

European Legal Practice Integrated Studies

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# ELPIS

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## MASTER

“CLIMATE CHANGE AS A THREAT TO PEACE  
AND INTERNATIONAL SECURITY”

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"To my family, for all the support and love in the world, to my friends, for the company and encouragement. I thank my colleagues, for the good times of coexistence, myself, for not giving up, for always dreaming and believing, and I thank God, for not abandoning me."

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(ABSTRACT)

“Climate change is one of the greatest challenges for humanity in the 21st century. According to science, the adverse effects of climate change will be very serious and are already being felt across the globe. In recent years, the debate on the relationship between climate change and security has gained increasing prominence, with all United Nations bodies participating. The United Nations Framework Convention on Climate Change and its subsequent treaties, the Kyoto Protocol and the Paris Agreement, form the legal regime for climate change, but the competence for peacekeeping matters lies with the United Nations, notably the Security Council. Therefore, this study analyzes the relationship between climate change, its own legal regime, and the legal regime for maintaining international peace and security within the United Nations system.”

Keywords: Climate Change; Peacekeeping; International Security; United Nations.

## ABBREVIATIONS

Paris Agreement.....	Agreement
United Nations General Assembly.....	General Assembly
Charter of the United Nations.....	Charter
United Nations International Law Commission.....	ILC
Conference of the Parties.....	COP
Economic and Social Council.....	ECOSOC
Security Council.....	Council
United Nations Framework Convention on Climate Change.....	Convention, Framework Convention or UNFCCC
Greenhouse gases.....	GHG
Clean Development Mechanisms.....	CDM
Subsidiary Body for Scientific and Technological Advice.....	SBSTA
Subsidiary Body for Implementation.....	SBI
Small Island Developing States.....	SIDS
Intergovernmental Panel on Climate Change.....	IPCC
Kyoto Protocol.....	Protocol
Common but differentiated responsibilities.....	CBDR
Common but differentiated responsibilities and respective capabilities.....	CBDRRC
International Tribunal for the Law of Sea.....	ITLOS
International Court of Justice.....	ICJ
Permanent Court of International Justice.....	PCIJ
Vienna Convention on the Law of Treaties.....	VCLT

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## 1. INTRODUCTION

Climate change is one of the greatest political, legal and scientific challenges of our age. In the recent decades, the climate issue has been the subject of intense debates at national, regional and international levels, involving political figures from all levels, civil society, businesses and even religious leaders.<sup>1 2 3 4 5 6 7</sup>

As United Nations Secretary-General António Guterres put it, "*Climate change is the defining issue of our time – and we are at a turning point. We face a direct existential threat.*"<sup>8</sup>

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<sup>1</sup> The Urgenda Case, brought by Dutch citizens against the government of the Netherlands, was the first in the world in which a national court condemned the state and established that the government has a legal duty to prevent dangerous climate change. On June 24, 2015, the Hague District Court ruled that the government must cut its greenhouse gas emissions by at least 25 percent by the end of 2020, compared to 1990 levels. The decision required the government to take immediately more effective action against climate change. Following this decision, several legal proceedings in national courts were initiated in several countries. A non-exhaustive list of these ongoing proceedings in national courts is available at: *Global Climate Litigation*: <https://www.urgenda.nl/en/themas/climate-case/global-climate-litigation/>. Accessed October 20, 2021. Another important case was the “Bundesklimaschutzgesetz” or “KSG” case in Germany, when a group of German youth filed a legal challenge to Germany's Federal Climate Protection Act in the Federal Constitutional Court, arguing that the KSG's target of reducing GHGs by 55% until 2030 from 1990 levels was insufficient. The complaints were partially successful as the highest court ordered the legislature to set clear provisions for reduction targets from 2031 onward by the end of 2022. In response to the decision, the federal lawmakers passed a bill approving an adapted KSG that requires, at a minimum, reduction of 65% in GHGs from 1990 levels by 2030. It has been in effect since August 31, 2021. Available at: <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html>. Accessed in May 05, 2022.

<sup>2</sup> In the European Union, Regulation (EU) 2018/1999 establishing the European Climate Law was recently amended by Regulation (EU) 2021/1119, which establishes the new climate neutrality regime with a 55% cut in greenhouse gas emissions by 2030, compared to 1990 levels, the objective of achieving carbon neutrality by the year 2050, and other provisions. EUROPEAN UNION. Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018. EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION, Official Journal of the European Union, L 328/1, 21 December 2018.

<sup>3</sup> Among other relevant documents at European regional level, there is also the European Green Deal and the European Climate Pact.

<sup>4</sup> These various international facts will be seen throughout this study.

<sup>5</sup> As KU and SCOTT state, "*Climate and its effects affect all people and levels of government. It affects all countries, regardless of location or level of development. It demands a response, no matter what the official position, chain of command or resources.*" In: KU, Charlotte; SCOTT, Shirley V. *Conclusions: A climate change role for the Council?* 229 – 243 pp., p. 233. In: *Climate Change and the UN Security Council*. Eds. KU, Charlotte; SCOTT, Shirley V. Edward Elgar Publishing, USA, 256 p., 2018.

<sup>6</sup> There are hundreds of non-governmental organizations working in the field of climate change. A non-exhaustive list, however, of NGOs accredited to the United Nations Framework Convention on Climate Change can be found at: UNFCCC. *Admitted NOGs*. Available in: <https://unfccc.int/process/parties-non-party-stakeholders/non-party-stakeholders/admitted-ngos/list-of-admitted-ngos>. Accessed November 6, 2021.

<sup>7</sup> Pope Francis, leader of the Roman Catholic Church, also expressed his concern about climate change by stating: "*When human beings destroy the biodiversity of God's creation; when humans compromise the integrity of the land and contribute to climate change by stripping the land of its natural forests or destroying its wetlands; when humans contaminate water, soil, air... all this is sin... Because a crime against nature is a crime against ourselves and a sin against God.*" See: FRANCIS, Pope. *Encyclical Letter Laudato Si (On the Care of Our Common Home)*. Ed. Libreria Editrice Vaticana, Vatican, 2015.

<sup>8</sup> NATIONS, United. *Secretary-General's remarks on climate change [as delivered]*. Secretary-General, United Nations, New York, 10 September 2018. In: [www.un.org/sg/en/content/sg/statement/2018-09-10/secretary-generals-remarks-climate-change-delivered](https://www.un.org/sg/en/content/sg/statement/2018-09-10/secretary-generals-remarks-climate-change-delivered). Accessed February 11, 2021.

Moreover, from an environmental concern, climate change has also become a variant to be considered in the context of the maintenance of international peace and security, migration, human rights and the sovereignty of States<sup>9 10 11 12</sup>.

In fact, the security risks arising from the adverse effects of climate change have been affirmed for almost half a century, because at the 1988 "Toronto Conference", a landmark of intergovernmental cooperation on climate change, it was stated in the conference statement that changes in the Earth's atmosphere<sup>13</sup> "*pose a major threat to international security*"<sup>14 15</sup>.

Therefore, the relevance of climate change cannot be disregarded by any government and civil society is increasingly concerned about the adoption of a posture consistent with the best practices of climate sustainability and environmental preservation by States, which created the legal regime of

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<sup>9</sup> For example, the recent open debate and vote on a draft resolution in the United Nations Security Council on climate and the maintenance of international peace and security. See: *Climate Change and Security*. Available at: <https://www.securitycouncilreport.org/monthly-forecast/2021-09/climate-change-and-security-2.php>. Accessed October 24, 2021.

<sup>10</sup> See: UNHCR. *Climate change and disaster displacement*, UNHCR. Available at: <https://www.unhcr.org/climate-change-and-disasters.html>. Accessed December 12, 2021.

<sup>11</sup> OHCHR. *Understanding Human Rights and Climate Change*. Office of the United Nations High Commissioner for Human Rights (OHCHR), COP21, 2015. In: <https://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf>. Accessed January 5, 2022.

<sup>12</sup> RAYFUSE and SCOTT state for example that: "*The principles of state and sovereignty, which are fundamental to the current system of international law, may be impacted by climate change. In addition to possible expansions of international regulation and supervision in areas previously considered within the exclusive domestic jurisdiction of states, the very notion of state may be challenged by territorial changes caused by the rising level of sea*". See: RAYFUSE, Rosemary; SCOTT, Shirley V. *Mapping the impact of climate change on international law*. 3 – 28 p., p. 20. In: *International Law in the Era of Climate Change*. RAYFUSE, Rosemary; SCOTT, Shirley V. (Eds.). Ed. Elgar, USA, 377 p., 2012. See also: BURKETT, Maxine. *The Nation Ex-Situ: On climate change, deterritorialized nationhood and the post-climate era*. *Climate Law* 2(3), IOS Press, 345–374 p., 2011. Kelsen, Hans. *Sovereignty*. 525 – 536 p. In: *Normativity and Norms. Critical Perspectives on Kelsenian Themes*. Eds. PAULSON, Bonnie Litschewski; PAULSON, Stanley L.. Clarendon Press, Oxford, 1998. PELLET, Alain. *Alain Pellet - The History of International Law and the Role of Sovereignty Lecture*. United Nations, 29 Mar 2017. In: <https://media.un.org/en/asset/k1g/k1gm01x3iz>. Accessed February 20, 2022.

<sup>13</sup> BODANSKY, Daniel. *The history of the global climate change regime*, p. 28. In: *International Relations and Global Climate Change*. Eds. LUTERBACHER, Urs; SPRINZ, Detlef F., MIT, 2001. Ver também: KU, Charlotte; SCOTT, Shirley V.. *The UN Security Council and global action on climate change*. 01-24 p., p. 1. In: *Climate Change and the UN Security Council*. Eds. KU, Charlotte; SCOTT, Shirley V.. Ed. Edward Elgar Publishing. USA, 256 p., 2018.

<sup>14</sup> WMO; UNDP. "*The changing atmosphere: Implications for global security – Conference Proceedings*". Conference Statement, Toronto, 27-30 June 1988, United Nations Environment Programme (UNEP); World Meteorological Organization (WMO). Available at: <https://wedocs.unep.org/handle/20.500.11822/29980>. Accessed January 15, 2022.

<sup>15</sup> KU, Charlotte; SCOTT, Shirley V.. *The UN Security Council and global action on climate change*. p. 1-24, p. 1. In: KU, Charlotte; SCOTT, Shirley V. (Eds.). *Climate Change and the UN Security Council*. Ed. Edward Elgar Publishing, USA, 256 p., 2018.

climate change with the United Nations Framework Convention on Climate Change (UNFCCC) of 1992, of which its later treaties, the Kyoto Protocol and the Paris Agreement are part of<sup>16 17</sup>.

On the other hand, as expressed in principle 25 of the Rio Declaration "*Peace, development and environmental protection are interdependent and indivisible*" and, therefore, the correlation of climate change with the maintenance of peace and international security has been increasingly present in the international political-legal world which, inevitably, attracts the United Nations once again to the center of the debate and, notably, the Security Council, its highest body for the maintenance of international peace and security<sup>18</sup>.

As an international organization responsible for the maintenance of international peace and security, but also a forum for the debate of nations around the world and with a view to achieving all the objectives expressed in its Charter, the United Nations has a central role to play, because, as IVANOVA explains<sup>19</sup>.

*"The United Nations, as a universal political body, has been indispensable in the process of confronting climate change. It provided the arena for member states to discuss, deliberate, and occasionally decide. It provided the institutional apparatus to support the negotiations with information, research and support to the process. It also provided the platform and incentives for a wide range of actors to participate and engage in the drafting of agreements and, even more importantly, in the subsequent implementation. The UN, therefore, has been the guardian of the issue of climate change since the 1960s, when concern first emerged on the international political stage and facilitated the creation of the legal regime of climate change."*

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<sup>16</sup> According to a study conducted by Yale University, more than 54 percent of Americans consider themselves concerned or alarmed about the climate issue. See: BERGQUIST, P.; LEISEROWITZ, A.; MARLON, J.; WANG, X., and others. *Global Warming's Six Americas in 2020*. New Haven, Yale Program on Climate Change Communication, 2020. Available at: <https://climatecommunication.yale.edu/publications/global-warmings-six-americas-in-2020/>. Accessed December 12, 2021.

<sup>17</sup> On the other hand, according to a recent study, Europeans are not as concerned as their American counterparts about climate change. See: NOWAKOWSKI, Adam; OSWALD, Andrew J.. *Do Europeans Care about Climate Change? An Illustration of the Importance of Data on Human Feelings*. IZA Discussion Papers, n.º 13660, Institute of Labor Economics (IZA), 2020. For a contrary view, see: BIJWAARD, Daan; DUNNE, Allison. *PAN-EUROPEAN SURVEY: Main multi-country report*. European Public Affairs, Ipsos Belgium, 2021. Available at: <https://ceb.org/climate-greater-worry-than-covid-19-for-young-europeans-new-poll-finds/>. Accessed January 5, 2022.

<sup>18</sup> Principle 25 of the Rio Declaration on Environment and Development: "*Principle 25 - Peace, development and environmental protection are independent and inseparable*".

<sup>19</sup> IVANOVA, Maria. *Climate Change*. p. 716. In: *The Oxford Handbook on The United Nations*, 2º Ed., Oxford, Oxford University Press, 2018.

In this sense, the General Assembly of the United Nations, still in 1988, recognized, through Resolution 43/53 on the protection of the global climate, that climate change "*is a common concern of humanity, since the climate is an essential condition for the sustenance of life on earth.*"<sup>20</sup>.

For its part, over the past 70 years, the Security Council "*has been a path by which stakeholders can make their concerns known to the global community*" in which, right or wrong, omitted or not, the Council "*has adapted in response to changes in the political environment in which it has had to act, to changes in the United Nations and its members, and changes in the nature of global security.*"<sup>21</sup>.

However, the analysis of the issue *in casu* is complex, based on a legal regime that intends to balance several conflicting interests, following principles of Public International Law long ago established, the imperative norms of *Ius Cogens*, the Charter of the United Nations, international treaties on climate change, international jurisprudence, allied to the best available scientific knowledge.

Nevertheless, in this study we intend to carry out an analysis of the legal regime of climate change, as well as the legal system of general public international law applicable to this object, and the interconnections between the former, the international responsibility of States and threat to international peace and security.

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<sup>20</sup>UNITED NATIONS. *United Nations General Assembly Resolution 43/53: "Protection of global climate for the present and future generations of mankind"*. United Nations General Assembly, United Nations, December 6, 1988. Doc. A/43/53 (1988). Available at: <https://undocs.org/en/A/RES/43/53>. Accessed February 11, 2022.

<sup>21</sup> KU, Charlotte; SCOTT, Shirley V.. *The UN Security Council and global action on climate change*. p. 01-24, p.9. In: KU, Charlotte; SCOTT, Shirley V. (Eds.). *Climate Change and the UN Security Council*. Ed. Edward Elgar Publishing, USA, 256 p., 2018.

## 2. THE SCIENCE OF CLIMATE CHANGE

If there is one subject dealt with by the International Community in which the natural sciences have great influence, it's climate change. The scientific findings and their conclusions are considered by the International Community, serving as a basis for decision-making by specialized international organizations, as well as in the elaboration of international treaties and the formulation of public policies of International Law, in a matter that represents an enormous challenge to International Law.<sup>22 23</sup>

Of course, scientific findings and conclusions in the field of climate change are not binding on States, not least because of their non-definitive nature in the sense that science does not have all the answers, and, due to this lack of linkage, there is a great deal of room for maneuver for the International Community in the formulation of its policies and legal instruments focused on the issue of climate change.<sup>24</sup>

Even though the science of climate change, as we know it today, had its beginning almost two centuries ago, it was only at the end of the twentieth century that it reached the great relevance that it has today.<sup>25 26</sup>

In 1979, under the auspices of the World Meteorological Organization (WMO), the first World Climate Conference was held in Geneva. In this conference, of a notably scientific nature, the dichotomy of climate change and the impact of human activities on the environment was discussed.

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<sup>22</sup>It is worth explaining, succinctly, the difference between climate change and global warming. According to ROOM, "Global warming generally refers to the warming observed on the planet as a result of anthropogenic emissions of greenhouse gases. Climate change refers to all long-term variations in climate, including sea level rise, extreme weather events, and acidification from the oceans." In: ROOM, Joseph. *Climate Change: What everyone needs to know. Second Ed.*, Oxford University Press, 2018, p. 19.

<sup>23</sup>DEHM, Julia. *International law, temporalities and narratives of the climate crisis*. London Review of International Law, vol. 4, n° 1, Oxford University Press, 2016, p. 172. Vide also: MAYER, Benoit. *State Responsibility and Climate Change Governance: A Light through the Storm*. Oxford University Press, 2014, p. 575.

<sup>24</sup>HULMES, Mike. *Why we disagree about climate change: Understanding Controversy, Inaction and Opportunity*. Cambridge University Press, 2009, p. 72.

<sup>25</sup>John Tyndall, in 1859, using a theory formulated 30 years earlier by Joseph Fourier, proved that the gases present in the atmosphere (water vapor, carbon dioxide, nitrous oxide, methane and ozone) exhibited properties that absorbed heat when infrared radiation passed through them.

<sup>26</sup>Relevant works were produced in the 60s and 70s of the twentieth century. see: *The most influential climate change papers of all time*. Available at: <https://www.carbonbrief.org/the-most-influential-climate-change-papers-of-all-time> . Accessed October 21, 2021.



At the end, a statement was issued calling on the world's governments "*to anticipate and prevent possible man-made climate change that could be adverse to the well-being of humanity.*"<sup>27 28</sup>

Following the guidance of the Declaration issued by the 1st World Climate Conference and instigated by several States that had the objective of bringing at least part of the science of climate change to their control, unlike what occurred previously because the science of climate change was controlled until then by scientists, the World Meteorological Organization (WMO) and the United Nations Environment Program (UNEP) created, jointly, in 1988, at the aforementioned Toronto Conference, the Intergovernmental Panel on Climate Change<sup>29 30</sup>, hereinafter also referred to simply as IPCC.

The creation of the IPCC was supported by United Nations General Assembly Resolution n° 43/53 on global climate protection of 1988, which confirmed the joint creation of the IPCC by the United Nations Environment Programme and the World Meteorological Organization, defining the IPCC as an international scientific organization with the objective of carrying out analyses of the environmental and socio-economic impacts of climate change, as well as to present realistic strategic responses to face the dangers posed by them.<sup>31 32 33 34 35</sup>

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<sup>27</sup> UNFCCC. *Climate Change Information Sheet 17. The international response to climate change: A history.* UNFCCC, 2000. In: <https://unfccc.int/cop3/fccc/climate/fact17.htm>. Accessed in July 08, 2021.

<sup>28</sup> The conference also endorsed plans to establish a World Climate Programme under the joint responsibility of the World Meteorological Organization (WMO), the United Nations Environment Programme (UNEP) and the International Council of Scientific Unions (ICSU).

<sup>29</sup> BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lvanya. *International Climate Change Law.* Oxford University Press, 2017, p. 99. Also: BODANSKY, Daniel. *The History of the Global Climate Change Regime.* In: LUTERBACHER, Urs. SPRINZ, Detlef F. (Eds.). *International Relations and Global Climate Change.* Global environmental accords series, MIT Press, 2001.

<sup>30</sup> The proposal for a joint management of the science of climate change was also set out in the Annual Report of the Executive Director of the United Nations Environment Programme (UNEP) published in 1985 and mentioned in United Nations General Assembly Resolution 43/53.

<sup>31</sup> NATIONS, UNITED. United Nations General Assembly Resolution 43/53. "*Protection of global climate for the present and future generations of mankind*". United Nations General Assembly, United Nations, December 6, 1988, Doc. A/43/53. Available at: <https://undocs.org/en/A/RES/43/53>. Accessed February 11, 2022.

<sup>32</sup> The IPCC is made up of 195 member states and functions independently from the United Nations Environment Programme and the World Meteorological Organization.

<sup>33</sup> Item 6 of United Nations General Assembly Resolution 43/53.

<sup>34</sup> Item 10, c, of United Nations General Assembly Resolution 43/53.

<sup>35</sup> As for the competence-duty of the IPCC to draw up public policies, this is a considerable change in the historical context of the attributions of science, in addition to that of formulating public policies to be appreciated by the International Community. This transformation marks a new form of relationship between science and decision-making by States and international organizations, in which science is assigned a duty that until then was not normally provided or even expected. Of course, this attribution allows only the recommendation of the best policies and options based on science, according to the scientific object of the organization, and it is up to the International Community to make decisions in fact and in law. See: HULMES, Mike. *Why we disagree about climate change: Understanding Controversy, Inaction and Opportunity.* Cambridge University Press, 2009, p. 92.

Internally, the IPCC is divided into three working groups and a task force. Working Group I deal with the Physical Sciences of Climate Change, Working Group II with Climate Change Impacts, Adaptation and Vulnerability, while Working Group III deals with Climate Change Mitigation. The main objective of the Task Force on National Greenhouse Gas Inventories is to develop and refine a methodology for the calculation and reporting of national greenhouse gas emissions and removals<sup>36</sup>.

The work of the IPCC is carried out through the preparation of evaluation reports published, on average, every 5 years and previously submitted to a review process known as "peer-review"<sup>37</sup>. A "Synthesis Report" and a "Summary for Policymakers" are also published, summarizing the conclusions of the working groups presented in the main scientific report.

According to IPCC scientists, it is extremely likely that anthropogenic actions, i.e. direct and indirect human actions, are the cause<sup>38 39</sup> of the climate change that the world has been experiencing, as well as the most extreme weather events. According to the IPCC, current atmospheric concentrations of carbon dioxide, methane and nitrous oxide are unprecedented in the last eight hundred thousand years of the planet<sup>40 41 42</sup>.

In addition, the main cause of climate change is the increase in temperature on the globe, and this increase in temperature has as its main source the increase in the concentration in the atmosphere

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<sup>36</sup> Other Task Force groups may be established by the IPCC for a specified period of time and for the consideration of a specific topic or issue. One example is the decision of the 47th IPCC Session in Paris in March 2018, which established a Task Force Group to improve gender balance and address gender-related issues in the IPCC.

<sup>37</sup> For further clarification on the IPCC reporting review system, see: IPCC. *IPCC Factsheet: How does the IPCC review process work?* IPCC, 2018. Available in: [https://www.ipcc.ch/site/assets/uploads/2018/02/FS\\_review\\_process.pdf](https://www.ipcc.ch/site/assets/uploads/2018/02/FS_review_process.pdf). Accessed July 8, 2020.

<sup>38</sup> IPCC. *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*. IPCC, Geneva, Switzerland, 2014, pg. 151.

<sup>39</sup> The vocabulary used by the IPCC to convey degrees of probability can be translated as follows: "Virtually certain: 99-100% probability; Extremely likely - 95-100% probability; Very likely: 90-100% probability; Probable: 66-100% probability; More likely than not: 50-100% probability; As likely as not: 33 to 66% probability; Unlikely: 0-33% probability; Very unlikely: 0-10% probability; Extremely unlikely: 0-5% probability; Exceptionally unlikely: 0-1% probability. ". See: IPCC. *Guidance Note for Lead Authors of the IPCC: Fifth Assessment Report on Consistent Treatment of Uncertainties*. IPCC, Geneva, Switzerland, 2010, pg. 04.

<sup>40</sup> UNFCCC. *Climate Change Leads to More Extreme Weather, but Early Warnings Save Lives*. UNFCCC. In: <https://unfccc.int/news/climate-change-leads-to-more-extreme-weather-but-early-warnings-save-lives>. Accessed in November 20, 2021.

<sup>41</sup> IPCC. *Guidance Note for Lead Authors of the IPCC: Fifth Assessment Report on Consistent Treatment of Uncertainties*. IPCC, Geneva, Switzerland, 2010, pg. 04.

<sup>42</sup> It has also been found that anthropogenic greenhouse gas (GHG) emissions since the pre-industrial era have led to large increases in atmospheric concentrations of carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>) and nitrous oxide (N<sub>2</sub>O). Between 1750 and 2011, cumulative anthropogenic CO<sub>2</sub> emissions to the atmosphere ranged from 2,040 ± 310 GtCO<sub>2</sub>. About 40% of these emissions remained in the atmosphere (880 ± 35 GtCO<sub>2</sub>); The rest was taken out of the atmosphere and stored on land (in plants and soils) and in the ocean. The ocean absorbed about 30% of the anthropogenic CO<sub>2</sub> emitted, causing ocean acidification. About half of anthropogenic CO<sub>2</sub> emissions between 1750 and 2011 occurred in the last 40 years. In: IPCC. *Climate Change 2014: Synthesis Report Summary for Policymakers Chapter*. IPCC, Geneva, Switzerland, 2014, p. 4.



of gases<sup>43</sup> known as greenhouse gases, including carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), nitrous oxide (N<sub>2</sub>O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), among others, which, at normal levels, are very important for life on earth, but, by concentrating in the atmosphere above these levels, they make it difficult to evade the heat that sunlight produces on the earth's surface. According to the analyses, the current emission of greenhouse gases has increased by 70% compared to the emissions found in 1970<sup>44 45 46 47</sup>.

According to the IPCC, it is estimated that human activities have already caused global warming of approximately 1.0°C above pre-industrial levels, as well as impacts on natural systems, and many terrestrial and oceanic ecosystems have already had their services altered due to global warming<sup>48 49 50</sup>.

And among the main negative impacts of climate change caused by global warming are the increase in average temperature in most terrestrial and oceanic regions of the planet, higher frequency of extreme events such as extreme heat waves, heavy precipitation and floods, periods of more prolonged droughts and desertification in other regions, forest fires, sea level rise, with loss of habitable areas on the coasts, low-lying zones and even dissolution of states by the complete disappearance of their territory, risk of food insecurity due to the loss of arable land and food crops, increase in diseases and pandemics, risk to biodiversity, with extinction of species of fauna and flora,

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43 IPCC. *Summary for Policymakers. In: Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty.* IPCC, Geneva, Switzerland, 2018, p. 32. See also: ROOM, Joseph. *Climate Change: What everyone needs to know.* 2<sup>o</sup> Ed., Oxford University Press, 2018.

44 The United Nations Framework Convention on Climate Change (UNFCCC) defines greenhouse gases in its Article 1, paragraph 5, as "gaseous constituents of the atmosphere, natural and anthropogenic, which absorb and re-emit infrared radiation."

45 For a full reference on greenhouse gases: IPCC. *2019 Refinement to the 2006 IPCC Guidelines for National Greenhouse Gas Inventories.* IPCC. Available at: <https://www.ipcc-nggip.iges.or.jp/public/2019rf>. Accessed April 17, 2021.

46 CHEN, Wei-Yin; LACKNER, Maximilian; SUZUKI, Toshio. *Introduction to Climate Change Mitigation.* Handbook of Climate Change Mitigation and Adaptation, Ed. Springer, New York, 2015, pg. 4.

47 IPCC. *Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change.* IPCC, Geneva, Switzerland, 2007, 104 p.

48 *Ibid.* 41.

49 *Ibid.* 46.

50 In its 2021 report, IPCC Working Group I finds that the chances are high that the level of global temperature warming will be exceeded by 1.5°C in the coming decades and that unless there are immediate, rapid and large-scale reductions in greenhouse gas emissions, limiting global temperature rise to around 1.5°C, or even at 2°C, it may be out of reach. The report states that many changes due to past and future greenhouse gas emissions have already been irreversible for centuries or millennia, notably changes in the ocean, ice sheets and global sea level. Still, the report states with great confidence that the concentration of CO<sub>2</sub> in the atmosphere is the highest in two million years. See: IPCC. *Summary for Policymakers. In: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change.* IPCC, 2021.

melting at the poles, mass migration, multiplication of risks of conflicts, among others<sup>51 52 53 54 55 56</sup>  
<sup>57</sup>.

Since its existence, the IPCC has produced six<sup>58</sup> *Comprehensive Assessment Reports* (1990, 1995, 2001, 2007, 2013/2014, 2021/2022/2023)<sup>59</sup>, as well as several Special Reports. These reports provide the scientific basis for negotiations and decision-making within the framework of the international legal regime of climate change by the International Community.

Nevertheless, the IPCC is not the only source of climate change science. The <sup>60</sup> Subsidiary Body for Scientific and Technological Advice (SBSTA) provided for in the United Nations Framework Convention on Climate Change also has as its function the scientific production and assistance to the Conference of the Parties to the Convention and the legal instruments linked to it, as will be seen below. In addition, scientific research institutions belonging to States, regional

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<sup>51</sup> Here we say negative impacts because, despite the regrets, some of the impacts of climate change can be considered positive for some states and specific localities. For example, the opening of new sea routes at the North Pole, new arable areas in localities that today do not support crops, among others, can be considered eventually positive by some States. However, it is evident that these points, which can be considered positive in an individualistic analysis, do not overlap with the overall negative macro impacts.

<sup>52</sup> Recently, hundreds of deaths have been attributed to above-normal high temperatures in frigid Canada. See: *Canada heatwave: Hundreds of sudden deaths recorded*. Available in <https://www.bbc.com/news/world-us-canada-57668738>. Accessed July 15, 2021.

<sup>53</sup> Recently, unusual flooding has caused death and destruction in Germany and China. See: *Climate scientists shocked by scale of floods in Germany*. Available in <https://www.theguardian.com/environment/2021/jul/16/climate-scientists-shocked-by-scale-of-floods-in-germany>. Accessed July 18, 2021. See also: *Worst rainfall in a thousand years leaves at least 25 dead in China*. Available in <https://exame.com/mundo/pior-chuva-em-1-000-anos-deixa-pelo-menos-25-mortos-em-provincia-chinesa/>. Accessed July 22, 2021.

<sup>54</sup> Fires in California have been getting bigger and more damaging. See: *Wildfires in California this year have scorched 3 times more land than in the same period of last year's record season*. Available in: <https://edition.cnn.com/2021/07/13/weather/california-wildfires-record-season/index.html>. Accessed July 18, 2021.

<sup>55</sup> A dissolução do Estado enseja ainda na perda da nacionalidade de seus cidadãos, como confirmado pela Comissão de Direito Internacional que afirmou “*when a state disappears by dissolution, its nationality also disappears*”. Em: ICL. *International Law Commission, Draft Articles on Nationality of Natural Persons in Relation to the Succession of States (With Commentaries)*. Suplemento nº 10, 03 Abril 1999, UN Doc. A/54/10.

<sup>56</sup> The temperature in the Arctic reached a new record this year 2021, the highest on record. See: *Arctic Circle is already recording 118 F degree days (and summer is just heating up)*. Available in <https://www.livescience.com/arctic-circle-siberia-hot-day-2021.html>. Accessed July 20, 2021.

<sup>57</sup> Para uma visão completa dos impactos das alterações climáticas, ver: IPCC. *Summary for Policymakers*. In: *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*. IPCC, Geneva, Switzerland, 2018, 32 pp. Ver também ROOM, Joseph. *Climate Change: What everyone needs to know*. 2º Ed, Oxford University Press, 2018.

<sup>58</sup> Until the conclusion of this work, only the first part of the sixth “*Assessment Report*” (AR6) of the IPCC has been published, this one referring to Working Group I. The other working groups will present their reports in the year 2022. The report of Working Group II (AR6) was publicly presented on February 28, 2022. The report of Working Group III is scheduled for April 2022 and the final report for September 2022.

<sup>59</sup> United Nations Assembly Resolution 43/53 outlined the scope of the first report to be carried out by the IPCC.

<sup>60</sup> However, like any scientific document, the reports of this international body are open to criticism by other scientists, political authorities and civil society. Nevertheless, they are considered the most serious scientific documents on climate change, as they reflect a broad consensus among the world's leading scientific opinions.

international organizations, universities, private initiative and civil society in general, also contribute to the scientific production related to climate change<sup>61 62</sup>.

In any case, it is undeniable that the IPCC reports are the most respected works currently at the level of science related to climate change, including for their scientific orientation and their public faith, while coming from an open international body with virtually global membership and with vast competence for issues related to climate change. However, they are liable to become the object of many disagreements in the scientific community itself and in the political class, as well as in civil society, due to the complex science behind climate change, as well as its interpretation and execution, which does not detract from the enormous importance of this international organization<sup>63</sup>.

Therefore, the legal regime of climate change in the scope of International Law has an intimate connection with this international organization and with the science produced by it.

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<sup>61</sup> Recently, the European Union, through Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021, determined, among other points relating to the European Climate Law, the creation of a European Scientific Advisory Board on Climate Change ('Advisory Board'), to serve as a reference point in scientific knowledge related to climate change. The Advisory Board should complement the work of the European Environment Agency (EEA) by acting independently in the performance of its tasks. As envisaged, in fulfilling its mission, the Advisory Board should avoid any overlap with the IPCC's mission at the international level.

<sup>62</sup> There are dozens of associations and institutions that study climate change and that also claim that human actions are responsible for the climate change currently experienced. See: *List of Worldwide Scientific Organizations*. Available in: <http://www.opr.ca.gov/facts/list-of-scientific-organizations.html>. Accessed December 1, 2021.

<sup>63</sup> Beck affirms the need for a culture that can find a voice in an open dialogue with the sciences, the political system, the market and civil society, to address the risks of climate change and "*demonstrate the collective will to act responsibly in relation to the losses that will always occur, despite all precautions.*" See: BECK, Ulrich. *Manufactured uncertainties - Interview with German sociologist Ulrich Beck*. Humanitas Institute, Unissinos, 2006. Available in: <https://pt.scribd.com/doc/119393767/Entrevista-Incertezas-fabricadas-Entrevista-com-o-sociologo-alemao-Ulrich-Beck>. Accessed August 19, 2021.

### 3. LEGAL PRINCIPLES OF CLIMATE CHANGE

The legal principles applicable to the legal regime of climate change come from Public International Law, customary and positive law, international treaties that form International Environmental Law, the United Nations Framework Convention on Climate Change and the international instruments linked to it, which together form the specific legal regime of climate change, through which States, in the use of their attributions and giving up part of their sovereignty, seek the creation of an international public legal order that accentuates the pursuit of common objectives, interests and concerns of Humanity.<sup>64 65 66 67 68 69</sup>

Thus, in addition to the general principles of Public International Law, applicable to this entire legal system, there are specific principles that originate, firstly, from the International Environmental Law that, in view of their evident connection, were adopted by the legal regime of climate change, and also by principles proper to this legal regime, as provided for in its own legal instruments.

The general principles of international environmental law were initially laid down in the Stockholm Declaration. The Stockholm Declaration was signed at the United Nations Conference on

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<sup>64</sup> According to DE PLÁCIDO E SILVA "legal principles are the basic points that serve as a starting point or vital elements of the Law itself. They indicate the foundation of law. And, in this sense, one does not understand only the juridical foundations, legally constituted, but every legal axiom derived from the universal juridical culture." SILVA, De Plácido. *Vocabulário Jurídico*. Editora Forense. Rio de Janeiro. 24ª Ed., 2004, p. 1095.

<sup>65</sup> Weatherall defines customary law as "the evidence of practice generally accepted as law between states, which derives from two elements: a quantitative element, defined by practice, and a qualitative element, which reflects the recognition of this practice as a necessary law (*opinio juris sive necessitatis*). See: WEATHERALL, Thomas. *Jus Cogens: International Law and Social Contract*. Cambridge University Press, 2017, p. 126.

<sup>66</sup> The very *caput* of Article 3 of the United Nations Framework Convention on Climate Change, which sets out the principles that should guide the parties in achieving the objectives of the Convention, uses the term *inter alia* when establishing these principles, so it is clear that other principles of international law are applicable to the legal regime of climate change.

<sup>67</sup> There is a minority thesis that there would not be one legal regime for climate change, but rather several regimes. For more see: SCHIPER, Elisa. *Conceptual History of Adaptation in the UNFCCC Process*. Review of European Community and International Environmental Law, vol. 15(1), Ed. Basil Blackwell, 2006, p. 82.

<sup>68</sup> Canotilho defines sovereignty in the following terms "Sovereignty, in general terms, and in the modern sense, translates into a supreme power at the internal level and an independent power at the international level". Vide: CANOTILHO, José Joaquim Gomes. *Direito Constitucional e Teoria da Constituição*. Almedina, 7ª Ed., 2003, p. 89. On the other hand, Fassbender states that "The sovereignty of the State can no longer be interpreted as the 'supreme authority', the authority that defines constitutional law, but rather results itself from the definition provided for by international law." See: FASSBENDER, Bard. *Sovereignty and Constitutionalism in International Law*. In: WALKER, Neil (Ed.). *Sovereignty in Transition*. Hart, 2003, Chp. 5, p. 129.

<sup>69</sup> QUEIROZ, Cristina. *Constitucionalismo e Globalização: Os problemas actuais do constitucionalismo no e para além do Estado*. In: *Novos Estudos de Direito. Público, Comparado, Filosofia do Direito e Relações Internacionais*. Tomo II, Ed. QUEIROZ, Cristina. Petrony Editora, 2019, pg. 21.

the Human Environment held in Stockholm in 1972 and convened by the United Nations General Assembly through Resolutions n° 2398 and 2581<sup>70 71 72 73</sup>.

The purpose of the Convention was to encourage the Member States of the United Nations to protect and improve the human environment, to provide a common framework and direction for them and the United Nations system, to encourage public debate and public awareness of the problem and its urgency, and by the adoption of a joint declaration by these States, which would serve as a document of basic principles applicable to issues related to the human environment within the framework of international law<sup>74 75</sup>.

Therefore, the Stockholm Declaration is considered the initial milestone of the modern era of international environmental law and is composed by its preamble and 26 principles that serve as guidance for the conduct to be observed by States in their relationship with the human environment<sup>76</sup>.

However, as a charter of principles emanating from a conference declaration, the Stockholm Declaration is not *de jure* a treaty, it has a *soft* law character<sup>77</sup> and its compliance is not formally compulsory *per se*, although its principles reflect what are considered to be in force as principles of international environmental law by the international community.

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<sup>70</sup> By United Nations General Assembly Resolution 2994 of December 15, 1972, the Stockholm Declaration was adopted with 112 votes in favor, none against and 10 abstentions. At the time, the United Nations had 132 member states.

<sup>71</sup> Another important measure agreed at the conference was the creation of the United Nations Environment Programme (UNEP), which has the function of coordinating the work of the United Nations on issues related to the global environment. Prior to the conference, the General Assembly had adopted Resolution 2849 of 1971, by which it called on the international community and United Nations bodies to strengthen international cooperation in the fields of the environment, rational use of natural resources and preservation of the proper ecological balance.

<sup>72</sup> General Assembly Resolution n.° 2398 was preceded by United Nations Economic and Social Council Resolution 1346, which requested the General Assembly to convene a conference to address the issue of the human environment.

<sup>73</sup> The invitation made by the Government of Sweden to hold the conference in its state was accepted by the General Assembly through Resolution n.° 2581.

<sup>74</sup> The preamble to UNGA Resolution 2398 provides that "... *Desiring to encourage further work in this field and to give it a common vision and direction, Believing it desirable to provide a framework for comprehensive consideration within the United Nations of the problems of the human environment in order to draw the attention of governments and public opinion to the importance and urgency of this issue and also to identify those aspects that can only or can be better resolved through international cooperation and agreement...* ".

<sup>75</sup> HANDL, Günther. *Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992*. United Nations Audiovisual Library of International Law, United Nations, 2012, p. 1.

<sup>76</sup> Despite the previous existence of international treaties on the environment, these focused exclusively on the utility of natural resources and not on their preservation. For further clarification see: SAND, Peter H. *The Evolution of International Environmental Law*. In: BODANSKY, Daniel; BRUNNÉE, Jutta; HEY, Ellen. *The Oxford Handbook of International Environmental Law*. Vol. 29, Oxford, 2007. See also: PEEL, Jacqueline; SANDS, Philippe. *Principles of International Environmental Law*. 4th Ed, Cambridge, 2018, p. 21.

<sup>77</sup> The *soft law* character of the Declaration hinders its direct application and prevents its compulsory imposition, but it helps to establish a standard of good governance in environmental matters to States, as well as having a strong influence on domestic legislation and other international treaties. See: DUPUY, Pierre-Marie. *Soft Law and the International Law of the Environment*. Michigan Journal of International Law, vol. 12(420), 1991, p. 431.



