4.2.3). This will lead to a sub-conclusion (4.2.4). Notwithstanding the conclusion, research will turn to self-contained regimes because these can limit the freedom to resort to countermeasures and retorsion (4.3). To conclude, environmental intervention will be applied to the case study of the Amazon fires (4.4), before reaching a conclusion (4.5).

4.1 Examples of environmental intervention

The introduction already clarified what is envisioned with the legal tool of environmental intervention. This paragraph will focus on some examples of State practice to illustrate how this might look like in practice.

Environmental intervention is used in response to environmental emergencies. For example, the US could have created an environmental emergency when failing to honour its bilateral conservation agreements with Canada. As a result, Canada imposed measures on American fishermen.[222] The same goes for the use of drift-nets by Mexican fishermen. These severely harm dolphins, and thus could result in an environmental emergency. The US responded by imposing an import ban on Mexican tuna in order to coerce Mexico to protect the dolphins while harvesting.[223] Although the legal standing of the US is not entirely clear, according to O'Connell,

[222] O'Connell, *The power and purpose of international law: insights from the theory and practice of enforcement* (n218) 232.
[223] ibid 249.

all States have a right to protect wildlife in the high seas in order to prevent endangering these species. This case leads her to conclude that States will use countermeasures to enforce environmental norms.[224]

Other examples are measures imposed under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).[225] The protection of endangered species contributes to the conservation of biological diversity, a CCH. In 1994, the CITES Standing Committee encouraged States Parties to take stricter measures against China and Taiwan to combat illegal trade of tigers and rhinoceroses. This illegal trade can present an environmental emergency. The US threatened with trade sanctions and while China succumbed under the pressure, Taiwan did not. As a result, the US imposed a ban on wildlife products against Taiwan until it decided to increase its efforts.[226]

CITES is an interesting example, because Article XIV(1) allows States to take stricter measures than advised and provided under the general provisions. It facilitates the taking of self-help measures. As a result, the EU imposed an import ban against Indonesia between 1991-1995 regarding all species listed in Appendix II of CITES.[227]

In all these examples States impose measures, but it is also possible to coerce a State by withdrawing previously given aid. O'Connell refers to the termination of the CBD fund. This funding is an inducement for States to protect the environment and its termination can be characterized as retorsion.[228]

These examples demonstrate the willingness of States to take action in response to possible environmental emergencies. It depends on the exact circumstances of the case, but it could be argued that these examples either violated the no-harm principle or the CCH. As seen in the preceding chapter, this places the environmental emergencies outside the reserved domain, deeming an intervention under these circumstances lawful. In all examples, the intervening States' were trying to coerce the wrongdoing States with measures to ensure compliance with environmental obligations. In some events, like the US trade sanctions, the intensity of the measure and the impact on Taiwan was strong enough to subordinate its will. These examples show that States seem to use the regular tools at their disposal for environmental protection.

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[224] O'Connell, 'Enforcing the new international law of the environment' (n201) 321.
[225] Convention on International Trade in Endangered Species of Wild Fauna and Flora, adopted 3 March 1973; entered into force 1 July 1975; UNTS Vol. 993, No. 14537 ("CITES").
[226] O'Connell, *The power and purpose of international law: insights from the theory and practice of enforcement* (n218) 279-280.
[227] Peter Sand, 'Enforcing CITES: The Rise and Fall of Trade Sanctions' (2013) 22(3) RECIEL 253.
[228] O'Connell, 'Enforcing the new international law of the environment' (n201) 319.

These tools are exactly the form environmental intervention is envisioned to take, and their corresponding legal framework can offer justifications.

4.2 Forms and justifications of environmental intervention

The self-help measures in the preceding paragraph were either countermeasures or retorsion. The former is mentioned as a justification for intervention[229] and the latter serves the same purpose. The legal framework surrounding both measures will be discussed before providing a sub-conclusion.

4.2.1 Countermeasures

Environmental intervention could take the form of countermeasures. Canada's measures and the US import ban, mentioned in paragraph 4.1, can be characterized as such.[230] Countermeasures were initially recognized in jurisprudence[231] and subsequently codified in the ARSIWA.[232] Currently, the ARSIWA represents customary international law and binds all States involved in the environmental intervention.[233] For environmental intervention to be justified as countermeasures, it must meet both the substantive and procedural requirements.