And in this sense, another declaration of principles of notable relevance to international environmental law is the Rio Declaration on Environment and Development, adopted 20 years after the Stockholm Declaration, at the United Nations Conference on Environment and Development, also known as the Rio Conference, Eco-92, Summit or Earth Summit, which took place in the city of Rio de Janeiro, Brazil, in 1992<sup>78 79</sup>.

The Rio Declaration on Environment and Development, in its turn, is composed of a preamble and 27 principles, and like the Stockholm Declaration, it is a charter of principles emanating from a declaration at a conference and, therefore, is not *de jure* a treaty, has a *soft law* character and its compliance is not formally compulsory *per se*, although some of its provisions reflect norms considered customary, emergent or that would serve as guides for the future development of other norms<sup>80</sup>.

In fact, both the Stockholm Declaration and the Stockholm Declaration do not directly mention climate change in their principles. Nevertheless, several of its principles are applicable to climate change, since they are applicable to the environment as a whole, of which climate is an eminent part, and several of the principles applicable to climate change have been transposed from these declarations to the United Nations Framework Convention on Climate Change and related legal instruments.

Actually, some principles of International Environmental Law applicable to climate change come from the aforementioned instruments, but some have their roots established for a longer time in the legal system of public international environmental law<sup>81 82</sup>, notably by the performance of

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<sup>78</sup> Through Resolution n.º 47/190, the UNGA endorsed the Rio Declaration. At this point, there is a small terminological difference between Resolution n.º 2994, referring to the Stockholm Declaration, which "noted" the signature of this Declaration, while Resolution n.º 47/190 used the term "endorsement".

<sup>79</sup> Other relevant instruments applicable to international environmental law and climate change were signed at the Rio Conference. The Earth Charter, the Declaration of Principles on Forests, the aforementioned Rio Declaration, and the Agenda 21, adopted in the form of declarations, and three treaties, under the nomenclature of convention, the Convention on Biological Diversity, the United Nations Convention to Combat Desertification and, most importantly for the subject in *casu*, the United Nations Framework Convention on Climate Change.

<sup>80</sup> PEEL, Jacqueline; SANDS, Philippe. *Principles of International Environmental Law*. 4º Ed, Cambridge, 2018, p. 41.

<sup>81</sup> In fact, both the Stockholm Declaration and the Rio Declaration do not directly mention climate change in their principles. Nevertheless, several of its principles are applicable to climate change, since they are applicable to the environment as a whole, of which climate is an eminent part, and several of the principles applicable to climate change have been transposed from these declarations to the United Nations Framework Convention on Climate Change and related legal instruments.

<sup>82</sup> It is also worth mentioning the work of the Committee on Legal Principles Relating to Climate Change of the *International Law Association* (ILA) which, through the Declaration of Legal Principles Related to Climate Change, provides principles applicable to the legal regime of climate change. The Declaration basically provides for the same principles presented here, with the exception of the general principle of international law of good faith which, that by its general application in international law, is inseparable from the legal regime of climate change.

international courts in the application of customary law, while others are specific to the legal regime of climate change, as will be seen below.

### 3.1. Principle of prevention

The principle of prevention is the oldest principle of international environmental law and has its roots in the rule of non-harm, established in the<sup>83</sup> *Island of Palmas* case<sup>84</sup>. According to the arbitral award handed down in that case, which dealt with conflicting interests in the exercise of sovereignty, the sovereign right of States to the use of their territories and natural resources is limited to the occurrence of significant cross-border damages, and a State is obliged to protect the rights of other States, notably the right to territorial integrity and inviolability<sup>85</sup>.

The no-harm rule was reaffirmed in the *Trail Smelter*<sup>86</sup> case on transboundary pollution involving the governments of Canada and the United States, in which it was stated that states do not have the right to use or permit the use of their territory in a manner that causes harm to the territory of another state. It was also stated that the damage would be unlawful when considered serious and proven.

Also, the principle of prevention originates the duty of States to prevent activities in their territory from causing damage to third parties States, limiting the sovereignty of States regarding the use of their territories, in favor of the right of other States to have their territories preserved and protected against significant damage caused by activities that did not occur within their jurisdiction.

The principle of prevention was included among the principles of the Stockholm Declaration<sup>87</sup> and later in the Rio Declaration<sup>88</sup>. Moreover, the duty to prevent harm was also corroborated by the

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<sup>83</sup> BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lvanya. *International Climate Change Law*. Oxford University Press, 2017, p. 40.

<sup>84</sup>Case of *Las Palmas* Island (Netherlands v. United States), International Court of Arbitration, April 4, 1928. *Reports of International Arbitral Awards*, vol. II, p. 829-871, United Nations, 2006.

<sup>85</sup>The use of the term "*significant*" denotes the understanding that States must tolerate small-impact cross-border damage.

<sup>86</sup>*Trail Smelter* Case (United States v. Canada), Court of Arbitration, April 16, 1938, and March 11, 1941.

<sup>87</sup> See Stockholm Declaration. "*Principle 21: In accordance with the Charter of the United Nations and the principles of international law, States have the sovereign right to exploit their own resources in application of their own environmental policy and the obligation to ensure that activities carried out within their jurisdiction or under their control, do not harm the environment of other States or of areas outside all national jurisdiction.*"

<sup>88</sup> See Rio Declaration. "*Principle 2: States, in accordance with the Charter of the United Nations and the principles of international law, have the sovereign right to exploit their own resources in accordance with their own environmental*

Advisory Opinion on the Legality of the Use of Nuclear Weapons issued by the International Court of Justice<sup>89</sup>.

And in relation to its *status*, the principle of prevention is now part of customary international law, as clarified by the International Court of Justice in 2010 on the *Pulp Mills* case<sup>90 91</sup>, when it provided that

*"The principle of prevention, as a customary rule, has its origin in the diligence that is required of a State in its territory. It is the obligation of every State not to knowingly allow its territory to be used for acts contrary to the rights of other States."*

And to this end, the principle of prevention unfolds procedural obligations to States, such as the duty of diligence, information and cooperation. The duty of care is constituted by the obligation incumbent on States to adopt the necessary measures and vigilance to prevent damage to the environment of other States or beyond the jurisdiction of the State. The duty of care was enshrined in the *Trail Smelter* case and was subsequently reiterated in the *Pulp Mills* case, in the Advisory Opinion of the International Tribunal for the Law of the Sea, and in the *Corfu Canal* case<sup>92</sup> between the United Kingdom and Albania before the International Court of Justice<sup>93</sup>.

And the duty of care also implies the obligation to monitor, regulate, carry out environmental impact studies, among other diligent actions that are necessary to prevent significant damage to third states<sup>94</sup>.

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*and development policies, and the responsibility to ensure that activities carried out within their jurisdiction or control do not harm the environment of other States or areas beyond the limits of national jurisdiction."*

<sup>89</sup> The International Court of Justice affirmed: *"The use of nuclear weapons may constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction, but represents the living space, the quality of life and the health of the human being, including the generations that have not yet been born. The existence of a general obligation on States to ensure that activities within jurisdiction and control respect the environment of other States and areas outside national control is now part of the corpus of international environmental law."* In: ICJ. *Legality of the Use of Nuclear Weapons*. Advisory Opinion, International Court of Justice, 1996.

<sup>90</sup> *Pulp Mills Case* (Argentina vs Uruguay), International Court of Justice, 2010.

<sup>91</sup> In its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the Court stated that *"the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or areas beyond their national control is now part of the body of international law relating to the environment."*, however, its customary character would only be clarified in the decision in the *Pulp Mills* case.

<sup>92</sup> ITLOS. *Responsibilities and Obligations of States Sponsoring Person and Entities with Respect to Activities in the Area*. Opinião Consultiva, International Tribunal for the Law of the Sea, February, 1 of 2011.

<sup>93</sup> *Corfu Channel Case* (United Kingdom v. Albania), International Court of Justice, 1949.

<sup>94</sup> *Case of Pulp Mills on the Uruguay River* (Argentina vs. Uruguay). International Court of Justice, Judgment of 20 April 2010, parag. 204.



It can be seen, therefore, both by the content of the provisions of both declarations and in the various decisions of the international courts, as well as by its *status* of customary law, that the principle of prevention and its resulting procedural obligations, when applicable to areas located outside the national jurisdiction of a given State, inevitably includes the atmosphere and the climate, therefore, this principle, despite the difficulties of concrete application to the case and even though not explicitly included among the principles set out in the United Nations Framework Convention on Climate Change, also applies to climate change.

### 3.2. Precautionary principle

The precautionary principle also stems from the no-harm rule. According to that principle, scientific uncertainty does not justify the absence of preventive measures where there is a possibility of serious or irreversible damage to the environment.

The precautionary principle differs from the principle of prevention since the latter has traditionally served to prevent a foreseeable or objectively expected event, while the former deals with precaution against risks not scientifically proven but plausible to occur, in order to provide a greater guarantee that the environment will not be seriously damaged<sup>95</sup>.

The precautionary principle is provided in Principle 15 of the Rio Declaration<sup>96</sup> and is explicitly provided by the United Nations Framework Convention on Climate Change (UNFCCC)<sup>97</sup> in its Article 3, paragraph 3.

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<sup>95</sup> BIRNIE, Patricia; BOYLE, Alan; REDGWELL, Catherine. *International Law and the Environment*. 3<sup>o</sup> Ed., Oxford, 2009, p. 153.

<sup>96</sup> See Rio Declaration. "Principle 15: "In order for the environment to be protected, preventive measures shall be applied by States, in accordance with their capabilities. Where there are threats of serious or irreversible risks, the lack of full scientific certainty will not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

<sup>97</sup> See Article 3(3) of the United Nations Framework Convention on Climate Change: "Article 3(3): Parties shall take precautionary measures to anticipate, avoid or minimise the causes of climate change and mitigate its harmful effects. Where there are threats of serious or irreversible damage, the lack of scientific certainty should not be used to justify delaying the taking of such measures, taking into account, however, that policies and measures related to climate change must be cost-effective in such a way as to ensure that overall benefits are achieved at the lowest possible cost. To achieve this, such policies and measures must take into account the diverse socio-economic contexts, be accessible, cover all sources, sinks and reservoirs of greenhouse gases and adapt to encompass all economic sectors. Targeted efforts on climate change can be undertaken in cooperation between stakeholders."

<sup>98</sup> In the case of the principle in the UNFCCC, the cost-benefit of the measures adopted in order to comply with the precautionary principle and the different socio-economic contexts of the States Parties become expressly relevant for the application of the principle, which was not explicitly given in the Rio Declaration and can be seen as a weakening of the precautionary principle or, at least, an adaptation of this to the heterogeneous reality of the member states of the International Community

The *status* of the precautionary principle in international law is not yet defined. However, the same is currently found in several international, regional and bilateral treaties that provide for the environment, as well as in countless national constitutions and legislations. Faced with this reality, the International Tribunal for the Law of the Sea, for example, noted that "*a trend has already begun towards the inclusion of the precautionary principle in the framework of the customary norms of international law.*"<sup>99</sup>.

Despite the still undefined status of the precautionary principle in the international legal order, its presence in the UNFCCC makes it applicable to international law on climate change, and scientific uncertainty should therefore not prevent States from taking the necessary measures to prevent harm in this context.

### ***3.3. Principle of common but differentiated responsibility (CBDR)***

The principle of common but differentiated responsibility developed from the application of the principle of equity in international law and can be considered<sup>100</sup> one of the most significant principles of the climate change legal system because, from its application, the obligations of the Parties to the UNFCCC are differentiated.<sup>101</sup>

On the basis of equity, it was recognized that the needs of developing States should be notably taken into account in the development, application and interpretation of the norms of international environmental law and that the greater participation of countries considered developed, which had contributed in greater proportion to the exploitation of natural resources and environmental degradation and, consequently, higher greenhouse gas emissions than developing countries, should also be considered.

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<sup>99</sup> ITLOS. *Responsibilities and Obligations of States Sponsoring Person and Entities with Respect to Activities in the Area*. Opinião Consultiva, International Tribunal for the Law of the Sea, February, 1 of 2011, par. 135.

<sup>100</sup> PEEL, Jacqueline; SANDS, Philippe. *Principles of International Environmental Law*. 4<sup>o</sup> Ed., Cambridge University Press, 2018, p. 226.

<sup>101</sup> GAO Xiang; WANG, Tian. *Reflection and operationalization of the common but differentiated responsibilities and respective capabilities principle in the transparency framework under the international climate change regime*. National Climate Center, China Meteorological Administration, 2019, p. 1.

Being its previous roots, the principle was included in the Rio Declaration and listed in Principle 7<sup>102 103</sup>, while the UNFCCC included the principle of common but differentiated responsibility in its Article 3, paragraph 1, making more explicit the responsibility of<sup>104</sup> the developed States for environmental degradation and their different responsibility and capacities, and including a complement that reveals greater consideration of the inequality of conditions between States<sup>105</sup>.

The common responsibility, that is, of the entire international community, comes from the global concern that climate change represents. The differentiation, as the greater responsibility of the States considered the most polluting and, as a rule, the most developed, constitutes a further recognition of the special needs and conditions of developing States, especially the most vulnerable, as a kind of application of the polluter pays principle, through which the state that has used more natural resources must bear the responsibility for the environmental damage caused<sup>106</sup>.

Also, the addition of the expression "*with their respective capacities*" exposes the understanding that States do not have the same conditions for responding to climate change and creates another basis for differentiating the responsibilities of States, even allowing their responsibility to grow as they achieve greater social, technological, financial and administrative development.<sup>107</sup>

The concept of respective capacities is reinforced by the principle that deals with developing States Parties and, notably, with specific needs and special circumstances, therefore more vulnerable to climate change, such as low-lying states, states in the process of desertification, states dependent

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<sup>102</sup>PEEL and SANDS claim that the principle has its roots in the United Nations Convention on Environment and Development. See: PEEL, Jacqueline; SANDS, Philippe. *Principles of International Environmental Law*. 4th Ed., Cambridge University Press, 2018, p. 245.

<sup>103</sup> Rio Declaration. "*Principle 7. States will cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. Given the different contributions to global environmental degradation, States have common but differentiated responsibilities. Developed countries recognize their responsibility in pursuing sustainable development at the international level, taking into account the pressures exerted by their societies on the global environment and the technologies and financial resources at their disposal.*".

<sup>104</sup>See Article 3(1) of the United Nations Framework Convention on Climate Change: "*Article 3(1): The Contracting Parties shall protect the climate system for the benefit of present and future generations of humanity, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Thus, developed country Parties should take the lead in combating climate change and its adverse effects.*".

<sup>105</sup> The preamble to the UNFCCC further reads that "*Noting that most current and historical global greenhouse gas emissions originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will increase to meet their social and development needs*". However, this reality is proving to be outdated as states such as China, India and Brazil develop and emit more and more GHGs.

<sup>106</sup> The polluter pays principle is, however, more widely used within the framework of the internal legislation of States and in an economic context of exploitation of natural resources and environmental services for economic purposes.

<sup>107</sup> BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lvanya. *International Climate Change Law*. Oxford University Press, 2017, p. 128.

on fossil fuels, among others. Their specific needs and the special circumstances in which they find themselves must be taken into full account in the decision-making and actions regarding mitigation and adaptation to the climate change scenario.<sup>108 109</sup>

Being a principle with great application in the International Law of Climate Change, it works through impositions of reduction of harsher emissions to developed States and greater commitments of technology transfer, financing, contributions and obligations to provide information to monitor their compliance with their obligations, as will be seen.

### 3.4. Principle of sustainable development

The principle of Sustainable Development has been included in international environmental law since the Rio Declaration, signed at the Earth Summit. The Declaration cites sustainable development in 12 of its 27 principles<sup>110 111</sup>.

Other documents considered landmark in the introduction of the principle into international environmental law were the *World Conservation Strategy* document and most importantly, the 1987 report of the World Commission on Environment and Development, called "*Our Common Future*"

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<sup>108</sup>See Article 3(2) of the UNFCCC which provides: "Art. 3. *In their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be guided, inter alia, by the following principles: (2) the specific needs and special circumstances of developing country Parties, especially those which are particularly vulnerable to the harmful effects of climate change, and of Contracting Parties, especially developing countries; which should bear a disproportionate and abnormal burden resulting from the Convention, shall be taken into full consideration;*".

<sup>109</sup>See Article 4(8) of the UNFCCC which provides: "Article 4... 8. *In implementing the commitments of this Article, the Parties shall give their full attention to actions necessary under the Convention, including actions relating to financing, insurance and technology transfer, to meet the specific needs and concerns of developing country Parties arising from the adverse effects of climate change and/or the impact of the implementation of response measures, in particular: (a) small island countries; (b) countries with low-lying coastal areas; (c) countries with arid and semi-arid zones, forest areas and areas subject to forest degradation; (d) countries with areas prone to natural disasters; (e) countries with areas subject to drought and desertification; (f) countries with areas where there is high urban air pollution; (g) countries with areas containing fragile ecosystems, including mountainous ecosystems; (h) Countries whose economies are highly dependent on revenues generated from the production, processing and export, and/or consumption of fossil fuels and associated energy-intensive products; and (i) inland and transit countries.*".

<sup>110</sup> Agenda 21, another relevant document signed by States in ECO-92, also provided for sustainable development and led to the creation of the Commission on Sustainable Development (CDS), linked to the United Nations Economic and Social Council (ECOSOC).

<sup>111</sup> For example, Principles 3 and 4 of the Rio Declaration provide: "Principle 3. *The right to development must be exercised in such a way as to enable the environmental and development needs of present and future generations to be met equitably.* Principle 4. *To achieve sustainable development, environmental protection must be an integral part of the development process, and cannot be considered in isolation from it.*".

also known as the "*Brundtland Report*", which established the main guidelines on the principle of sustainable development and conceptualized the principle as<sup>112 113</sup>

*"Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs."*

Also, the principle of sustainable development is expressly provided for<sup>114</sup> in the UNFCCC in its Articles 3, 4 and 5. The consideration of the development of States at the socioeconomic level, considering that development at this level is also an objective to be achieved so that States<sup>115</sup>, especially those in development, can better cope with the adverse effects of climate change, reinforces the developmental side of the principle<sup>116</sup>. Even the weight of development is expressed at the end of Article 3(5), which states that the measures taken to combat climate change do not justify arbitrary discrimination or a covert restriction on international trade<sup>117 118</sup>. In this sense, climate change does indeed pose extensive challenges to international sustainable development<sup>119</sup>.

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<sup>112</sup> Some authors consider that it is not a principle, but a concept. In this sense, see: DUPUY, Pierre-Marie; VIÑUALES, Jorge E.. *International Environmental Law*. 2nd Ed., Cambridge, 2018, p. 91. And yet, considering the principle as only Principle of Development, that is, with a developmentalist focus, see: ANTUNES, Paulo de Bessa. *Direito Ambiental*. 20ª Ed., Ed. Atlas, 2019, p. 23.

<sup>113</sup> NATIONS, United. *Report of the World Commission on Environment and Development: Our Common Future*. United Nations, 1987, pg. 36.

<sup>114</sup> See Article 3(4) and (5) of the United Nations Framework Convention on Climate Change: "Article 3....the Parties shall be guided, inter alia, by the following principles: 4) The Parties have the right and shall promote sustainable development. Policies and measures to protect the climate system against changes caused by human activity shall be appropriate to the specific conditions of each Party and shall be integrated into national development programmes, taking into account that economic development is essential for the adoption of climate-oriented measures; (5) The Parties shall cooperate in promoting a supportive and open international economic system conducive to sustainable economic growth and development in all Parties, especially the Contracting Parties of developing countries, thereby enabling them to have a greater capacity to address the problems raised by climate change. Measures taken to combat climate change, including unilateral measures, shall not constitute a means of effecting arbitrary or unjustified discrimination, or a covert restriction, on international trade."

<sup>115</sup> In this sense, the 2030 Agenda, adopted in 2015 by the United Nations General Assembly through Resolution 70/1, presents 17 objectives and 169 Sustainable Development Goals, which aim to eradicate poverty and hunger, protect human rights and human dignity, protect the planet from degradation and promote peace by the year 2030.

<sup>116</sup> It is notable that the UNFCCC in its Article 3(4) uses the expression "*The Parties have the right and shall promote sustainable development*." By using the term "*has the right*", the Convention safeguards the right to development claimed notably by developing countries that consider that, at a historical level, have made little use of natural goods, compared to States considered developed. On the other hand, by using the term "*should promote*" establishes the obligation that socioeconomic development takes place through a sustainable conduct.

<sup>117</sup> The influence of climate change on the economic field is increasingly recognised. Recently, the Governing Council of the European Central Bank (ECB) acknowledged that climate change has profound implications for price stability and committed to following a climate action plan. See: *ECB changes inflation target and approves plan to combat climate change*. Available in <https://expresso.pt/economia/2021-07-08-BCE-muda-meta-de-inflacao-e-aprova-plano-de-combate-a-mudanca-climatica-8125fd61>. Accessed July 20, 2021.

<sup>118</sup> In the field of private international financing, several banking institutions around the world claim to adopt the so-called Equator Principles, through which the sustainability of projects applying for financing is analyzed on the basis of socio-environmental, sustainable development and, more recently, climate impact principles (Annex A). See: *Equator Principles*. Available in: [www.equator-principles.com](http://www.equator-principles.com). Accessed December 13, 2021.

<sup>119</sup> PENNY, Christopher K. *Climate change as a "threat to international peace and security"*. p. 30, p. 25 - 46. In: *Climate Change and the UN Security Council*. Eds. KU, Charlotte; SCOTT, Shirley V., Ed. Elgar, 256 p., 2018.

Therefore, while safeguarding the right of States to development at the socio-economic level, the principle of sustainable development provides the north as to the sustainable way in which this development is to be achieved.

### 3.5. Principle of intergenerational equity

The principle of intergenerational equity has been recognized by international law for more than a century and has been expressed in several treaties. The principle of intergenerational equity obliges States to take into account future generations in their decision-making, and there is no prediction or provision as to the "distance" between generations<sup>120 121</sup>.

In fact, in the field of climate change, predictions of serious and irreversible impacts notably raise the importance of this principle, which must play an important role in the creation, interpretation and application of the rules of international law relating to climate change.

The Stockholm Declaration included the *in casu* principle in its<sup>122</sup> first two principles, while the<sup>123</sup> Rio Declaration sets out in its Principle 3 and the<sup>124</sup> UNFCCC expressed in its Article 3, paragraph 1.

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<sup>120</sup>PEEL and SANDS explain that the idea of intergenerational equity was initially used in the *Pacific Fur Seal Arbitration* case of 1893 and is contained in the International Whaling Convention of 1946, the African Convention on Nature of 1968 and the World Heritage Convention of 1972, among others. See: PEEL, Jacqueline; SANDS, Philippe. *Principles of International Environmental Law*. 4th Edition, Cambridge, 2018, p. 221.

<sup>121</sup>As DUPUY and VIÑUALES explain, "the principle of intergenerational equity aims to distribute the quality and availability of natural resources and the efforts necessary for their conservation among current and future generations. DUPUY, Pierre-Marie; VIÑUALES, Jorge E.. *International Environmental Law*. 2nd Ed. Cambridge, 2018, p. 88.

<sup>122</sup>Stockholm Declaration: "Principle 1. Man has the fundamental right to freedom, equality and the enjoyment of adequate living conditions in an environment of such quality as to enable him to lead a dignified life and enjoy well-being, having the solemn obligation to protect and improve the environment for present and future generations. In this regard, policies that promote or perpetuate apartheid, racial segregation, discrimination, colonial oppression and other forms of oppression and foreign domination are condemned and must be eliminated." "Principle 2. The earth's natural resources including air, water, land, flora and fauna and especially representative samples of natural ecosystems must be preserved for the benefit of present and future generations through careful planning or planning."

<sup>123</sup>Rio Declaration: "Principle 3. The right to development shall be exercised in such a way as to take equitable account of the development and environmental needs of present and future generations."

<sup>124</sup>See Article 3(1) of the United Nations Framework Convention on Climate Change: "Article 3. 1. The Contracting Parties shall protect the climate system for the benefit of present and future generations of humanity, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Thus, developed country Parties should take the lead in combating climate change and its adverse effects;"

Therefore, States should consider the right of future generations to an environment and climate<sup>125</sup> that allows for a dignified and healthy life, and State action in the field of climate change should especially consider the long-lasting and long-term effects of GHG emissions and the adverse effects of climate change on the future generations.

### 3.6. Principle of cooperation

The Principle of Cooperation applicable in the context of climate change has its origin in the general principles of international law. As PEEL and SANDS explain<sup>126 127</sup>, *"the principle of good neighborliness enunciated in Article 74 of the Charter of the United Nations in relation to social, economic and trade issues has been translated into the development and application of rules that promote international environmental cooperation"*<sup>128 129</sup>. Also, the Stockholm Declaration included the principle of cooperation in its Principle 24, while the<sup>130</sup> Declaration of the Rio provides for it in Principle 27.<sup>131</sup>

Unlike the declarations, the UNFCCC does not provide for the application of the principle of cooperation in a single article, but rather in several provisions of the treaty, and Article 4 of the Convention has several provisions on the duty of cooperation in force between the Parties. In addition,

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<sup>125</sup> The International Court of Justice also expressed itself in this same sense, in the Advisory Opinion on the Legality of the Use of Nuclear Weapons, the ICJ stated "Consequently, in order to correctly apply to the present case the law of the Charter on the use of force and the law applicable in armed conflicts, in particular humanitarian law, it is imperative that the Court take into account the unique characteristics of the nuclear weapon system and, in particular, its destructive capacity, its ability to cause untold human suffering, and its ability to cause harm to future generations.". See: TIJ. *Legality of the Use of Nuclear Weapons*. Advisory Opinion, International Court of Justice, 1996, para. 36.

<sup>126</sup> MAZZUOLI, Valério de Oliveira. *Curso de Direito Internacional Público*. 9ª Ed, Revista dos Tribunais, 2015, p. 151.

<sup>127</sup> DUPUY and VIÑUALES state that "Cooperation remains an obligation of conduct whose specific manifestation depends on what could be expected of a State acting in good faith. Due to the relatively vague nature of such a duty, there are several ways to perform it." In: DUPUY, Pierre-Marie; VIÑUALES, Jorge E.. *International Environmental Law*. 2nd Ed. Cambridge, 2018, p. 75.

<sup>128</sup> PEEL, Jacqueline; SANDS, Philippe. *Principles of International Environmental Law*. 4ª Ed., Cambridge, 2018, p. 213.

<sup>129</sup> See Article 74 of the Charter of the United Nations: "Article 74. The Members of the United Nations also agree that their policy towards the territories to which this Chapter applies should be based, in the same way as the policy pursued in their respective metropolitan territories, on the general principle of good neighborliness, with due regard to the interests and well-being of the rest of the world with regard to social issues, economic and commercial."

<sup>130</sup> Stockholm Declaration: "Principle 24. All countries, large or small, should engage in a spirit of cooperation and on an equal footing in the solution of international issues concerning the protection and improvement of the environment. It is indispensable to cooperate through multilateral and bilateral agreements and other appropriate means in order to avoid, eliminate or reduce, and effectively control the harmful effects that activities carried out in any sphere may have on the environment, with due regard to the sovereignty and interests of all States".

<sup>131</sup> Rio Declaration: "Principle 27. States and peoples shall cooperate in good faith and in a spirit of partnership in the fulfillment of the principles enshrined in this Declaration and for the further development of international law in the field of sustainable development."

as already stated, the duty of cooperation also stems from the principle of prevention, notably with regard to the prevention of cross-border damage and the obligations<sup>132</sup> arising from this duty.

Therefore, in the legal regime of climate change the principle of cooperation is present in several aspects, whether they have the focus on reducing GHG emissions, technical assistance from developed States to developing States, especially in relation to those considered vulnerable, whether from financial, technological assistance, or other possible forms of cooperation that will be treated more deeply in the analysis of the obligations and provisions of the UNFCCC and the legal instruments linked to it.

### 3.7. Final considerations

The principles applicable to the legal regime of climate change come primarily from international environmental law. However, because it is part of the Legal Order of Public International Law, the general principles of this order also apply to climate change, in particular the principle of good faith, as provided for in the Vienna Convention on the Law of Treaties<sup>133</sup>.

These principles serve as guidance to States in the implementation of treaties, their obligations and are fundamental to the achievement of the greater objective of avoiding serious damage to the climate and, consequently, to human life on earth.

In this sense, the legal regime of climate change is composed of several treaties, which seek to implement these principles and achieve this goal, as will be seen below.

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<sup>132</sup> See Article 4 of the United Nations Framework Convention on Climate Change: "*Article 4. Commitments. (1) (c) Promote and cooperate in the development, application and dissemination, including the transfer of technologies, practices and processes that control, reduce or prevent anthropogenic greenhouse gas emissions...; (d) promote sustainable management and, where appropriate, promote and cooperate in the conservation and improvement of sinks and reservoirs of all greenhouse gases...; (e) cooperate in preparing for adaptation to the impacts of climate change, develop and develop appropriate and integrated plans...; g) To promote and cooperate in scientific, technological, technical, socio-economic and other research...; (h) To promote and cooperate in the full, open and rapid exchange of scientific, technological, technical, socio-economic and legislative information relating to the climate system and climate change. .; "*, among other provisions.

<sup>133</sup> See Article 26 of the Vienna Convention on the Law of Treaties (VCLT): "*Article 26 - Pacta sunt servanda: Every treaty in force is binding on the Parties and must be complied with by them in good faith.*".



## 4. LEGAL REGIME OF CLIMATE CHANGE

In 1990, the United Nations General Assembly adopted Resolution n° 45/212, by which it decided to establish a single intergovernmental negotiation process, under the auspices of the General Assembly and with the support of the United Nations Environment Programme (UNEP) and the World Meteorological Organization (WMO), for the preparation of a framework convention on climate change or other related instruments that could be agreed, taking into account the work of the Intergovernmental Panel on Climate Change (IPCC) and the conclusions of international climate meetings, notably the second World Climate Conference<sup>134 135 136</sup>.

Open for signature by States at the Rio Conference, the United Nations Framework Convention on Climate Change (UNFCCC) was signed at the time by 154 States and currently has virtually universal adherence by 197 Parties, 196 of which are States plus the European Union<sup>137 138</sup>.

This time, the UNFCCC is the basis, the central structure or the *framework*<sup>139</sup> of the international legal order on climate change, from which it develops on the premise of fundamental rules previously agreed for this purpose in the Convention.

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<sup>134</sup> Recalling Resolution n.º 43/53 of December 6, 1988, as well as Resolution n.º 44/207 of December 22, 1989, the General Assembly adopted Resolution n.º 45/212 by which it decided to establish a single process of intergovernmental negotiation.

<sup>135</sup> General Assembly Resolution n.º 45/212: "1. *Decides to establish a single intergovernmental negotiation process under the auspices of the General Assembly, supported by the United Nations Environment Programme and the World Meteorological Organization, for the preparation by an Intergovernmental Negotiating Committee of an effective framework convention on climate change, containing appropriate commitments and any related instruments that may be agreed, taking into account the proposals that may be put forward by the States participating in the negotiation process, the work of the Intergovernmental Panel on Climate Change and the results achieved at international meetings on the subject, including the Second World Climate Conference.*". In: NATIONS, United. United Nations General Assembly Resolution 45/212. United Nations General Assembly, United Nations, 1990. Doc. A/RES/45/212.

<sup>136</sup> In the same resolution, the General Assembly established that this negotiation process should be concluded before the United Nations Conference on Environment and Development, to be held in the city of Rio de Janeiro and convened the previous year by the General Assembly, in accordance with Resolution n.º 44/228 of December 22, 1989. At this conference, a framework convention on climate change should be opened for signature by States.

<sup>137</sup> According to Article 20, the signing of the Convention was opened between June 4 and 14, 1992, in Rio de Janeiro, and at the United Nations Headquarters, subsequently, from June 20, 1992 to June 19, 1993. By this date, the Convention had received 166 signatures.

<sup>138</sup> NATIONS, United. *Treaty status available at: United Nations Framework Convention on Climate Change*. In: [https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=IND&mtdsg\\_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=en](https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=IND&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=en). Accessed July 16, 2021.

<sup>139</sup> BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 118. DUPUY, Pierre-Marie; VIÑUALES, Jorge E.. *International Environmental Law*. 2º Ed. Cambridge, 2018, p. 176. PEEL, Jacqueline; SANDS, Philippe. *Principles of International Environmental Law*. 4ª Edição, Cambridge, 2018, p. 300. For a position contrary to the interpretation that the United Nations Framework Convention on Climate Change constitutes an appropriate *framework* for the legal regime of climate change, see: SCOTT, Shirley V.. *Does the UNFCCC Fulfil the Functions Required of a Framework Convention? Why Abandoning the United*

The UNFCCC establishes the Conference of the Parties (COP) as the highest body of the Convention<sup>140</sup>. In turn, the Secretary-General of the United Nations is the depositary of the Convention, its amendments and the protocols adopted under the Convention<sup>141</sup>.

The United Nations Framework Convention on Climate Change and the international treaties, the Kyoto Protocol and, more recently, the Paris Agreement, established from and under the auspices of the Conference of the Parties (COP) and linked to the Convention, together with decisions of the Conference of the Parties (COP), form the current international legal regime on climate change within the framework of the United Nations<sup>142 143 144</sup>.

Following will be analyzed the main provisions of the United Nations Framework Convention on Climate Change (UNFCCC) and subsequently the legal instruments linked to it.

#### **4.1. Objectives, principles and obligations under the UNFCCC**

The objectives, principles and obligations set out in the United Nations Framework Convention on Climate Change (UNFCCC) will be analysed below.

##### ***4.1.1. Objectives of the UNFCCC***

The United Nations Framework Convention on Climate Change is an international treaty of virtually universal adherence. As a framework convention, the UNFCCC formulates the objectives

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*Nations Framework Convention on Climate Change Might Constitute a Long Overdue Step Forward.* Journal of Environmental Law, n° 27, Oxford, 2015, 69–89.

<sup>140</sup> *Caput of Article 7* of the United Nations Framework Convention on Climate Change: "Article 7. *Conference of the Parties: 1 A Conference of the Parties is hereby established. 2 The Conference of the Parties, as the supreme organ of the Convention, shall regularly review the implementation of the Convention and any related legal instruments which the Conference of the Parties may adopt and shall, in accordance with its mandate, take such decisions as may be necessary to promote the effective implementation of the Convention...*".

<sup>141</sup> See Article 19 of the United Nations Framework Convention on Climate Change: "Article 19. *Depositary: The Secretary-General of the United Nations shall be the depositary of the Convention and of the protocols adopted in accordance with the terms of Article 17.*"

<sup>142</sup> The Kyoto Protocol entered into force on February 16, 2005.

<sup>143</sup> The Paris Agreement entered into force on April 22, 2016.

<sup>144</sup> BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 90.

of the regime, concepts, establishes essential commitments for the Parties, a general system of governance and sets rules for subsequent agreements between the Parties.

Its preamble reflects the broad spectrum of interests at stake that permeated the Convention and its signature, but in its first paragraph the Convention recognizes "*that the alteration of the Earth's climate and its negative effects are a common concern of humanity*"<sup>145</sup>. Moreover, many of his predictions were withdrawn from the field of principles due to the lack of consensus among states<sup>146</sup>.

Laid out in the Article 2, the objective of the Convention is to stabilize the concentrations of greenhouse gases in the atmosphere at a level that prevents dangerous human interference in the climate system, and this level must be reached within a sufficient time to allow ecosystems to adapt naturally to climate change, so that food production is not threatened and that the development continues in a sustainable manner<sup>147 148 149</sup>.

According to PEEL and SANDS, the wording of Article 2 emphasizes that preventing and combating climate change is the primary objective of the Convention, but the Convention also recognizes that some level of climate change is inevitable<sup>150 151</sup>.

Therefore, the Convention aims to contain dangerous human interference in the climate system by stabilizing concentrations in the atmosphere of greenhouse gases not controlled by the Montreal Protocol, in order to prevent this interference from being dangerous and reducing the

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<sup>145</sup> Preamble to the United Nations Framework Convention on Climate Change: "*Recognizing that the alteration of the Earth's climate and its negative effects are a common concern of humanity.*"

<sup>146</sup> PEEL, Jacqueline; SANDS, Philippe. *Principles of International Environmental Law*. 4<sup>a</sup> Ed., Cambridge, 2018, p. 301.

<sup>147</sup> See Article 2 of the UNFCCC: "*Article 2. Objective: The ultimate objective of this Convention and of any legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, the stabilization of atmospheric concentrations of greenhouse gases at a level that avoids dangerous anthropogenic interference with the climate system. Such a level should be reached for a sufficient period of time to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to allow economic development to continue in a sustainable manner.*"

<sup>148</sup> The Convention defines the term "*greenhouse gases (GHG)*" in its Article 1(5) as "*the gaseous constituents of the atmosphere, both natural and anthropogenic, which absorb and re-emit infrared radiation.*"

<sup>149</sup> Considering the Vienna Convention on the Protection of the Ozone Layer and the Montreal Protocol on Substances that Deplete the Ozone Layer, the UNFCCC excludes from its scope the control of greenhouse gas emissions regulated by the Montreal Protocol. The gases regulated by the Montreal Protocol are as follows: Chlorofluorocarbons (CFCs); Hydrochlorofluorocarbons (HCFCs); Halons; Methyl bromide; Carbon tetrachloride (CTC); Methylchloroform; Hydrobromofluorocarbons (HBFCs); and Hydrofluorocarbons (HFCs).

<sup>150</sup> PEEL, Jacqueline; SANDS, Philippe. *Principles of International Environmental Law*. 4<sup>a</sup> Ed., Cambridge, 2018, p. 301.

<sup>151</sup> As for the objective of the Convention, DUPUY and VIÑUALES state that "*the objective of the Convention has the merit of specifying the source of emissions that should be limited – anthropogenic emissions – while remaining open to future developments in science as to understanding the problem over the years. In fact, it was only after the fourth IPCC report, published in 2007, that the COP linked a specific limit to this objective, that is, not to allow an increase of more than 2°C in temperature at the end of the twenty-first century.*". In: DUPUY, Pierre-Marie; VIÑUALES, Jorge E.. *International Environmental Law*. 2nd Ed. Cambridge, 2018, p. 55.

possible adverse effects of climate change, but did not initially set limits on the increase in global temperature, since the applicable science had not yet presented studies and data to do so, which occurred only several years after the adoption of the Convention<sup>152 153 154</sup>.

#### 4.1.2. Principles in the UNFCCC

Section 3 of the Convention sets out the basic principles which should, *inter alia*, guide the conduct of the Parties in the performance of their obligations. At this point, the addition of the term<sup>155</sup> *inter alia* to the wording of the Article 3 leaves no doubt as to the applicability of other principles to the UNFCCC, such as the principle of prevention, which is not specifically listed in Article 3 or other general principles of public international law, such as the principle of good faith.

Among the principles laid down in the Framework Convention are the precautionary principle, the principle of sustainable development, the principle of common but differentiated responsibility and respective capabilities, the principle of cooperation and the principle of intergenerational equity, already referred to in the previous chapter.

Nevertheless, there is an innovation regarding the principle of common but differentiated responsibility (CBDR) in the Convention, with the accession of the term "*respective capacities*", which was not present in the Rio Declaration, and that opened the possibility that some developing country Parties may be charged differently, according to their capabilities, notably economic, vis-à-vis other developing Parties without economic capacity to do so<sup>156</sup>.

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<sup>152</sup> The Convention defines the "*climate system*" in its Article 1, paragraph 3, as being "*the whole of the atmosphere, hydrosphere, biosphere and lithosphere and their interactions*".

<sup>153</sup> The Convention defines "*adverse effects of climate change*" in its Article 1(1) as "*changes in the physical environment, or biota, resulting from climate change that have significant negative effects on the composition, resilience or productivity of natural and managed ecosystems, or on the functioning of socio-economic systems or on human health and well-being*".

<sup>154</sup> The Convention defines "*climate change*" in its Article 1(2) as "*a change in climate attributable, directly or indirectly, to human activity which alters the composition of the global atmosphere and which, in conjunction with natural climatic variations, is observed over comparable periods of time*".

<sup>155</sup> According to BODANSKY, BRUNNÉE and RAJAMANI, while developing countries succeeded in including a chapter on principles in the Convention, the United States, which opposed the inclusion of principles in the text of the Convention, succeeded in reducing the binding force of the obligations to be provided for in the instrument. However, according to the authors, the content of the principles provided for in the Convention have been well controlled by the developed States. In: BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 127.

<sup>156</sup> The top four greenhouse gas emitters are China, the European Union, India and the United States, and account for more than 55 percent of total emissions over the past decade, excluding land-use change. As a result, developing countries already occupy a prominent place among the largest emitters, which calls into question the idea that only developed

#### 4.1.3. *Obligations under the UNFCCC*

Article 4 of the Convention deals with the obligations or commitments of the Parties of the Framework Convention and applies the Principle of Common but Differentiated Responsibility and Respective Capabilities, present in the Article 3, paragraph 3, of the Convention, in the distribution of the obligations between the Parties.

The Convention presents an initial set of commitments common to all Parties, while establishing another set of commitments separate for the Parties considered developed, which in turn are also divided into two other groups with different commitments<sup>157</sup>.

As regards the binding force, the Convention does not lay down many obligations of result and uses an open and flexible terminology available in the Article 4, paragraph 1, stating that the Parties shall honour their commitments, considering their common but differentiated responsibilities, their own national and regional development priorities, as well as their own objectives and circumstances. Therefore, it cannot be said that most of the commitments in the UNFCCC impose obligations of results on the Parties, been several of them obligations of conduct<sup>158 159</sup>.

Therefore, Chapter 4 of the UNFCCC distributes the various obligations of the Parties into three levels: 1 - obligations common to all Parties; 2 - obligations of developed Parties and Parties in the process of transition to a market economy (Parties included in Annex I); and 3 - financial and technological assistance obligations applicable only to developed Parties as set out in Annex II<sup>160 161</sup>.

Thus, the Parties considered developed were listed in two Annexes to the Convention, with Annex I consisting of 38 Parties and Annex II consisting of 25 Parties. The difference of 13 Parties in Annex I correspond to the Parties considered to be developed but in the process of transition into

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countries should be charged to adopt measures to reduce GHG emissions. See: *G-20 countries account for 78% of all CO2 emissions, study reveals*. Available in <https://news.un.org/pt/story/2019/11/1695901>. Accessed August 1, 2020.

<sup>157</sup> Claim of the least developed States as a condition for the signature of the Convention.

<sup>158</sup> See section 4(1) of the United Nations Framework Convention on Climate Change: "*Article 4. Commitments: 1 - All Parties, taking into account their common but differentiated responsibilities, their specific national and regional development priorities and their objectives and circumstances...*".

<sup>159</sup> BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 120.

<sup>160</sup> The following countries are considered to be in transition to a market economy, listed in Annex 1 and not listed in Annex 2: Belarus, Latvia, Lithuania, Poland, Estonia, the Russian Federation, Romania and Hungary.

<sup>161</sup> DUPUY, Pierre-Marie; VIÑUALES, Jorge E.. *International Environmental Law*. 2<sup>o</sup> Ed. Cambridge, 2018, p. 178.

a market economy, with this latter ones having fewer obligations than the Parties listed in Annex II<sup>162</sup>  
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Among the obligations common to all parties to the Convention, Article 4 provides for the obligation to draw up national inventories of anthropogenic emissions by sources and removals of greenhouse gases by sinks<sup>164 165</sup>, as best as possible; formulate national and, as appropriate, regional programmes that include measures to mitigate and adapt to climate change; promote and cooperate for the development of technologies and research related to the object of the Convention<sup>166</sup>; promote sustainable management and cooperation in the conservation and strengthening of sinks and

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<sup>162</sup> Iceland, Australia, Italy, Austria, Japan, Belarus, Latvia, Belgium, Lithuania, Bulgaria, Luxembourg, Canada, Norway, New Zealand, Denmark, Netherlands, Spain, Poland, United States, Portugal, Estonia, United Kingdom of Great Britain and Northern Ireland, Russian Federation, Czechoslovak Republic, Finland, Romania, France, Sweden, Greece, Switzerland, Hungary, Turkey, Ireland and Ukraine.

<sup>163</sup> Article 4(6) of the Convention granted flexibility to the Parties in the process of transition to a market economy included in Annex I: "*Article 4. Paragraph 6 In the implementation of their commitments under paragraph 2 above, a certain degree of flexibility shall be allowed by the Conference of the Parties to Parties included in Annex I which are in the process of transition to a market economy in order to improve the capacity of those Parties with respect to climate change, including taking into account historical values, considered as a reference for anthropogenic greenhouse gas emissions not controlled by the Montreal Protocol.*"

<sup>164</sup> Article 1(9) of the Convention defines "sources" as "*any process or activity which releases greenhouse gases, or their precursors, or aerosols into the atmosphere*".

<sup>165</sup> Article 1(8) of the Convention defines "sinks" as "*any process, activity or mechanism which removes from the atmosphere a greenhouse gas, or its precursor, or an aerosol*".

<sup>166</sup> See section 4(1) of the United Nations Framework Convention on Climate Change: "*Article 4. Commitments: 1 All Parties, taking into account their common but differentiated responsibilities, their specific national and regional development priorities and their objectives and circumstances, shall: (a) develop, periodically update, publish and make available to the Conference of the Parties, in accordance with the terms of Article 12, their national inventories of anthropogenic emissions by source; as well as the removal by sinks of all greenhouse gases not controlled by the Montreal Protocol, using comparable methodologies to be agreed by the Conference of the Parties; (b) formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change, taking into account anthropogenic emissions by sources and the removal by sinks of all greenhouse gases not controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate change; (c) promote and cooperate in the development, implementation and dissemination, including the transfer of technologies, practices and processes that control, reduce or prevent anthropogenic greenhouse gas emissions not controlled by the Montreal Protocol, in all relevant sectors, including energy, transport, industry, agriculture, forestry and waste management; (d) Promote sustainable management and, where appropriate, promote and cooperate in the conservation and improvement of sinks and reservoirs of all greenhouse gases not controlled by the Montreal Protocol, including biomass, forests, oceans, as well as other terrestrial, coastal and marine ecosystems; (e) cooperate in preparing for adaptation to the impacts of climate change, develop and develop appropriate and integrated plans for the management of coastal zones, water resources and agriculture, and for the protection and rehabilitation of areas, especially in Africa, affected by drought and desertification and floods; (f) take climate change into account as far as possible in its relevant social, economic and environmental actions and policies and employ appropriate methods, for example impact assessment, formulated and defined at national level, with a view to minimizing the adverse effects on the economy, public health and the quality of the environment of projects or measures taken by them to mitigate or adapt to climate change; (g) promote and cooperate in scientific, technological, technical, socio-economic and other research, in the systematic observation and development of data archives relating to the climate system and aimed at increasing understanding and reducing or eliminating the remaining uncertainties as to the causes, effects, extent and temporal dimension of climate change and as to the economic and social consequences of the various response strategies; (h) Promote and cooperate in the full, open and rapid exchange of scientific, technological, technical, socio-economic and legislative information concerning the climate system and climate change and the economic and social consequences of the various response strategies; (i) promote and cooperate in education, training and public information on climate change and encourage wider participation in this process, including that of non-governmental organizations; and (j) communicate to the Conference of the Parties information relating to implementation in accordance with the terms of Article 12.*"

reservoirs of greenhouse gases;<sup>167</sup> cooperate in preparing for adaptation to the impacts of climate change, develop appropriate and integrated plans; take climate change into account as far as possible in its relevant social, economic and environmental actions and policies and employ appropriate methods; promote and cooperate in the framework of scientific research aimed at increasing the understanding of climate change; promote and cooperate in the full, open and fast exchange of information relating to the climate system and climate change; promote and cooperate in education, training and information of the public regarding climate change, encourage the widest participation; and communicate to the Conference of the Parties the information concerning the implementation of the Convention in accordance with Article 12 of the Convention<sup>168</sup>.

As of the importance of all the provisions relating to the obligations of the Party, it can be said that the most significant obligation common to the Parties to the Convention is to produce the national inventories of emissions and removals of greenhouse gases and the respective report, since all Parties to the Convention, whether developed or not, must submit them, in accordance with the methodology approved by the Conference of the Parties<sup>169 170</sup>.

Nevertheless, the national inventory of GHG emissions and reductions shall be made within the possibilities of the Parties, as stated in Article 12(1)(a) of the Convention, which reflects the freedom of action that is granted to Parties in general by the Convention, considering the principle of common but differentiated responsibility and respective capabilities. In general, Article 4(1) of the Convention reflects the application of the *in casu* principle to all Parties to the Convention<sup>171</sup>.

In other turn, the obligations set forth in Article 4°, paragraph 2, are intended for the developed country Parties listed in Annex I to the Convention. In addition to the common obligations set out in paragraph 1 of Article 4, the Parties included in Annex I shall limit their anthropogenic emissions of

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<sup>167</sup>Article 1(7) of the Convention defines "reservoirs" as "a component, or components, of the climate system in which a greenhouse gas, or a precursor thereof, is stored".

<sup>168</sup> See Article 12(1) of the United Nations Framework Convention on Climate Change: "Article 12. Communication and information on implementation: 1 In accordance with paragraph 1 of Article 4, each Party shall communicate to the Conference of the Parties, through the Secretariat, the following information: (a) a national inventory of anthropogenic emissions by sources and removals by semi-sources of all greenhouse gases not controlled by the Montreal Protocol; to the extent of its capabilities, using comparable methodologies to be promoted and agreed upon by the Conference of the Parties; (b) a general description of the steps taken or envisaged by the Party to implement the Convention; and (c) any other information that the Party considers relevant to the achievement of the objectives of the Convention and wishes to be included in its communication, including, if possible, material relevant to the calculation of global emission trends."

<sup>169</sup> BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 130.

<sup>170</sup> See Article 12(1)(a) of the United Nations Framework Convention on Climate Change above.

<sup>171</sup> Ibid. 153.

greenhouse gases and increase the removal of these gases so that by the end of the year of 1999 the concentration levels of these gases were, individually or jointly, at their 1990s levels.<sup>172173</sup>

The Parties to Annex I and the developed country Parties shall also periodically submit detailed information on the policies and measures taken in relation to the reduction of emissions and levels of removals of greenhouse gases, as well as on the projection of their residual anthropogenic emissions by sources and removals may sinks, using in the calculations the best available scientific knowledge and the methodologies defined by the Conference of the Parties, which shall examine the information submitted by the Parties of Annex I<sup>174</sup>.

Therefore, in addition to the initial commitment to return greenhouse gas concentration to 1990 levels, developed country Parties and Annex I Parties shall provide the Conference of the Parties with detailed information on their public policies and actions taken to mitigate climate change.

As regards Article 4(2), BODANSK, BRUNNÉE and RAJAMANI explain that

*"The Article refers to "anthropogenic emission levels of CO<sub>2</sub> and other greenhouse gases not controlled by the Montreal Protocol," without specifying whether GHG*

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<sup>172</sup> See Article 4(2)(a) and (b) of the United Nations Framework Convention on Climate Change: "Article 4.... 2.The Contracting Parties consisting of developed countries and the other Parties included in Annex I specifically undertake as follows: (a) Each of these Parties shall adopt policies and take corresponding measures for the mitigation of climate change by limiting their anthropogenic emissions of greenhouse gases and by protecting and developing their sinks and reservoirs of greenhouse gases. These policies and measures will demonstrate that developed countries are taking the lead in modifying long-term trends in anthropogenic emissions in a manner consistent with the objective of this Convention, recognizing that a return by the end of this decade to previous levels of anthropogenic emissions of carbon dioxide and other greenhouse gases not controlled by the Montreal Protocol will contribute to such a modification and taking into account the differences between the Parties in the starting points and ways of addressing the problem, the economic structures and basic resources, the need to maintain strong and sustainable economic growth, the available technologies and other individual constraints, as well as the need for appropriate and equitable contributions from each of the Parties in a global effort to achieve this objective. These Parties may develop such policies and measures together with other Parties and may assist other Parties in contributing to the achievement of the objective of the Convention, in particular that of this subparagraph; (b) To promote progress towards this objective, each of these Parties shall, within six months of the entry into force of this Convention and thereafter, periodically and in accordance with Article 12, communicate detailed information on its policies and measures referred to in subparagraph (a) above, as well as on its protections from anthropogenic emissions by sources and removals by sinks of uncontrolled greenhouse gases by the Montreal Protocol during the period referred to in subparagraph (a), with the aim of returning, individually or jointly, to 1990 levels of these anthropogenic emissions of carbon dioxide and other greenhouse gases not controlled by the Montreal Protocol. This information shall be considered by the Conference of the Parties at its first session and periodically thereafter in accordance with the terms of Article 7;"

<sup>173</sup> For the results, see: UNFCCC. *Changes in GHG emissions from 1990 to 2004 for Annex I Parties*. UNFCCC, 2006. Available at: [https://unfccc.int/files/pdf/ghg\\_table\\_06](https://unfccc.int/files/pdf/ghg_table_06). Accessed June 15, 2021.

<sup>174</sup> See Article 4(2) and of the United Nations Framework Convention on Climate Change: "Article 4. n.º 2. (e) Each of these Parties shall: (i) To coordinate, in an appropriate manner, with other Parties, the relevant economic and administrative instruments developed to achieve the objective of the Convention; and (ii) Identify and periodically review its policies and practices that encourage activities that lead to higher levels of anthropogenic greenhouse gas emissions not controlled by the Montreal Protocol that may occur;"



*emission levels should be considered collectively or whether each gas should be accounted for separately. In any case, Article 4.2 is notable both for highlighting CO<sub>2</sub> and for clearly excluding GHGs controlled by the Montreal Protocol.*"<sup>175</sup>

Therefore, the reduction foreseen for Annex I Parties by the UNFCCC can be made without an exact quantification of each GHG, accounting for the result of all the GHG jointly.

In its turn, Article 4(3) of the Convention stipulates additional financial obligations to the developed Parties of the Annex II and to the developed country Parties, which shall provide financial assistance to developing country Parties<sup>176</sup>.

Furthermore, Article 4(4) of the Convention provides that "*Developed country Parties and other developed Parties included in Annex II shall also assist developing country Parties that are particularly vulnerable to the adverse effects of climate change to bear the costs of adapting to those adverse effects.*"

And Article 4(5) establishes that it is the responsibility of the developed country Parties and the Parties present in Annex II of the Convention to take all possible measures to enable the transfer of environmental technologies and technical knowledge to other Parties, in particular those vulnerable to the negative effects of climate change, in order to enable them to implement the provisions of the Convention<sup>177 178</sup>. These are obligations based on the Principle of Cooperation and the Principle of Common but Differentiated Responsibility<sup>179</sup>.

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<sup>175</sup> BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 134.

<sup>176</sup> As BODANSKY, BRUNNÉE and RAJAMANI point out, "*these extra resources have three main purposes: the preparation of emission inventories and reports by developing Parties; the implementation of measures to reduce emissions; and to cover the costs of adapting to the adverse effects of climate change*" BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 138.

<sup>177</sup> See Article 4(5) of the United Nations Framework Convention on Climate Change: "*Article 4. n.º 5 Developed country Parties and other developed Parties included in Annex II shall take all possible steps to promote, facilitate and finance, where appropriate, the transfer of, or access to, environmentally sound technologies and know-how to other Parties, particularly developing country Parties, to enable them to implement the provisions of the Convention. In this process, developed country Parties shall support the development and enhancement of endogenous capacities and technologies of developing country Parties. Other Parties and organizations that are in a position to do so should also contribute by facilitating the transfer of such technologies.*".

<sup>178</sup> See Article 4(4) of the United Nations Framework Convention on Climate Change: "*Article 4. Paragraph 4 Developed country Parties and other developed Parties included in Annex II shall also assist developing country Parties, which are particularly vulnerable to the adverse effects of climate change, to bear the costs of adapting to those adverse effects.*".

<sup>179</sup> The Parties present in Annex II and the developed country Parties have more obligations in relation to the Parties to Annex I, reinforcing the application of the principle of common but differentiated responsibility also among the Parties considered developed, requiring that the most developed Parties among them have an even greater contribution in achieving the objectives of the Convention.

At this point, it should be noted, however, that the wording in paragraphs 2, 3, 4, 5 of Article 4 of the Convention uses the term "*developed country Parties*" in conjunction with the term "Parties listed in Annex I" or "*Parties listed in Annex II*", as the case may be, when providing for obligations, respectively, making the text unclear<sup>180</sup>.

In addition, at the level of differentiation of the Parties, Article 4(8) of the Convention provides that in the implementation of the Convention, Parties considered to be developing and notably more vulnerable to the adverse effects of climate change should be prioritized, with full attention to the necessary actions, including actions related to financing, insurance and technology transfer. In this particular, Article 4(8) and Article 4(10) of the Convention list developing Parties with the following characteristics as notably vulnerable<sup>181 182</sup>.

Finally, the financial obligations, as well as those of technology transfer and financing of the Convention, were not foreseen in details or amounts predetermined by the Convention. Thus, "*the regulation of these obligations has been fundamentally fulfilled by the decisions of the Conference of the Parties, which in its meetings establishes climate funds, specifies the standards of projects eligible to receive funding and adopts general policies regarding the amounts to be contributed by and to each Parties.*"<sup>183 184</sup>.

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<sup>180</sup> BODANSKY, BRUNNÉE and RAJAMANI explain that the inclusion of the term "*developed country Parties*" in the aforementioned articles, together with the mention of the Parties in the Annexes, as the case may be, makes unclear the individual obligation of each Party in Annex II to fulfill its obligations in isolation. This understanding is corroborated by the expression at the end of Article 4(3) of the UNFCCC which provides that in order to meet financial commitments, account must be taken of the need for the flow of resources to be adequate and predictable and the importance of distributing costs among developed country Parties. In: BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 137.

<sup>181</sup> See section 4(8) of the United Nations Framework Convention on Climate Change: "*Article 4. In implementing the commitments of this Article, the Parties shall give their full attention to actions necessary under the Convention, including actions relating to financing, insurance and technology transfer, to meet the specific needs and concerns of developing country Parties arising from the adverse effects of climate change and/or from the impact of the implementation of response measures, in particular: (a) small island countries; (b) countries with low-lying coastal areas; (c) countries with arid and semi-arid zones, forest areas and areas subject to forest degradation; (d) countries with areas prone to natural disasters; (e) countries with areas subject to drought and desertification; (f) countries with areas where there is high urban air pollution; (g) countries with areas containing fragile ecosystems, including mountain ecosystems; (h) countries whose economies are highly dependent on revenues generated from the production, processing and export, and/or consumption of fossil fuels and associated energy-intensive products; and (i) inland and transit countries.*"

<sup>182</sup> See Article 4(10) of the United Nations Framework Convention on Climate Change: "*Article 4. In implementing the commitments of the Convention and in accordance with the terms of Article 10, Parties shall take into account the situation of those Parties, particularly those consisting of developing countries, whose economies are vulnerable to the adverse effects of the implementation of climate change response measures. This applies, inter alia, to Parties whose economies are highly dependent on revenues generated from the production, processing and export, and or from the consumption of fossil fuels and associated energy-intensive products, and or from the use of fossil fuels for which those Parties have serious difficulties in switching to alternative sources.*"

<sup>183</sup> BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 137.

<sup>184</sup> "*The Green Climate Fund was created by 194 country Parties that are party to the United Nations Framework Convention on Climate Change in 2010. It was designed as an operational entity of the Convention's financial mechanism*

## 4.2. Organizational structure at UNFCCC

The United Nations Framework Convention on Climate Change establishes five permanent institutions that should function to provide for the implementation of the Convention. They are: the Conference of the Parties (COP), the Secretariat, the Subsidiary Body for Scientific and Technological Consultation (SBSTA), the Subsidiary Body for Implementation (SBI) and the Financial Mechanism.

It should be noted that the Conference of the Parties (COP), in accordance with its competences, has created other subsidiary bodies, not provided for in the Convention. The following are the most important provisions applicable to the institutions established by the UNFCCC<sup>185 186</sup>.

### 4.2.1. Conference of the Parties (COP)

Article 7(2) of the Convention establishes the Conference of the Parties (COP) as the supreme organ of the Convention<sup>187 188</sup>. The Conference of the Parties (COP), also in accordance with paragraph 2 of paragraph 7 of the Convention and for the purpose of implementing and monitoring the implementation of the Convention may: (a) periodically review the obligations of the Parties and the institutional mechanisms established by the Convention; (b) promote and facilitate the exchange of information on measures taken by the Parties; (c) facilitate the coordination of measures adopted

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*and is headquartered in the Republic of Korea. It is governed by 24 members of the Council, representing countries, and receives guidance from the Conference of the Parties to the Convention (COP). Created by the United Nations Framework Convention on Climate Change (UNFCCC), the Fund aims to support a paradigm shift in the global response to climate change. It allocates its resources to low-emission, climate-resilient projects and programs in developing countries."* See: UNEP. *Green Climate Fund (GCF)*. Available in: <https://www.unep.org/pt-br/sobre-o-pnuma/financiamento-e-parcerias/parceiros-de-financiamento/fundo-verde-para-o-clima>. Accessed June 30, 2021.

<sup>185</sup> See Article 7(2)(i) of the United Nations Framework Convention on Climate Change: "Article 7. (i) Establish such subsidiary bodies as may be deemed necessary for the implementation of the Convention;"

<sup>186</sup> Other subsidiary bodies to the Conference of the Parties are: the Adaptation Committee; the Adaptation Fund; the Climate Technology Advisory Council.

<sup>187</sup> See Article 7(2) of the United Nations Framework Convention on Climate Change: "Article 7 n.º 2 "As the supreme body of this Convention, the Conference of the Parties shall keep under regular review the implementation of this Convention and any of its legal instruments that the Conference of the Parties may adopt, and shall take, in accordance with its mandate, such decisions as may be necessary to promote the effective implementation of this Convention....".

<sup>188</sup> As BODANSKY, BRUNNÉE and RAJAMANI teach, "at the 1989 Hague Conference, seventeen Heads of State proposed the creation of a 'new institutional authority' to address climate change with non-unanimous decision-making powers. This radical proposal was never seriously pursued in the negotiations of the Convention. On the contrary, the Convention adopted a more traditional type of international institution, which is essentially intergovernmental rather than supranational in nature and which acts primarily in coordination and in a facilitating manner. In: BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 141.

by Parties jointly; (d) promote, guide and develop methodologies for the preparation of inventories of greenhouse gas emissions by sources and removals by sinks, to evaluate the effectiveness of measures; (e) assess, on the basis of all information available under the Convention, the overall effects of the measures taken, in particular the environmental, economic and social effects, as well as their cumulative impacts; (f) examine, adopt and publish periodic reports on the implementation of the Convention; (g) make recommendations on any matters necessary for the implementation of the Convention; (h) mobilize financial resources in accordance with the Convention; (i) establish the subsidiary bodies under which it may be deemed necessary for the implementation of the Convention; (j) define and adopt, by consensus, the rules of procedure and financial regulations of the Conference of the Parties and its subsidiary bodies; (l) use, where appropriate, services and cooperation with relevant international and intergovernmental organizations and non-governmental organizations; (m) perform other functions as may be necessary to achieve the objective of the Convention<sup>189</sup>.

Regarding the justification for the creation of a treaty body, already common in the legal regime of International Environmental Law, it is *"to allow the periodic adjustment and review of technical details that would hardly be adequate to be incorporated into the text of the treaty"*<sup>190</sup>.

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<sup>189</sup>See Article 7(2) of the United Nations Framework Convention on Climate Change: *"Article 7. Paragraph 2: 2. The Conference of the Parties, as the supreme organ of the Convention, shall regularly review the implementation of the Convention and any related legal instruments which the Conference of the Parties may adopt and shall, in accordance with its mandate, take such decisions as may be necessary to promote the effective implementation of the Convention. To this end, it shall: (a) periodically review the obligations of the Parties and the institutional arrangements made under this Convention and also examine, in the light of the objectives of the Convention, the experience gained in its implementation and the development of scientific and technological knowledge; (b) Promote and facilitate the exchange of information on the measures taken by the Parties related to climate change and its effects, taking into account the different constraints, responsibilities and capacities of the Parties and their respective commitments under the Convention; (c) facilitate, at the request of two or more Parties, the coordination of measures adopted by them in relation to climate change and its effects, taking into account the different constraints, responsibilities and capacities of the Parties and their respective commitments under the Convention; (d) promote and guide, in accordance with the objective and provisions of the Convention, the development and periodic improvement of comparable methodologies, to be agreed by the Conference of the Parties, inter alia, to prepare inventories on emissions from sources of greenhouse gases and their removal by sinks and to evaluate the effectiveness of measures to limit emissions and improve the removal of such gases; (e) assess, on the basis of all information available in accordance with the provisions of the Convention, the implementation of the Convention by the Parties, the overall effects of the measures taken under the Convention, in particular the environmental, economic and social effects, as well as their cumulative impacts, and the extent to which progress is being made towards achieving the objectives of the Convention; (f) To consider and adopt regular reports on the implementation of the Convention and to ensure their publication; (g) To make recommendations on any matters necessary for the implementation of the Convention; (h) seek to mobilize financial resources in accordance with paragraphs 3, 4 and 5 of Article 4 and Article 11; (i) To establish such subsidiary bodies as may be deemed necessary for the implementation of the Convention; (j) examine the reports submitted by subsidiary bodies and provide them with directives; (k) to agree and adopt, by consensus, procedural and financial rules for itself and its subsidiary bodies; (l) Seek and use, where appropriate, services and cooperation, as well as information provided by competent international and intergovernmental organizations and non-governmental organizations; and (m) to perform such other functions as may be necessary to achieve the objective of the Convention, as well as all the functions assigned to it under the Convention."*

<sup>190</sup>In this sense, SAVARESI exposes that *"The justification for entrusting to the treaty bodies the adoption of such rules is to allow the periodic adjustment and revision of technical details that would hardly be adequate to be incorporated into the text of the treaty. Other times, the decisions of treaty bodies may be regarded as authoritative interpretation of the terms of treaties, and the practice of implementation may make these decisions binding. Establishing whether or not*

For the purpose of taking decisions under the Convention, the Conference of the Parties (COP) meets annually, as determined by paragraph 4 of Article 4, and the first meeting of the Parties was held in 1995 in Berlin<sup>191 192 193</sup>. Moreover, since the treaty entered into force in 1994, the first meeting took place in 1995, as also determined by paragraph 4 of Article 4 of the Convention, which provided that the first session of the Meeting of the Parties of the Conference of the Parties was to be convened by the Interim Secretariat no later than one year after the entry into force of the Convention. The meetings of the COP shall be open to the United Nations, its specialized agencies, specialized national and international bodies, as well as to civil society, as observers, in accordance with paragraph 6 of Article 7 of the Convention<sup>194 195 196</sup>.

And as regards the procedures to be adopted by the Conference of the Parties, the rules in force stipulate that votes must be taken by consensus. Even if Article 7(3) of the Convention provides that<sup>197</sup> on the possibility of adopting procedures with *a quorum* of specific majorities for particular decisions, consensus is currently the standard, which is understood in accordance with United Nations practice as no objection<sup>198</sup>.

It should also be noted, as will be seen later, that the Conference of the Parties to the Convention serves as the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol and as the Meeting of the Parties to the Paris Agreement, respectively.

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*the decisions of the treaty bodies impose obligations on the Parties therefore requires a context-specific assessment."* In: SAVARESI, Annalisa. *The Paris Agreement and the Future of the Climate Regime: Reflections on an International Law Odyssey*. ESIL Annual Conference. Conference Paper n.º 13/2016, Eds. BINDER, Christina; D'ARGENT, Pierre; PAZARTZIS, Photini. 2016, 1-17, p. 7.

<sup>191</sup> For more on COP decisions. See: BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 90.

<sup>192</sup> Each Party shall have one vote as provided for in Article 18 of the Convention.

<sup>193</sup> Article 7(5) of the Convention provides for the possibility of extraordinary meetings as may be deemed necessary by the Conference of the Parties or upon written request with the support of at least one third of the Parties.

<sup>194</sup> The United Nations Framework Convention on Climate Change entered into force on 21 March 1994.

<sup>195</sup> The functions of the Secretariat *in casu* have been fulfilled by the Secretary-General of the United Nations.

<sup>196</sup> See Article 7(6)(m) of the United Nations Framework Convention on Climate Change: "Article 7(6) The United Nations, its specialized agencies and the International Atomic Energy Agency, as well as any State member of or observer to such organizations which is not a Party to the Convention, may be represented as observers at sessions of the Conference of the Parties. Any body or agency, national or international, governmental or non-governmental, which has competence in matters covered by the Convention and which has informed the Secretariat of its wish to be represented as an observer at a session of the Conference of the Parties may be admitted as such, unless at least one third of the Parties present object. The admission and participation of observers shall be subject to the rules of procedure adopted by the Conference of the Parties."

<sup>197</sup> Despite the provision in Article 7(3) that at its first session the Conference of the Parties should adopt its own rules of procedure and those of its subsidiary bodies, which should include decision-making procedures for matters not covered by the decision-making procedures stipulated in the Convention, the COP has so far adopted only onetime provisional rule of procedure which have been used to date, providing for the internal procedures of the COP and its subsidiary bodies, forms of voting, decision-making, quorum, among others.

<sup>198</sup> BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 75.

And even though these treaties, the Convention, the Kyoto Protocol and the Paris Agreement, are all independent international treaties under the Vienna Convention on the Law of Treaties, and the last two subsequent to the Convention, these are signed under the auspices and bound by the objectives of the Convention, according to its principles and serving the Conference of the Parties to the Convention Meeting of the Parties to each of these new treaties. These two are proposed to fill the gaps left by the Convention, or rather, to make the achievement of its objectives more effective, establishing more concrete obligations to achieve the stabilization of the concentration of greenhouse gases in the atmosphere, in order to avoid dangerous anthropogenic interference with the climate system, in the manner provided by the Article 2 of the Convention<sup>199</sup>.

#### **4.2.2. Secretariat**

The Secretariat is established in<sup>200</sup> <sup>201</sup>Article 8 of the Convention and to it is assigned administrative functions, without any punitive or supervisory function<sup>202</sup>.

The functions of the Secretariat shall be to prepare the sessions of the Conference of the Parties and of the subsidiary bodies established by the Convention; compile and transmit the reports submitted to it; assist the Parties, notably the developing Parties, in compiling and communicating the information required under the Convention; prepare reports of its activities and submit them to the Conference of the Parties; ensure the necessary coordination with the secretariats of other relevant international bodies; to engage, under the guidance of the Conference of the Parties, such administrative and contractual arrangements as may be required for the performance of its functions; and to carry out such other secretariat functions as may be specified in the Convention and any of its Protocols and also other functions as may be determined by the Conference of the Parties<sup>203</sup>.

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<sup>199</sup> See Article 2 of the Vienna Convention on the Law of Treaties: "*Article 2: Definitions -1 For the purposes of this Convention: (a) 'treaty' means an international agreement concluded in writing between States and governed by international law, whether contained in a single instrument or in two or more related instruments, and whatever its particular name.*"

<sup>200</sup>See Article 8(1) of the United Nations Framework Convention on Climate Change: "*Article 8. ... n.º. 1 - The Secretariat is hereby established.*"

<sup>201</sup> The secretariat was initially established in 1992 in Geneva, Switzerland. Since 1995, the secretariat has been located in Bonn, Germany.

<sup>202</sup> The Secretariat of the Convention is led by the Executive Secretary, and the position has been held since 2016 by Patricia Espinosa, after appointment of the then Secretary-General of the United Nations Ban Ki-moon.

<sup>203</sup>See Article 8(2) of the United Nations Framework Convention on Climate Change: "*Article 8...(2) The functions of the Secretariat shall be: (a) to prepare the sessions of the Conference of the Parties and its subsidiary bodies established*

#### 4.2.3. *Subsidiary Body for Scientific and Technological Consultation (SBSTA)*

The Subsidiary Body for Scientific and Technological Consultation (SBSTA) is a permanent subsidiary body of the Conference of the Parties and was established in Article 9 of the Convention. The body shall be open to the participation of all Parties, shall be multidisciplinary, shall have expert representatives from all the Parties and shall submit regular reports to the Conference of the Parties on all aspects of its work<sup>204</sup>.

This body is responsible for providing scientific support to the Conference of the Parties so that it can take its decisions on the basis of the best available scientific knowledge. The functions of this subsidiary body are: a) to provide assessments on the state of scientific knowledge regarding climate change and its adverse effects; (b) prepare scientific assessments of the effects of the measures taken for the implementation of the Convention; (c) identify innovative, effective and up-to-date technologies and recommend ways and means of promoting the development and <sup>205</sup>transfer of these technologies; provide guidance on scientific programmes and international cooperation in research and development related to climate change; and answer questions of a scientific, technological and methodological nature which the Conference of the Parties or its subsidiary bodies may put to it<sup>206</sup>.

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*by the Convention and to provide them with the services requested; (b) compile and transmit the reports submitted to it; (c) To assist the Parties, particularly those of developing countries, when requested, in the compilation and communication of the information required in accordance with the provisions of the Convention; (d) prepare reports on its activities and submit them to the Conference of the Parties; (e) ensure the necessary coordination with the secretariats of other relevant international bodies; (f) to engage, under the guidance of the Conference of the Parties, such administrative and contractual arrangements as may be required for the effective performance of its functions; and (g) To carry out such other secretariat functions as may be specified in the Convention and any of its Protocols and also such other functions as may be determined by the Conference of the Parties."*

<sup>204</sup> See Article 9(1) of the United Nations Framework Convention on Climate Change: "Article 9. Paragraph 1 A subsidiary body for scientific and technological consultation is hereby established to provide the Conference of the Parties and, where appropriate, other subsidiary bodies, with timely information and opinions on scientific and technological matters relating to the Convention. This body shall be open to the participation of all Parties and shall be multidisciplinary. It should include representatives of the governments competent in the relevant field of expertise. It shall submit regular reports to the Conference of the Parties on all aspects of its work."

<sup>205</sup> More in: BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 144.

<sup>206</sup> See Article 9(2) of the United Nations Framework Convention on Climate Change: "Article 9. Paragraph 2 - 2 Under the guidance of the Conference of the Parties and relying on existing competent international bodies, this body shall: (a) Provide assessments of the state of scientific knowledge concerning climate change and its effects; (b) Prepare scientific assessments of the effects of the measures taken for the implementation of the Convention; (c) identify innovative, effective and up-to-date technologies and know-how and advise on ways and means of promoting the development and/or transfer of such technologies; (d) provide guidance on scientific programmes and international cooperation in research and development related to climate change, as well as on endogenous ways and means of supporting capacity building in developing countries; and (e) to answer such scientific, technological and methodological questions as the Conference of the Parties or its subsidiary bodies may put to it."

#### ***4.2.4. Subsidiary Body for Implementation (SBI)***

The Subsidiary Body for Implementation (SBI) was established in Article 10 of the UNFCCC to assist the Conference of the Parties in evaluating and reviewing the implementation of the Convention. Participation in this permanent subsidiary body shall be open to all Parties of the Convention, shall include representatives of governments who are specialize in climate change and shall submit regular reports to the Conference of the Parties on all aspects of its work<sup>207</sup>.

As for specific functions, the main one is established in paragraph 2 of Article 10 of the Convention, which provides that, under the guidance of the Conference of the Parties, the Subsidiary Implementation Body must assess the overall cumulative effect of the steps taken by the Parties in the light of the latest scientific assessments on climate change. Another relevant function is to assist the Conference of the Parties, where necessary, in the preparation and implementation of its decisions<sup>208 209 210</sup>.

#### ***4.2.5. Financial mechanism of the UNFCCC***

Article 11 of the Convention establishes the Financial Mechanism, which is a "*mechanism for the provision of financial resources on a donation or concession basis, including the transfer of*

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<sup>207</sup> See Article 10(1) of the United Nations Framework Convention on Climate Change: "*Article 10. Paragraph 1 - 1 A subsidiary implementing body is hereby established to assist the Conference of the Parties in the evaluation and review of the effective implementation of the Convention. This body shall be open to the participation of all Parties and shall comprise representatives of governments who are experts in matters relating to climate change. It shall submit to the Conference of the Parties regular reports on all aspects of its activity.*".

<sup>208</sup> BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 145.

<sup>209</sup> See section 10(2)(a) of the United Nations Framework Convention on Climate Change: "*Article 10. (2) Under the guidance of the Conference of the Parties, this body shall: (a) consider the information communicated under paragraph 1 of Article 12 to assess the overall cumulative effect of the steps taken by the Parties in the light of the latest scientific assessments on climate change;*"

<sup>210</sup> See Article 10(2)(c) of the United Nations Framework Convention on Climate Change: "*Article 10. (2) Under the guidance of the Conference of the Parties, this body shall: (c) assist the Conference of the Parties, where appropriate, in the preparation and implementation of its decisions.*"



technology", which operates under the direction of the Conference of the Parties and is accountable to it<sup>211</sup>.

It is also up to the COP to decide on the policies, priority programs and criteria for election to the Financial Mechanism, as well as to entrust the management of the mechanism to one or more existing international entities<sup>212 213</sup>.

#### **4.3. Implementation of the UNFCCC**

The implementation of the Convention is dealt notably by its Articles 12 and 13. BODANSK, BRUNNÉE and RAJAMANI maintain that

*"The Convention establishes a relatively weak implementation system, which consists of the so-called 'pledge and review'. First, countries are obliged, under Article 12, to report information on their GHG emissions and implementation measures. While this reporting requirement falls well short of a binding pledge, it obliges parties to publicly declare what they are doing and therefore serves as a stimulus for national action. Next, Article 7(2) provides for the international review of the parties' reports by the COP."*<sup>214</sup>

In fact, Article 12(1)(a) of the Convention provides that the Parties submit their national inventories of anthropogenic emissions and removals of greenhouse gases "to the extent of their capabilities", so that this is effectively an obligation of conduct and not exactly of result and it is quite

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<sup>211</sup> See Article 11(1) of the United Nations Framework Convention on Climate Change: "Article 11. No. 1 - 1 - A mechanism is defined here for the provision of financial resources on a donation or concession basis, including the transfer of technology. It shall operate under the direction of, and be accountable to, the Conference of the Parties and shall decide on its policies, priority programmes and eligible criteria relating to this Convention. Its management shall be entrusted to one or more of the existing international entities."

<sup>212</sup> Article 21(3) of the Convention establishes the Global Environment Facility (GEF) of the United Nations Development Programme, from the United Nations Environment Programme and the International Bank for Reconstruction and Development on a provisional basis as the international entity responsible for the management of the financial mechanism. The provisional measure remains in force, despite statutory changes in the Global Environment Fund to conform to the Convention.

<sup>213</sup> Notwithstanding the relevance of the Financial Mechanism, BODANSK, BRUNNÉE and RAJAMANI clarify that "Article 11(5) explicitly authorizes the developed Parties to provide financial resources through other bilateral and regional bodies, and not only through the mechanism provided for in the Convention... in 2010, bilateral development bodies provided \$10 billion in climate finance, while the Convention's financial mechanism provided less than \$1 billion." In: BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, Oxford, 2017, p. 147.

<sup>214</sup> *Ibis* 213.

heterogeneous among the Parties to the Convention, also in view of the principle of common but differentiated responsibility and in accordance with the capacities of the Parties.

The Convention also provided for the possibility of establishing a multilateral consultative process, to be considered by the Conference of the Parties at its first session, which would be accessible to the Parties, at their request, for the peaceful resolution of questions relating to the implementation of the Convention. To date, the mentioned consultative process, which would be established along the lines of the non-compliance procedure of the Montreal Protocol, has not been established<sup>215</sup>.

#### ***4.4. Peaceful settlement of disputes in the UNFCCC***

The resolution of conflicts concerning the interpretation or application of the Convention is dealt with in Article 14 of the Convention which provides that, in the event of a conflict, the Parties shall seek to resolve it through negotiation or any other peaceful means of their own choosing<sup>216</sup>.