There are several substantive requirements. First, the injured State may only impose countermeasures on the State *responsible* for the environmental emergency and can only induce that State to *comply* with its environmental obligation.[234] Second, countermeasures cannot use force, as conform the definition of intervention in this thesis.[235] Third, countermeasures must be proportionate with the injury suffered from the environmental emergency.[236] This requirement can cause friction between States due to the differences in environmental values they hold, which is complicated by the lack of a general formula for the assessment of proportionality.[237] The only thing clear, is that, according to the *Gabčíkovo-Nagymaros* case, environmental intervention by

[229] Kunig (n21), para. 30; Jamnejad and Wood (n21) 377.
[230] O'Connell, *The power and purpose of international law: insights from the theory and practice of enforcement* (n218) 232, 249.
[231] Arbitral Tribunal, *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, 9 December 1978, 18 R.I.A.A. 416, p. 443-444; *Gabčíkovo-Nagymaros* [82-88].
[232] ARSIWA, Article 22, 49-54.
[233] Jamnejad and Wood (n21) 379.
[234] ARSIWA, Article 49(1); *Gabčíkovo-Nagymaros* [83, 87].
[235] ARSIWA, Article 50(1); *Nicaragua* [248-249].
[236] ARSIWA, Article 51; *Gabčíkovo-Nagymaros* [85].
[237] O'Connell, *The power and purpose of international law: insights from the theory and practice of enforcement* (n218) 253.

taking unilateral control of a shared resource can be disproportionate.[238] Fourth, countermeasures must be terminated when the intervened State complies with its environmental obligations, and is therefore reversible.[239] Accordingly, the effects of countermeasures should be temporary.[240] Fifth, environmental intervention is limited by the obligation to protect human rights, which also influences the proportionality requirement.[241] The measures imposed as environmental intervention cannot severely impact the human rights of the people in the intervened State, like O'Connell argues the US did with its disproportionate actions against Cuba's entire economy for decades.[242] To that end, periodical review of the countermeasures is desirable.

The procedural requirements demand the intervening State to call upon the responsible State to comply with its environmental obligations before resorting to countermeasures and to notify the responsible State if deciding to take them, thereby offering negotiation.[243]

If environmental intervention meets all these requirements, it could be justified as a countermeasure. A difficulty arises with the requirement of 'an injured State' under Article 49(1) ARSIWA. Designating an injured State might be evident with a violation of the no-harm principle, but not with the CCH. Therefore, the possible *erga omnes* character of the CCH, as discussed in paragraph 3.3.3, could ensure the taking of third-party countermeasures under Article 54 ARSIWA. This article allows other States than the injured State, as entitled under Article 48(1) ARSIWA, to take measures. Yet, Article 54 ARSIWA refers to "lawful measures" instead of countermeasures. Countermeasures are inherently unlawful measures which wrongfulness is precluded by its response to another unlawful measure, turning it into a lawful measure.[244] The ILC adopted this terminology after considering that State practice regarding third-party countermeasures was "embryonic", "sparse and [involving] a limited number of States", while leaving the matter open for further development of international law.[245] In the following years, several scholars supported the practice of third-party countermeasures. State practice is vital to determine whether third-party countermeasures are allowed due to the lack of jurisprudential guidance.[246] Proukaki, Dawidowicz and Tams conclude that States regularly

[238] *Gabčíkovo-Nagymaros* [85].
[239] ARSIWA, Article 49(3), 53; *Gabčíkovo-Nagymaros* [87].
[240] ILC ARSIWA commentaries (n71) 131.
[241] ARSIWA, Article 50(1)(b).
[242] O'Connell, *The power and purpose of international law: insights from the theory and practice of enforcement* (n218) 255.
[243] ARSIWA, Article 52(1); *Gabčíkovo-Nagymaros* [84].
[244] ARSIWA, Article 22.
[245] ILC ARSIWA commentaries (n71) 137, 139.
[246] Tams, *Enforcing obligations erga omnes in international law* (n204) 207.

implemented third-party countermeasures, which were met with little protest.[247] They came to this conclusion after impressive research on State practice, while referring to each other. This strengthens their conclusion.