As Dr.<sup>q</sup> Maria José Rangel de Mesquita teaches us

*"Article 33(1) of the Charter of the United Nations, inserted in Chapter IV dedicated to the peaceful settlement of disputes, is the main source of universal international law that contains a developed – albeit not exhaustive – list of the peaceful means of dispute settlement: negotiation, inquiry, mediation, conciliation, arbitration, the judicial process, the use of regional organizations or agreements."*<sup>217 218</sup>

Article 14(2)(a) provides that the Parties of the Convention might accept the jurisdiction of the International Court of Justice (ICJ). This is an optional conferral of jurisdiction on the ICJ and

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<sup>215</sup> See Article 13 of the UNFCCC: "Article 13 Resolution of issues relating to the implementation of the Convention: At its first session, the Conference of the Parties shall consider the establishment of a multilateral consultative process, accessible to the Parties, at their request, for the resolution of questions relating to the implementation of the Convention."

<sup>216</sup> See Article 14(1) of the UNFCCC: "Article 14. Dispute resolution 1. In the event of a conflict between two or more Parties concerning the interpretation or application of the Convention, the Parties concerned shall endeavor to resolve it through negotiation or by any other peaceful means of their own choosing."

<sup>217</sup> MESQUITA, Maria José Rangel. *Justiça Internacional: Lições. Parte I, Introdução*. AAFDL, Lisboa, 2010, p. 68.

<sup>218</sup> Good offices are one of the peaceful means of settling disputes not mentioned in the Charter and is defined basically by the friendly attempt of one or more States to open the way for negotiations between Parties interested in the resolution of a conflict.

not a mandatory jurisdiction, to which the Parties of the Convention may or may not submit themselves. In this sense, it should be noted that the ICJ has never been called upon by the Parties in order to resolve a conflict arising from the Convention<sup>219 220 221 222</sup>.

Nevertheless, as will be seen below, the possibility of resolving conflicts arising from the Convention outside the scope of its own institutions and compliance mechanisms leads to the understanding that the Convention does not have its own complete set of secondary rules.

#### 4.5. Other provisions of the UNFCCC

The Convention, in its Article 15, allows amendments to be made, which may be proposed by any Party and which must be approved at the ordinary sessions of the COP<sup>223</sup>.

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<sup>219</sup> See Article 14(2) of the UNFCCC: "Article 14. Dispute resolution 2 2 When ratifying, accepting, approving or acceding to the Convention, or at any time thereafter, a Party which is not a regional economic integration organization may declare, in a written instrument submitted to the depositary, that, in respect of any dispute concerning the interpretation or application of the Convention, it recognizes as compulsory ipso facto and without any special agreement with respect to any Party accepting the same obligation: (a) the submission of the conflict to the International Court of Justice; and or (b) arbitration in accordance with procedures to be adopted as soon as possible by the Conference of the Parties and to be set out in an annex relating to the arbitration. A Party that is a regional economic integration organization may make a declaration to the same effect with respect to arbitration in accordance with the terms referred to in subparagraph (b) above."

<sup>220</sup> For more on attribution of jurisdiction, see: MESQUITA, Maria José Rangel. *Justiça Internacional: Lições. Parte I, Introdução*. AAFDL, Lisboa, 2010, p. 142.

<sup>221</sup> BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 149.

<sup>222</sup> There is also the possibility of compulsory arbitration, in accordance with the procedures to be adopted by the Conference of the Parties, which must also be accepted in advance by the Parties, as provided for in Article 14(2)(b) of the UNFCCC. However, this route of conflict resolution has not yet been used or even the procedures and regulations to be used defined. In this sense, BODANSKY, BRUNNÉE and RAJAMANI explain that "to date, the dispute settlement procedure provided for in Article 14 has not been used. This is consistent with experience in other environmental regimes. Although dispute settlement procedures are common in multilateral environmental agreements, States rarely use them, either because no State is particularly affected by another State's lack of compliance or because States generally seek to avoid adversarial processes with each other." In: BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 155. See also: ROMANO, Cesare. *International Dispute Settlement*. In: BODANSKY, Daniel; BRUNNÉE, Jutta; HEY, Ellen (Eds.). *Oxford Handbook of International Environmental Law*. Oxford University Press, 2007, p. 1036–1041.

<sup>223</sup> See Article 15 of the UNFCCC: "Article 15. Amendments to the Convention: 1. Any Party may propose amendments to the Convention. 2. Amendments to the Convention shall be adopted at an ordinary session of the Conference of the Parties. The text of any proposed amendment to the Convention shall be communicated to the Parties by the Secretariat at least six months before the session at which its adoption is to be proposed. The Secretariat shall also communicate proposed amendments to the signatories to the Convention and, for information, to the depositary. 3. The Parties shall make every effort to reach agreement by consensus on any proposed amendment. Once all efforts to reach consensus have been exhausted without the amendment having been adopted, the amendment, as a last resort, shall be adopted by a majority of three-quarters of the votes of the Parties present and voting at the session. The amendment adopted shall be communicated by the Secretariat to the depositary, which shall distribute it to the Parties for acceptance. 4. Instruments of acceptance relating to an amendment shall be deposited with the depositary. An amendment adopted in accordance with the terms of the above paragraph shall enter into force for those Parties which have accepted it on the 90th day after

While urging the Parties to the Convention to make every effort to ensure that any amendment to the Convention is approved by consensus of all Parties, the amendment of the Convention by a qualified majority of three-quarters of the votes of the Parties present and voting at the session is permitted. In the event of the adoption of an amendment by a qualified majority, the<sup>224</sup> adopted amendment shall enter into force only for those Parties which accepted it in accordance with Article 15(3) of the Convention.

The Article 16 of the Convention presents an alternative possibility to the one provided for in Article 15, as it allows for the adoption and amendment of Annexes to the Convention. An Annex adopted under Article 16 of the Convention shall enter into force for all Parties to the Convention six months after the date of communication by the depositary to the Parties of the adoption of that Annex, with the exception of those Parties which have notified the depositary in writing, within that period, of the non-acceptance of the new Annex.

Accordingly, in the case of Article 16, amendments to the Convention via its annexes, which for all intents and purposes are an integral part of the Convention, do not depend on the explicit acceptance of a Party and shall apply to it in the event of failure to exercise its right to notify the Secretary-General of the United Nations, depositary of the Convention, of its refusal to accept the adoption of the Annex in question<sup>225</sup>.

Finally, as provided for in Article 17 of the Convention, the COP might, at any ordinary session, adopt protocols bound to the Convention, applicable only to the Parties that adopt it. Also,

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*the date of receipt by the depositary of an instrument of acceptance by at least three-quarters of the Parties to the Convention. 5. The amendment shall enter into force for any other Party on the 90th day after the date on which that Party deposited with the depositary its instrument of acceptance of that amendment. 6. For the purposes of this article, "the Parties present and voting" means the Parties present and voting affirmatively or negatively."*

<sup>224</sup> Article 15(6) of the Convention defines 'Parties present and voting' as Parties present and voting in the affirmative or negative way, thus excluding abstentions.

<sup>225</sup> See Article 16(1) of the UNFCCC: "Article 16 Adoption of and amendments to the Annexes to the Convention: (1) The Annexes to the Convention shall form an integral part thereof; unless otherwise specified, a reference to the Convention shall at the same time constitute a reference to any annexes thereto. Without prejudice to the provisions of Article 14(2)(b) and paragraph 7, such annexes shall be limited to lists, forms and any other material of a descriptive nature having a scientific, technical, procedural or administrative character."

only the Parties of the Convention can be Parties these protocols and the decisions taken under these protocols can only be taken and apply only to the Parties of the respective protocol<sup>226 227</sup>.

In this sense, it can be seen from the history of amendments, protocols and other instruments adopted under the Convention that, in fact, this *framework* has served to deepen the implementation of its objectives through instruments adopted *a posteriori*. The Kyoto Protocol, adopted in 1997, a protocol adopted under Article 17 of the Convention, is one of these instruments and will be examined below, as will the Paris Agreement, which will be seen after.

Finally, the Convention does not accept that Parties submit reservations, as established under Article 24, despite the fact that declarations of interpretation have been made, while the withdrawal of a Party from the Convention can only take place after three years of the accession of that Party to the Convention<sup>228 229</sup>.

#### 4.6. Final considerations

The UNFCCC establishes the objective, the basic commitments, the guidelines and the institutions that will act in the climate change legal regime. As a *framework*, its provisions on commitments are more oriented to the conduct of the Parties than to results.

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<sup>226</sup> See Article 17 of the UNFCCC: "*Article 17 Protocols: 1. The Conference of the Parties may, at any ordinary session, adopt protocols to the Convention. 2. The text of any proposed protocol shall be communicated to the Parties by the Secretariat at least six months before such session. 3. The requirements for the entry into force of any protocol shall be established by the instrument itself. 4. Only Parties to the Convention may be Parties to a protocol. 5. Decisions under any protocol may be taken only by the Parties to that protocol.*"

<sup>227</sup> As for the additional amendments and protocols, BODANSKY, BRUNNÉE and RAJAMANI explain that "*The additional protocols and amendments are adopted under the auspices of the Conference of the Parties (COP), which plays the main role in the development of a treaty. However, with respect to these legislative provisions, each Party to the Convention remains sovereign to decide on the accession of a subsequent step, whether it be explicit consent (standard protocol and amendment) or refrain from rejecting (simplified amendment via annex), whether or not it wishes to be bound by a new instrument.*". In: BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 156.

<sup>228</sup> The States of Fiji, Kiribati, Nauru and Papua New Guinea, for example, submitted declarations stating that accession to the Convention did not constitute a waiver of any right concerning the International Law of the International Responsibility of States for Unlawful Acts.

<sup>229</sup> See Article 25 of the UNFCCC: "*Article 25 Withdrawal: 1 - Three years after the date on which the Convention entered into force for a Party, that Party may at any time withdraw from the Convention by written notification to the depositary. 2. Any withdrawal shall take effect one year after the date of receipt by the depositary of the notification of withdrawal or at such later date as may have been specified in the notification of withdrawal. 3. Any Party withdrawing from the Convention shall be deemed to have also withdrawn from any protocol to which it is a Party.*"

Considering the time lapse between its creation and the current moment, it can be said that the regime has in the Convention a *framework* capable of allowing the International Community to act together in the field of climate change and that, if it has not been done satisfactorily, is more related to political issues than to the Convention itself.

In any case, it is on this basis that other legal instruments have been adopted, some with binding obligations, while others not. The Kyoto Protocol is an instrument linked to the Convention that established mandatory obligations and that uses the differentiation between the Parties established by the Convention to distribute the obligations, as will be analyzed below.

## 5. KYOTO PROTOCOL

The Kyoto Protocol is an international treaty, within the meaning of Article 2(1) of the Vienna Convention on the Law of Treaties (CVDT), has been adopted pursuant to Article 17 of the UNFCCC and is bound by the Convention and its objectives<sup>230</sup>.

Negotiations on the Protocol were initiated following the Decision 1/CP.1 adopted by the Conference of the Parties (COP) at its first session, held in Berlin in 1995, which determined that a negotiation process should be initiated and to<sup>231</sup> be carried out in the light of the best available scientific information and assessments on climate change and its impacts, including, *inter alia*, the IPCC reports, with the<sup>232</sup> *"priority objective of strengthening the commitments of Article 4, paragraph 2 (a) and (b) of the Convention"*<sup>233 234</sup>.

The Protocol was adopted at the session of the Conference of the Parties (COP) held in Kyoto, Japan, on 11 December 1997, and was opened for signature, ratification, acceptance or approval by the Parties on 16 March 1998. Accession to the Protocol should be open to all Parties of the Convention at any time and should be binding only on those Parties which accept it by depositing the instruments of accession with the depositary of the Protocol which, like the UNFCCC, designates the

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<sup>230</sup> See Article 2(1) of the VCLT.

<sup>231</sup> See Decision 1/CP.1 - FCCC/CP/1995/7/Add.1

<sup>232</sup> See Article 3 of Decision 1/CP.1 - FCCC/CP/1995/7/Add.1.

<sup>233</sup> "2. (a) To have as a priority objective the process of strengthening the commitments of Article 4, paragraph 2 (a) and (b) of the Convention, for developed countries and other Parties included in Annex I, both; develop policies and measures, as well as define quantified limitation and reduction targets within specified timeframes, such as 2005, 2010 and 2020, for their anthropogenic emissions by sources and removals by sinks of greenhouse gases not controlled by the Montreal Protocol, taking into account differences in starting points and approaches, economic structures and resource bases, the need to maintain strong and sustainable economic growth, available technologies and other individual circumstances, as well as the need for equitable and adequate contributions by each of these Parties to the global effort. In: Article 2(a) Decision 1/CP.1 - FCCC/CP/1995/7/Add.1.

<sup>234</sup> Therefore, already in its first session, the Conference of the Parties (COP) decided on the need for a new instrument that would serve to instrumentalize the implementation of the *framework* established by the UNFCCC, notably with a quantification at the level of emissions, reductions and removal of greenhouse gases from anthropogenic sources, as well as the specification of these GHGs. In addition, consideration should be given to issues relating to the differentiation of the Parties, their individual capacities and the right to sustainable development. Annex A of the Kyoto Protocol lists the following greenhouse gases to be the subject of the protocol: Carbon dioxide (CO<sub>2</sub>), Methane (CH<sub>4</sub>), Nitrous oxide (N<sub>2</sub>O), Hydrofluorocarbons (HFCs), Perfluorocarbons (PFCs) and Sulfur hexafluoride (SF<sub>6</sub>).

Secretary-General<sup>235 236</sup> of the United Nations as its depositary<sup>237 238</sup>. Moreover, like the UNFCCC, the Protocol does not accept reservations from the Parties<sup>239</sup>.

At present, the Kyoto Protocol has 192 Parties, but the absence of the United States of America, despite having signed the protocol but never ratified it, and Canada, which is no longer a Party, since has withdrawn from the Protocol, is notable. However, these two continue to have the responsibilities and obligations defined by the UNFCCC<sup>240 241 242</sup>.

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<sup>235</sup>See Article 24 of the Kyoto Protocol: *"Article 24: 1. This Protocol shall be open for signature and subject to ratification, acceptance or approval by States and regional economic integration organizations which are Parties to the Convention. It will be open for signature at the United Nations Headquarters in New York from March 16, 1998 to March 15, 1999. This Protocol shall be open for accession from the day following the date on which it is closed for signature. The instruments of ratification, acceptance, approval or accession shall be deposited with the Depositary. 2. Any regional economic integration organization which becomes a Party to this Protocol without any of its member States being a Party shall be bound by all obligations under this Protocol. In the case of such organizations, one or more of whose member States are Parties to this Protocol, the Organization and its Member States shall decide on their respective responsibilities in the performance of their obligations under this Protocol. In such cases, the Organization and the Member States shall not have the right to exercise the rights under this Protocol simultaneously. 3. In their instruments of ratification, acceptance, approval or accession, regional economic integration organizations shall declare the extent of their competence in respect of matters governed by this Protocol. These organizations shall also inform the Depositary, which in turn shall inform the Parties, of any substantial change within the scope of its competence."*

<sup>236</sup>The Parties may also withdraw from the Protocol after three years of its validity for the Party wishing to withdraw, under Article 27 of the Kyoto Protocol.

<sup>237</sup>See Article 23 of the Kyoto Protocol: *"Article 23: The Secretary-General of the United Nations shall be the Depositary of this Protocol."*

<sup>238</sup>In fact, the Kyoto Protocol only entered into force in the year 2005, when 55 Parties to the Convention, included among those Parties to Annex I to the Convention that represented the total of at least 55 percent of the total carbon dioxide emissions in 1990 of the Parties included in Annex I, deposited their instruments of ratification, acceptance, approval or accession, complying with the "double trigger" provided for in Article 25(1) of the Protocol. See: Article 25 of the Kyoto Protocol: *"Article 25: 1. This Protocol shall enter into force on the ninetieth day after the date on which at least 55 Parties to the Convention, incorporating the Parties included in Annex I, which accounted in total for at least 55 percent of the total carbon dioxide emissions for 1990 of the Parties included in Annex I, have deposited their instruments of ratification, acceptance, approval or accession. 2. For the purposes of this Article, "the total carbon dioxide emissions for 1990 of the Parties included in Annex I" means the amount reported up to the date of adoption of this Protocol by the Parties included in Annex I in their first communications submitted pursuant to Article 12 of the Convention. 3. For each State or regional economic integration organization which ratifies, accepts or approves this Protocol or accedes to it after the conditions set out in paragraph 1 above of entry into force have been fulfilled, this Protocol shall enter into force on the ninetieth day following the date of deposit of its instrument of ratification, acceptance, approval or accession. 4. For the purposes of this Article, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by the member states of the organization."*

<sup>239</sup>See Article 26 of the Kyoto Protocol: *"Article 26: No reservation may be made to this Protocol."*

<sup>240</sup>There are 191 states and the European Union. See: UNFCCC. *Status Kyoto Protocol*. Available in: <https://unfccc.int/process/the-kyoto-protocol/status-of-ratification>. Accessed June 22, 2021.

<sup>241</sup>The U.S. Senate unanimously approved, 95-0, a proposal that would require developing parties to participate in emissions reduction commitments under the Kyoto Protocol. Because the protocol did not include such commitments, the United States did not ratify it, despite having signed it.

<sup>242</sup>In accordance with Article 27 of the Kyoto Protocol, the Government of Canada notified the Secretary-General on 15 December 2011 that it had decided to withdraw from the Kyoto Protocol as of 15 December 2012, in compliance with the 1 year notice provided for in Article 27(2).



That said, the Conference of the Parties (COP), pursuant to Article 13(1) of the Protocol, serves as the Meeting of the Parties of the Kyoto Protocol<sup>243244</sup>, and this is called the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol. The Secretariat of the Convention shall also serve as the Secretariat of the Protocol in accordance with Article 14 thereof<sup>245</sup>.

In addition, the Subsidiary Body for Scientific and Technological Consultation (SBSTA) and the Subsidiary Body for Implementation (SBI), subsidiary bodies of the Conference of the Parties and established by the Convention, also serve as subsidiary bodies of the Conference of the Parties serving

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<sup>243</sup> See Article 7 of the UNFCCC.

<sup>244</sup> See Article 13 of the Kyoto Protocol: "Article 13: 1. The Conference of the Parties, the supreme organ of the Convention, shall act as the meeting of the Parties to this Protocol. 2. Parties to the Convention which are not Parties to this Protocol may participate as observers in the proceedings of any session of the Conference of the Parties serving as the meeting of the Parties to this Protocol. When the Conference of the Parties acts as the meeting of the Parties to this Protocol, decisions under this Protocol shall be taken only by those Parties to this Protocol. 3. When the Conference of the Parties acts as the meeting of the Parties to this Protocol, any member of the Bureau of the Conference of the Parties representing a Party to the Convention but not at that time a Party to this Protocol shall be replaced by an additional member to be elected by and from among the Parties to this Protocol. 4. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall keep under regular review the implementation of this Protocol and shall, within its mandate, take the decisions necessary to promote its effective implementation. It shall carry out the functions assigned to it by this Protocol and shall: (a) Assess, on the basis of all information made available in accordance with the provisions of this Protocol, the implementation of this Protocol by the Parties, the overall effects of measures taken pursuant to this Protocol, in particular environmental, and social effects, as well as their cumulative impacts, and the extent to which progress towards the objective of the Convention is being achieved; (b) Periodically review the obligations of the Parties under this Protocol, taking into account any revisions required by Article 4, paragraph 2(d), and Article 7, paragraph 2, of the Convention, in the light of the objective of the Convention, the experience gained in its implementation and the evolution of scientific and technological knowledge, and in this regard consider and adopt periodic reports on the implementation of this Protocol; (c) Promote and facilitate the exchange of information on the measures taken by the Parties to address climate change and its effects, taking into account the different circumstances, responsibilities and capacities of the Parties and their respective commitments under this Protocol; (d) Facilitate, at the request of two or more Parties, the coordination of the measures taken by them to address climate change and its effects, taking into account the different circumstances, responsibilities and capacities of the Parties and their respective commitments under this Protocol; (e) To promote and guide, in accordance with the objective of the Convention and the provisions of this Protocol, and taking full account of the relevant decisions of the Conference of the Parties, the development and periodic improvement of comparable methodologies for the effective implementation of this Protocol, to be agreed by the Conference of the Parties serving as the meeting of the Parties to this Protocol; (f) Make recommendations on any matters necessary for the implementation of this Protocol; (g) Seek to mobilize additional financial resources in accordance with Article 11, paragraph 2; (h) To establish such subsidiary bodies as may be necessary for the implementation of this Protocol; (i) Seek and use, where appropriate, the services and cooperation and information provided by competent international organizations and intergovernmental and non-governmental bodies; and (j) To perform such other functions as may be necessary for the implementation of this Protocol and to consider any assignment resulting from a decision of the Conference of the Parties. 5. The rules of procedure of the Conference of the Parties and the financial procedures applied in accordance with the Convention shall apply *mutatis mutandis* in accordance with this Protocol, unless otherwise decided by consensus by the Conference of the Parties serving as the meeting of the Parties to this Protocol. 6. The first session of the Conference of the Parties serving as the meeting of the Parties to this Protocol shall be convened by the Secretariat in conjunction with the first session of the Conference of the Parties scheduled after the date of entry into force of this Protocol. Subsequent ordinary sessions of the Conference of the Parties serving as the meeting of the Parties to this Protocol shall be held each year and in conjunction with the ordinary sessions of the Conference of the Parties, unless the Conference of the Parties serving as the meeting of the Parties to this Protocol decides otherwise. 7. Special sessions of the Conference of the Parties serving as the meeting of the Parties to this Protocol shall be held on such other occasions as may be deemed necessary by the Conference of the Parties serving as the meeting of the Parties to this Protocol, or at the written request of any Party".

<sup>245</sup> See Article 14 of the Kyoto Protocol: "Article 14: 1. The secretariat established by Article 8 of the Convention shall serve as the secretariat for this Protocol. 2. Article 8(2) of the Convention on the Functions of the Secretariat and Article 8(3) of the Convention on Provisions Relating to the Functioning of the Secretariat shall apply *mutatis mutandis* to this Protocol. In addition, the Secretariat shall carry out the functions assigned to it under this Protocol."

as the meeting of the Parties to the Kyoto Protocol, pursuant to Article 15 of the Protocol, while the provisions of the Convention on the resolution of conflicts are incorporated into the Protocol by the Article 19. Therefore, as well as the multilateral consultative process provided for the Parties to the Convention<sup>246 247 248</sup>.

Regarding the objective, the Kyoto Protocol established mandatory levels of reduction of anthropogenic emissions of greenhouse gases (GHG), listed in its Annex A, to at<sup>249</sup> least 5% below 1990 levels, in a commitment period between the years 2008 and 2012, for the Parties included in Annex I of the Convention, and this objective may be achieved individually or jointly by the Parties<sup>250</sup>.

Subsequently, the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP) adopted an amendment to the Protocol, known as the Doha Amendment, which set a target of at least 18% <sup>251 252</sup> reduction of anthropogenic GHG emissions compared to 1990 levels, for a commitment period between the years 2013 and 2020, continuing the provisions of the Protocol, but in a more ambitious way<sup>253</sup>. The amendment, however, only entered into force on 31 December

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<sup>246</sup> See Article 15 of the Kyoto Protocol: "Article 15: 1. The Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for Implementation established by Articles 9 and 10 of the Convention shall act as, respectively, the Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for the Implementation of this Protocol. The provisions relating to the functioning of these two bodies under the Convention shall apply mutatis mutandis to this Protocol. The sessions of the meetings of the Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for the Implementation of this Protocol shall be held in conjunction with the meetings, respectively, of the Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for the Implementation of the Convention. 2. Parties to the Convention which are not Parties to this Protocol may participate as observers in the proceedings of any session of the subsidiary bodies. When bodies serve as subsidiary bodies to this Protocol, decisions under this Protocol shall be taken only by those who are Parties to this Protocol. 3. When the subsidiary bodies established by Articles 9 and 10 of the Convention exercise their functions in relation to matters relating to this Protocol, any member of the Offices of those subsidiary bodies representing a Party to the Convention but at that time not a Party to this Protocol shall be replaced by an additional member to be elected by and from among the Parties to this Protocol."

<sup>247</sup> See Article 19 of the Kyoto Protocol: "Article 19: The provisions of Article 14 of the Convention on the Settlement of Disputes shall apply mutatis mutandis to this Protocol."

<sup>248</sup> See Article 16 of the Kyoto Protocol: "Article 16: The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, as soon as practicable, consider the application of this Protocol and modify, as appropriate, the multilateral consultative process referred to in Article 13 of the Convention in the light of any relevant decisions that may be taken by the Conference of the Parties. Any multilateral consultative process that may be applied to this Protocol shall operate without prejudice to the procedures and mechanisms established in accordance with Article 18."

<sup>249</sup> Vide artigo 3º do Protocolo de Kyoto: "Article 3: 1. The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012....".

<sup>250</sup> On the negotiations of the limits to be provided for in the Protocol, see: PEEL, Jacqueline; SANDS, Philippe. *Principles of International Environmental Law*. 4th Edition, Cambridge, 2018, p. 308.

<sup>251</sup> Decision 1/CMP.8. FCCC/KP/CMP/2012/13/Add.1.

<sup>252</sup> Amendments to the Protocol and via annexes are permitted under Articles 20 and 21 of the Kyoto Protocol, in terms similar to those provided for amendments and amendments via annexes in the UNFCCC.

<sup>253</sup> The Doha Amendment also amends Annex A to the Protocol for the Parties that have accepted it, including and updating the list of regulated greenhouse gases (GHGs), to become the following: Carbon dioxide (CO<sub>2</sub>); Methane (CH<sub>4</sub>);

2020, 90 days after three-quarters or 144 Parties of the Protocol, deposited their instruments of acceptance under Article 20(3) of the Kyoto Protocol<sup>254</sup>.

It happens that the future of the Protocol is uncertain, either in the face of the unsatisfactory results, by the absence of new commitments for the period after 2020, by the absence of very relevant countries such as Canada, United States, Japan and Russia, or by the preference of the States for the model of differentiation of the obligations of the Parties adopted by the Paris Agreement<sup>255 256</sup>.

Nevertheless, even if there are doubts about its continuity, the Kyoto Protocol has innovated in the legal regime of climate change, incorporating species of provisions, obligations and mechanisms non-existent in the regime before and, even if unsatisfactorily, has advanced in the implementation of the UNFCCC objectives, which is why the Kyoto Protocol is quite significant in the legal context of climate change. We shall therefore proceed to examine the most important provisions of the Protocol<sup>257 258</sup>.

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Nitrous oxide (N<sub>2</sub>O); Hydrofluorocarbons (HFCs); Perfluorocarbons (PFCs); Sulphur hexafluoride (SF<sub>6</sub>); and Nitrogen Trifluoride (NF<sub>3</sub>).

<sup>254</sup> In a communication dated 10 December 2010, Japan indicated that it had no intention of joining the second commitment period. New Zealand said it remains a party to the Kyoto Protocol but will adopt a quantified emissions reduction target under the UNFCCC for the period 2013-2020 by not joining the Doha patch. In a communication of 8 December 2010, Russia indicated that it did not intend to make a quantitative limitation of emissions or a reduction commitment for the second commitment period of the Kyoto Protocol.

<sup>255</sup> BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 192.

<sup>256</sup> The practical results of the Kyoto Protocol are negative, because if on the one hand the developed countries with obligations under the protocol have achieved their reduction targets, but the other States have increased their emissions much more, so that the balance is unfavorable. On the negative result, see: SCHIERMEIER, Quirin. *The Kyoto Protocol: Hot Air*. *Nature*, Vol. 491, Nov. 2012, p. 656-658. On the positive results obtained by the Parties with emission reduction obligations, see: UNFCCC. *Kyoto's Second Phase Emission Reductions achievable but greater ambition needed*. Available at: <https://unfccc.int/news/kyoto-s-second-phase-emission-reductions-achievable-but-greater-ambition-needed>. Accessed July 10, 2021.

<sup>257</sup> PEEL and SANDS underscore the importance of the Kyoto Protocol by stating that "*In terms of international law, the achievements of the Protocol have been more significant. In particular, the parties to the Kyoto Protocol have agreed on a detailed set of rules for the implementation of the treaty – known as the Marrakesh Accords – that are likely to form the basis for implementation agreements in many areas under the Paris Agreement. The main provisions of the Marrakesh Accords concerned the rules for the implementation of the "flexibility mechanisms" of the Kyoto Protocol, the elaboration of permitted activities in relation to carbon sinks (known as land use, land use change and forestry activities (LULUCF) and the establishment of an innovative compliance mechanism. In addition, the Agreements provided guidelines on national systems for the estimation of anthropogenic sources of greenhouse gas emissions, the preparation of the information necessary for the fulfillment of reporting obligations under the protocol, and the performance of reviews by expert review teams ... experience that will be highly relevant to the design of similar mechanisms under the Paris Agreement.*". In: PEEL, Jacqueline; SANDS, Philippe. *Principles of International Environmental Law*. 4th Ed., Cambridge, 2018, p. 308.

<sup>258</sup> DUPEY and VIÑUALES lay out the relevance of the Kyoto Protocol as follows: "*their analysis remains important because the Kyoto Protocol represents a 'top-down' regulatory approach that, despite positive experiences when applied to long-range transboundary air pollution and ozone depletion, has been deemed inadequate as a general response to climate change. Perhaps it remains important as a specific response..., but not as a general response capable of addressing the wide range of activities and sources of greenhouse gases.*". In: DUPUY, Pierre-Marie; VIÑUALES, Jorge E.. *International Environmental Law*. 2nd Ed. Cambridge, 2018, p. 180.

### 5.1. Principle of common but differentiated responsibility and respective capacities (CBDRRC) in the Kyoto Protocol

The principle of common and differentiated responsibility and respective capacities (CBDRRC) is only expressly provided for in the Kyoto Protocol in the Article 10<sup>259</sup>.

In fact, the Conference of the Parties (COP), through the Berlin Mandate, established that the new <sup>260</sup> instrument should provide for new commitments, in terms of reducing GHG emissions, only to the Parties of Annex I of the Convention, the developed Parties, making it clear that no new commitments should be made in this regard to Parties not present in Annex I to the UNFCCC, differentiating the obligation of each Parties of the future instrument since the beginning of the negotiations.

While the Conference of the Parties (COP), through the Berlin Mandate, in its Article 2, *a*, determined that new limits on emissions and reductions of GHG should be provided for in the new instrument for the parts of Annex I of the Convention, through Article 2, *b*, of the same decision, the Conference of the Parties (COP) excluded the possibility of new emission reduction obligations and mandatory limits on emissions of GHGs for the other Parties of the Convention not included in Annex I to the Convention, determining, however, that in respect of these, the new instrument should reinforce the obligations already provided by<sup>261</sup> Article 4(1) of the Convention, notably corresponding to the national inventories of anthropogenic emissions by sources and their respective reports.

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<sup>259</sup>as BODANSKY, BRUNNÉE and RAJAMANI teach, *"The Kyoto Protocol contains only one explicit reference and a few implicit references to the principle of common but differentiated responsibility and respective capacities (CBDRRC). The preamble refers to "common but differentiated responsibilities and "specific national and regional development priorities, objectives and circumstances". However, the differentiation in the Kyoto Protocol is attributed by most commentators to this principle and the associated notion of leadership of developed countries. In fact, the climate regime, in particular the Kyoto Protocol, has been characterized as the "clearest attempt to transform, activate and operationalize the principle (CBDRRC) from a legal concept to a political instrument."* In: BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 166. In fact, the differentiation of the Parties to the Kyoto Protocol is prior to the negotiations themselves, having been defined at the beginning of the whole process and represents the application of the principle of common but differentiated responsibility and of the respective capacities by the Parties in the adoption of this new instrument linked to the Convention, in a model of differentiation that is called top-down, started with the annexes of the UNFCCC.

<sup>260</sup>Decision 1/CP.1: "2. The process will, inter alia: (a) Aim, as a priority in the process of strengthening the commitments of Article 4.2(a) and (b) of the Convention, for developed countries/other Parties included in Annex I, both: - develop policies and measures, as well as - establish quantified limitation and reduction targets within specific timeframes, such as 2005, 2010 and 2020, for their anthropogenic emissions by sources and removals by sinks of greenhouse gases not controlled by the Protocol to Montreal."

<sup>261</sup>Decision 1/CP.1. "(2) (b): Not to introduce any new commitments for Parties not included in Annex I, but to reaffirm existing commitments in Article 4.1 and to continue to advance in the implementation of these commitments in order to achieve sustainable development, taking into account Articles 4.3, 4.5 and 4.7;". See: Decision 1/CP.1 - FCCC/CP/1995/7/Add.1

And in the Kyoto Protocol, the Parties to the instrument are divided among those present in Annex B of the Protocol, corresponding to the developed Parties that have acceded to the Protocol and are listed in Annex I of the UNFCCC, to which new binding obligations of conduct, result and<sup>262</sup> *compliance are imposed*, in the field of emission reductions and removal of GHGs from anthropogenic sources, and Parties not included in any annexes of the Protocol, on which no new obligations are imposed in terms of emission reduction and removal of the GHGs subject to the Protocol.

As to how the differentiation of the Parties is applied in the Protocol, BODANSKY, BRUNNÉE and RAJAMANI conclude that

*"Since the emission targets apply only to Annex I Parties, the provisions of the Protocol designed to monitor compliance with the targets are limited to Annex I Parties, including the obligation to establish a national system for the estimation of GHG emissions by removal sources and sinks, the reporting requirements in relation to annual inventories and national communications, and per-review processes by experts. The compliance procedure of the Kyoto Protocol ... it is also adapted to the differentiated obligations of the Parties and thus establishes a targeted approach to the application of compliance to Annex I Parties with respect to their issuance targets and related procedural commitments, and a facilitative approach to compliance of Parties not present in Annex I, with general and much more flexible and contextualized commitments of the Protocol."*<sup>263</sup>

According to the authors, *"regarding the differentiation of Annex I Parties, the Kyoto Protocol still allows developed Parties, but in transition of their economies, to adopt a base period other than 1990 for the definition of their emissions targets. Annex I Parties still have different goals and deadlines from each other"*<sup>264</sup>.

Therefore, the Kyoto Protocol applies the differentiation of the Parties into two distinct standards, first between the Parties present or not in Annex I of the UNFCCC, establishing specific

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<sup>262</sup> Including among these the Parties in transition to a market economy, even if with less stringent obligations than the other Parties to Annex B to the Kyoto Protocol.

<sup>263</sup> BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 167.

<sup>264</sup> *Ibis* above.

obligations and procedures to the former, and, second, differentiating the parts of Annex I itself, as already previously done in the Convention, which differentiates the developed Parties from the developed Parties that are transitioning their economies to the market economy<sup>265</sup>.

The main obligations, procedures and mechanisms provided by the Kyoto Protocol will be analyzed below.

## **5.2. Obligations under the Kyoto Protocol**

Obligations under the Kyoto Protocol are divided into obligations for all Parties and obligations for Parties listed in Annex I to the UNFCCC. First, the obligations common to all Parties of the Protocol and then the exclusive obligations of the Parties present in Annex I will be examined.

### ***5.2.1. Obligations common to all parties***

The obligations common to all Parties of the Kyoto Protocol are provided for in Article 10. Although they are common obligations, the principle of common but differentiated responsibility is still considered by on the fulfilment of these obligations, as well as the specific priorities, objectives and circumstances of each Party<sup>266</sup>.

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<sup>265</sup> See Article 3(5) of the Kyoto Protocol: *"Article 3 - No. 5: 5. Parties included in Annex I in the process of transition to a market economy whose base year or period has been established in accordance with Decision 9/CP.2 of the Conference of the Parties at its second session shall use that base year or period for the implementation of their commitments under this Article. Any other Party included in Annex I in the process of transition to a market economy which has not yet submitted its first national communication pursuant to Article 12 of the Convention may also notify the Conference of the Parties serving as the meeting of the Parties to this Protocol that it intends to use a historical base year or period other than 1990 for the implementation of its commitments under of this article. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall decide on the acceptance of such notification."*

<sup>266</sup> See Article 10, *caput*, of the Kyoto Protocol: *"Article 10. All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, without introducing new commitments for Parties not included in Annex I, but reaffirming existing commitments under Article 4, paragraph 1, of the Convention, and continuing to advance the implementation of these commitments to achieve sustainable development, taking into account Article 4, paragraphs 3, 5 and 7 of the Convention, shall: (a) Formulate, where relevant and to the extent possible, cost-effective national and, where appropriate, regional programmes to improve the quality of local emission factors, activity data and/or models reflecting the socio-economic conditions of each Party for the preparation and periodic updating of national inventories of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, using comparable methodologies to be agreed by the Conference of the Parties and consistent with the guidelines for the preparation of national communications adopted by the Conference of the Parties; (b) Formulate, implement, publish and regularly*

Therefore, Article 10 "serves as a means to advance the implementation of Article 4(1) of the Convention and also aims to achieve a breakthrough in sustainable development. Since the article applies to all Parties to the Protocol, it has many elements of contextualization and qualifying provisions"<sup>267</sup>.

That said, the main obligations incumbent upon all Parties and provisioned by Article 10 concern the enhancement of national and regional programmes to improve the quality of local emission factors, activity data and/or models on the socio-economic conditions of each Party for the preparation and periodic updating of national inventories, formulation, implementation, publication and regular updating of these national and, where appropriate, regional programmes, with measures to mitigate climate change and measures to facilitate adequate adaptation to climate change; or to cooperation on the transfer of and access to environmentally sound technologies, *know-how*, practices and processes relevant to climate change, as well as technical and scientific research, promotion of environmental education, in particular to developing countries, including national communications reports to the Conference of the Parties (COP), information on programmes and activities carried out

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update national and, where appropriate, regional programmes containing measures to mitigate climate change and measures to facilitate adequate adaptation to climate change: (i) Such programmes would cover, *inter alia*, the energy, transport and industry sectors, as well as agriculture, forestry and waste management. In addition, adaptation technologies and methods to improve spatial planning would improve adaptation to climate change; and (ii) Parties included in Annex I shall submit information on actions under this Protocol, including national programmes, in accordance with Article 7; and other Parties shall seek to include in their national communications, as appropriate, information on programmes containing measures that the Party believes contribute to addressing the changes climate and its adverse impacts, including the reduction of increases in greenhouse gas emissions, and increases and removals by sinks, capacity building and adaptation measures; (c) Cooperate in promoting effective modalities for development, implementation and dissemination, and take all practicable measures to promote, facilitate and finance, as appropriate, the transfer of or access to technologies, *know-how*, practices and processes relevant to climate change, in particular to developing countries, including the formulation of policies and programmes for the effective transfer of environmentally sound technologies of public or domain ownership public and the creation of an enabling environment for the private sector, promote and improve the transfer of and access to environmentally sound technologies; (d) Cooperate in scientific and technical research and promote the maintenance and development of systematic observation systems and development of data archives to reduce uncertainties related to the climate system, the adverse impacts of climate change, and the economic and social consequences of various response strategies and promote the development and strengthening of endogenous capacities and capacities to participate in efforts, international and intergovernmental programmes and networks of systematic research and observation, taking into account Article 5 of the Convention; (e) Cooperate and promote at the international level and, where appropriate, using existing bodies, the development and implementation of education and training programmes, including the strengthening of national capacity-building, in particular human and institutional capacities and the exchange or secondment of personnel to train specialists in this field, in particular for developing countries, and to facilitate at the national level public awareness and public access to information on the climate change. Appropriate modalities for implementing these activities should be developed through the relevant bodies of the Convention, taking into account Article 6 of the Convention; (f) Include in its national communications information on programs and activities carried out in accordance with this Article in accordance with the relevant decisions of the Conference of the Parties; and (g) To give full consideration, in the implementation of the commitments provided for in this Article, to Article 4, paragraph 8, of the Convention."

<sup>267</sup> BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 170.

under Article 10 of the Protocol, in accordance with the relevant decisions of the Conference of the Parties<sup>268</sup>.

Finally, Article 10 does not impose any new *de facto* obligation and, in compliance with the Berlin Mandate decision, it expands the application of Article 4(1) of the UNFCCC with a focus on sustainable development, one of the principles of the climate change legal system<sup>269</sup>.

### ***5.2.2. Obligations of the Parties of the Annex***

The Parties included in Annex I to the UNFCCC have their obligations under articles 2, 3, 4, 5, 7 and 11 of the Kyoto Protocol. These are binding obligations that are subject to transparency, review and compliance mechanisms with the possibility of sanction for non-compliance.

As provided in Article 2, in order to promote sustainable development and achieve the GHG emission reduction targets<sup>270</sup>, Annex I Parties shall implement and/or develop policies and measures in accordance with their national circumstances and cooperate with other Parties to increase the individual and combined effectiveness of their adopted policies and measures, including with international organizations (for the limitation or reduction of GHG emissions not controlled by the

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<sup>268</sup> See Article 10(f) of the Kyoto Protocol.

<sup>269</sup> PEEL, Jacqueline; SANDS, Philippe. *Principles of International Environmental Law*. 4<sup>a</sup> Ed., Cambridge, 2018, p. 315.

<sup>270</sup> See Article 2(1)(a) of the Kyoto Protocol: "Article 2: 1. Each Party included in Annex I, in fulfilling its quantified commitments to limit and reduce emissions under Article 3 in order to promote sustainable development, shall: (a) Implement and/or develop policies and measures in accordance with its national circumstances, such as: (i) Increasing energy efficiency in relevant sectors of the national economy; (ii) Protection and enhancement of sinks and reservoirs of greenhouse gases not controlled by the Montreal Protocol, taking into account their commitments in the relevant international environmental agreements; promotion of sustainable forest management practices, afforestation and reforestation; (iii) Promoting sustainable forms of agriculture in light of climate change considerations; (iv) Research and promotion, development and increasing use of new and renewable forms of energy, carbon dioxide sequestration technologies and advanced and innovative environmentally sound technologies; (v) Progressive reduction or progressive elimination of market imperfections, tax incentives, tax and customs exemptions and subsidies in all greenhouse gas emitting sectors that run counter to the objective of the Convention and the application of market-based instruments; (vi) Encouraging appropriate reforms in relevant sectors to promote policies and measures that limit or reduce greenhouse gas emissions not controlled by the Montreal Protocol; (vii) Measures to limit and/or reduce greenhouse gas emissions not controlled by the Montreal Protocol in the transport sector; (viii) Limitation and/or reduction of methane emissions through recovery and use in waste management as well as in the production, transmission and distribution of energy;".



Montreal Protocol for aviation and marine fuels)<sup>271 272</sup>, and the Parties included in Annex I shall endeavor to implement these policies and measures in such a way as to minimize the adverse effects of climate change, including its effects on international trade and social, environmental and economic impacts on other Parties, especially developing country Parties and the Parties most vulnerable to the impacts of climate change<sup>273 274</sup>.

The quantitative mitigation obligation, which sets out the limits and deadlines for the reduction of emissions and removal of GHGs and which is applicable to developed Parties, is provided for in<sup>275</sup> Article 3 of the Kyoto Protocol in the following terms:

*"Article 3: 1. Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic emissions of carbon dioxide equivalent of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated in accordance with their quantified emission limitation and reduction commitments set out in Annex B and in accordance with the provisions of this Article, with a view to reducing its global emissions of such gases by at least 5 percent below 1990 levels in the commitment period from 2008 to 2012."*

As it turns out, Annex B Parties of the Protocol (Annex I of the UNFCCC) are bound by the obligation to reduce their emissions by 5% below 1990 levels for the commitment period from 2008 to 2012, and this obligation may be fulfilled individually or jointly between more than one Party of the Protocol.

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<sup>271</sup> See Article 2(1)( b) of the Kyoto Protocol: "Article 2: 1. Each Party included in Annex I, in fulfilling its quantified commitments to limit and reduce emissions under Article 3 in order to promote sustainable development, shall: (b) Cooperate with other Parties to increase the individual and combined effectiveness of its policies and measures adopted pursuant to this Article in accordance with Article 4, paragraph 2(e)(i) of the Convention. To this end, these Parties should take steps to share their experiences and exchange information on such policies and measures, including the development of ways to improve their comparability, transparency and effectiveness. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session or as soon as practicable, consider ways to facilitate such cooperation, taking into account all relevant information."

<sup>272</sup> See Article 2(2) of the Kyoto Protocol: "Article 2:... 2. Parties included in Annex I shall seek to limit or reduce greenhouse gas emissions not controlled by the Montreal Protocol from aviation fuels and marine bunkers, working through the International Civil Aviation Organization and the International Maritime Organization, respectively. "

<sup>273</sup> See Article 2(3) of the Kyoto Protocol: "Article 3. ... 3. Parties included in Annex I shall endeavour to implement policies and measures under this Article in such a way as to minimise adverse effects, including adverse effects of climate change, effects on international trade and social, environmental and economic impacts on other Parties, especially developing country Parties and in particular those identified in Article 4, paragraphs 8 and 9 of the Convention, taking into account Article 3 of the Convention. The Conference of the Parties serving as the meeting of the Parties to this Protocol may take other measures, as appropriate, to promote the implementation of the provisions of this paragraph. " .

<sup>274</sup> In this sense, the Adaptation Fund was established in 2001, under the Kyoto Protocol, to finance concrete adaptation projects and programs in developing countries Parties of the protocol. See: UNFCCC. Adaptation Fund. Available in: <https://unfccc.int/Adaptation-Fund>. Accessed July 2, 2021.

<sup>275</sup> BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 171.

However, there are exceptions to the general rule of Article 3(1). As already stated, developed Parties with their economies in transition may choose a base date other than 1990, and a certain degree of flexibility should be allowed by the Conference of the Parties serving as the meeting of the Parties to the Protocol in the consideration of the implementation of this obligation by these Parties in accordance with Article 3, paragraphs 5 and 6 of the Protocol<sup>276 277</sup>.

The obligation to reduce emissions by 5% may be fulfilled individually or jointly by agreement of two or more Parties under<sup>278</sup> Article 4 of the Protocol, and additional financial obligations are provided for openly and without specific definition to the Parties of Annex II of the Convention, and these extra financial obligations should serve to assist developing countries in fulfilling their obligations under the Convention<sup>279</sup>.

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<sup>276</sup> See paragraphs 3, 5 and 6 of the Kyoto Press: "Article 3 ... 5. Parties included in Annex I in the process of transition to a market economy whose base year or period has been established in accordance with Decision 9/CP.2 of the Conference of the Parties at its second session shall use that base year or period for the implementation of their commitments under this Article. Any other Party included in Annex I in the process of transition to a market economy which has not yet submitted its first national communication pursuant to Article 12 of the Convention may also notify the Conference of the Parties serving as the meeting of the Parties to this Protocol that it intends to use a historical base year or period other than 1990 for the implementation of its commitments under this Article. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall decide on the acceptance of such notification. 6. Taking into account Article 4, paragraph 6, of the Convention, in the implementation of its commitments under this Protocol in addition to those under this Article, a certain degree of flexibility shall be allowed by the Conference of the Parties serving as the meeting of the Parties to this Protocol to the Parties included in Annex I in the process of transition to a market economy."

<sup>277</sup> In addition, any Party included in Annex I may use 1995 as its base year for hydrofluorocarbons, perfluorocarbons and sulphur hexafluoride for the purpose of calculating the emission reduction targets set out in paragraph 7 of Article 3 of the Kyoto Protocol.

<sup>278</sup> See Article 4(1) of the Kyoto Protocol: "Article 4. 1. Any Parties included in Annex I that have reached an agreement to meet their commitments under Article 3 jointly shall be deemed to have fulfilled those commitments, provided that their total combined anthropogenic emissions of carbon dioxide equivalent of greenhouse gases listed in Annex A do not exceed their assigned amounts calculated in accordance with their quantified emission limitation and reduction commitments set out in Annex B, and in accordance with the provisions of Article 3. The respective level of emission allocated to each of the Parties to the Agreement shall be established in that Agreement."

<sup>279</sup> See section 11 of the Kyoto Protocol: "Article 11. 1. In implementing Article 10, the Parties shall take into account the provisions of Article 4, paragraphs 4, 5, 7, 8 and 9 of the Convention. 2. In the context of the implementation of Article 4, paragraph 1, of the Convention, in accordance with the provisions of Article 4, paragraph 3, and Article 11 of the Convention, and through the entity or entities entrusted with the operation of the financial mechanism of the Convention, the developed country Parties and other developed Parties included in Annex II to the Convention shall: (a); and (b) Also provide the financial resources, including for the transfer of technology, necessary for developing country Parties to meet the total incremental costs agreed to advance the implementation of existing commitments under Article 4, paragraph 1, of the Convention which are covered by Article 10 and which are agreed between a developing country Party and the international entity or entities referred to in Article 11 of the Convention, according to this Article. The implementation of these existing commitments should take into account the need for adequacy and predictability in the flow of funds and the importance of an appropriate division of burdens among developed country Parties. The guidance to the entity or entities entrusted with the operation of the financial mechanism of the Convention in the relevant decisions of the Conference of the Parties, including those agreed prior to the adoption of this Protocol, shall apply mutatis mutandis to the provisions of this paragraph. 3. Developed country Parties and other developed Parties to Annex II to the Convention may also provide, and developing country Parties avail themselves of financial resources for the implementation of Article 10, through bilateral, regional and other multilateral channels."

As for the legal force of the obligation of quantitative limitation on GHG emissions, "*Article 3(1) of the Protocol uses mandatory terms (shall) in relation to the individual targets of the Annex I Parties and is clear and precise, granting the compliance with these limits the character of a binding obligation of result*"<sup>280</sup>. Therefore, the Parties may be sanctioned by the compliance mechanism of the Protocol if they do not meet the reduction targets set forth by the Protocol.

Other relevant obligations of the Annex I Parties, which are not of outcome but conduct obligations, are to establish a national system for the estimation of anthropogenic emissions by sources and removals by sinks of all greenhouse gases subject to the Protocol, in accordance with the Article 5 of the Protocol, and to<sup>281</sup> submit annual inventories of greenhouse gases, as well as national

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<sup>280</sup> BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 172.

<sup>281</sup> See Article 5 of the Kyoto Protocol: "*Article 5. 1. Each Party included in Annex I shall have in place, no later than one year before the beginning of the first commitment period, a national system for the estimation of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol. Guidelines for such national systems, which shall incorporate the methodologies specified in paragraph 2 below, shall be decided by the Conference of the Parties serving as the meeting of the Parties to this Protocol at its first session. 2. The methodologies for estimating anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol shall be those accepted by the Intergovernmental Panel on Climate Change and agreed by the Conference of the Parties at its third session. Where such methodologies are not used, appropriate adjustments shall be applied in accordance with the methodologies agreed upon by the Conference of the Parties serving as the meeting of the Parties to this Protocol at its first session. Based on, inter alia, the work of the Intergovernmental Panel on Climate Change and the opinion provided by the Subsidiary Body for Scientific and Technological Advice, the Conference of the Parties acting as the meeting of the Parties to this Protocol shall regularly review and, as appropriate, review such methodologies and adjustments, taking full account of any relevant decisions of the Conference of the Parties. Any review of methodologies or adjustments shall be used only to verify compliance with commitments under Article 3 in relation to any commitment period adopted after such review. 3. The global warming potentials used to calculate the carbon dioxide equivalence of anthropogenic emissions by sources and removals by sinks of greenhouse gases listed in Annex A shall be those accepted by the Intergovernmental Panel on Climate Change and agreed by the Conference of the Parties at its third session. Based on, inter alia, the work of the Intergovernmental Panel on Climate Change and the opinion provided by the Subsidiary Body for Scientific and Technological Advice, the Conference of the Parties acting as the meeting of the Parties to this Protocol shall regularly review and, as appropriate, review the global warming potential of each of these greenhouse gases, taking full account of any relevant decisions of the Conference of the Parties. Any review of a global warming potential shall apply only to commitments under Article 3 in respect of any commitment period adopted after such review.*".

communications at regular intervals<sup>282</sup>, and the guidelines for both cases are decided by the Conference of the Parties as the meeting of the Parties to the Kyoto Protocol<sup>283</sup>.

Finally, the Parties to the Protocol, notably those listed in Annex I to the UNFCCC (Annex B of the Protocol), still have market mechanisms to assist them in fulfilling their obligations. These mechanisms will be seen below.

### 5.3. Flexibility mechanisms in the Kyoto Protocol

Market mechanisms or flexibilization mechanisms are set out in Articles 6, 12 and 17 of the Kyoto Protocol and were established to facilitate the implementation of the Protocol by Annex I Parties, while allowing limited action by Parties not present in the Annex, but still allowing this last ones to help the achievement<sup>284</sup> of the sustainable development and to contribute to the objectives of the Convention.

There are three mechanisms provided for in the Protocol, two of which are based on projects to be developed by the Parties: 1) Joint Implementation Mechanism; and 2) Clean Development

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<sup>282</sup>See Article 7 of the Kyoto Protocol: "Article 7. 1. Each Party included in Annex I shall incorporate in its annual inventory of anthropogenic emissions by sources and removals by sinks of greenhouse gases not controlled by the Montreal Protocol, submitted in accordance with the relevant decisions of the Conference of the Parties, such additional information as may be necessary to ensure compliance with Article 3, to be determined in accordance with paragraph 4 below. 2. Each Party included in Annex I shall incorporate in its national communication, submitted in accordance with Article 12 of the Convention, such supplementary information as may be necessary to demonstrate compliance with its commitments under this Protocol, to be determined in accordance with paragraph 4 below. 3. Each Party included in Annex I shall submit the information required under paragraph 1 above annually, beginning with the first inventory due under the Convention for the first year of the commitment period after the entry into force of this Protocol for that Party. Each of these Parties shall submit the information required by paragraph 2 above as part of the first national communication due under the Convention after the entry into force of this Protocol and after the adoption of the guidelines provided for in paragraph 4 below. The frequency of the subsequent submission of information required by this Article shall be determined by the Conference of the Parties serving as the meeting of the Parties to this Protocol, taking into account any schedule for the submission of national communications decided by the Conference of the Parties. 4. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall adopt at its first session, and periodically review thereafter, guidelines for the preparation of the information required by this Article, taking into account the guidelines for the preparation of communications of the Parties included in Annex I adopted by the Conference of the Parties. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall also, before the first commitment period, decide on the modalities for the accounting of the amounts allocated."

<sup>283</sup> These guidelines were defined in the decisions known as the "Marrakesh Accords".

<sup>284</sup> PEEL and SANDS use the terminology "flexibilization mechanisms", while BODANSKY, BRUNNÉE and RAJAMANI use the term "market mechanisms".

Mechanism (CDM); and the third mechanism that is the emissions trading or GHG emission reduction bonds<sup>285</sup>.

These credits, or carbon bonds, have an equal metric of one ton of CO<sub>2</sub> and there are four different modalities of these in the flexibilization mechanisms, these being: 1) Unit of assigned quantity (AAU), created from a result of reduction of anthropogenic emissions by sources of a Party listed in Annex I; 2) Removal Unit (RMU), generated by Annex I Parties from afforestation, reforestation, forest management and other GHG removal sink activities; 3) Emission Reduction Unit (ERU), created from joint implementation projects of Annex B Parties; and 4) Certified emission reductions (CERs), generated from projects under the clean development mechanism (CDM)<sup>286</sup> <sup>287</sup>  
<sup>288</sup>.

### **5.3.1. Joint Implementation Mechanism**

Article 6 of the Protocol establishes the mechanism called the Joint Implementation Mechanism. Through the Joint Implementation Mechanism, any Party included in Annex I may transfer to, or acquire from any other Party, emission reduction units (ERUs) resulting from anthropogenic emission reduction projects by sources or anthropogenic removals of GHG sinks, in any sector of the economy, in order to meet its emission reduction targets set out in<sup>289</sup> Article 3 of the Protocol.

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<sup>285</sup> The inclusion of these free market-based mechanisms was a condition imposed by the United States of America and were justified with the idea that the reduction in emissions has the same effect on global warming, regardless of where they occur, and that, therefore, the use of mechanisms that would enable a better cost-benefit in reducing emissions would be the correct option, allowing greater flexibility for Parties to achieve their binding emission reduction targets, since these Parties could effectively purchase bonds, or carbon credits, from third parties and then these credits would be used to prove compliance with their obligations. See: DEPLEDGE, Joanna. *Tracing the origins of the kyoto Protocol: an article-by-article textual history*. In: BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 179.

<sup>286</sup> These land use activities are referred to by the acronym LULUCF and correspond to the English term "Land use, *land use change and forestry*".

<sup>287</sup> A carbon sink is a natural storehouse—ocean, forest, and soil—that absorbs and captures carbon dioxide (CO<sub>2</sub>) from the atmosphere, reducing the presence of greenhouse gases in the air.

<sup>288</sup> BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 180.

<sup>289</sup> See Article 6(1) of the Kyoto Protocol: "*Article 6. 1. For the purpose of fulfilling its commitments under Article 3, any Party included in Annex I may transfer or acquire from any other Party emission reduction units resulting from projects aimed at reducing anthropogenic emissions by sources or increasing anthropogenic removals by sinks of greenhouse gases in any sector of the economy, provided that: (a) any such project has the approval of the Parties concerned; (b) Any such project provides for a reduction in emissions by sources, or an improvement in removals by sinks, which is in addition to any other that would otherwise occur; (c) it does not acquire emission reduction units if it is not in conformity with its obligations under Articles 5 and 7; (d) The acquisition of emission reduction units shall be complementary to domestic shares for the purpose of fulfilling the commitments set out in Article 3.*".

The Joint Implementation Mechanism "*involves only the transfer of carbon credits between Annex I Parties, and not the creation of additional emission units, which could be calculated in the global effort to reduce emissions.*" In this case, the Parties may jointly achieve their goals, provided that under the specific terms of the Protocol and by the Conference of the Parties acting as the meeting of the Parties to the Kyoto Protocol<sup>290 291</sup>.

In addition, double counting is prohibited because emission reduction bonds that a Party acquires from another Party must be added to the amount allocated to the acquiring Party and subtracted from the selling Party<sup>292 293</sup>.

And this time, the guidelines for the implementation of Article 6 of the protocol were established first through the decisions known as the "*Marrakesh Agreements*", signed at the 7th Conference of the Parties (COP7) and later by Decision 9/CMP.1 of the Conference of the Parties acting as the meeting of the Parties to the Kyoto Protocol<sup>294</sup>.

Finally, the Protocol provides that the acquisition of carbon credits through the Joint Implementation Mechanism should be complementary to the domestic actions taken by the Parties, so that this mechanism is auxiliary and not effectively the main source for the purpose of fulfilling the commitments provided by the Protocol<sup>295 296</sup>.

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<sup>290</sup> BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, pg. 181.

<sup>291</sup> See Article 6(2) and (3) of the Kyoto Protocol: "*Article 6. 2. The Conference of the Parties serving as the meeting of the Parties to this Protocol may, at its first session or as soon as practicable, develop guidelines for the implementation of this Article, including for verification and reporting. 3. A Party included in Annex I may authorise legal persons to participate, under its responsibility, in actions leading to the generation, transfer or acquisition, in accordance with this Article, of emission reduction units.*"

<sup>292</sup> See Article 3(10) of the Kyoto Protocol: "*Article 3. 10. Any emission reduction units, or any part of an assigned value, that a Party acquires from another Party in accordance with the provisions of Article 6 or Article 17 shall be added to the value assigned to the acquiring Party.*"

<sup>293</sup> See Article 3(11) of the Kyoto Protocol: "*Article 11. Any emission reduction units, or any part of an allocated amount, that a Party transfers to another Party in accordance with the provisions of Article 6 or Article 17 shall be subtracted from the amount allocated to the transferring Party.*"

<sup>294</sup> Decision 9/CMP.1. FCCC/KP/CMP/2005/8/Add.2

<sup>295</sup> BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 182.

<sup>296</sup> See Article 6(1)(d) of the Kyoto Protocol: "*Article 6. 1. For the purpose of fulfilling its commitments under Article 3, any Party included in Annex I may transfer or acquire from any other Party emission reduction units resulting from projects aimed at reducing anthropogenic emissions by sources or increasing anthropogenic removals by sinks of greenhouse gases in any sector of the economy, provided that: (d) The acquisition of emission reduction units shall be complementary to domestic actions for the purpose of fulfilling the commitments set forth in Article 3.*"

### 5.3.2. Clean Development Mechanism (CDM)

The Clean Development Mechanism was established by Article 12 of the Kyoto Protocol. It stated this CDM objective is to "*assist Parties not included in Annex I to achieve sustainable development and contribute to the ultimate goal of the Convention, and to assist Parties included in Annex I to achieve compliance with their quantified commitments to limit and reduce emissions under Article 3.*"

Through this mechanism, Parties of the Protocol not included in Annex I, without binding GHG emission reduction obligations, may develop projects that result in certified emission reductions and Annex I Parties with emission reduction obligations may acquire these carbon credits and use them for the calculation of the compliance with their emission limitation and reduction targets<sup>297</sup>.

It is up to the Conference of the Parties acting as the meeting of the Parties of the Kyoto Protocol to designate the certifying bodies and develop the regulation of this mechanism, which also occurred in the decisions of the "*Marrakesh Agreements*", which established strict rules for this mechanism<sup>298</sup>.

Finally, the Clean Development Mechanism is the only one of the flexibility mechanisms that allows the direct participation of the Parties not foreseen in the annexes. This way, it includes them in the effort to reduce anthropogenic GHG emissions and their removal from the atmosphere. Also, this mechanism has been included in the protocol precisely from proposals from developing countries, notably Brazil and China<sup>299</sup>.

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<sup>297</sup> See Article 12(3)(b) of the Kyoto Protocol: "*Article 12. 3. Under the clean development mechanism: (a) Parties not included in Annex I shall benefit from project activities that result in certified emission reductions; and (b) Parties included in Annex I may use the certified emission reductions resulting from such project activities to contribute to the fulfilment of part of their quantified emission limitation and reduction commitments under Article 3, as determined by the Conference of the Parties serving as the meeting of the Parties to this Protocol.*"

<sup>298</sup> BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 183.

<sup>299</sup> JOHNSON, Ken. *Brazil and the politics of the climate change negotiations*. The Journal of Environment and Development. Vol. 10(2), 2001, p. 178. In: BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 182.

### 5.3.3. Carbon Market or Emissions Trading

The Carbon Market or Emission Trading is provided for in Article 17 of the Kyoto Protocol. Under this mechanism, the Parties listed in Annex I to the UNFCCC may use emissions trading for the purpose of fulfilling their commitments under Article 3 of the Protocol.

It is up to the Conference of the Parties to establish the principles, modalities, rules and guidelines, in particular for verification and accountability of the emissions trading, which was also done in the "*Marrakesh Accords*"<sup>300</sup>, as well as for the other mechanisms<sup>301</sup>.

As in the case of the Joint Implementation Mechanism, Article 17 provides that the use of emissions trading shall be complementary to the domestic actions of the Parties and prohibits double counting by providing that emission reduction bonds that a Party acquires from another Party are added to the amount allocated to the acquiring Party and subtracted from the selling Party<sup>302</sup>.

## 5.4. Transparency and implementation of the Kyoto Protocol

There are two factors that are key to ensuring the effectiveness of the Kyoto Protocol. First, that the Parties comply with the provisions of the Protocol and their commitments, and second, that the emissions data presented and used to assess compliance are reliable, as are the methodologies involved<sup>303</sup>.

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<sup>300</sup> See Article 17 of the Kyoto Protocol: "*Article 17. The Conference of the Parties shall define the relevant principles, modalities, rules and guidelines, in particular for verification, reporting and responsibility for emissions trading. Parties included in Annex B may participate in emissions trading for the purpose of fulfilling their commitments under Article 3. Any such trade shall be complementary to domestic actions to meet quantified emission limitation and reduction commitments under this Article.*"

<sup>301</sup> Decision 11/CMP.1. FCCC/KP/CMP/2005/8/Add.2

<sup>302</sup> See Article 3(10) and (11) of the Kyoto Protocol: "*Article 3. 10. Any emission reduction units, or any part of an assigned value, that a Party acquires from another Party in accordance with the provisions of Article 6 or Article 17 shall be added to the value assigned to the acquiring Party. 11. Any emission reduction units, or any part of an allocated amount, that a Party transfers to another Party in accordance with the provisions of Article 6 or Article 17 shall be subtracted from the amount allocated to the transferring Party.*"

<sup>303</sup> UNFCCC. *Guidelines under Articles 5, 7 and 8: Methodological Issues, Reporting and Review under the Kyoto Protocol*. UNFCCC. Disponível em <https://unfccc.int/process/transparency-and-reporting/reporting-and-review-under-the-kyoto-protocol/overview/guidelines-under-articles-5-7-and-8-methodological-issues-reporting-and-review-under-the-kyoto-1>. Accessed in June 22, 2021.



In fact, any compliance system requires a strong system for measuring, reporting and verifying the information provided and, this time, in its articles 5, 7 and 8, the Kyoto Protocol provides for the communication and review of information provided by Annex I Parties, as well as national systems for the preparation of greenhouse gas inventories and the methodology to be applied to them<sup>304</sup>.

In its turn, Article 18 of the Protocol established that it would be for the Conference of the Parties serving as the meeting of the Parties of the Kyoto Protocol to establish a compliance mechanism, which would include a list of consequences for non-compliance with obligations under the Protocol<sup>305</sup>.

As it turns out, the protocol provides, in addition to the system of measurement, communication and verification of the information and results presented by the Parties, a compliance mechanism that must provide for "*consequences*" for the Parties that fail to comply with their obligations, "*taking into account the cause, type, degree and frequency of non-compliance*" of these, being, therefore, a mechanism that has a punitive/sanctioning character.

Below we will talk about the main provisions of the Kyoto Protocol that form the legal framework in matters of communication, revision and compliance.

#### ***5.4.1. Measurement, communication and verification***

The National systems and methodologies for the preparation of greenhouse gas inventories, the reporting by Parties and the verification of this information provided are provided for in Articles 5, 7 and 8 of the Protocol.

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<sup>304</sup> BRUNNÉE, Jutta. *A fine balance: facilitation and enforcement in the design of a compliance system for the Kyoto Protocol*. Tulane Environmental Law Journal, Vol. 13(2), 2000, p. 223-241. In: BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 193.

<sup>305</sup> See Article 18 of the Kyoto Protocol: "*Article 18. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session, adopt appropriate and effective procedures and mechanisms to determine and deal with cases of non-compliance with the provisions of this Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance. Any procedures and mechanisms under this Article which entail binding consequences shall be adopted by means of an amendment to this Protocol.*"

Article 5 obliges Annex I Parties to establish national systems for the estimation of anthropogenic emissions by sources and removals by sinks of greenhouse gases not regulated by the Montreal Protocol<sup>306</sup>.

The guidelines and methodologies for estimating anthropogenic emissions by sources and removals by sinks of greenhouse gases *in casu* shall be those accepted by the Intergovernmental Panel on Climate Change (IPCC) and decided by the Conference of the Parties serving as the meeting of the Parties to the Protocol. This regulation was made by the Conference of the Parties serving as the meeting of the Parties to the Protocol through the "Marrakesh Agreements"<sup>307 308 309 310</sup>.

Article 7 requires Annex I Parties to include in their annual greenhouse gas inventories, as well as in their national communications, both of which are already provided for in the Convention, supplementary information to demonstrate compliance with the Protocol. It also provides for additional accounting procedures to track and record the participations and transactions of the Parties to the Protocol in transactions relating to the flexibilization or carbon market mechanisms<sup>311 312 313</sup>

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<sup>306</sup> See Article 5(1) of the Kyoto Protocol: "Article 5. 1. Each Party included in Annex I shall have in place, not later than one year before the beginning of the first commitment period, a national system for the estimation of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol. Guidelines for such national systems, which shall incorporate the methodologies specified in paragraph 2 below, shall be decided by the Conference of the Parties serving as the meeting of the Parties to this Protocol at its first session."

<sup>307</sup> See Article 5(2) of the Kyoto Protocol: "Article 5. 2. The methodologies for estimating anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol shall be those accepted by the Intergovernmental Panel on Climate Change and agreed by the Conference of the Parties at its third session. Where such methodologies are not used, appropriate adjustments shall be applied in accordance with the methodologies agreed upon by the Conference of the Parties serving as the meeting of the Parties to this Protocol at its first session. Based on, inter alia, the work of the Intergovernmental Panel on Climate Change and the opinion provided by the Subsidiary Body for Scientific and Technological Advice, the Conference of the Parties acting as the meeting of the Parties to this Protocol shall regularly review and, as appropriate, review such methodologies and adjustments, taking full account of any relevant decisions of the Conference of the Parties. Any review of methodologies or adjustments shall be used only to verify compliance with commitments under Article 3 in relation to any commitment period adopted after such review."

<sup>308</sup> Article 5(3) of the Kyoto Protocol further provides that "the global warming potentials used to calculate the carbon dioxide equivalence of anthropogenic emissions by sources and removals by sinks of greenhouse gases listed in Annex A shall be those accepted by the Intergovernmental Panel on Climate Change and agreed upon by the Conference of the Parties ..."

<sup>309</sup> Decision 19/CMP.1 FCCC/KP/CMP/2005/8/Add.2.

<sup>310</sup> As BODANSKY, BRUNNÉE and RAJAMANI teach, "the national monitoring systems required by Article 5 are intended to facilitate the preparation by each part of Annex B of an annual inventory of greenhouse gas emissions and removals, required by Article 7. These requirements allow the assessment of the parties' compliance with their emission reduction commitments. The inventory and reporting commitments then provide a crucial interface between the parties' implementation efforts and the conformity assessment process.". In: BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 194.

<sup>311</sup> See Article 7(1) of the Kyoto Protocol.

<sup>312</sup> See Article 7(2) of the Kyoto Protocol.

<sup>313</sup> See Article 4(1) of the UNFCCC.

<sup>314</sup>. The regulation of the procedures and principles applicable to these obligations of the Parties also took place via the decisions of the "*Marrakesh Agreements*" <sup>315</sup> <sup>316</sup> <sup>317</sup>.

Finally, national inventories and communications submitted by Annex I Parties shall undergo *per-review* by teams of technical experts, as provided for in Article 8 of the Kyoto Protocol<sup>318</sup>.

As regards the objective of this revision, Article 8(3) of the Protocol provides that

*"The review process shall provide a complete and comprehensive technical assessment of all aspects of a Party's implementation of this Protocol. The expert review teams shall prepare a report to the Conference of the Parties acting as the meeting of the Parties to this Protocol, assessing the implementation of the Party's commitments and identifying any potential problems and factors influencing the fulfilment of the commitments. The reports shall be distributed by the Secretariat to all Parties to the Convention. The Secretariat shall list the implementation issues indicated in such reports for further consideration by the Conference of the Parties serving as the meeting of the Parties to this Protocol."*

This time, the national inventories and communications submitted by each Annex I Party must undergo a "*full and comprehensive technical assessment of all aspects of the implementation of the Protocol*" and it is for the Conference of the Parties serving as the meeting of the Parties to the Protocol to consider the implementation issues presented in the report issued by the teams of technical experts on the implementation of the Protocol by each Party.

Finally, the technical review in question does not have a sanctioning or punitive character, serving as a technical arm to identify problems and issues of implementation of the Protocol, since the Kyoto Protocol established a specific compliance mechanism, which will be seen below.

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<sup>314</sup> See Article 7(2) and (3) of the Kyoto Protocol.

<sup>315</sup> See Article 7(4) of the Kyoto Protocol.

<sup>316</sup> Decision 15/CMP.1 FCCC/KP/CMP/2005/8/Add.2.

<sup>317</sup> Thus, Articles 5 and 7 of the Protocol complement each other, the first providing for the estimation of GHGs emitted and removed from the atmosphere, while the second deals with the information to be provided by these Parties, in the form of annual inventories of greenhouse gases and national communications.

<sup>318</sup> See Article 8(2) of the Kyoto Protocol: "*Article 8. Paragraph 2 - Expert evaluation teams shall be coordinated by the Secretariat and composed of experts selected from among those appointed by the Parties to the Convention and, as the case may be, by intergovernmental organizations, in accordance with the guidelines provided for this purpose by the Conference of the Parties.*".

#### 5.4.2. Compliance mechanism

Article 18 of the Kyoto Protocol provides for the establishment by the Conference of the Parties serving as the meeting of the Parties to the Protocol, at its first session, of a *compliance* mechanism that determines "*consequences*" for Parties that fail to comply with their obligations, and is therefore a mechanism of a sanctioning nature.

The regulation of this mechanism took place via the "*Marrakesh Accords*", where a Compliance Committee was established, to serve as a compliance mechanism<sup>319</sup> with two branches, one with punitive and the other with facilitative nature <sup>320 321 322</sup>.

Also, both branches of the Compliance Committee are open to access by all Parties to the Protocol, as well as by teams of technical experts and the Conference of the Parties as the meeting of the Parties to the Protocol <sup>323 324</sup>.

The facilitating branch has a strand which, taking into account the principle of common but differentiated responsibility and respective capabilities, should decide on the provision of advice and facilitation of assistance to individual Parties with regard to the implementation of the Protocol; facilitating technical and financial assistance to any interested Party, including technology transfer and capacity building from sources other than those established under the Convention and Protocol for developing countries<sup>325</sup>; facilitation of financial and technical assistance, including technology

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<sup>319</sup> Decision 27/CMP.1. FCCC/KP/CMP/2005/8/Add.3

<sup>320</sup> PEEL, Jacqueline; SANDS, Philippe. *Principles of International Environmental Law*. 4<sup>th</sup> Ed., Cambridge, 2018, pg. 316.

<sup>321</sup> See Decision 27/CMP.1- Annex – II. 2: "*The Committee shall function through a plenary, a table and two branches, namely, the facilitating branch and the executing branch.*". Decision 27/CMP.1- Annex – XIV. FCCC/KP/CMP/2005/8/Add.3.

<sup>322</sup> BROWN explains that "*the two branches of the Compliance Committee consider 'implementation issues'; these can be raised by expert review teams in accordance with Article 8 of the Kyoto Protocol; by any State Party to the Kyoto Protocol with respect to itself; or by any State Party in relation to the performance by another State party of its obligations.*". In: BROWN, Chester. *International, Mixed, and Private Disputes Arising Under the Kyoto Protocol*. Journal of International Dispute Settlement, Vol. 1(2), Oxford University Press, 2010, p. 455.

<sup>323</sup> See Decision 27/CMP.1- Annex – VIII – 3: "*Each branch shall base its deliberations on any relevant information provided by: (a) Reports of expert review teams in accordance with Article 8 of the Protocol; (b) the Party concerned; (c) the Party that has submitted an implementation issue in relation to another Party; (d) Reports of the Conference of the Parties, the Conference of the Parties serving as the meeting of the Parties to the Protocol and the subsidiary bodies of the Convention and the Protocol; and (e) The other branch.*". Decision 27/CMP.1- Annex – XIV. FCCC/KP/CMP/2005/8/Add.3.

<sup>324</sup> However, their competencies are different, which explains the possibility of communication of implementation issues by one branch to the other.

<sup>325</sup> Decision 27/CMP.1- Annex – XIV. FCCC/KP/CMP/2005/8/Add.3.

transfer and capacity building; and the formulation of recommendations to the interested Party that submits questions.

Therefore, the facilitating branch might act on matters involving any of the Parties to the Protocol without, however, having the competence to impose punitive measures, and it is responsible for advising, facilitating, assisting and recommending measures to the Parties so that they can fulfill their obligations and implement the Kyoto Protocol.

On the other hand, the punitive branch of the Compliance Committee exercises its powers exclusively on the Parties included in Annex I to the Convention, as determined in the Berlin Mandate, which prohibited new binding obligations for the Parties to the Convention not listed in the Annex<sup>326</sup>.

Sanctions imposed on Annex I Parties by the punitive arm of the Compliance Committee may include a declaration of non-compliance, suspension of that Party's eligibility to participate in the market or the flexibility mechanisms, and penalties may also be applied in respect of GHG emission reduction levels attributed to the non-compliant Party in future commitment periods<sup>327</sup>.

This time, there is a bifunctional *compliance* system in the Kyoto Protocol, with a facilitating branch and a punitive branch, which act together to ensure the compliance of the Parties with the provisions of the protocol.

Therefore, despite the innovative and ambitious punitive mechanism, in terms of compliance<sup>328 329</sup> in the legal regime of climate change, the punitive branch of the compliance mechanism adopted under the Kyoto Protocol was not transposed to the *compliance* mechanism of the Paris Agreement, which opted for a mechanism of only facilitating character, as will be seen later.

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<sup>326</sup> Decision 27/CMP.1. Annex - XVI. FCCC/KP/CMP/2005/8/Add.3.

<sup>327</sup> Decision 27/CMP.1. Annex - XV. 5. FCCC/KP/CMP/2005/8/Add.3.

<sup>328</sup>In this sense, BODANSKY, BRUNNÉE and RAJAMANI state that "the most distinct characteristics of the compliance mechanism of the *Kyoto Protocol* are closely connected to the binding emissions targets of the protocol, MRV regime, market mechanisms and clear differentiation between the parties of Annex I and non-Annex I. Therefore, the compliance system of the protocol should not exert significant influence on the development of the implementation and compliance mechanism of the *Paris Agreement*, since the *Paris Agreement* relies on "nationally determined contributions" that do not set legally binding targets and are applicable to all, rather than just developed states... with regard to the *Paris Agreement*, the facilitating aspects of the *Kyoto* procedures and mechanisms constitute a more likely repository of ideas for the design of the agreement mechanism to "facilitate implementation" and "promote compliance". In: BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 200.

<sup>329</sup> LEFEBER, René; OBERTHÜR, Sebastian. *Holding countries to account: The Kyoto Protocol's compliance system revisited after four years of experience*. Climate Law, IOS Press, 2010, p. 157.

Nevertheless, the Parties of the Kyoto Protocol are subject to the mechanisms provided for the procedures before the Compliance Committee, and the Parties present in Annex I to the Convention are subject to the sanctions determined by the punitive branch of the Committee, while the other Parties are only reached by the facilitating branch of the compliance mechanism.

### **5.5. Final considerations**

As seen, the Kyoto Protocol was an innovative instrument in the legal regime of climate change. By providing for mandatory compliance outcome obligations and a punitive compliance mechanism, the protocol sought to implement the UNFCCC efficiently.

However, the results were not the most satisfactory, since States without binding obligations, i.e. developing States, began to emit more and more GHGs, making the impact of the reductions achieved by the Parties to Annex I to the UNFCCC not sufficient to reduce the levels of these gases in the atmosphere. Moreover, the absence of major developed states has undermined the effectiveness of the instrument.

Finally, it seems to us that the differentiation of obligations between developed and developing States no longer reflects the global reality, so a more horizontal approach was adopted by the International Community in the legal instrument adopted subsequently, namely the Paris Agreement. Unfortunately, as we shall see, this new instrument has not yet adopted at least none of the successes of the Kyoto Protocol, notably the binding outcome obligations and the sanctioning *compliance* mechanism.

## 6. PARIS AGREEMENT

The beginning of the development of the Paris Agreement took place from Decision 1/CP.17, taken at the 17th session of the Conference of the Parties of the UNFCCC, in Durban, South Africa, in 2011, in which it was decided to "*Adopt a protocol, another legal instrument, or an agreed outcome with legal force under the Convention applicable to all Parties*"<sup>330</sup>. The process would be carried out through the work of a subsidiary body established for this purpose, known as the <sup>331</sup>*Ad Hoc Working Group on the Durban Platform for Advanced Action (ADP)*. The ADP was supposed to finish its work no later than 2015.

In the preamble to the Decision, the Parties to the Convention strongly acknowledge the seriousness of the danger posed by climate change. The terminology adopted in the preamble to the decision, even if it has no binding force, according to which climate change poses an urgent and potentially irreversible threat to human societies and the planet, is remarkable<sup>332 333</sup>.