An often heard criticism on third-party countermeasures is its favouring of Western States. Although, the Western dominance cannot be denied, Dawidowicz and Tams conclude that not exclusively Western States impose third-party countermeasures while referring to such examples of State practice and the absence of protest by both Western and non-Western States to any third-party countermeasure.[248] Nonetheless, two additional requirements on third-party countermeasures could ensure its fair application. First, it could be required from the intervening State to formally notify an international or regional organization of its wish to impose third-party countermeasures. Ruys offers the UN as such an organization by referring to the right of self-defence where States are required to notify the UNSC. Notifications require additional explanation for the reason, form, proportionality and necessity of the environmental intervention.[249] Second, it would be desirable if third-party countermeasures are only allowed if the initial violation reaches a certain threshold.[250] This aligns with the intensity factor of coercion and the definition of environmental emergency.

Environmental intervention through countermeasures is not coercive as prohibited under the principle of non-intervention. The wrongfulness of the countermeasures is precluded due to its response to an initial wrongful act. Therefore, it is a lawful response to an environmental emergency, deeming the environmental intervention lawful.[251] Moreover, countermeasures are solely intended to coerce the intervened State in compliance with an obligation it has already accepted. According to Tzanakopoulos, this is the reason that countermeasures cannot coerce a State in complying. The State was already bound to comply.[252] This is irrespective of the impact on the intervened State. Accordingly, the States' international environmental obligations guide the lawfulness of environmental intervention.

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[247] Elena Katselli Proukaki, *The Problem of Enforcement in International Law: Countermeasures, the Non-Injured State and the Idea of International Community* (Routledge 2009) 87, 201-202; Martin Dawidowicz, 'Public Law Enforcement without Public Law Safeguards? An Analysis of State Practice on Third-party Countermeasures and Their Relationship to the UN Security Council' (2007) 77(1) BYIL 408-415; Tams, 'Individual States as Guardians of Community Interests' (n199) 391.
[248] Dawidowicz (n247) 362-363, 389-390, 410-412; Tams, *Enforcing obligations erga omnes in international law* (n204) 235-237.
[249] Ruys (n93) 49.
[250] Ronzitti (n68) 29; Ruys (n93) 49.
[251] ARSIWA, Article 22.
[252] Tzanakopoulos (n21) 626.

4.2.2 Retorsion

Retorsion is another form environmental intervention can take. These are lawful, yet unfriendly measures not involving the use of force.[253] Well-known examples are the severance of diplomatic ties, the banning of exports, the implementation of quotas or the withdrawal of voluntarily given aid.[254] The sanctions under CITES and the termination of the CBD fund, mentioned in paragraph 4.1, are measures of retorsion.[255] Contrary to countermeasures, retorsion is not subjected to any formal requirements. They are lawful measures - irrespective of the State's intention - and may contain a punitive element.[256] Due to its lawfulness, retorsion appears limitless and not coercive. Giegerich contradicts this statement by arguing that the principle of non-intervention limits the exercise of retorsion.[257] According to him, retorsion can be rendered unlawful if "its coercive force is strong enough to pose a serious threat to the self-determination of the target State with regard to its [reserved domain]."[258] Interestingly, Giegerich acknowledges the reduction of the reserved domain to the extent that retorsion will most likely not breach the principle of non-intervention.[259] Contrary, Tzanakopoulos argues that retorsion should not be limited because the intervening State is not violating obligations owed towards the intervened State. After all, retorsion are lawful measures. Arguing otherwise would assume a prohibition on the use of lawful measures to induce a State to do something it is not obliged to do.[260] According to Tzanakopoulos, retorsion is only limited by the obligations between the intervening and intervened State.[261] This is an interesting discussion. It begs the question whether coercive, but lawful measures, as retorsion, are prohibited by the principle of non-intervention. Helal answers that only applying lawful measures is a form of persuasion not violating the principle of non-intervention.[262] If the lawful measure consists of offering benefits, that measure alone will not amount to unlawful coercion, except when there is a legal obligation to provide the benefits and the intervening State withholds.[263] The author sides with Helal and Tzanakopoulos. The essence of retorsion is its lawfulness under international law. It appears that the end is lost if a lawful yet coercive measure would violate the principle of non-intervention. It would end the States'