With regard to climate change as a common concern of humanity and the relationship with human rights, the preamble to the Paris Agreement recognizes that climate change is a common concern of humanity and that "*Parties should, in taking action to address climate change, respect, promote and consider their respective human rights obligations, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and persons in vulnerable situations and the right to development, as well as gender equality, women's empowerment and intergenerational equity.*"<sup>334</sup>.

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<sup>330</sup> Decision 1/CP.17. FCCC/CP/2011/9/Add.1.

<sup>331</sup> See Decision 1/CP.17. Paragraph 2: "*Decides also to launch a process to develop a protocol, other legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties, through a subsidiary body under the Convention established herein and to be known as the Ad Hoc Working Group on the Durban Platform for Enhanced Action;*"

<sup>332</sup> "Recognizing that climate change poses an urgent and *potentially irreversible threat to human societies and the planet and therefore requires an urgent approach by all Parties, and recognizing that the global nature of climate change requires the broadest possible cooperation from all countries*"..."*Noting with great concern the significant gap between the aggregate effect of the Parties' mitigation pledges in terms of global annual emissions of greenhouse gases by 2020 and aggregate emission pathways consistent with the likelihood of keeping the increase in global average temperature below 2°C or 1.5°C above pre-industrial levels.*". See: Decision 1/CP.17. FCCC/CP/2011/9/Add.1.

<sup>333</sup> At COP26 the Glasgow Climate Pact was signed, in which the Parties of the UNFCCC state their concern about the fact that, according to the IPCC, human activities have already caused a 1.1°C increase in temperature since the industrial revolution and that this increase is already felt in all regions of the globe.

<sup>334</sup> BOYLE, Alan. *Climate Change, The Paris Agreement and Human Rights. International and Comparative Law Quarterly*, British Institute of International and Comparative Law, Cambridge University Press, 2018, p. 759-777.

In this sense, although climate change is not classified as a threat to peace, it remains evident that, in the view of the International Community, it could irreversibly threaten something as considerable as or even greater than peace, that is, human society and our planet, and that its approach must be done quite holistically.

That said, considering Decision 1/CP.17 and the work of the *Ad Hoc* Working Group, the Paris Agreement, a long-term, balanced and virtually universal agreement, was approved at the 21st Conference of the Parties in Paris in 2015<sup>335</sup>.

The Paris Agreement, or simply the "*Agreement*", was widely celebrated at the time of its adoption because, although it did not remedy the climate crisis, it was a considerable achievement of international diplomacy, as exposed by BODANSK, BRUNNÉE and RAJAMANI, according to which

*"U.N. Secretary-General Ban Ki-Moon characterized the 2015 Paris Agreement, adopted after years of deeply contentious multilateral negotiations, as a "monumental triumph." Others, in the same vein, hailed the Agreement as "historic," a "milestone," the "world's greatest diplomatic success" and "big, big deal." To the extent that these claims are true, it is not because the Paris Agreement resolves the climate crisis decisively or is new in its approach, but because the agreement represents a considerable achievement in multilateral diplomacy."*<sup>336</sup>

However, the practical outcome of the Paris Agreement is disputed by some who consider that its provisions have little or no binding force and are more geared towards a direction of the Parties than towards an effective outcome based on binding obligations<sup>337 338</sup>.

Nevertheless, BODANSK, BRUNNÉE and RAJAMANI point out that the Paris Agreement

*"Sets an ambitious direction for the climate regime and complements that direction with a set of basic obligations common to all countries, including legally binding*

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<sup>335</sup> BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 209.

<sup>336</sup> *Ibis* above.

<sup>337</sup> FALK, Richard. *Voluntary International Law and the Paris Agreement*. 2016. In: <https://richard-falk.org/2016/01/16/voluntary-international-law-and-the-paris-agreement/>. Accessed in June 30, 2021.

<sup>338</sup> RAJAMANI, Lavanya. *The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations*. Journal of Environmental Law. Oxford University Press, 2016, p. 337.



*conduct obligations in relation to each party's nationally determined mitigation contributions and an expectation of progression over time. It also establishes a common framework of transparency and accountability and an iterative process, in which the parties take stock every five years of their collective progress and propose contributions to emissions reductions for the next five-year period."*<sup>339</sup>

In the institutional field, the Paris Agreement provides that the Conference of the Parties, the supreme organ of the Convention, will act as the meeting of the Parties to the Agreement, and it will be up to the latter to analyze the implementation of the Agreement and take the necessary decisions to promote its effective implementation, creating the necessary subsidiary bodies and exercising other functions necessary for its implementation<sup>340 341</sup>.

The Secretariat established by Article 8 of the Convention also functions as the Secretariat of the Paris Agreement, and the Subsidiary Body for Scientific and Technological Consultation and the Subsidiary Body for Implementation, established in<sup>342</sup> Articles 9 and 10 of the Convention, serve as subsidiary bodies of the Agreement. It should also be noted that the Financial Mechanism provided for in the UNFCCC is also used by the Paris Agreement as its financial mechanism<sup>343 344 345</sup>.

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<sup>339</sup> BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 210.

<sup>340</sup> See Article 16(1) of the Paris Agreement: "Article 16. No. 1. The Conference of the Parties, the supreme organ of the Convention, shall act as the meeting of the Parties to this Agreement."

<sup>341</sup> See Article 16(4) of the Paris Agreement: "Article 16. No. 4. The Conference of the Parties serving as the meeting of the Parties to the Paris Agreement shall regularly review the implementation of this Agreement and shall, within its mandate, take the decisions necessary to promote its effective implementation. It shall exercise the functions assigned to it by this Agreement and shall: (a) Establish such subsidiary bodies as may be necessary for the implementation of this Agreement; and (b) Perform such other functions as may be necessary for the implementation of this Agreement."

<sup>342</sup> See Article 17(1) of the Paris Agreement: "Article 17. No. 1. The secretariat established by Article 8 of the Convention shall serve as the secretariat for this Agreement."

<sup>343</sup> See Article 18(1) of the Paris Agreement: "Article 18. No. 1. The Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for Implementation established in Articles 9 and 10 of the Convention shall serve, respectively, as the Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for the Implementation of this Agreement. The provisions of the Convention relating to the functioning of these two bodies shall apply mutatis mutandis to this Agreement. Sessions of the meetings of the Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for the Implementation of this Agreement shall be held in conjunction with the meetings, respectively, of the Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for the Implementation of the Convention."

<sup>344</sup> Other subsidiary bodies or other institutional arrangements established by or under the Convention may be established by decision of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, as provided for in Article 19 of the Paris Agreement.

<sup>345</sup> See Articles 9(8) and 19(1) of the Paris Agreement.

In addition, provisions of the Convention on the adoption of amendments to the Convention, on the adoption and amendment of the Annexes to the Convention and on the settlement of conflicts, have also been incorporated into the Paris Agreement<sup>346 347 348</sup>.

Below we will look at the main provisions of the Paris Agreement.

### 6.1. Form and legal force of the provisions of the Paris Agreement

The legal form of the Paris Agreement was a sensitive issue from the beginning of the negotiations of what would become the Agreement. The options ranged from *hard law* instruments, such as the treaty and protocols, to *soft law*, such as COP decisions<sup>349</sup>.

The Paris Agreement is, from the point of view of international law, a treaty, as provided for in the Vienna Convention on the Law of Treaties. It is called the Paris Agreement and not the Paris Protocol, due to the political sensitivities of the United States of America, and wasn't explicitly adopted under Article 17 of the UNFCCC, which provides for the Protocols. In any case, the nomenclature of the instrument is legally irrelevant<sup>350 351</sup>.

In this sense, BODANSKY, BRUNNÉE and RAJAMANI explain that

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<sup>346</sup> See Section 22 of the Paris Agreement: "Article 22. The provisions of Article 15 of the Convention on the adoption of amendments to the Convention shall apply *mutatis mutandis* to this Agreement."

<sup>347</sup> See Section 23 of the Paris Agreement: "Article 23. No. 1. The provisions of Article 16 of the Convention on the adoption and amendment of the Annexes to the Convention shall apply *mutatis mutandis* to this Agreement. 2. The Annexes to this Agreement shall form an integral part thereof and, unless expressly stated otherwise, a reference to this Agreement shall at the same time constitute a reference to its Annexes. Those annexes should be restricted to lists, forms and any other material of a descriptive nature having a scientific, technical, procedural or administrative character."

<sup>348</sup> See Section 24 of the Paris Agreement: "Article 24. The provisions of Article 14 of the Convention on the Settlement of Disputes shall apply *mutatis mutandis* to this Agreement."

<sup>349</sup> "The Alliance of Small Island States (SIDS) and other vulnerable countries have long argued that anything short of a legally binding instrument would be an affront to their existential crisis. The European Union (EU), the United States (US) and other developed countries have also consistently supported a legally binding global and comprehensive agreement under the UNFCCC. Brazil, China and India, concerned about the restrictions of a new legal agreement on their development prospects, were initially reluctant to endorse the request for a legally binding instrument, but in the final hours of the 2011 Durban conference,..., only India remained steadfast in its opposition to such an instrument... Eventually, the EU prevailed..." See: BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 210.

<sup>350</sup> See Article 2 of the VCLT.

<sup>351</sup> BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 212.

*"The Paris Agreement is a treaty adopted under the United Nations Framework Convention on Climate Change. As such, the provisions of the UNFCCC that apply to "related legal instruments" apply to the Paris Agreement, including the ultimate objective of the UNFCCC. Furthermore, Article 2 of the Paris Agreement binds the purpose of the Agreement to improving the implementation of the Framework Convention."*<sup>352</sup>

To entry into force, the Agreement provided for the need of the ratification, acceptance, approval or accession of at least 55 Parties of the Convention that collectively accounted for at least 55% of total global greenhouse gas emissions, constituting a "*double trigger*"<sup>353 354</sup>, along the same lines as the Kyoto Protocol. In addition, it was also provided that at any time after three years from the date of entry into force of the Agreement for a Party, the Party might withdraw from the Agreement and that no reservation to the instrument would be accepted<sup>355 356 357 358</sup>.

Currently, adherence to the Paris Agreement is virtually universal, with 195 signatories and 191 Parties in the year 2021. This time, as an international treaty in force, of virtually universal adherence and linked to the UNFCCC, the Paris Agreement has provisions that vary across the spectrum of legal force (*hard law, soft law and non-law*)<sup>359 360</sup>, with each provision of the Agreement

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<sup>352</sup> *Ibis* above.

<sup>353</sup> The Paris Agreement was opened for signature on 22 April 2016 (Earth Day) and was signed by 175 Parties on the same day. It entered into force on November 4, 2016.

<sup>354</sup> See Article 21(1) of the Paris Agreement: "*Article 21. 1. This Agreement shall enter into force on the thirtieth day after the date on which at least 55 Parties to the Convention accounting in total for at least an estimated 55% of total global greenhouse gas emissions have deposited their instruments of ratification, acceptance, approval or accession.*".

<sup>355</sup> BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 247.

<sup>356</sup> See Article 28(1) of the Paris Agreement: "*Article 28. 1. At any time after three years from the date on which this Agreement has entered into force for a Party, that Party may withdraw from this Agreement by written notification to the Depositary.*".

<sup>357</sup> This was the case in the United States of America after the election of Donald Trump. This fact exposed the fragility of the Agreement and the International Community in the absence of the largest economic power and major emitter of greenhouse gases in the fight against climate change. The U.S. has become again a party to the Paris Agreement in 2021, following Joe Biden's victory in the presidential election.

<sup>358</sup> See Article 27 of the Paris Agreement: "*Article 27. No reservation may be made to this Agreement.*".

<sup>359</sup> UNFCCC. *Paris Agreement - Status of Ratification*. Available at: <https://unfccc.int/process/the-paris-agreement/status-of-ratification>. Accessed July 10, 2021.

<sup>360</sup> For a breakdown of all the provisions present in the Paris Agreement and their respective framing in the spectrum of legal force, see Table 7.1 in: BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, pp. 251–257.

containing a unique mixture of these elements, each occupying a place in the spectrum of legal force, as we shall see below<sup>361 362</sup>.

## 6.2. Objectives of The Paris Agreement

The Paris Agreement, as set forth in paragraph 1 of its Article 2, reinforces the implementation of the UNFCCC, including its objective, with a view to strengthening the global response to the threat of climate change, within a context of sustainable development and efforts to eradicate poverty<sup>363</sup>.

In this regard, Article 2 (a) of the Agreement establishes quantitative limits on the level of permissibility of an increase in global temperature, providing that the Parties shall aim to

*"keep global average temperature rise well below 2°C above pre-industrial levels and pursue efforts to limit temperature rise to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;"*<sup>364</sup>

Other objectives of the Agreement are, *"to increase the capacity to adapt to the adverse impacts of climate change and to foster climate resilience and the development of low greenhouse gas*

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<sup>361</sup> BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 213.

<sup>362</sup> In this sense, BODANSKY, BRUNNÉE and RAJAMANI state that *"For example, within the scope of individual obligations (of each party), framed in mandatory terms (shall), with clear and precise normative content, and without qualifying or discretionary elements, such provisions can be characterized as "hard law". In the middle of the spectrum are provisions that identify the actor (each part or all parties) and establish standards, but include elements of qualification, discretionary or are formulated in exhortatory or consultative terms (should or encourage). These provisions can be characterized, in various ways, as "soft law." At the other end of the spectrum are provisions without normative content that capture understandings between parties, provide context, or offer a narrative about the need for the offer or its location in the larger picture. can be characterized as "non-law," a purely descriptive term that should not be interpreted as denigrating the critical importance of these in the Paris Agreement.*" In: BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 213.

<sup>363</sup> See Section 2 of the Paris Agreement: *"Article 2. 1. This Agreement, in strengthening the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including: (a) To keep the increase in global average temperature well below 2 °C above pre-industrial levels and to pursue efforts to limit the increase in temperature to 1.5 °C above pre-industrial levels, recognising that this would significantly reduce the risks and impacts of climate change; (b) Increase the capacity to adapt to the adverse impacts of climate change and foster climate resilience and the development of low greenhouse gas emissions in a way that does not threaten food production; (c) Promote financial flows consistent with a path of low greenhouse gas emissions and climate-resilient development. 2. This Agreement shall be implemented to reflect equality and the principle of common but differentiated responsibilities and respective capacities in the light of different national circumstances."*

<sup>364</sup> See Article 2(a) of the Paris Agreement.

*emissions in a way that does not threaten food production"; and "promote financial flows consistent with a path of low greenhouse gas emissions and climate-resilient development."*<sup>365 366</sup>.

And as for limiting global temperature rise, recently at COP26, held in Glasgow, the Parties to the UNFCCC and the Paris Agreement, considering the latest IPCC report, decided to *"pursue efforts to limit the temperature increase to 1.5°C, recognizing that this requires meaningful and effective action by all parties in this critical decade based on the best available scientific knowledge, reflecting common but differentiated responsibilities and respective capacities in light of different national circumstances"...* To this end, they recognized that *"limiting global warming to 1.5°C by 2100 requires rapid, profound and sustained reductions in global greenhouse gas emissions, including reducing global carbon dioxide emissions by 45 percent by 2030 from the 2010 level and to net zero by mid-century."*<sup>367</sup>.

This time, the current goal of the Paris Agreement is to limit global warming to 1.5°C by 2100 and, in terms of reducing global CO<sub>2</sub> emissions, to reduce them by 45% compared to the 2010 level by 2030 and by 100% compared to the same base date by the year 2050<sup>368</sup>.

### **6.3. Principle of common but differentiated responsibility and respective capacities (CBDRRC) in the Paris Agreement**

As an international treaty linked to the UNFCCC, the Paris Agreement innovated in relation to the structural form of the treaties applicable to the legal regime of climate change, by adopting a hybrid structure, in which the system of division of the parties between developed and developing

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<sup>365</sup> See Article 2( *b* ) of the Paris Agreement.

<sup>366</sup> See Article 2( *c* ) of the Paris Agreement.

<sup>367</sup> Decision 1/CP.26 and Decision 1/CMA.3.

<sup>368</sup> It should be noted, however, that according to the synthesis report on nationally determined contributions under the Paris Agreement, FCCC/PA/CMA/2021/8, published on 17 September 2021 and which takes into account the information of the last 165 available nationally determined contributions communicated by the 192 Parties to the Paris Agreement and recorded in the provisional register of nationally determined contributions on 12 October 2021, the aggregate level of greenhouse gas emissions, taking into account the effective implementation of all the determined national contributions presented, is estimated to be, in the year 2030, 13.7% above the level of 2010.

countries, namely via annexes, adopted in the UNFCCC and the Kyoto Protocol, was merged with a more horizontal and more egalitarian system<sup>369 370</sup>.

Thus, in order to achieve the objectives of the Agreement, both in terms of maintaining the increase in temperature at the maximum limit of 2°C, or ideally at 1.5°C, above pre-industrial levels, and in relation to increasing the capacity to adapt to the impacts of climate change and in the economic promotion to combat them, the parties should consider equality and the principle set out in Article 2 (2), which provides that the "*Agreement shall be implemented to reflect equality and the principle of common but differentiated responsibilities and respective capacities in the light of different national circumstances.*"<sup>371</sup>.

BODANSK, BRUNNÉE and RAJAMANI note that, unlike the UNFCCC and the Kyoto Protocol, which also provides for the application of the principle of common but differentiated responsibility and respective capabilities

*"The Paris Agreement contains references to the principle in the preamble, in the provisions relating to the objective of the agreement, progression and development of long-term strategies for the reduction of greenhouse gas emissions, but always with the qualification "in the light of different national circumstances". The most significant of these references appears in Article 2, which sets the limit of temperature increase and frames the implementation of the entire agreement."*<sup>372</sup>

*A priori*, the inclusion of the term "*in the light of the different national circumstances*" seems to make it even more difficult to be held accountable and responsible for fulfilling the obligations arising from the Agreement, since it further individualizes the specific situation of each Party. In fact, the Agreement does not describe precisely how the principle will be applied to its provisions.

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<sup>369</sup> Thus, according to BODANSK, BRUNNÉE and RAJAMANI, "*the Paris Agreement crystallizes this emerging hybrid architecture, in which the egalitarian substance to promote participation (contained in the nationally determined contributions of the parties) is combined with a top-down process to promote ambition and responsibility.*". In: BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 2 20.

<sup>370</sup> In this sense, FERREIRA and VOIGT explain that "*the approach to differentiation under the Paris Agreement is much more diversified than under the Convention. While categories of countries, such as "developed" and "developing", are still relevant, these categories are not defined anywhere. Nor does the agreement make any reference to the annexes to the Convention.*". In: FERREIRA, Felipe; VOIGT, Christina. *Differentiation in the Paris Agreement*. Climate Law, Brill, 2016, p. 65.

<sup>371</sup> The 2°C limit was first recognized by the G-8 in L'Aquila in 2009. It was incorporated into the Copenhagen Agreement in the same year and into the Cancun Agreement in 2010. He was also present at the Durban Platform decision that launched the negotiations for the Paris Agreement.

<sup>372</sup> BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 221.

However, this new formulation seems to have as its main focus the developing States, especially the most vulnerable, which should be granted greater flexibility in complying with the provisions of the Agreement, according to their national circumstances<sup>373 374</sup>.

#### **6.4. Obligations under the Paris Agreement**

In order to achieve the objectives of the Agreement, the Agreement's provisions for obligations are divided into three different areas. First, mitigation, through which States must adopt behaviors that limit the increase in global temperature. Second, adaptation, which consists of finding ways in which states can minimize the damage that may be caused by climate change. Finally, there are the obligations of financial and technological support, through which States, especially those developed or in better economic conditions, must assist others to fulfill their obligations and improve their conditions of mitigation, adaptation, sustainable development and climate resilience in their territories<sup>375</sup>.

##### ***6.4.1. Mitigation obligation***

The mitigation objective set out in Article 2(a) of the Paris Agreement, i.e. the objective of achieving a maximum increase of 2°C in the global average temperature or, ideally, of 1,5°C above pre-industrial levels, should notably be achieved in the manner provided for in Article 4 of the Agreement, as set out in paragraph 1 of that Article which provides that:

*"In order to achieve the long-term temperature objective set out in Article 2, the Parties aim to reach a global peak in greenhouse gas emissions as soon as possible, recognizing that the peak will take longer for developing country Parties, and to achieve rapid reductions thereafter in accordance with the best available scientific*

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<sup>373</sup> FERREIRA, Felipe; VOIGT, Christina. *Differentiation in the Paris Agreement*. Climate Law, Brill, 2016, p. 66.

<sup>374</sup> In any event, the principle of common but differentiated responsibility and respective capacities in the light of different national circumstances is fully applicable to all provisions of the Agreement, notably in relation to mitigation, adaptation, transparency, *compliance* and financing obligations. In addition, by establishing the new parameters for limiting the increase in temperature to 1.5°C, the Glasgow Climate Pact reaffirms the applicability of the *in casu* principle.

<sup>375</sup> CHEN, Wei-Yin; LACKNER, Maximilian; SUSUKI, Toshio. *Introduction to Climate Change Mitigation*. Handbook of Climate Change Mitigation and Adaptation, Pringer Science, New York, 2015, p. 06.

*knowledge, in order to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, based on equality and in the context of sustainable development and efforts to eradicate poverty."*

As it turns out, there was no deepening as to the dates, progressive percentage, or clear time limits on reaching the global peak in emissions or subsequent rapid reductions. The Parties, despite attempts during the negotiation, opted for an agreement with objectives, but omitted as to the temporal precision and a program with specific dates and projections in relation to that provided for in Article 4 (1), of the Agreement, containing only the general forecast for the "*second half of this century*"<sup>376</sup>. This gap was recently closed at COP26, where it was established that global warming should be limited to 1.5°C by 2100 and global carbon dioxide emissions reduced by 45% by 2030 compared to the 2010 level and by 100% by 2050, as previously stated.

In this sense, Article 4 (2), brings the most significant binding obligation of the Paris Agreement, which introduces into the legal regime of climate change the National Determined Contributions – NDC, by providing that

*"Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties should pursue domestic mitigation measures to achieve the objectives of such contributions."*

This time, the National Determined Contributions, or "*NDCs*", reflect the ambitions of each Party for the reduction of domestic emissions and each Party to the Agreement can present its NDCs in the amount and in the way it considers most appropriate, with some adopting a more quantitative bias, while others a more qualitative or even conditioned to international financing. Thus, in relation to the preparation, communication and maintenance of the National Determined Contributions, it is not an obligation of result, but of conduct<sup>377 378 379</sup>.

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<sup>376</sup> Some of the parties to the Agreement have proposed that a quantitative global emission limits with dates and percentage of reductions from 2010 levels should have been included in the Agreement. For more see: BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 229.

<sup>377</sup> The nationally determined contributions already submitted by each Party are available at: UNFCCC. *NDC's Registry*: Available at: <https://www4.unfccc.int/sites/NDCStaging/Pages/All.aspx>. Accessed in July 10, 2021.

<sup>378</sup> PEEL, Jacqueline; SANDS, Philippe. *Principles of International Environmental Law*. 4<sup>o</sup> Ed. Cambridge, 2018, p. 322.

<sup>379</sup> BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 232.



In addition, the principle of common but differentiated responsibility applies to the fulfillment of this obligation, according to their respective capacities and in the light of different national circumstances, which entails the greater responsibility of the developed Parties and/or with greater economic power, and each new NDC presented must<sup>380</sup> represent a progression beyond the then existing nationally determined contribution of each Party, reflecting his greatest possible ambition<sup>381</sup>.

The obligation to prepare, communicate and successively maintain NDCs is complemented throughout Article 4 of the Agreement, so that, notably, each Party shall communicate a nationally determined contribution every five years. Assistance shall be provided to developing Parties, the least developed Parties and small island developing States, which may also prepare plans reflecting their special circumstances, where the Parties may act together in mitigation actions, and all Parties shall provide the information necessary for the clarity, transparency and understanding of their NDCs, and the NDCs communicated by the Parties shall be recorded in a public register maintained by the Secretariat<sup>382 383 384 385 386 387</sup>.

NDCs are the way in which the Paris Agreement expects all Parties to commit to its ultimate goal of limiting global temperature rise. Because they are voluntary in terms of their quantification and the way in which they will be achieved, the Agreement grants great flexibility to the Parties.

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<sup>380</sup> See Article 4(4) of the Paris Agreement: "Article 4. n.° 4. Developed country Parties should continue to take the lead in achieving absolute emission reduction targets in the economy in a comprehensive manner. Developing country Parties should continue to strengthen their mitigation efforts, and are encouraged to take as a guide over time emissions reduction targets or economy-wide limitation targets in light of different national circumstances."

<sup>381</sup> See Article 4(3) of the Paris Agreement: "Article 4. n.° 3. Each successive nationally determined contribution of the Parties shall represent a progression beyond the then prevailing nationally determined contribution of the Party and reflect its greatest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, taking into account the different national circumstances."

<sup>382</sup> In accordance with Decision 1/CP.21 and any relevant decisions of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement. See Article 4(9) of the Paris Agreement.

<sup>383</sup> See Article 4(5) of the Paris Agreement. "Article 4. n.° 5. Support shall be provided to developing country Parties for the implementation of this Article in accordance with Articles 9, 10 and 11, recognizing that enhanced support for developing country Parties will allow for greater ambition in their actions."

<sup>384</sup> See Article 4(6) of the Paris Agreement. "Article 4. n.° 6. Least developed countries and small island developing states can prepare and communicate strategies, plans and actions for the development of low greenhouse gas emissions reflecting their special circumstances."

<sup>385</sup> See sections 4, 7 and 16 et seq. of the Paris Agreement. "Article 4. n.° 7. Mitigation co-benefits resulting from the Parties' adaptation actions and/or economic diversification plans may contribute to mitigation outcomes under this Article." and "Article 4. No. 16. The Parties, including regional economic integration organizations and their Member States, which have reached an agreement to act jointly under paragraph 2 of this Article, shall notify the Secretariat of the terms of that agreement, including the level of issuance assigned to each Party within the relevant time period, when they communicate their nationally determined contributions. The Secretariat shall, in turn, inform the Parties and signatories to the Convention of the terms of that Agreement."

<sup>386</sup> See Article 4(8) of the Paris Agreement: "Article 4. n.° 8. In communicating their nationally determined contributions, all Parties shall provide the information necessary for clarity, transparency and understanding in accordance with Decision 1/CP.21 and any relevant decisions of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement."

<sup>387</sup> See Article 4(12) of the Paris Agreement: "Article 4. n.° 12. Nationally determined contributions communicated by the Parties shall be recorded in a public register maintained by the Secretariat."

Finally, by providing for a renewal of commitments every five years and a more ambitious than the previous NDC, the Agreement seeks to ensure that its objective is progressively achieved<sup>388 389</sup>.

#### 6.4.2. *Obligation to adapt*

The second objective of the Paris Agreement, as provided for in Article 2(b), is to increase the capacity of the Parties to adapt to the negative impacts of climate change, climate resilience and to provide development via low greenhouse gas emissions, so that it does not threaten food production<sup>390</sup>.

And as for the adaptation in the Paris Agreement, BODANSK, BRUNNÉE and RAJAMANI explain that

*"The Paris Agreement contains a hard law clause and several soft law clauses related to adaptation. The parties are obliged to (use the expression "shall") to be involved in adaptation planning and the implementation of adaptation actions. Parties are encouraged (use of the term "should") to submit and update communications on adaptation (possibly as part of their national determined contributions - CND), identifying priorities and needs, for inclusion in a public register, and to strengthen cooperation on adaptation. Many of these provisions are qualified by phrases such as "as appropriate," which allow for discretion ... In addition, the adaptation article of the Paris Agreement includes several contextual*

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<sup>388</sup> In fact, the way NDCs are accounted for is confusing and allows for some manipulation by states. As an example, Brazil excludes areas that are not in reserves and conservation units, accounting only for protected areas. In this way, it gives the impression that removals by GHG sinks are increasing, when in reality they would be decreasing, if the whole territory were considered. However, despite being different from the form of NDCs presented by other states, the methodology used by the Brazilian state is within the established parameters. Available in: <https://www.cnnbrasil.com.br/nacional/brasil-exclui-area-nao-protetida-da-conta-de-captura-de-carbono-e-esconde-numeros/>. Accessed December 15, 2021.

<sup>389</sup> BHASIN, Shikha; CASTRO, Paula; PAUW, Pieter W.; PICKERING, Jonathan. *Conditional nationally determined contributions in the Paris Agreement: foothold for equity or Achilles heel?* In: *Special issue: Making climate action more effective: lessons learned from the first Nationally Determined Contributions (NDCs)*. Climate Policy, Vol. 20(4), 2020, p. 469.

<sup>390</sup> In fact, adaptation measures refer to actions to be taken to improve or respond to the impacts of climate change, these being different from loss and damage, while the latter refer to damage that cannot be prevented by climate change mitigation or adaptation. See: PEEL, Jacqueline; SANDS, Philippe. *Principles of International Environmental Law*. 4th Ed. Cambridge, 2018, p. 326.

*provisions. For example, Article 7.2 recognises that adaptation is a global challenge.*"<sup>391</sup>

Thus, the objective of adaptation to climate change is also addressed, notably, in Article 7 of the Agreement, and the provision that creates the most relevant obligation for the Parties is Article 7, paragraph 9, of the Agreement, which provides that each Party to the Agreement shall, as appropriate, develop planning processes for the adaptation and implementation of actions, including the development or improvement of relevant plans, policies or contributions, and this obligation can be fulfilled in a variety of ways, such as the implementation of adaptation actions, commitments and/or efforts, formulation and implementation of national adaptation plans, assessment of impacts and vulnerability in relation to climate change, monitoring, evaluation and learning from the plans, adaptation policies, programs and actions, building the resilience of socioeconomic and ecological systems, among others<sup>392</sup>.

Other relevant obligations relating to adaptation to climate change are found in Article 7(7) of the Agreement, which provides that the Parties to the Agreement shall strengthen their cooperation in strengthening adaptation action, with the sharing of information, good practices, experiences and lessons learned; strengthening institutional arrangements, including those under the Convention; strengthening scientific knowledge on climate, including research, systematic observation of the climate system and early warning systems; providing assistance to developing countries in identifying effective adaptation practices, their adaptation needs and priorities, consistent with the encouragement of good practices; and by improving the effectiveness and durability of actions aimed at those of the Parties to the Agreement on adaptation to climate change<sup>393 394</sup>.

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<sup>391</sup> BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 237.

<sup>392</sup> See Article 7(9)(e) of the Paris Agreement: "Article 7(9)(e) of the Paris Agreement: "Article 7(9). Each Party, as appropriate, engages in adaptation planning processes and the implementation of actions, including the development or enhancement of relevant plans, policies and/or contributions, which may include: (a) The implementation of adaptation actions, commitments and/or efforts; (b) the process of formulating and implementing national adaptation plans; (c) The assessment of impacts and vulnerability in relation to climate change, with a view to formulating nationally determined prioritised actions, taking into account vulnerable people, places and ecosystems; (d) Monitoring and evaluation and learning from adaptation plans, policies, programs and actions; and (e) Building the resilience of socio-economic and ecological systems, including through economic diversification and sustainable management of natural resources."

<sup>393</sup> The English text of the Paris Agreement uses the term "should" in Article 7(7).

<sup>394</sup> See Article 7(7) of the Paris Agreement: "Article 7. n.º 7. The Parties should strengthen their cooperation in strengthening adaptation action, taking into account the Cancún Adaptation Framework, including with regard to: (a) Sharing of information, good practices, experiences and lessons learned, including, as appropriate, their relationship to science, planning, policies and implementation relating to adaptation actions; (b) Strengthening institutional arrangements, including those under the Convention that serve this Agreement, to support the synthesis of relevant information and knowledge, and the provision of technical support and guidance to the Parties; (c) Strengthening

In addition, Article 7(10) et seq. of the Agreement provides for the need for each Party to submit and keep up to date a communiqué on priorities, implementation needs, support, plans and actions in the field of adaptation to climate change, and the communication in question shall be presented together with a national adaptation plan and nationally determined contributions, provided for in<sup>395</sup> Article 4 of the Agreement, and the communication shall be registered with the Secretariat of the Agreement<sup>396 397 398</sup>.

Article 7 also provides that the obligation of continuous and reinforced support to developing countries and that the overall assessment of the implementation of the Agreement by the parties, provided for in Article 14 of the Agreement, should consider adaptation actions<sup>399 400 401</sup>.

The Paris Agreement raises the importance of adaptation to the negative effects of climate change in the legal regime of climate change, including in the regime several provisions non-existent in this regard before, notably linked to NDCs, even if without a binding force of result, so that the Parties can deal with the inevitable preventable and predictable adverse effects of climate change<sup>402</sup>.

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*scientific knowledge on climate, including research, systematic observation of the climate system and early warning systems, in a manner that informs climate services and supports decision-making; (d) Assisting developing country Parties in identifying effective adaptation practices, adaptation needs, priorities, support provided and received for adaptation actions and efforts, and challenges and gaps, in a manner consistent with the encouragement of good practices; (e) improving the effectiveness and durability of adaptation actions."*

<sup>395</sup>See Article 7(10) of the Paris Agreement: "Article 7. n.º 10 Each Party shall, as appropriate, submit and periodically update an adaptation communication, which may include its priorities, implementation and support needs, plans and actions, without creating any additional burden on developing country Parties. "

<sup>396</sup>See Article 7(11) of the Paris Agreement: "Article 7. n.º 11. The adaptation communications referred to in paragraph 10 of this Article shall, as appropriate, be submitted and updated periodically, as a component of or in conjunction with other communications or documents, including a national adaptation plan, a nationally determined contribution as referred to in Article 4, paragraph 2, and/or a national communication."

<sup>397</sup> See Article 7(12) of the Paris Agreement: "Article 7. n.º 12. The communications of adaptation referred to in paragraph 10 of this Article shall be recorded in a public register kept by the secretariat."

<sup>398</sup> The obligation to register the communiqué is undoubtedly a mandatory obligation, in view of the use of the term "shall" in the English text of the Paris Agreement.

<sup>399</sup>See Article 7(13) of the Paris Agreement: "Article 7. n.º 13. Continued and enhanced international support shall be provided to developing country Parties for the implementation of paragraphs 7, 9, 10 and 11 of this Article, in accordance with the provisions of Articles 9, 10 and 11."

<sup>400</sup> Through Decisions 13/CMA.1 and 1/CMP.14, it was decided that the Adaptation Fund, created under the Kyoto Protocol and which aims to finance concrete adaptation projects and programs in developing countries Parties to the protocol, will serve the Paris Agreement, as of January 1, 2019.

<sup>401</sup>See Article 7(14) of the Paris Agreement: "Article 7. n.º 14. The global assessment referred to in Article 14 shall, *inter alia*: (a) Recognize the adaptation efforts of developing country Parties; (b) Improve the implementation of adaptation actions taking into account the adaptation communication referred to in paragraph 10 of this Article; (c) Review the adequacy and effectiveness of adaptation and the support provided for adaptation; and (d) Review the overall progress made in achieving the overall adaptation goal referred to in paragraph 1 of this Article."

<sup>402</sup> PEEL, Jacqueline; SANDS, Philippe. *Principles of International Environmental Law*. 4<sup>o</sup> Ed. Cambridge, 2018, p. 325.

### 6.4.3. Support mechanism in the Paris Agreement

In order to comply with the provisions of Article 2(c) of the Paris Agreement, which provides for the promotion of financial and technological flows with a view to mitigation, adaptation and a path of low greenhouse gas emissions and climate resilience development, articles 9, 10 and 11 of the Agreement deal specifically with the mechanisms to support this objective.

Article 9 reaffirms the binding, but not quantitative, obligation of the developed Parties to provide financial resources for the assistance of developing Parties in a balanced manner in terms of mitigation and adaptation<sup>403 404</sup>, taking into account the strategies, priorities and needs of developing Parties. It is also the responsibility of the developed Parties to report every two years on the support provided, including transparent and consistent information. It is envisaged that the other Parties of the Agreement might provide assistance on a voluntary basis<sup>405 406</sup>.

As BODANSK, BRUNNÉE and RAJAMANI explain, *"Article 9 also creates a number of new reporting requirements (including reports that include projected levels of public funding) and*

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<sup>403</sup>See Article 9(1) and (2) of the Paris Agreement: *"Article 9. 1. Developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in the continuation of their obligations under the Convention. 2. Other Parties are encouraged to provide or continue to provide such support voluntarily. 3. As part of a global effort, developed country Parties should continue to take the lead in mobilizing climate finance from a wide variety of sources, instruments and channels, noting the significant role of public funds, through a variety of actions, including country-supporting strategies-driven, and taking into account the needs and priorities of developing country Parties. Such mobilization of climate finance should represent a progression beyond previous efforts. 4. The provision of expanded financial resources shall aim to achieve a balance between adaptation and mitigation, taking into account nationally led strategies, and the priorities and needs of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change and have significant capacity constraints, such as least developed countries and small island developing States, considering the need for public resources and subsidized resources for adaptation. 5. Developed country Parties shall report every two years quantitative and qualitative indicative information related to paragraphs 1 and 3 of this Article, as appropriate, including, if available, projected levels of public financial resources to be provided to developing country Parties. Other Parties that have provided resources are encouraged to communicate such information voluntarily every two years. 6. The global balance sheet referred to in Article 14 shall take into account relevant information provided by developed country Parties and/or bodies to the Agreement on climate finance-related efforts. 7. Developed country Parties shall provide every two years transparent and consistent information on support to developing country Parties provided and mobilized through public interventions in accordance with the modalities, procedures and guidelines to be adopted by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement at its first session, as stipulated in Article 13, paragraph 13. Other Parties are encouraged to do so. 8. The Financial Mechanism of the Convention, including its operational entities, shall serve as the financial mechanism of this Agreement. 9. The institutions serving this Agreement, including the operational entities of the Financial Mechanism of the Convention, shall aim to ensure efficient access to financial resources through simplified approval procedures and enhanced agile support for developing country Parties, in particular for least developed countries and small island developing States, in the context of their national climate strategies and plans."*

<sup>404</sup> See Article 9(4) of the Paris Agreement.

<sup>405</sup> See Article 9(7) of the Paris Agreement.

<sup>406</sup> See Article 9(2) of the Paris Agreement.

*introduces a new substantive, albeit soft law norm, recommending that the mobilization of climate finance "should represent a progression beyond previous efforts."*<sup>407 408</sup>.

And as for the progression in financial aid efforts to developing parties, the Copenhagen Accord, signed in 2009 at COP15, had already established a goal of 30 billion dollars in climate change financing for the period between 2010 and 2012, and a goal of 100 billion dollars per year in financing, in accordance with Article 9, by the year 2020<sup>409 410</sup>.

In this regard, in Decision 1/CP.21 that approved the Paris Agreement, the Parties agreed that the existing financing target provided for in the Copenhagen Agreement would be maintained until 2025, and that before 2025, the Conference of the Parties, serving as the meeting of the Parties to the Paris Agreement, should set a new target for collective financial assistance to developing Parties, from this floor of \$100 billion a year<sup>411 412</sup>.

Also in the field of financial support, Article 10 creates a technology framework to provide guidance to the Technology Mechanism provided by the Convention to promote and facilitate its action on the development and transfer of technologies with the aim of supporting the implementation of the objectives of the Paris Agreement by the developing Parties. It is also determined that the Technology Mechanism provided for in the Convention will serve the implementation of the Agreement. Finally, at the level of financial support<sup>413 414 415</sup>, Article 11 provides for another important but *soft law* rule that all Parties should cooperate to strengthen the capacity of developing

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<sup>407</sup> BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 240.

<sup>408</sup> See Article 9(3) of the Paris Agreement.

<sup>409</sup> Decision 2/CP.15. FCCC/CP/2009/11/Add.1

<sup>410</sup> Copenhagen Agreement : "8th - ... *The collective commitment of developed countries is to provide new and additional resources, including forestry and investments through international institutions, approaching \$30 billion for the period 2010–2012 with balanced allocation between adaptation and mitigation. Funding for adaptation will be prioritized for the most vulnerable developing countries, such as the least developed countries, small island developing states and Africa. In the context of significant mitigation actions and transparency in implementation, developed countries commit to the goal of jointly mobilizing \$100 billion per year by 2020 to meet the needs of developing countries. This funding will come from a wide variety of sources, public and private, bilateral and multilateral, including alternative sources of financing. New multilateral financing for adaptation will be delivered through effective and efficient funding arrangements, with a governance structure that provides equal representation of developed and developing countries. A significant portion of this funding should flow through the Copenhagen Green Climate Fund.*"

<sup>411</sup> Decision 1/CP.21, Paris Agreement, Paragraph 54.

<sup>412</sup> However, the developed Parties have not complied with this provision, as expressed in Decision 1/CP.26.

<sup>413</sup> See Article 11(1) of the UNFCCC.

<sup>414</sup> See Article 10(4) of the Paris Agreement: "Article 10. n.° 4. *A technology framework is hereby established to provide comprehensive guidance for the work of the Technology Mechanism to promote and facilitate enhanced action on the development and transfer of technologies with the aim of supporting the implementation of this Agreement, in pursuit of the long-term vision referred to in paragraph 1 of this Article.*"

<sup>415</sup> See Article 10(3) of the Paris Agreement: "Article 10. n.° 3. *The Technology Mechanism established under the Convention shall serve this Agreement.*"

Parties, in particular countries with lower capacity, to implement adaptation and mitigation actions, to facilitate the development, dissemination and deployment of technologies, access to climate finance, education, training and public awareness<sup>416 417</sup>.

## **6.5. Flexibility and cooperation mechanism in the implementation of NDCs**

Following the practice initially provided for by the Kyoto Protocol, which established the Clean Development Mechanism, Joint Implementation Mechanism, and emissions trading, the Paris Agreement, in its Article 6, also grants the Parties of the Agreement the possibility to seek voluntary cooperation among themselves, in order to allow the use of internationally transferred mitigation results through the carbon credit markets<sup>418</sup>.

In fact, Article 6 does not refer directly to the term "*carbon market*" and even reinforces the importance of non-commercial practices, but, in the end, provides for two possibilities, mechanisms of flexibilization or market of carbon credits, which the Parties can make use of to achieve their nationally determined contributions and the fulfillment of their obligations under the Agreement<sup>419</sup>.

First, under Article 6(2), Parties are permitted to voluntarily engage in cooperative approaches to the use of internationally transferred mitigation outcomes for nationally determined contributions. This includes the existing carbon markets and other flexibilization mechanisms that connect the Parties' national climate change policies.

In turn, Article 6(4) creates a new mechanism, available for voluntary use by the Parties, with a view to contributing to the mitigation of greenhouse gas emissions and supporting sustainable

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<sup>416</sup> See Article 11(3) of the Paris Agreement: "*Article 11. n.º 3. All Parties shall cooperate to strengthen the capacity of developing country Parties to implement this Agreement. Developed country Parties shall increase support for capacity-building actions in developing country Parties.*".

<sup>417</sup> See Article 11(1) of the Paris Agreement: "*Article 11. n.º 1. Capacity building under this Agreement should enhance the capacity and capacity of developing country Parties, in particular countries with lower capacity, such as least developed countries, and those that are particularly vulnerable to the adverse effects of climate change, such as small island developing States, to take effective action on climate change, including, inter alia, to implement adaptation and mitigation actions, and should facilitate the development, dissemination and deployment of technologies, access to climate finance, relevant aspects of education, training and public awareness, and transparent, timely and accurate communication of information.*".

<sup>418</sup> See Article 6(1) of the Paris Agreement: "*Article 6. n.º 1. The Parties recognize that some Parties choose to seek voluntary cooperation in the implementation of their nationally determined contributions to enable greater ambition in their mitigation and adaptation actions and to promote sustainable development and environmental integrity.*".

<sup>419</sup> BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 236.

development, under the authority and guidance of the Conference of the Parties serving as the meeting of the Parties of the Agreement, which should also set the rules, modalities and procedures for that mechanism<sup>420 421 422</sup>.

BODANSKY, BRUNNÉE and RAJAMANI explain that the new mechanism *"is not limited to project-based reductions and may involve emission reduction policies or programs. In addition, it will be able to generate offsets for emission reductions in developed and developing countries, thereby combining the functions of the Clean Development Mechanism and the joint implementation of the Kyoto Protocol."*<sup>423</sup>

At this point, it is perceived that the previous approach of the flexibilization mechanisms provided for in the Kyoto Protocol, which are more focused on the developed Parties, begin to reflect the current reality of the International Community, in which not only developed countries are major GHG emitters with interests in seeing their obligations relaxed.

## 6.6. Loss and damage in the Paris Agreement

In terms of recognizing the need for reparation for the loss and damage caused by climate change, the Paris Agreement, for the first time in an international treaty on climate change, addresses the issue in its Article 8. The issue of including loss and damage in treaties has been advocated primarily by the states most vulnerable to climate change<sup>424 425</sup>.

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<sup>420</sup> See Article 6(4) of the Paris Agreement: *"Article 6. n.º 4. A mechanism to contribute to the mitigation of greenhouse gas emissions and to support sustainable development is hereby established under the authority and guidance of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement for use by the Parties on a voluntary basis. It shall be overseen by a body designated by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, and shall aim to: (a) Promote the mitigation of greenhouse gas emissions while fostering sustainable development; (b) Encourage and facilitate participation in the mitigation of greenhouse gas emissions by public and private entities authorized by a Party; (c) Contribute to the reduction of emission levels in the Host Party, which will benefit from mitigation activities, resulting in emission reductions that may also be used by another Party to meet its nationally determined contribution; and (d) Deliver joint mitigation on global emissions."*

<sup>421</sup> See Article 6(7) of the Paris Agreement: *"Article 6. n.º 7. The Conference of the Parties serving as the meeting of the Parties to the Paris Agreement shall adopt rules, modalities and procedures for the mechanism referred to in paragraph 4 of this Article at its first session."*

<sup>422</sup> The rules for the Flexibilization Mechanisms under the Paris Agreement were established at COP26.

<sup>423</sup> BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 237.

<sup>424</sup> PEEL, Jacqueline; SANDS, Philippe. *Principles of International Environmental Law*. 4º Ed. Cambridge, 2018, p. 326.

<sup>425</sup> BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 238.



As such, the Paris Agreement recognizes *"the importance of avoiding, minimizing and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow-onset events, and the role of sustainable development in reducing the risk of loss and damage."*<sup>426</sup>.

In this sense, the Paris Agreement refers the issue of loss and damage to the Warsaw International Mechanism for Loss and Damage associated with the Impacts of Climate Change, established at the Warsaw Conference, as a way to provide assistance to the states most impacted by climate change<sup>427 428 429</sup>.

However, the Paris Agreement's provision for loss and damage has a bias that does not properly refer to the classical understanding of reparation for damages. Under pressure from developed countries, notably the United States, a paragraph was included in the decision of the Conference of the Parties approving the Paris Agreement, in which the Parties agree that the provisions<sup>430</sup> of Article 8 do not provide grounds for holding either Party liable for loss and damage caused to another Party to the Agreement, in the following terms:

*"Decision 1/CP.21 - 52. Agrees that Article 8 of the Agreement does not involve or provide a basis for any liability or compensation;"*

BODANSK, BRUNNÉE and RAJAMANI maintain that the above article removes the reparatory force of losses and damages, as well as the necessary liability for doing so, within the exclusive scope of the Paris Agreement. Nevertheless, the authors consider Article 8 important because it inserts the topic of loss and damage within the scope of the Paris Agreement, in its own chapter, that is separate from other themes of the Agreement, such as adaptation, being as intended

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<sup>426</sup> See Article 8(1) of the Paris Agreement: *"Article 8. n.° 1. The Parties recognize the importance of avoiding, minimizing and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow-onset events, and the role of sustainable development in reducing the risk of loss and damage."*

<sup>427</sup> See Article 8(2) of the Paris Agreement: *"Article 8. n.° 2. The Warsaw International Mechanism for Loss and Damage Associated with the Impacts of Climate Change shall be subject to the authority and guidance of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement and may be enhanced and strengthened as determined by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement. "*

<sup>428</sup> Decision 2/CP.19 FCCC/CP/2013/10/Add.1

<sup>429</sup> The Subsidiary Implementation Body (SBI) proposes a definition for the "loss and damage" provided for in the Paris Agreement as being *"the actual and/or potential manifestation of impacts associated with climate change in developing countries that adversely affect their human and natural systems."* In: Subsidiary Body for Implementation. Report on the Regional Expert Meetings on a Range of Approaches to Address Loss and damage Associated with the Adverse Effects of Climate Change, Including Impacts Related to Extreme Weather Events and Slow Onset Events. In: United Nations Framework Convention on Climate Change (UNFCCC), 37th Session, Doha, 2012.

<sup>430</sup> Decision 1/CP.21. FCCC/CP/2015/10/Add.1

by the States Parties most vulnerable to climate change, while providing a basis for these Parties to develop, within the scope of the Agreement, this topic<sup>431</sup>.

Therefore, within the framework of the Paris Agreement, loss and damage is addressed within the principle of cooperation, already established previously for by the Warsaw International Mechanism for Loss and Damage<sup>432</sup>, so that the international community acts to improve understanding, action and support to Parties impacted by climate change, pursuant to item 5 of Decision 2/CP. 19, without the direct attribution of liability to either Party for the loss and damage caused by the adverse effects of climate change<sup>433</sup>.

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<sup>431</sup> BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 239.

<sup>432</sup>See Article 8(3), (4) and (5) of the Paris Agreement: "Article 8. 3. Parties should enhance understanding, action and support, including through the Warsaw International Mechanism, as appropriate, in a cooperative and facilitative manner with respect to the loss and damage associated with the adverse effects of climate change. 4. Therefore, areas of cooperation and facilitation to enhance understanding, action and support may include: (a) Early warning systems; (b) emergency preparedness; (c) Slow-onset events; (d) Events that may involve irreversible and permanent loss and damage; (e) comprehensive risk assessment and management; (f) risk insurance facilities, climate risk pooling and other insurance solutions; (g) Non-economic losses; (h) Resilience of communities, livelihoods and ecosystems. 5. The Warsaw International Mechanism shall cooperate with existing bodies and expert groups under the Agreement, as well as with relevant organizations and expert bodies outside the Agreement."

<sup>433</sup> Vide Decision 2/CP.19 - 5. "Also decides that the Warsaw international mechanism shall fulfil the role under the Convention of promoting the implementation of approaches to address loss and damage associated with the adverse effects of climate change, pursuant to decision 3/CP.18, in a comprehensive, integrated and coherent manner by undertaking, inter alia, the following functions: (a) Enhancing knowledge and understanding of comprehensive risk management approaches to address loss and damage associated with the adverse effects of climate change, including slow onset impacts, by facilitating and promoting: (i) Action to address gaps in the understanding of and expertise in approaches to address loss and damage associated with the adverse effects of climate change, including, inter alia, the areas outlined in decision 3/CP.18, paragraph 7(a); (ii) Collection, sharing, management and use of relevant data and information, including gender-disaggregated data; (iii) Provision of overviews of best practices, challenges, experiences and lessons learned in undertaking approaches to address loss and damage; (b) Strengthening dialogue, coordination, coherence and synergies among relevant stakeholders by: (i) Providing leadership and coordination and, as and where appropriate, oversight under the Convention, on the assessment and implementation of approaches to address loss and damage associated with the impacts of climate change from extreme events and slow onset events associated with the adverse effects of climate change; (ii) Fostering dialogue, coordination, coherence and synergies among all relevant stakeholders, institutions, bodies, processes and initiatives outside the Convention, with a view to promoting cooperation and collaboration across relevant work and activities at all levels; (c) Enhancing action and support, including finance, technology and capacity-building, to address loss and damage associated with the adverse effects of climate change, so as to enable countries to undertake actions pursuant to decision 3/CP.18, paragraph 6, including by: (i) Providing technical support and guidance on approaches to address loss and damage associated with climate change impacts, including extreme events and slow onset events; (ii) Providing information and recommendations for consideration by the Conference of the Parties when providing guidance relevant to reducing the risks of loss and damage and, where necessary, addressing loss and damage, including to the operating entities of the financial mechanism of the Convention, as appropriate; (iii) Facilitating the mobilization and securing of expertise, and enhancement of support, including finance, technology and capacity-building, to strengthen existing approaches and, where necessary, facilitate the development and implementation of additional approaches to address loss and damage associated with climate change impacts, including extreme weather events and slow onset events;".

## 6.7. Transparency, global balance and implementation of the Paris Agreement

The Paris Agreement establishes supervisory mechanisms aimed at transparency and compliance with obligations of the overall outcome of actions taken under the Agreement. To this end, it creates a transparency framework (Article 13), an overall balance sheet (Article 14) and a mechanism to facilitate implementation and monitor compliance with the provisions of the Agreement (Article 15).

The transparency framework aims to provide a clear understanding of climate change actions and should be clear and monitor the progress of the Parties towards achieving individual nationally determined contributions and their adaptation actions, and should include good practices, priorities, needs and gaps<sup>434</sup>.

The purpose of the transparency framework is to provide clarity on the support provided and received by each Party and, as far as possible, to provide a complete picture of the aggregate financial support provided in the context of the Paris Agreement, for information to the overall balance sheet provided for in Article 14 of the Agreement<sup>435</sup>.

Each Party shall regularly provide a report of the national inventory of anthropogenic emissions by sources and removals by sinks of greenhouse gases not listed in the Montreal Protocol, prepared using good practice methodologies accepted by the Intergovernmental Panel on Climate Change (IPCC) and as agreed by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement; and other information necessary to monitor progress in the implementation and achievement of nationally determined contributions under<sup>436</sup> Article 4 of the Paris Agreement.

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<sup>434</sup> See Article 13(5) of the Paris Agreement: "Article 13. n.° 5. The purpose of the transparency framework for action is to provide a clear understanding of climate change action in light of the objective of the Convention as set out in Article 2 thereof, including clarity and monitoring of progress towards achieving the individual nationally determined contributions of Parties under Article 4, and adaptation actions of Parties under Article 7, including good practices, priorities, needs and gaps, to inform the overall stocktaking in accordance with Article 14."

<sup>435</sup> See Article 13(6) of the Paris Agreement: "Article 13. n.° 6. The purpose of the supporting transparency framework is to provide clarity on the support provided and received by individual Parties relevant in the context of climate change actions under Articles 4, 7, 9, 10 and 11, and, as far as possible, to provide a complete picture of the aggregate financial support provided, to inform the overall balance sheet pursuant to Article 14."

<sup>436</sup> See Article 13(7)(a) of the Paris Agreement: "Article 13. n.° 7. Each Party shall regularly provide the following information: (a) A report of the national inventory of anthropogenic emissions by sources and removals by sinks of greenhouse gases, prepared using good practice methodologies accepted by the Intergovernmental Panel on Climate Change and agreed by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement; (b) Information necessary to monitor the progress made in implementing and achieving its nationally determined contribution pursuant to Article 4."

However, Article 13(3) of the Agreement, in addition to recognizing the special circumstances of the least developed countries and small island developing States, states that the transparency framework must be "*implemented in a facilitative, non-intrusive, non-punitive manner that respects national sovereignty and that avoids placing an excessive burden on the Parties*", which completely removes any possibility of attributing a punitive character to the transparency framework of the Paris Agreement<sup>437</sup>.

Nevertheless, the reports shall undergo a technical review by experts, and it shall be for the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement to adopt common modalities, procedures and guidelines, as appropriate, for transparency of action and support<sup>438 439</sup>.

However, because it does not provide for binding performance obligations in relation to determined national contributions, the transparency framework provided by the Agreement is the main mechanism for holding States within the Paris Agreement to account. However, due to the lack of a sanctioning character and binding force, typical of the rules of *soft law*<sup>440 441</sup>, it is based on the premise that pressure from other Parties and civil society will influence the behavior of the Parties to the Agreement to fulfill their obligations<sup>442</sup>.

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<sup>437</sup> See Article 13(3) of the Paris Agreement: "*Article 13. n.º 3. The transparency framework should build on and strengthen the transparency mechanisms under the Convention, recognizing the special circumstances of least developed countries and small island developing States, and be implemented in a facilitative, non-intrusive, non-punitive manner that respects national sovereignty and that avoids placing an unreasonable burden on the Parties.*".

<sup>438</sup> See Article 13(11) and (12) of the Paris Agreement: "*Article 13. n.º 11. The information submitted by each Party pursuant to paragraphs 7 and 9 of this Article shall undergo a technical review by experts in accordance with Decision 1/CP.21. For those developing country Parties that need it in light of their capabilities, the review process will include assistance in identifying capacity development needs. In addition, each Party shall participate in a facilitative and multilateral review of progress related to efforts under Article 9, and their respective implementation and fulfillment of its nationally determined contribution. No. 12. The technical review by experts pursuant to this paragraph shall consist of an analysis of the support provided to the Party, as relevant, and its implementation and fulfillment of its nationally determined contribution. The review shall also identify areas for improvement for the Party, and include a review of the consistency of information with the modalities, procedures and guidelines referred to in paragraph 13 of this Article, taking into account the flexibility agreed with the Party pursuant to paragraph 2 of this Article. The review shall pay particular attention to the respective national capacities and circumstances of developing country Parties.*".

<sup>439</sup> See Article 13(13) of the Paris Agreement: "*Article 13. n.º 13. The Conference of the Parties serving as the meeting of the Parties to the Paris Agreement shall, at its first session, building on the experience of arrangements related to transparency under the Convention, and drawing on the provisions of this Article, adopt common modalities, procedures and guidelines, as appropriate, for transparency of action and support.*".

<sup>440</sup> ASSELT, Harro van; PAUW, Pieter; SAELEN, Håkon. *Assessment and Review under a 2015 Climate Change Agreement*. Nordic Council of Ministers 2015, 2015. In: BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 242.

<sup>441</sup> SHELTON. *Commitment and Compliance*. In: RAUSTIALA, Kal; SKOLNIKOFF, Eugene B.; VICTOR, David (Eds.). *The implementation and Effectiveness of International Environmental Commitments: Theory and Practice*. Cambridge, MIT Press, 1988. Em: BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 242.

<sup>442</sup> BODANSKY, Daniel; BRUNNÉE, Jutta; RAJAMANI, Lavanya. *International Climate Change Law*. Oxford University Press, 2017, p. 242.

On the other hand, the "global stock take" is set out in Article 14 of the Agreement, according to which the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement shall, periodically, take stock of the overall implementation of the Agreement and assess collective progress towards the achievement of its purpose and long-term objectives<sup>443 444</sup>.

Article 14 further provides that the first global review shall be carried out in 2023 and every five years thereafter, unless the Conference of the Parties as the meeting of the Parties of the Paris Agreement decides otherwise, and the outcome of the global balance sheet shall inform the Parties in updated terms, the result of international cooperation for climate action.

It should be noted that the Conference of the Parties serving as the meeting of the Parties of the Paris Agreement, in carrying out the global assessment under Article 14(1), "*shall do so in a comprehensive and facilitating manner, considering mitigation, adaptation and the means of implementation and support, and in the light of equality and the best available science.*".

Finally, within the framework of transparency and implementation measures, Article 15 establishes a mechanism to facilitate implementation and promote compliance by the Parties with the provisions of the Agreement<sup>445</sup>.

This mechanism consists of a specialized committee of a facilitative nature, which shall operate in a transparent, non-accusatory and non-punitive manner, with special attention to the respective

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<sup>443</sup>See Article 14 of the Paris Agreement: "Article 14. No. 1. The Conference of the Parties serving as the meeting of the Parties to the Paris Agreement shall periodically take stock of the implementation of this Agreement to assess collective progress towards achieving the purpose of this Agreement and its long-term objectives (referred to as the "global stocktake"). It should do so in a comprehensive and facilitating manner, considering mitigation, adaptation, and the means of implementation and support, and in the light of equality and the best available science. No. 2. The Conference of the Parties serving as the meeting of the Parties to the Paris Agreement shall hold its first global review in 2023 and every five years thereafter, unless the Conference of the Parties as the meeting of the Parties to the Paris Agreement decides otherwise. No. 3. The outcome of the global stocktake shall inform the Parties in update and reinforcement, in a nationally determined manner, of their actions and support in accordance with the relevant provisions of this Agreement, as well as in strengthening international cooperation for climate action."

<sup>444</sup> This time, the crucial function of the global balance sheet is in the context of nationally determined contributions (NDCs) and seeks an analysis of collective, rather than individual, actions and results in efforts to limit the increase in global temperature to a maximum of 2°C.

<sup>445</sup>See Article 15 of the Paris Agreement: "Article 15. n.º 1. A mechanism to facilitate the implementation and promote compliance with the provisions of this Agreement is hereby established. No. 2. The mechanism referred to in paragraph 1 of this Article shall consist of a committee which shall be specialised and of a facilitating nature, and shall function in such a way as to be transparent, non-accusatory and non-punitive. The Committee shall pay particular attention to the respective national capacities and circumstances of the Parties. No. 3. The Committee shall operate under the modalities and procedures adopted by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement at its first session and shall report annually to the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement."

national capacities and circumstances of the Parties, and shall operate under the modalities and procedures defined by the Conference of the Parties serving as the meeting of the Parties of the Paris Agreement.

Regarding the Committee provided for in the Paris Agreement, GAO and VOIGT state that

*"The nature of the committee is facilitative, not punitive and not adversarial; but nevertheless, it is an independent body designed to work with the Parties to get them to do what they agreed they would do. The modalities and procedures establish a direct engagement with the Party concerned, a dialogue and a process in order to facilitate the "return to compliance" by the Party. The publicity surrounding these procedures, the public report to the CMA, as well as the open meetings further reinforce the 'accountability' aspect of the committee's function."*<sup>446</sup>

Thus, the Paris Agreement establishes a kind of individual *compliance* mechanism for the Parties in its Article 15, to be implemented by a committee of experts, but which does not have a punitive character, as well as the transparency framework and the overall balance sheet previously provided for in Articles 13 and 14 of the Agreement, that do not have sanction provisions for non-compliance with the obligations set forth in the Agreement.

Nevertheless, as will be seen below, the international responsibility of States is not subject only to the specific legal regime of climate change, which is, as a rule, little focused on holding the Parties accountable for non-compliance with the obligations arising from the regime, as seen so far.

## **6.8. Final considerations**

As seen, the Paris Agreement is the newest international treaty linked to the UNFCCC in force. The Agreement, unlike its predecessor, the Kyoto Protocol, adopted a more egalitarian approach between the Parties, without division by annexes, and granted each to present its own GHG emission reduction targets through Nationally Determined Contributions (NDCs), an innovation in the legal regime of climate change.

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<sup>446</sup> GAO, Xiang; VOIGT, Christina. *Accountability in the Paris Agreement: The Interplay between Transparency and Compliance*. Em: ZETTERBERG, Charlotta. *Nordic Environmental Law Journal*, 2020, p. 56.

The Agreement adopted the flexibility mechanisms, previously provided for in the Kyoto Protocol, which in theory facilitate the fulfillment of the goals by the Parties, but failed to adopt the punitive character of the compliance mechanism provided for in the Protocol, prioritizing an approach of voluntary compliance with the obligations, so that non-compliance with obligations provided for in the Agreement does not lead to *a priori* sanctions. Indeed, the absence of obligations of result undermines the effectiveness of the Agreement, while the absence of sanctions or a punitive nature in the *compliance* mechanism, in favor of a facilitative, cooperative and flexible approach, leaves little room for effective *enforcement* of the provisions of the Agreement.

On the other hand, the Agreement innovated by providing its own chapter on Losses and Damages, although it expressly excludes the liability of Parties for losses and damages suffered by other Parties, initiating, however, the provision on this subject within the framework of the treaties on climate change.

Finally, the non-compliance by developed States with the financing of US\$100 billion per year, as well as the flexibility in the way NDCs are presented and calculated, coupled with the inclusion of the term "*in the light of different national circumstances*" to the principle of common but differentiated responsibility and respective capacities, leaves little room for the newly established COP26 target for the years 2030 and 2050, of a 45% and 100% reduction in GHG emissions in relation to 2010 levels, as well as limiting the temperature increase to 1.5°C by 2100, is effectively achieved, even more so when one considers that, according to the analyses already carried out, if the NDCs presented are effectively met, there will still be an increase of more than 10% in GHG emissions in 2030 compared to 2010.

This time, the Paris Agreement, however concluded, leaves relevant legal gaps, which prevent the attribution of responsibility to Parties that fail to comply with their obligations, as well as reparation to States that suffer from the damage caused by climate change. Nevertheless, international law provides for the responsibility of States, as will be seen below. On the other hand, international cooperation, a democratic and universal forum such as the Conference of the Parties serving as the Conference of the Parties to the Paris Agreement can serve in fact in such a way as to develop the culture necessary for effective action by the International Community to combat climate change and its adverse effects, developing the capacity of States collectively to adapt and prepare to mitigate the damages that may be unavoidable, at the same time developing a sufficiently robust legal framework for the case.

## 7. INTERNATIONAL RESPONSIBILITY OF STATES FOR CLIMATE CHANGE

As BAPTISTA teaches

*"It is an axiom of any legal order that the violation of most of its norms must have some negative consequence for the person responsible for it. If such violations systematically do not trigger any reaction from the rest of the members of the community, especially from the injured persons, with a demand for the cessation of the activity in question and compensation for the damage caused, it will be necessary to conclude that this will not be a violation of a legal order, but perhaps of a mere social or moral order."*<sup>447</sup>

Therefore, any conduct that violates an international norm requires the accountability of the State that has breached, by action or omission, its obligation under international law, otherwise one could not speak of a legal order of international law<sup>448 449</sup>.

This is a customary principle, undisputed in jurisprudence, according to which the violation of an international norm implies the international responsibility of the State. In addition, Article 1 of the Project on the International Responsibility of States, authored by the United Nations International

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<sup>447</sup> BAPTISTA, Eduardo Correia. *Direito Internacional Público*. Vol. II, Ed. AAFDL, 2015, p. 549.

<sup>448</sup> PELLET in turn explains the evolution of international liability "While barely distinguishing between the responsibility of individuals and that of the State, Grotius admitted, however, that from a damage caused "arises an obligation by the law of nature to make reparation for the damage, if any." This formulation formed the very basis of international responsibility until recently." In: PELLET, Alain. *The Definition of Responsibility in International Law*. In: *The Law of International Responsibility. Chapter 1*. (Eds.) CRAWFORD, James; OLLESON, Simon; PARLETT, Kate; PELLET, Alain. Oxford University Press, 2010, p. 5. Quoting: GROTIUS, Hugo. *The Rights of War and Peace*. (Ed.) TUCK, R., Tuck, (Trans.) Barbeyrac, 1625, Liberry Fund, Indianapolis, 2005. In: PELLET, Alain. *The Definition of Responsibility in International Law*. In: *The Law of International Responsibility. Chapter 1*. (Eds.) CRAWFORD, James; OLLESON, Simon; PARLETT, Kate; PELLET, Alain. Oxford University Press, 2010, p. 5. PELLET also explains the most recent changes in the concept of international responsibility, which include international criminal law and the absence of the need to prove the damage.

<sup>449</sup> DUPUY and KERBRAT explain about the legal order that "The notion of legal order designates a coordinated set of norms, endowed with binding force in relation to specific matters, and whose ignorance entails certain definite consequences. These different elements are found in international law, but with specific characteristics, which prevent us from assimilating it to the model given by domestic legal systems." In DUPUY, Pierre-Marie; KERBRAT, Yann. *Droit International Public*. 15th Edition, Dalloz, 2020, p. 136.



Law Commission (ILC), provides for an accurate codification of customary law for the purposes of international responsibility of States, hereinafter referred to as the "ILC Project"<sup>450 451 452 453</sup>.

The ILC Project provides that the international responsibility of a State arises from an unlawful international act, and it's this fact that is the generator of international responsibility that produces legal consequences for the State that committed it <sup>454 455</sup>.

And as for the qualification of the standards of international responsibility, ALLAND explains that

*"The legal order is composed of <primary> rules where the provisions of behavior (obligations to do or not to do) and <secondary> rules that only apply after a non-compliance, a violation of a primary rule, an internationally unlawful act from which its raison d'être derives, for example, the obligation to repair the damage, which arises from a harmful act. The study of international liability involves examining the secondary rules governing the consequences associated with an internationally unlawful and/or harmful act."*<sup>456</sup>

Then, the norms of international responsibility are norms qualified as secondary and this international responsibility to be imputed to a State, or to an international organization, is not of a criminal or civil nature, being this an undifferentiated or *sui generis* regime<sup>457 458</sup>, since the

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<sup>450</sup> "It is a principle of international law, and even a general concept of law that any breach of a commitment entails the obligation of reparation." *Litigation between Germany and Poland the Chorzów Plant: Publications of the Permanent Court of International Justice. Collection of Judgments. Case concerning The Factory at Chorzów.* PCIJ, Series A, n.º 9, Judgment 8, 1927, p. 29.

<sup>451</sup> BAPTISTA, Eduardo Correia. *Direito Internacional Público*. Vol. II, Ed. AAFDL, 2015, p. 549.

<sup>452</sup> ILC draft on the international responsibility of the State: "Article 1: The responsibility of the State for its internationally unlawful acts: Every internationally unlawful act of a State entails its international liability."

<sup>453</sup> HOBBER, K. *State responsibility and attribution*. In: MUCHLINSKI, P; ORTINO, F; SCHREUER, C. (Eds.). *The Oxford Handbook of International Investment Law*. Oxford University Press. In: CRAWFORD, James. *State Responsibility. The General Part*. Cambridge University Press, Cambridge, 2014, p. 43.

<sup>454</sup> See section 28 of the ILC Project. "Art. 28. *Legal Consequences of an Internationally Unlawful Act: The international liability of a State which, in accordance with the provisions of Part One, arises from an unlawful international act, produces the legal consequences which are enunciated in that Party.*"

<sup>455</sup> ALLAND, Denis. *Handbook of Public International Law*. 6th updated edition, Paris, Presses Universitaires de France, 2019, p. 241.

<sup>456</sup> ALLAND, Denis. *Handbook of Public International Law*. 6th updated edition, Paris, Presses Universitaires de France, 2019, p. 239. See also: CRAWFORD, James. *State Responsibility. The General Part*. Cambridge University Press, Cambridge, 2014, p. 64.

<sup>457</sup> On the other hand, BAPTISTA states disagrees and states that: "... These are not secondary rules, but primary ones, since they regulate not only the imputation of unlawful acts, but also of lawful acts. They integrate the regime of each subject ...". In: BAPTISTA, Eduardo Correia. *Direito Internacional Público*. Vol. II, Ed. AAFDL, 2015, p. 562.

<sup>458</sup> The responsibility of International Organizations is provided for in the Project on International Responsibility of International Organizations, also authored by the United Nations Commission on International Law. In this study we will not analyze the international responsibility of international organizations *per se*.

responsibility of the State does not know such a distinction and conceives only of international responsibility<sup>459</sup>.

As we have seen, the legal regime of climate change provides for different compliance mechanisms, according to each of its legal instruments, and there is some form of accountability for non-compliance with obligations, especially in the case of the mechanism of the Kyoto Protocol, but, as a rule, the legal regime of climate change adopts a very facilitating approach, cooperative and flexible at the level of State accountability, with a focus on the voluntary return of Parties to compliance, rather than a punitive, sanctioning approach of effective accountability of Parties for nonconformities<sup>460</sup>.

However, the idea that the legal regime of climate change is an independent regime regarding international responsibility is not the correct one, since it does not contain its own secondary norms in a complete way or sanctioning mechanisms in general, which would preclude the application of the concept of *lex specialis*<sup>461 462 463 464</sup>, at least with regard to the part of the regime that does not have a compliance mechanism of sanctioning nature.

The application of the general regime of international responsibility of the State in the context of climate change depends, firstly, on the absence of a proper regime of secondary norms that creates a *lex specialis* in the field of climate change, as provided for in Article 55 of the ILC Project.

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<sup>459</sup> CRAWFORD, James. *The System of International Responsibility*. In: *The Law of International Responsibility*. Oxford University Press, Oxford, 2010. In: WEATHERALL, Thomas. *Jus Cogens. International Law and Social Contract*. Cambridge University Press, Cambridge, 2017, p. 12.

<sup>460</sup> TABAU, Anne-Sophie. *Climate Change Compliance Procedures*. Oxford Public International Law. Oxford University Press, 2015, p. 02. See also: KARLSSON-VINKHUYZEN, Silvia, MCGEE, Jeffrey S., PICKERING, Jonathan, WENTA, Joseph. *Global Climate Governance Between Hard and Soft Law: Can the Paris Agreement's 'Crème Brûlée' Approach Enhance Ecological Reflexivity*. Journal of Environmental Law, Oxford, 2019, p. 9.

<sup>461</sup> As BAPTISTA explains, "the international norms that regulate liability are norms that have been qualified as secondary, in the sense that they come into force by virtue of the violation of primary norms", Therefore, the primary norms are the norms regulating the rights and duties of the international subjects and the secondary norms are the regulatory norms of the responsibility of the international subjects. See: BAPTISTA, Eduardo Correia. *Direito Internacional Público*. Vol. II, Ed. AAFDL, 2015, p. 552.

<sup>462</sup> WEWERINKE-SINGH, Margaretha. *State Responsibility, Climate Change and Human Rights under International Law*. Ed. Hart, 2019, p. 69. See also: GERVASI, Mario. *On the United States' Decision to Withdraw from and Cease Implementation of the Paris Agreement on Climate Change*. Oxford University Press, 2019, p. 804. LEFEBER, René. OBERTHÜR, Sebastian. *Holding countries to account: The Kyoto Protocol's compliance system revisited after four years of experience*. Climate Law, IOS Press, 2010, p. 157.

<sup>463</sup> Article 55 of the United Nations Commission on the International Responsibility of States rules out the application of the rules of international responsibility provided for therein "if and to the extent that the conditions of existence of an internationally unlawful act, the content or implementation of the international responsibility of a State are governed by special norms of international law".

<sup>464</sup> GERVASI, Mario. *On the United States' Decision to Withdraw from and Cease Implementation of the Paris Agreement on Climate Change*. Oxford University Press, 2019, p. 804.

As already seen, the compliance mechanisms provided for in the legal instruments of the legal regime of climate change (Convention, Kyoto Protocol, Paris Agreement and decisions of the Parties in their various forms), establish different mechanisms, according to each instrument. However, with the exception of the compliance mechanism of the Kyoto Protocol, which has a punitive branch applicable only to States that have adopted the protocol and are listed in Annex I of the Convention, the legal regime of climate change has only a facilitative and sanction-free compliance mechanism.

On the other hand, with the exception of the States that have adopted the Kyoto Protocol and are listed in Annex I to the Convention, which have mandatory obligations regarding GHG reduction, the International Law on Climate Change is founded on the voluntary cooperation of the parties, with voluntary reductions of GHG emissions, in the good faith of States and in the assistance to the developing States, especially the most vulnerable.

Therefore, since the existence or not of a *lex specialis* is defined only from the analysis of the concrete case of each regime or international legal instrument and that, in many cases, even providing for secondary norms, these leave many gaps and silence as to possible legal situations, it seems to us that the legal regime of climate change does not have a set of secondary norms of its own capable of satisfying the provisions of Article 55 of the ILC Project and to remove the norms of the general regime of the international responsibility of States for unlawful acts in the context of climate change<sup>465</sup>.

Furthermore, the application of the general regime of the international responsibility of States in the event of an unlawful international legal act within the framework of the legal regime of climate change is justified, since the Convention itself provides for the possibility for the Parties to seek the

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<sup>465</sup> CRAWFORD, James. *State Responsibility. The General Part*. Cambridge University Press, Cambridge, 2014, p. 104.

resolution of conflicts through negotiation or any other peaceful means of their own choice or through the International Court of Justice<sup>466 467 468 469</sup>.

Therefore, it is understood that, in view of these considerations, the international responsibility of States for an unlawful act, as provided for in the ILC Project, is applicable in the context of climate change, despite the practical difficulties that may be opposed to it. Below we will analyze the general aspects of the international responsibility of States and the main questions regarding its application in the context of climate change.

### 7.1. Requirements of the international responsibility of States

The application of international liability for the violation of an international standard requires compliance with two formal requirements: that an act may be attributable to a particular international state or entity, and that this act be unlawful.<sup>470</sup>

The Article 2 of the ILC Project reflects these necessities assumptions to establish the existence of an internationally unlawful act of the a State.<sup>471</sup> Firstly, the conduct in question must be attributable to a State in accordance with international law and, secondly, in order for responsibility

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<sup>466</sup>See Article 14(1) of the UNFCCC: "*Article 14. n.º 1. In the event of a conflict between two or more Parties concerning the interpretation or application of the Convention, the Parties concerned shall endeavour to resolve it through negotiation or any other peaceful means of their own choosing.*".

<sup>467</sup> See Article 14(2) of the UNFCCC: "*Article 14. n.º 2. When ratifying, accepting, approving or acceding to the Convention, or at any time thereafter, a Party that is not a regional economic integration organization may declare, in a written instrument submitted to the depositary, that, in respect of any dispute concerning the interpretation or application of the Convention, it recognizes as compulsory ipso facto and without any special agreement with respect to any Party accepting the same obligation: (a) the submission of the conflict to the International Court of Justice; and or (b) arbitration in accordance with procedures to be adopted as soon as possible by the Conference of the Parties and to be set out in an annex relating to the arbitration. A Party that is a regional economic integration organization may make a declaration to the same effect with respect to arbitration in accordance with the terms referred to in subparagraph (b) above.*".

<sup>468</sup> FRENCH, Duncan; RAJAMANI, Lavanya. *Climate Change and International Environmental Law: Musings on a Journey to Somewhere*. Journal of Environmental Law. Vol. 25(3). Oxford University Press, 2013, p. 452.

<sup>469</sup>WEWERINKE-SINGH further states that during the ratification of the United Nations Framework Convention on Climate Change, States such as Fiji, Kiribati, Nauru and Papua New Guinea submitted reservations stating that the provisions of the Convention did not constitute a waiver of any right that could arise from damages arising from climate change under the International Law of State Responsibility. In: WEWERINKE-SINGH, Margaretha. *State Responsibility, Climate Change and Human Rights under International Law*. Ed. Hart, 2019, p. 6.

<sup>470</sup> BAPTISTA, Eduardo Correia. *Direito Internacional Público*. Vol. II, Ed. AAFDL, 2015, p. 554. See also: CRAWFORD, James. *State Responsibility. The General Part*. Cambridge University Press, Cambridge, 2014, p. 67.

<sup>471</sup>ILC Project on International Responsibility of States: "*Article 2. Elements of an internationally unlawful act of the State. There is an internationally unlawful act of the State when the conduct, consisting of an action or omission: a) is attributable to the State under international law; and (b) constitutes a violation of an international obligation of the State.*".

to be attributed to the State, the conduct must constitute a breach of an international legal obligation in force for that State at the time of the act. These requirements will be seen below.

### ***7.1.1. Attribution of international responsibility to States***

The first requirement of the international responsibility of the State is that of the imputation or attribution of an unlawful act must be imputed to a particular State or group of States.

In order to ascertain compliance with this first assumption, a process of attribution of international responsibility is necessary, according to which international law defines whether or not a conduct can be considered an "*Act of State*"<sup>472</sup>.

In this sense, BAPTISTA exposes

*"Despite the terminology 'act', international law has long established positive duties, particularly for States; that is, duties that require a certain positive action. Duties that disregard of which by mere inaction implies liability for omission."*<sup>473</sup>

Than, "*act*" means not only actions actually taken, but also omissions by a particular State with regard to the fulfilment of a particular obligation.

And according to international law, an "*act of the State*" is anyone that is conducted by an organ of the State that exercises some legislative, executive, judicial or other function in the organizational structure of the State. In this sense, the State is responsible unlimitedly for acts of its organs, provided that they are exercising the powers of the State and on its behalf<sup>474 475</sup>.