[253] ILC ARSIWA commentaries (n71) 128; Joyner (n86), para. 3.
[254] Joyner (n86), para. 24.
[255] Sand (n227) 251.
[256] Ruys (n93) 24; Tzanakopoulos (n21) 626.
[257] Giegerich (n72), para. 14.
[258] ibid, para. 24. Emphasis removed.
[259] ibid, para. 25.
[260] Tzanakopoulos (n21) 626.
[261] ibid 627.
[262] Helal (n19) 81.
[263] ibid 85-86.

freedom of diplomacy which is an acceptable manner of expression opinions. [264] That being said, environmental intervention using retorsion is limited by the environmental obligations of the States involved. On this, as seen, Giegerich, Helal and Tzanakopoulos all agree.

4.2.3 More options for environmental intervention?

The question is what remains if environmental intervention cannot be qualified as a countermeasure or retorsion. This could easily occur when a countermeasure fails to meet a requirement, especially the proportionality requirement, or when retorsion is neither lawful nor a countermeasure. The *Nicaragua* case demonstrates that it is possible for an unlawful measure - the trade embargo of the US - not to amount to unlawful intervention.[265] Jamnejad and Wood correctly conclude that the ICJ implies that the US' measures in the *specific* case did not amount to intervention, but not excluding the possibility it could have in other situations.[266] Their conclusion is supported by Ruys.[267]

It appears that countermeasures and retorsion are non-exhaustive forms of environmental intervention. After all, it is possible for an unlawful measure, not being a countermeasure, to violate the principle of non-intervention. Accordingly, it is only possible to determine, to a certain extent, the forms environmental intervention can take. Why certain measures in certain situations are accepted and others not, will remain partly elusive, certainly with a lack of guidance from the ICJ. It remains a case-by-case assessment, which should at least take into account the factors of coercion, the environmental obligations of the involved States and the reduction of the reserved domain. As Ruys concludes, "[i]n the end, it remains altogether unclear to what exact extent the principle of non-intervention prohibits certain economic sanctions."[268]

If environmental intervention wants to ensure compliance with the principle of non-intervention, it should use either countermeasures or retorsion. Nonetheless, it is reasonable to ask whether such measures are an appropriate response to environmental emergencies. Ehrmann counter-argues the use of self-help measures for environmental violations by referring to the countermeasures' complicated requirement of a direct infringement on a State's right and the reluctance of States to endanger political relationships in protection of the environment.[269]

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[264] Jamnejad and Wood (n21) 375.
[265] The trade embargo violated the Treaty of Friendship, Commerce and Navigation of 1956. (Hofer (n68) 182; *Nicaragua* [292]); *Nicaragua* [244-245].
[266] Jamnejad and Wood (n21) 370.
[267] Ruys (n93) 26-27.
[268] ibid.
[269] Markus Ehrmann, 'Procedures of compliance control in international environmental treaties' (2002) 13 ColoJIntlEnvtlL&Pol 383-384.

Although O'Connell endorses the use of countermeasures for environmental intervention, she also raises the issue of how they should be used and when they are appropriate.[270] While O'Connell asks valid questions, which can be used to guide the form environmental intervention can best take, Ehrmann commits two errors. First, the no-harm principle is meant to prove a direct infringement on a State's right for the use of countermeasures.[271] Second, State practice has shown that States are far from reluctant to impose measures in protection of the environment. The examples in paragraph 4.1, 4.2.1 and in the introduction regarding the Amazon fires demonstrate overwhelming support regarding self-help measures in protection of the environment. Ehrmann's criticism is understandable and should not be put aside too easy, but we can also not deny the great acceptance among States of countermeasures and retorsion. Accordingly, these measures can be used for environmental intervention.

4.2.4 Sub-conclusion

The preceding paragraphs demonstrate that environmental intervention by countermeasures or retorsion will not be prohibited under the principle of non-intervention. Although these are non-exhaustive forms of environmental intervention, it remains uncertain which precise other forms are possible. It is a rather grey area of international law in which further research is necessary. It suffices here to determine that self-help measures are appropriate for environmental intervention. These measures correspond with the aim of environmental intervention to provide States with a tool, short of force, to unilaterally respond to environmental emergencies. They are accepted practices in international law and by States, while compatible with the principle of non-intervention. These seem fruitful circumstances under which environmental intervention can flourish.

4.3 Self-contained regimes

Although this thesis is limited to the lawfulness of environmental intervention under the principle of non-intervention, self-contained regimes restrain the exercise of retorsion and countermeasures, and thus possibly environmental intervention.[272] These regimes contain exhaustive implementation procedures excluding the possibility of environmental intervention.[273] Characteristics of these regimes are the independence of outside institutions in applying its

[270] O'Connell, 'Enforcing the new international law of the environment' (n201) 318.
[271] See the beginning of para. 3.2.1.
[272] ICJ, *United States Diplomatic and Consular Staff in Tehran* (United States of America v. Iran), Judgment 24 May 1980, ICJ Reports 1980 [83, 86]; Giegerich (n72), para. 14.
[273] Giegerich (n72), para. 17.

norms, the independence of rules outside the regime and the possession of own dispute settlement procedures.[274] Notwithstanding the self-sufficiency of some treaty regimes, Giegerich and Proukaki both question whether the resort to unilateral intervention can exhaustively be excluded. They arrive at this conclusion after researching the comprehensive World Trade Organization regime and EU dispute settlement regime.[275] Accordingly, there is little chance that, the mostly less comprehensive, environmental treaties will be able to exhaustively exclude the possibility of environmental intervention. Some treaties discussed in this thesis support this conclusion. For example, CITES even seems to incorporate and embrace the practice of retorsion by acknowledging States' freedom to adopt stricter measures. Further, it depends on outside judicial bodies for dispute settlement.[276] The other treaties discussed - the WHC, CBD and UNFCCC - also are very unlikely to be considered a fully self-contained regime. These regimes do not have a specific judicial body and rely on other rules outside the regime. Concluding, environmental intervention using countermeasures and retorsion will not be limited by environmental self-contained regimes.

4.4 Environmental intervention applied to the Amazon fires

As we have come to the end of the research, a case study on the Brazilian Amazon fires in 2019 can illustrate the matters discussed.[277] Although not officially recognized, these fires will likely breach some of Brazil's environmental obligations.[278] This case study will look at possible violations of the no-harm principle and the CCH, while applying treaties discussed in this thesis.[279] It is assumed that the fires took, at least partly, place in the sites listed under the relevant treaties.

Any State which can prove that the fires significantly damaged their territory and that Brazil did not fulfil its due diligence obligation, can rely on the customary no-harm principle for

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[274] Proukaki (n247) 220.
[275] Giegerich (n72), para. 18-21; Proukaki (n247) 220-222.
[276] CITES, Article XVIII.
[277] See the introduction for a short explanation of the facts.
[278] Human Rights Watch, 'Brazil: Amazon penalties suspended since October' (*Human Rights Watch*, 20 May 2020) <https://www.hrw.org/news/2020/05/20/brazil-amazon-penalties-suspended-october> accessed on 12 July 2020; Beatrice Crona and Victor Galaz, 'Politics is failing to protect the Amazon. It's time for finance to step up instead'(*World Economic Forum*, 14 December 2018) <https://www.weforum.org/agenda/2018/12/politics-are-failing-to-protect-the-amazon-its-time-to-use-finance/> accessed on 12 July 2020.
[279] Brazil is a State party to these treaties. WHC: 'States Parties' <https://whc.unesco.org/en/statesparties>; UNFCCC: 'List of Parties' <https://unfccc.int/process/parties-non-party-stakeholders/parties-convention-and-observer-states>; CBD: List of Parties <https://www.cbd.int/information/parties.shtml> (all accessed on 12 July 2020).

environmental intervention. Additionally, the Amazon is protected under the WHC, which includes natural heritage sites located in the Amazon in Brazil, Bolivia and Venezuela.[280] Brazil likely violated its duty to not take any measures which damage the natural heritage sites of Bolivia and Venezuela.[281] This enables Bolivia and Venezuela to invoke the no-harm principle under Article 6(3) WHC to justify their environmental intervention. They, and other affected States Parties, can also rely on the CBD to invoke the no-harm principle because it limits Brazil's right to exploit the Amazon resources by the obligation not to damage the other State's environment.[282]

Additionally, States can invoke the CCH for environmental intervention. Under Article 4(d) UNFCCC States Parties should conserve sinks and reservoirs of greenhouse gases, including terrestrial ecosystems like the Amazon. Due to the characterization of climate change as a CCH, all States should cooperate in preserving these terrestrial ecosystems and therefore have a legitimate interest in undertaking action.[283] Likewise, the CBD applies to ecosystems within a State's territory due to the jurisdictional scope in Article 4.[284] States are encouraged to cooperate for the conservation and sustainable use of biodiversity.[285]

As a result, Brazil is likely to have committed an international wrongful act due to, or as a result of, the Amazon fires. These fires are not solely Brazil's concern if violating the no-harm principle or the CCH, because these are matters in which the State is not free to decide. This is the first element of intervention as prohibited under the principle of non-intervention. The next question concerns the form environmental intervention in the Amazon fires can take in light of the element of coercion.

It has been argued that countermeasures are more appropriate in response to a clear violation of an obligation, like the no-harm principle, or to physical damage.[286] Retorsion can be more suitable for violations of the CCH and can also be more effective and with lesser side effects in situations where the violation had minor effects on the environment.[287] Nonetheless, the extensive practice on third-party countermeasures supports a practice of using countermeasures for a violation of the CCH. Such is demonstrated by the EU threatening to refrain from ratifying the EU-Mercosur agreement - a trade deal with South American States - while Brazil failed to

[280] Garcia (n3) 192; 'World Heritage List' <https://whc.unesco.org/en/list/> accessed on 12 July 2020.
[281] WHC, Article 6(3).
[282] CBD, Article 3.
[283] Garcia (n3) 282.
[284] ibid.
[285] CBD, Article 5.
[286] O'Connell, 'Enforcing the new international law of the environment' (n201) 320.
[287] Giegerich (n72), para. 4.

combat the fires. Finland's finance minister even mentioned considering an EU import ban on Brazilian beef.[288] Other forms environmental intervention can take, are the freezing of Brazilian assets, the imposition of a trade embargo on products from the Amazon, the withdrawal of voluntarily given aid or the severance of diplomatic ties. All these forms can be countermeasures or retorsion, depending on the obligations owed by Brazil and the intervening States. In any way, they will not violate the principle of non-intervention.

4.5 Concluding thoughts

This chapter has demonstrated that States use tools already at their disposal for environmental intervention. These tools are self-help measures - countermeasures or retorsion - and provide the circumstances under which environmental intervention can lawfully take place. Both are accepted under the principle of non-intervention and the element of coercion. The international environmental obligations States owe towards each other are leading in the decision which measure is most appropriate as a response to the environmental emergency and as form of environmental intervention. An interesting finding in this chapter was the reaffirmation of the hypothesis in Chapter 3, that State practice shows an acceptance of imposing measures by the not directly injured State, as with the CCH. Notwithstanding, the somewhat uncertain influence of the CCH on the reduction of the reserved domain, countermeasures and retorsion are accepted as its form of environmental intervention. This makes one think about the cumulative character of the element of the reserved domain and the element of coercion. Are extremely coercive measure acceptable as long as a matter is clearly outside the reserved domain? Or, would it be possible to view the element of coercion and the element of the reserved domain as communicating vessels? The less coercive a matter is, the more the matter can lie within the reserved domain before violating the principle of non-intervention. It is to be questioned if such a practice would be desirable. In the author's view environmental intervention would do best to refrain from intervening in every environmental matter, especially those clearly outside the reserved domain. It should remain a 'last resort' tool.

[288] 'Amazon fires: G7 to release funds for fire-fighting planes' (*BBC*, 26 August 2019) <https://www.bbc.com/news/world-latin-america-49469476> accessed on 12 July 2020.

Chapter 5. Conclusion

Pictures of the beautiful Amazon rainforest going up in flames, whilst the Brazilian President Bolsonaro refused international assistance. This was the motivation behind the research question in this thesis. This thesis set out to research the circumstances under which States could lawfully intervene in the domestic sphere of another sovereign State in response to environmental emergencies. The answer to this question was sought in the legal framework provided by the principle of non-intervention. Although the answer whether environmental intervention is possible in certain situations requires a case-by-case assessment, general remarks can be made.

The analysis on the principle of non-intervention led to two cumulative elements defining any intervention as prohibited under the principle: the element of the reserved domain - the matters in which the State is free to decide by virtue of its sovereignty - and the element of coercion. Accordingly, environmental intervention can be lawful if either intervening in a matter not falling within the reserved domain and/or not amounting to coercion. These are the circumstances allowing environmental intervention. Analysis on both elements were relevant because in the absence of one, or both, of the elements, environmental intervention would not be prohibited under the principle of non-intervention.

The first circumstance is a reduced reserved domain. Research laid bare the increasing relative understanding of sovereignty in international environmental law. States are bound by the environmental norms they have consented to and the body of customary international environmental law. This thesis focused on an analysis of the no-harm principle and the CCH. From research on the normative development and their enforcement mechanisms, the conclusion could be drawn that both hold the potential to reduce the reserved domain. Specifically, the no-harm principle inevitably reduces the reserved domain by restraining States' freedom to undertake an activity which could significantly harm the territory of another State. The CCH can achieve the same effect, but the extent of its influence remains ambiguous due to the lack of its clear normative consequences. Nonetheless, States have shown willingness to enforce the CCH via self-help measures, with the help of *erga omnes* obligations. This strengthens its influence on the reserved domain enough for environmental intervention.

The second circumstance is the meaning of coercion under the principle of non-intervention, which brings us to the use of self-help measures. Coercion turned out to be an elusive concept leaning on several factors, although none being decisive. When researching how States normally coerced other States to act in a certain way, it became clear that States resorted to self-help

measures. Most notably countermeasures and retorsion. A State invoking the no-harm principle can choose between using countermeasures or retorsion for environmental intervention. If the State invokes the CCH, some authors prefer the use of retorsion, although States practice demonstrated the acceptance of third-party countermeasures. Retorsion and countermeasures are established and accepted practices under international law and among States. Even a matter as the CCH can be lawful by using these measures. The EU threatening the EU-Mercosur deal already shows that States are ready to intervene like this. Therefore, both countermeasures and retorsion are suitable for environmental intervention. Moreover, neither are allowed to use force nor are prohibited under the principle of non-intervention. They are not unlawful coercive measures. After all, countermeasures only force States to comply with its existing obligations and retorsion are lawful measures not breaching any obligation towards the intervened State. The obligations that States hold towards each other guide the form and justification of environmental intervention in the specific case.

Concluding, a reduced reserved domain and self-help measures are the circumstances under which States can lawfully intervene in response to environmental emergencies. Although these are cumulative elements, it would be desirable for the legitimacy of environmental intervention if both elements are fulfilled. Special attention needs to be paid to the obligations States have towards each other. These obligations determine the exact scope of the reserved domain and the possibilities of resorting to self-help measures. It seems that environmental intervention has high potential to develop from an activist idea into a legal tool. With this we stumble upon a point for future research. Will environmental intervention gain support among States? Although sovereignty is always perceived as the most valuable thing for States, does this mean we just have to accept its corollary of the principle of non-intervention, even when faced with environmental emergencies? At what point can we interpret and change the law? The author argues that this point has been reached with the protection of the environment, especially in situations covered by the no-harm principle and the CCH. Further research concerning the practical side and the *opinio juris* of States regarding environmental intervention is necessary. Specifically about the possible other forms environmental intervention can take. Further research can even conclude whether environmental intervention holds the potential to, eventually, develop into a legal duty instead of a legal tool, voluntarily at the disposal of States. For now, we can only hope that “our house” will not be burning this year.

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