In addition, an organ of the State means any person or entity which has the *status* of an organ in accordance with the domestic law of a particular State; or which, not being an organ of the State,

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<sup>472</sup> CRAWFORD, James. *State Responsibility. The General Part*. Cambridge University Press, Cambridge, 2014, p. 113.

<sup>473</sup> BAPTISTA, Eduardo Correia. *Direito Internacional Público*. Vol. II, Ed. AAFDL, 2015, p. 561.

<sup>474</sup> ILC Project on International Responsibility of States: "*Article 4. Conduct of the organs of a State: 1. The conduct of any organ of the State exercising legislative, executive, judicial or other function - whatever its position in the organization of the State - shall be considered an act of the State under international law, and regardless of whether it is an organ of the central government or a territorial unit of the State. 2. Any person or entity having such status in accordance with the domestic law of the State shall be included as an organ.*".

<sup>475</sup> CRAWFORD, James. *State Responsibility. The General Part*. Cambridge University Press, Cambridge, 2014, p. 117.

exercises powers of the public power of a State in a particular situation, according to the laws of that State; or in the case of organs made available to a State by another State; of a person or group of persons directed controlled by a state; a person or group of persons who is in fact exercising the powers of public authority in the absence of official authorities; of an insurrection movement that will become the new government of that State; or in the case of recognition and adoption of an act as proper by a State<sup>476 477 478 479 480 481 482</sup>.

There are also cases of connection of a State with an act of another State, in which the acts of the latter would be considered to be of the former. This situation arises when a State assists another State in the commission of an internationally unlawful act, directs or controls another State in the commission of an internationally unlawful act, or coerces another State to commit an unlawful act

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<sup>476</sup> See Article 4(2) of the ILC Project on the International Responsibility of States.

<sup>477</sup> See Article 5 of the ILC Project on the International Responsibility of States: *"Article 5. Conduct of persons or entities exercising powers of public power: An act of the State, according to international law, shall be considered to be the conduct of a person or entity that is not an organ of the State, in accordance with Article 4, which, in accordance with the legislation of that State, may exercise powers of public power, provided that the person or entity is acting in that capacity in the particular situation."*

<sup>478</sup> See Article 6 of the ILC Project on the International Responsibility of States: *"Article 6. Conduct of organs placed at the disposal of a State by another State: An act of the State, according to international law, shall be considered to be the conduct of an organ made available to a State by another, whenever the organ is exercising powers of the public power of the State at whose disposal it is found."*

<sup>479</sup> See Article 8 of the ILC Project on the International Responsibility of States: *"Article 8. Conduct directed or controlled by a State: The conduct of a person or group of persons shall be considered an act of the State under international law if that person or group of persons is in fact acting on the instructions of or under the direction or control of that State in carrying out the conduct."*

<sup>480</sup> See Article 9 of the ILC Project on the International Responsibility of States: *"Article 9. Conduct carried out in the absence or absence of official authorities: The conduct of a person or group of persons shall be considered an act of the State under international law if the person or group of persons is in fact exercising powers of public power in the absence or absence of official authorities and in circumstances such as to require the exercise of those powers."*

<sup>481</sup> See Article 10 of the ILC Project on the International Responsibility of States: *"Article 10. Conduct of one insurrection movement or another: 1. The conduct of an insurrection movement which becomes the new government of that State shall be considered an act of the State under international law. 2. The conduct of an insurgency or other movement which is successful in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be deemed to be an act of the new State, and in accordance with international law. 3. This Article shall not be prejudiced by the attribution to a State of any conduct, whatever its relation to the movement in question, which is to be regarded as an act of that State by virtue of Articles 4 to 9."*

<sup>482</sup> See Article 11 of the ILC Project on the International Responsibility of States: *"Article 11. Conduct recognized and adopted by a State as its own: Conduct which is not attributable to a State in accordance with the preceding articles, however, shall be considered an act of that State in accordance with international law if and to the extent that that State recognizes and adopts the conduct in question as its own."*

under international law. In addition, it is possible for an act to be imputed to more than one State or even an International Organization<sup>483 484 485</sup>.

Therefore, the first presumption of international responsibility is fulfilled when an unlawful act is recognized as conducted by a State, including in cases of omission, in the form recognized by customary law and provided for by the Project on International Responsibility of States authored by the United Nations Commission on International Law, and thus this act can be attributed to that respective State.

However, still according to customary law and the ILC Project, the attribution of an act as unlawful to a particular State, or indeed, its liability, depends on the presence of factors of extinction of obligations for impossibility of compliance or the presence of a cause of justification: other than the case of force majeure or supervening impossibility of fulfilling the obligation by extinction of the object of the treaty<sup>486</sup>.

By force majeure is meant the natural facts or acts of third parties which materially force an organ of a State to carry out an action which, had it not been for the former, would not have been carried out, and for which the State has not competed with its will, whether by action, omission or

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<sup>483</sup> See Article 16 of the ILC Project on the International Responsibility of States: *"Article 16. Aid or assistance in the commission of an internationally unlawful act: A State which assists or assists another State in committing an internationally unlawful act is internationally liable to provide such aid or assistance if: (a) that State does so in knowledge of the circumstances of the internationally unlawful act; and (b) the act would be internationally unlawful if committed by that State."*

<sup>484</sup> See Article 17 of the ILC Project on International Responsibility of States: *"Article 17. Direction and control exercised when committing an internationally unlawful act. A State which directs and controls another State in the commission of an internationally unlawful act is internationally liable for that act if: (a) that State does so with knowledge of the circumstances of the internationally unlawful act; and (b) the act would be internationally unlawful if committed by the State it directs and controls."*

<sup>485</sup> See Article 18 of the ILC Project on the International Responsibility of States: *"Article 18. Coercion from another state. A State that coerces another State to commit an act is internationally liable if: (a) in the absence of coercion, such act would constitute an internationally unlawful act of the coerced State; and (b) the coercing State does so by knowing the circumstances of the act."*

<sup>486</sup> BAPTISTA, Eduardo Correia. *Direito Internacional Público*. Vol. II, Ed. AAFDL, 2015, p. 561.

assumption of risk. This time, there is no legal act of the State, because it did not contribute to the same and, therefore, there can be no illegality or need for justification<sup>487 488 489</sup>.

In turn, the supervening impossibility of fulfilling the obligation by extinguishing the object of the treaty is provided for in the CVDT, in this case, if there is no object of international obligation of the State, there is no non-compliance with the norm and, therefore, there is no illegality or need for justification, and the impossibility may be definitive, extinguishing the obligation, or temporary, when the obligation is suspended for the period in which the impossibility of compliance persists<sup>490</sup>  
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Thus, the first requirement of the international responsibility of the State is that of imputation or attribution of an internationally unlawful act to a State, and the acts of the organs of a State are imputed to them, in the form of international law. We now come to the analysis of the second requirement of international responsibility.

### ***7.1.2. Violation of an international obligation by States***

The second condition for the application of international responsibility to a State is that the action or omission attributed to the State must constitute a breach of an international obligation of that State at the time of that act, that is to say, the rule must be in force for that State at the time of the execution of the act.

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<sup>487</sup> See Article 23 of the ILC Project on International Responsibility of States: "*Article 23. Force majeure: 1. The unlawfulness of an act of a State in disagreement with an international obligation of that State shall be excluded if the act is due to force majeure, understood as the occurrence of an irresistible force or an unforeseeable event, beyond the control of the State, making it materially impossible, in this circumstance, to carry out the obligation. 2. Paragraph 1 shall not apply if: (a) the situation of force majeure is due, by itself or in combination with other factors, to the conduct of the State invoking it; or (b) the State has assumed the risk of that situation.*".

<sup>488</sup> BAPTISTA on the relationship between cause of justification, excluding unlawfulness and force majeure: "*It should be stressed, therefore, that force majeure cannot be considered as a cause of justification. If there is no legal act, there can be no unlawfulness, and therefore no justification is necessary.*". For more see: BAPTISTA, Eduardo Correia. *Direito Internacional Público*. Vol. II, Ed. AAFDL, 2015, p. 556.

<sup>489</sup> BAPTISTA, Eduardo Correia. *Direito Internacional Público*. Vol. II, Ed. AAFDL, 2015, p. 561.

<sup>490</sup> See Article 61 of the Vienna Convention on the Law of Treaties: "*Article 61- Supervening impossibility of compliance: 1. A Party may invoke the impossibility of complying with a treaty as a ground for terminating its validity or for withdrawing from it if such impossibility results from the definitive disappearance or destruction of an object indispensable to the fulfilment of the treaty. If the impossibility is temporary, it can only be invoked as a ground for suspending the application of the treaty. 2. The impossibility of compliance may not be invoked by a Party as a reason for terminating the validity of the treaty, for withdrawing from it or for suspending its application if such impossibility results from a breach by the invoking Party of an obligation under the treaty or of any other international obligation relating to any other Party to the treaty.*".

<sup>491</sup> BAPTISTA, Eduardo Correia. *Direito Internacional Público*. Vol. II, Ed. AAFDL, 2015, p. 560.



Thus, the violated rule must constitute an obligation arising from international law, from any of its sources, and it is only up to the International Legal Order to classify an act as unlawful for the purposes of applying international responsibility, and the domestic law of States is inapplicable for these purposes<sup>492 493 494</sup>.

Since it is indispensable that the conduct of the State be contrary to the norm derived from international law that establishes an obligation<sup>495</sup>, it is still necessary that the norm must be in force for that State, or international organization, at the time of the act.

Therefore, Article 13 of the ILC Project provides that a legal act of a State constitutes a breach of an obligation only when that State is bound by that obligation at the time the act occurs.

In this sense, Article 14 of the ILC Project deals with the moment of the legal act for the purposes of the unlawfulness of the act<sup>496 497</sup>. The time of execution of the act is distinguished into two species. The first concerns acts of immediate consummation and the second concerns acts that

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<sup>492</sup>See Article 3 of the ILC Project on the International Responsibility of States: *"Article 3. The characterization of an act of a State as internationally unlawful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful under domestic law."*

<sup>493</sup>Article 38 of the Statute of the International Court of Justice (ICJ) provides for the sources of international law: *"Article 38 1 - The Court (\*), whose function is to decide in accordance with international law the disputes submitted to it, shall apply: a) International conventions, whether general or special, which establish rules expressly recognized by the disputing States; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; d) With the exception of the provisions of Article 59, the judicial decisions and the doctrine of the most qualified publicists of the different nations, as an auxiliary means for the determination of the rules of law. international conventions, international customs and general principles of law. Doctrine and jurisprudence are auxiliary means. (2) This provision shall be without prejudice to the power of the Court (\*) to decide a question ex aequo et bono if the parties so agree."*

<sup>494</sup>BAPTISTA explains that *"it is a mere corollary of the principle that a subject cannot invoke the Law created by him as a justification for violating International Law, not even its Constitution. This applies to States, international organizations and armed movements. In: BAPTISTA, Eduardo Correia. Direito Internacional Público. Vol. II, Ed. AAFDL, 2015, p. 587.*

<sup>495</sup>See Article 12 of the ILC Project on the International Responsibility of States: *"Article 12. Existence of a violation of an international obligation: There is a violation of an international obligation by a State when an act of that State is not in conformity with what is required of it by the obligation, whatever the origin or nature of it."*

<sup>496</sup>See Article 14 of the ILC Project on International Responsibility of States: *"Article 14. Extension in time of a violation of an international obligation: 1. The violation of an obligation by an act of a State that is not of a continuous character occurs at the time when the act is performed, even if its effects last. 2. The violation of an international obligation by an act of a State which is of a continuous character extends throughout the period during which the act continues and remains in disagreement with the international obligation. 3. The violation of an international obligation requiring the State to prevent a certain event shall occur at the time when that event begins and shall extend throughout the period in which the event continues and remains in disagreement with that obligation."*

<sup>497</sup>At this point, it should be noted, for the purposes of the present study, that Article 14(3) *in casu* specifically provides for cases of omission of a State in the face of international obligations that determine the prevention of a particular event, providing that in this case the action *"shall take place at the moment when that event begins and extends throughout the period in which the event continues and remains in disagreement with that obligation"*. This time, since the customary principle of prevention is one of the basic principles of international environmental law, applicable to the legal regime of climate change, Article 14(3) of the ILC project seems to be especially relevant.

are continuous or that last in time, in which an unlawful situation initiated by an unlawful act extends over time for the duration of the act<sup>498 499</sup>. Nevertheless, the distinction between the two species can be complex, since acts of apparently immediate consummation may in fact be preceded by a series of prior acts necessary for their consummation, that is, of compound unlawful acts, and these cases are provided for in Article 15 of the ILC Project<sup>500</sup>.

As regards the illegality of an act committed by a State in the light of international law, it is still necessary to ascertain how and whether the presence of intent, guilt or even damage is necessary to constitute the breach of an international obligation by a State and its responsibility. In this sense, BAPTISTA explains that

*"The problem of the relevance of intent (in its direct form: intention and conscience to obtain a certain result) and negligence in the unlawful act in the light of international law has classically provoked great discussions. The issue now seems more settled in the sense that there is no general rule, all depending on the primary obligation at issue."*<sup>501</sup>

And in fact, the ILC Project does not distinguish between liability for intent or negligence/fault, despite occasional mentions of differentiation in the comments made by ICL to the submitted project, it is a deliberate omission<sup>502 503</sup>.

Therefore, the necessity of the presence of intent or negligence in the action of the State, for it to be responsible, will depend on the primary norm violated, and *"in any case, no awareness of the illegality is necessary, being irrelevant its absence (error on the Law)..."*<sup>504</sup>.

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<sup>498</sup> BAPTISTA, Eduardo Correia. *Direito Internacional Público*. Vol. II, Ed. AAFDL, 2015, p. 588.

<sup>499</sup> BAPTISTA further explains that the distinction between the two species can be complex, as acts of seemingly immediate consummation may actually be preceded by a series of prior acts necessary for their consummation. Moreover, the issue is very relevant in the application of treaties, since accession to a treaty abruptly alters the law applicable to an international subject, thereby also altering the jurisdiction under it. In: BAPTISTA, Eduardo Correia. *Direito Internacional Público*. Vol. II, Ed. AAFDL, 2015, p. 588.

<sup>500</sup> BAPTISTA, Eduardo Correia. *Direito Internacional Público*. Vol. II, Ed. AAFDL, 2015, p. 589. Also: CRAWFORD, James. *State Responsibility. The General Part*. Cambridge University Press, Cambridge, 2014, p. 269.

<sup>501</sup> BAPTISTA, Eduardo Correia. *Direito Internacional Público*. Vol. II, Ed. AAFDL, 2015, p. 590.

<sup>502</sup> CRAWFORD, James. *State Responsibility. The General Part*. Cambridge University Press, Cambridge, 2014, p. 63.

<sup>503</sup> WEWERINKE-SINGH, Margaretha. *State Responsibility, Climate Change and Human Rights under International Law*. Ed. Hart, 2019, p. 86.

<sup>504</sup> BAPTISTA, Eduardo Correia. *Direito Internacional Público*. Vol. II, Ed. AAFDL, 2015, p. 593.

Finally, in relation to the presumption of illegality, it is necessary to analyze the need, in the light of the international law applicable to the international responsibility of States, to find damage arising from non-compliance with an international obligation for the liability of a State.

As stated earlier, any conduct that violates an international norm requires the accountability of the State that has breached this obligation, otherwise one could not speak of a legal order of Public International Law.

Thus, it could be said that damage is not a prerequisite for the international responsibility of States, since any conduct that violates an international norm requires the accountability of the State that has failed to comply with this obligation. Moreover, the Project on the International Liability of the ICL makes no express mention of the need for harm to occur, and this intentional omission is correct<sup>505</sup>.

As BAPTISTA explains

*"in the light of international law, any violation of an obligation always implies damage, at least for the holder of the corresponding right, hence the tendency to affirm sovereignly that any violation of this Order implies liability. This understanding, therefore, does not exclude the relevance of the damage, first of all in the determination of compensation, if natural reconstitution is not possible or is excessively costly. It merely maintains that it is always present. When the violation did not cause any material damage, it is understood that the entity that suffered the consequences in its legal sphere always suffers moral damage and is also entitled to compensation. Because it has not suffered any material damage, in these cases the jurisprudence has limited it to a mere satisfaction: that the perpetrator of the violation must apologize for his act or, at least, see his act qualified as a violation of international law by the court."*<sup>506</sup>

Therefore, the presumption is that any breach of an international obligation by a State generates damage, whether moral or material, and its extent is of greater relevance in the determination of compensation<sup>507</sup> or the form of reparation of the damage in general. Therefore, in

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<sup>505</sup> CRAWFORD, James. *State Responsibility. The General Part*. Cambridge University Press, Cambridge, 2014, p. 58.

<sup>506</sup> BAPTISTA, Eduardo Correia. *Direito Internacional Público*. Vol. II, Ed. AAFDL, 2015, p. 593-594.

<sup>507</sup> BAPTISTA, Eduardo Correia. *Direito Internacional Público*. Vol. II, Ed. AAFDL, 2015, p. 595.

cases of serious damage caused by a breach of an international obligation, the damage should be considered for the purposes of reparation, while in situations where there is no material damage, there will be moral damage, for which reparation will also be fixed as a basis for the extent of the moral damage suffered by the victim State<sup>508 509</sup>.

### ***7.1.3. Causes of exclusion of unlawfulness***

Specific situations can lead to the preclusion of the illegality of an international legal act and, consequently, of the international responsibility to be applied to a State, since, in this case, there is no longer any unlawful act for which that State can be held responsible<sup>510</sup>.

These causes of the exclusion of the illegality of an act not in accordance with international law committed by States are listed in the Project on the International Responsibility of the States of the ILC.

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<sup>508</sup>The forms of reparation of the damage are restitution, compensation and satisfaction, as provided for in Article 34 of the ILC Project: *"Article 34: Forms of reparation: The full reparation of the damage caused by the internationally unlawful act shall be in the form of restitution, compensation and satisfaction, individually or in combination, in accordance with the provisions of this Chapter."*

<sup>509</sup>See Article 39 of the ILC Project on International Responsibility of States: *"Article 39. Contribution to injury: In determining reparation, account shall be taken of the contribution to the injury by intentional or negligent action or omission of the injured State or of any person or entity in respect of which reparation is sought."*

<sup>510</sup>CRAWFORD, James. *State Responsibility. The General Part*. Cambridge University Press, Cambridge, 2014, p. 275.

According to the ILC Project, they are as follows: consent; self-defense; countermeasures or reprisals in relation to an internationally unlawful act committed by another State; force majeure; extreme danger; and state of need<sup>511 512 513 514 515 516 517 518</sup>.

Although these six causes of exclusion do not all belong to the same category, the ILC Project contains two provisions that generally apply to all, despite doctrinal differences<sup>519</sup>. It is about compliance with peremptory norms of international law (*Ius Cogens*) and the consequences of invoking a circumstance extinguishing the illegality.

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<sup>511</sup> See Article 20 of the ILC Project on International Responsibility of States: "Article 20. Consent: A valid consent of a State to the commission of a particular act by another State excludes the unlawfulness of that act in relation to the first to the extent that the act remains within the limits of said consent."

<sup>512</sup> See Article 21 of the ILC Project on the International Responsibility of States: "Article 21. Self-defence: The unlawfulness of an act of a State is excluded if the act constitutes a lawful measure of self-defence taken in accordance with the Charter of the United Nations."

<sup>513</sup> See Article 22 of the ILC Project on International Responsibility of States: "Article 22: Countermeasures in relation to an internationally unlawful act. The unlawfulness of an act of a State in disagreement with an international obligation towards another State shall be excluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with Chapter II of Part Three."

<sup>514</sup> The ILC Project also provides in detail, from its articles 49 to 54, on the possibility and form of application of countermeasures or reprisals as a means of implementing the responsibility of a State.

<sup>515</sup> See Article 23 of the ILC Project on the International Responsibility of States: "Article 23: Force majeure: 1. The unlawfulness of an act of a State in disagreement with an international obligation of that State shall be excluded if the act is due to force majeure, understood as the occurrence of an irresistible force or an unforeseeable event, beyond the control of the State, making it materially impossible, in this circumstance, to carry out the obligation. 2. Paragraph 1 shall not apply if: (a) the situation of force majeure is due, by itself or in combination with other factors, to the conduct of the State invoking it; or (b) the State assumed the risk of that situation."

<sup>516</sup> As already mentioned in the topic on imputation of an act to a State, in cases of force majeure, it is understood that there is no legal act of the State, because it did not contribute to the same and, therefore, there can be no illegality or need for justification, so the inclusion of them together with the causes of exclusion of illegality is due to the presence of this form of classification of force majeure in the Project on International Responsibility of the United Nations Commission on International Law.

<sup>517</sup> See Article 24 of the ILC Project on International Responsibility of States: "Article 24. Extreme danger: 1. The unlawfulness of an act of a State in disagreement with an international obligation of that State is extinguished if the author of the act in question has no reasonable alternative, in a situation of extreme danger, to save the life of the author or the lives of other persons entrusted to the care of the author. 2. Paragraph 1 shall not apply if: (a) the situation of extreme danger is due solely to, or in combination with, the conduct of the State invoking it; or (b) the act in question is likely to create a comparable or greater danger."

<sup>518</sup> See Article 25 of the ILC Project on International Responsibility of States: "Article 25. State of necessity: 1. No State may invoke the state of necessity as a ground for the exclusion of unlawfulness of an act in disagreement with an international obligation of that State, unless the act: (a) is the only way for the State to preserve an essential interest against serious and imminent danger; and (b) does not seriously affect an essential interest of the State or States to which the obligation exists, or of the international community as a whole. 2. In no case may the State invoke the state of necessity as a ground for exclusion of unlawfulness if: (a) the international obligation in question excludes the possibility of invoking necessity, or (b) the State has contributed to the occurrence of the state of necessity."

<sup>519</sup> CRAWFORD, James. *State Responsibility. The General Part*. Cambridge University Press, Cambridge, 2014, p. 274.

However, Article 26 of the ILC Project establishes that the grounds for exclusion of unlawfulness are not applicable to an act of a State that is in breach of an obligation arising from an imperative rule, an *Ius Cogens* rule of general international law<sup>520 521</sup>.

Therefore, an imperative part of general international law is also known as a norm of *Ius Cogens* and, as conceptualized in Article 53 of the CVDT<sup>522</sup>. Then, a norm of *Ius Cogens*<sup>523 524</sup> is a norm that expresses the greatest interests and values of the international community, and from which no State can evade its fulfillment or justify its non-compliance, since they are mandatory, imperative, peremptory norms in the International Legal Order, and oblige all States to comply with it, under penalty of application of international responsibility<sup>525</sup>.

If a State invokes any of the causes for the extinction of the unlawfulness and, as long the non-compliant rule is not an *Ius Cogens* norm<sup>526</sup>, the consequence of this invocation only allows the State invoking it to refrain from fulfilling the obligation for as long as the circumstance of exclusion of the

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<sup>520</sup> Articles 40 and 41 of the ILC Project still deal with serious breaches of obligations arising from mandatory norms (*Ius Cogens*). A breach of such an obligation is serious if it involves the flagrant or systematic breach of the obligation by the responsible State (Article 40(2)). See Articles 40 and 41 of the ILC Project on the International Responsibility of States: "Article 40. Application of this Chapter: 1. This Chapter applies to liability which is entailed by a serious breach by a State of an obligation arising from an imperative rule of general international law. 2. A breach of such an obligation is serious if it involves the flagrant or systematic breach of the obligation by the State responsible. Article 41 Particular consequences of a serious breach of an obligation under this Chapter 1. States shall cooperate to put an end, by legal means, to any serious violation within the meaning of Article 40. 2. No State shall recognize as lawful a situation created by a serious violation within the meaning of Article 40 or provide assistance or assistance for the maintenance of that situation. 3. This Article shall be without prejudice to the other consequences referred to in this Part as well as such other consequences as a violation to which this Chapter applies may entail, in accordance with international law."

<sup>521</sup> See Article 26 of the CDI Draft on the International Responsibility of States: "Article 26: Compliance with imperative norms: Nothing in this Chapter excludes the unlawfulness of any act of a State that is not in conformity with an obligation arising from an imperative norm of general international law."

<sup>522</sup> See Article 53 of the Vienna Convention on the Law of Treaties: "Article 53 Treaties incompatible with an imperative rule of general international law (*jus cogens*). Any treaty which, at the time of its conclusion, is incompatible with an imperative norm of general international law shall be null and void. For the purposes of this Convention, an imperative rule of general international law is a norm accepted and recognized by the international community of States as a whole as a norm the derogation from which is not permitted and which can only be modified by a new norm of general international law of the same nature."

<sup>523</sup> It can be said that most of the *Ius Cogens* character norms are norms of the Law of Armed Conflict, Humanitarian Law and Diplomatic Relations, but not only. In any case, they are norms that deal with the most cherished values of humanity.

<sup>524</sup> According to BATTISTA "When the violated norm has a customary nature and gives to all existing States an interest in the realization of responsibility for its violation, it is a norm that protects a collectivized interest that constitutes a public interest of the International Community. These are norms that assume the nature of *Ius Cogens*". BAPTISTA, Eduardo Correia. *International Law Public*. Vol. II, Ed. AAFDL, 2015, p. 668.

<sup>525</sup> WEATHERALL, Thomas. *Jus Cogens. International Law and Social Contract*. Cambridge University Press, Cambridge, 2017, p. 4.

<sup>526</sup> Regarding the protection of the environment and also climate change as *Ius Cogens*, WEATHERALL expounds that "There is some support in contemporary jurisprudence that the general obligation to protect the environment is an *erga omnes* obligation of States to the international community as a whole... however, the status of obligations arising from this concern remains uncertain. . suggests a distinction in principle between the norms belonging to the *ius cogens* and those relating to the common heritage of humanity, although these "larger interests" are clearly interrelated.". In: WEATHERALL, Thomas. *Jus Cogens. International Law and Social Contract*. Cambridge University Press, Cambridge, 2017, pp. 259-260.

unlawfulness remains in existence. Nevertheless, material compensation is applicable to the State that suffered losses from the act no longer considered unlawful, as provided for in Article 27 of the ILC Project<sup>527 528</sup>.

This been said, in the absence of a cause for exclusion of illegality to justify an unlawful act, the international liability is applied to a State for non-compliance with an international obligation in force for that State at the time of its non-compliance and that State becomes obliged to repair the damage caused, in the forms of reparation of the damages that will be analyzed below.

#### **7.1.4. Damage Reparation**

Once the international liability of a State for an unlawful legal act has been established, it is necessary to make reparation for the damage, whether moral or material, caused by the unlawful act<sup>529</sup>.

In this sense, BATTISTA exposes that

*"Once those conditions have been fulfilled and it is impossible to invoke one of the grounds for exclusion of unlawfulness or liability examined, the entity to whom the unlawful act is imputed assumes a number of secondary obligations which form part of the content of the legal relationship of international liability of which it is the passive holder in relation to the entities harmed by the act."*<sup>530</sup>

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<sup>527</sup> See Article 27 of the ILC Project on International Responsibility of States: "Article 27: Consequences of invoking a circumstance extinguishing the illegality. The invocation of a circumstance that excludes unlawfulness, in accordance with this Chapter, shall not affect: a) the fulfillment of the obligation in question, if and to the extent that the circumstance excluding the illegality no longer exists; b) the question of compensation for any material loss caused by the act in question."

<sup>528</sup> In the field of climate change, it seems difficult to apply the exclusionary causes of illegality. First, consent to non-compliance with obligations arising from the regime cannot be granted by a State or even a group of States. On the other hand, we would hardly be facing a case of possible self-defense, that is, because reprisals against a non-compliant State would end up causing damage to the entire International Community, which would be disproportionate, either because the extreme danger or the state of necessity, by their natures, perhaps to a lesser extent the latter, do not appear to be practical options in this matter.

<sup>529</sup> See Article 31 of the ILC Project on the International Responsibility of States: "Article 31. Reparation: 1. The responsible State has an obligation to make full reparation for the damage caused by the internationally unlawful act. 2. Prejudice shall include any damage, material or moral, caused by the internationally unlawful act of a State."

<sup>530</sup> BAPTISTA, Eduardo Correia. *Direito Internacional Público*. Vol. II, Ed. AAFDL, 2015, p. 654.

The ICL Project provides that the State that does not comply with a standard must resume its compliance and that the reparation of the damage caused does not affect the duty to continue to comply with the international standard previously non-compliant, that is, after the reparation it is up to the State to resume conformity with the violated standard<sup>531 532</sup>.

The ICL Project further provides that it is up to the State responsible for the internationally unlawful act to cease that act, if it continues to occur, and to provide security and appropriate guarantees of non-repetition, if circumstances so require.

And the obligation to repair the damage may exist in relation to another State, to several States or to the International Community as a whole, according to the nature and content of the norm establishing the violated international obligation. In addition, several States may be responsible for the damage to be repaired to one State, to several States or to the International Community<sup>533 534 535 536 537</sup>.

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<sup>531</sup> See Article 29 of the ILC Project on the International Responsibility of States: "Article 29 Continuity of the duty to perform the obligation: *The legal consequences of an internationally unlawful act under this Part do not affect the continuity of the duty of the responsible State to comply with the violated obligation.*" .

<sup>532</sup> See Article 30 of the ILC Project on International Responsibility of States: "Article 30 Cessation or non-repetition. *The State responsible for the internationally unlawful act has the obligation to: a) cease that act, if it continues; (b) provide security and appropriate guarantees of non-repetition, if circumstances so require.*" .

<sup>533</sup> See Article 42 of the ILC Project on International Responsibility of States: "Article 42. *Invocation of responsibility for an aggrieved State. A State shall have the right, as an injured State, to invoke the liability of another State if the obligation violated exists: (a) in relation to that State individually; or (b) in relation to a group of States, of which that State is a part, or the international community as a whole, and the breach of obligation: i. in particular affects that State; or ii. is of such a nature as to radically alter the situation of all other States in respect of which there is an obligation to comply further.*" .

<sup>534</sup> See Article 45 of the ILC Project on International Responsibility of States: "Article 45. *Plurality of aggrieved States: When several States are harmed by the same internationally unlawful act, each injured State may separately invoke the responsibility of the State which committed the internationally unlawful act.*" .

<sup>535</sup> See Article 48 of the ILC Project on the International Responsibility of States: "Article 48. *Invocation of liability by a State other than the injured party: 1. Any State, other than the injured party, may invoke the liability of another State in accordance with paragraph 2 if: (a) the violated obligation exists in relation to a group of States, including that State, and is established for the protection of a collective interest of the group; or (b) the violated obligation exists in relation to the international community as a whole.*" .

<sup>536</sup> See Article 33 of the ILC Project on the International Responsibility of States: "Article 33. *Scope of the international obligations set out in this Part: 1. The obligations of the responsible State set out in this Part may exist in relation to another State, to several States or to the international community as a whole, depending in particular on the nature and content of the international obligation and the circumstances of the violation. 2. This Part shall be without prejudice to any right which the international responsibility of a State may generate directly for the benefit of any person or entity other than a State.*" .

<sup>537</sup> See Article 47 of the ILC Project on International Responsibility of States: "Article 47. *Plurality of responsible States: 1. When several States are responsible for the same internationally unlawful act, the responsibility of each may be invoked in relation to that act. 2. Paragraph 1: (a) no injured State is permitted to receive compensation in excess of the damage it has suffered; (b) there is no prejudice to any right of appeal against the other States responsible.*" .



That said, there are three forms of reparation provided for by the ICL Project on the International Responsibility of States, and they can be implemented individually or jointly. They are: restitution, compensation and satisfaction<sup>538</sup>.

First, reparation should, according to Article 35 of the ICL Project, ideally take the form of restitution, whereby a State responsible for an act in disagreement with international law has the obligation to make restitution, to re-establish the situation that existed before the unlawful act was committed, provided that and to the extent that restitution is not materially impossible or does not entail a disproportionate burden with respect to the benefit it would derive of a reparation via restitution rather than reparation via compensation<sup>539</sup>.

At this point, in cases of restitution, in addition to re-establishing the situation that existed before the anti-juridical act was committed, it is also up to the responsible State to restore the situation that "*would probably exist if the act had not been committed, including benefits that were not obtained as a result.*" <sup>540 541</sup>.

If restitution is not possible, the second form of reparation applicable to the State responsible for the unlawful act is compensation, which must cover any damage, moral or material, including loss of profits and interest, which is susceptible to financial measurement and which is proven by the State victim of the anti-legal act, as provided for in Article 36 of the ICL Project <sup>542 543</sup>.

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<sup>538</sup> See Article 34 of the ILC Project on International Responsibility of States: "*Article 34. Forms of reparation. Full reparation for the damage caused by the internationally wrongful act shall be in the form of restitution, indemnification and satisfaction, individually or in combination, in accordance with the provisions of this Chapter.*".

<sup>539</sup> See Article 35 of the ILC Project on the International Responsibility of States: "*Article 35. Restitution. A State responsible for an internationally unlawful act has an obligation to make restitution, that is, to re-establish the situation that existed before the unlawful act was committed, provided that and to the extent that restitution: (a) is not materially impossible; (b) does not entail a burden wholly disproportionate to the benefit that would be derived from restitution rather than compensation.*".

<sup>540</sup> BAPTISTA, Eduardo Correia. *Direito Internacional Público*. Vol. II, Ed. AAFDL, 2015, p. 654.

<sup>541</sup> Such a form of redress proves to be considerably difficult in the case of climatic damage, either because of the difficulty in returning the global temperature to previous levels, or, for example, because of the difficulty of re-establishing the territory of a State that will disappear due to the rise in sea level or even the existence of a river or other environmental service damaged by the illegal act.

<sup>542</sup> See Article 38 of the ILC Project on International Responsibility of States: "*Article 38. Interest: 1. Interest shall be paid on any principal sum due under this Chapter to the extent necessary to secure full reparation. The rate of interest and the method of calculation shall be fixed in such a way as to achieve this result. 2. Interest shall be computed from the date on which the principal sum should have been paid until the obligation is fully discharged.*".

<sup>543</sup> See Article 36 of the ILC Project on International Responsibility of States: "*Article 36. Compensation: 1. The State responsible for an internationally unlawful act has an obligation to compensate for the damage caused by it, provided that such damage is not repaired by restitution. 2. The indemnity shall cover any damage capable of financial measurement, including loss of profits, to the extent that it is proved.*".

In the case of compensation, the problem persists, since the financial measurement of the damage, which will often only occur in the long term, considerably hinders the application of this form of reparation, moreover, it is necessary to consider the impossibility of payment by the States that are found guilty of the damages caused by the adverse effects of climate change<sup>544</sup>.

Finally, if a damage cannot be repaired by restitution or compensation, it is left with the third form. The responsible State shall make amends through satisfaction, as provided for in <sup>545</sup>Article 37 of the ICL Project. This form of reparation is exceptional and has application in cases where the damage to be repaired is a moral damage<sup>546 547</sup>.

In the case of reparation for satisfaction, the violating State shall make reparation for the damage caused through an acknowledgment of the violation, an expression of repentance, a formal apology, a declaration or judicial decision of the violating State recognizing the unlawful act, or another appropriate modality. Regardless of the form of satisfaction to be adopted, it must be proportionate to the cause and must not be humiliating to the State responsible for the unlawful act<sup>548</sup>.

In the field of climate change, this form of reparation could be used in cases of occasional breaches of obligations, notably the lighter and more flexible obligations that, *a priori*, are not materially harmful, such as insignificant non-compliance with a deadline without practical effects in the presentation of NDCs for example.

Therefore, these are the forms of reparation to be implemented in cases of damage caused by acts that do not comply with international law by States, and despite the practical difficulties, these

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<sup>544</sup> In this sense, "It may seem counterintuitive for industrial states, which have developed at the expense of the global environment, to claim the inability to pay full reparation to less developed states that are severely affected by the adverse impacts of climate change. After all, the recognition of the ability to pay as justification for the decrease in reparations was thought of primarily as a defense that developing countries could use against developed ones. However, given the tremendous variability in the various climate-changing damage assessments, which depend largely on value-laden valuation (e.g., the discount rate applicable to future damages), recognition of the ability of responsible states to pay full reparation should at least serve as a safeguard against excessive claims. The ability of industrial states to pay is not unlimited. ". In: MAYER, Benoit. Climate change reparations and the law and practice of state responsibility. Asian Journal of International Law, No. 7, Cambridge PRESS, 2017, pp. 185–216, p. 203, par. 3.

<sup>545</sup> See Article 37 Of the ILC Project on International Responsibility of States: "Article 37. Satisfaction: 1. The State responsible for an internationally unlawful act has an obligation to give satisfaction for the damage caused by that act provided that it cannot be repaired by restitution or compensation. 2. Satisfaction may consist of an acknowledgment of the violation, an expression of regret, a formal apology, or another appropriate modality. 3. Satisfaction shall not be disproportionate to the harm and shall not be humiliating to the responsible State."

<sup>546</sup> CRAWFORD, James. *State Responsibility. The General Part*. Cambridge University Press, Cambridge, 2014, p. 527.

<sup>547</sup> BAPTISTA, Eduardo Correia. *Direito Internacional Público*. Vol. II, Ed. AAFDL, 2015, p. 658.

<sup>548</sup> BAPTISTA, Eduardo Correia. *Direito Internacional Público*. Vol. II, Ed. AAFDL, 2015, p. 659.

can be implemented within the framework of international liability for non-compliance with norms arising from the legal regime of climate change, on which we will comment below.

## **7.2. The application of international responsibility to the State for violation of obligations under the climate change legal regime**

If the presumption is that any failure of a State to comply with an international obligation generates harm, it could therefore be said that a State that fails to comply with its obligations to limit and reduce greenhouse gas emissions, as well as the other obligations of conduct provided for in the legal regime of climate change<sup>549</sup>, is subject to international liability, regardless of the finding of actual material damage<sup>550</sup>.

However, in the case of specific damages arising from non-compliance with norms dealing with climate change, the victim, as well as the perpetrator of the unlawful act, may be difficult to determine, despite the fact that the most vulnerable States are known, as already foreseen in the legal regime of climate change itself. Moreover, the adverse effects of climate change have been felt in all regions of the planet, according to the most recent scientific studies, while the very states that do not comply with the applicable rules may also become victims of their own illicit acts<sup>551 552 553</sup>.

A different situation is encountered in the face of non-compliance that does not cause, *prima facie*, material damage, such as issues relating to transparency or compliance with deadlines without practical effects, such as the delay in providing information on a measure actually adopted but not

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<sup>549</sup> In this matter, on March 29, 2023, the General Assembly of the United Nations adopted resolution A/RES/77/276 in which, referring to Article 65 of the Statute of the Court, it requested the International Court of Justice to give an advisory opinion on “the obligations of States in respect of climate change”.

<sup>550</sup> MAYER, Benoit. *State Responsibility and Climate Change Governance: A Light through the Storm*. Oxford University Press. 2014, p. 551. See also: SANDS, Philippe. *Climate Change and the Rule of Law: Adjudicating the Future in International Law*. Journal of Environmental Law, Cambridge, 2016, p. 33.

<sup>551</sup> In addition, the effects of a breach of obligations of this field can take years to be felt by the victims. Therefore, in general, connecting an unlawful act of excess GHG emission with a damage caused to a specific State is not a simple task and it would be up to science to point out the relationship between these acts, that is, the causal link, and not exactly the Law. See: MBENGUE, Makane Moise. *Scientific Fact-finding by International Courts and Tribunals*. Journal of International Dispute Settlement, Vol. 3(3), Oxford University Press, 2012, p. 511.

<sup>552</sup> VOIGT, Christina. *Climate Change and Damages*. Em: CARLARNE, Cinnamon P., GRAY, Kevin R., TARASOFSKY, Richard G. (Eds.). *The Oxford Handbook of International Climate Change Law*. Oxford, 2016, p. 464.

<sup>553</sup> Vide: IPCC. *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate*. IPCC, Cambridge University Press, 2021. IPCC. *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate*. IPCC, Cambridge University Press, 2022. IPCC. *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*. IPCC, 2018. And others.

yet communicated to the Conference of the Parties. In these cases, where there is no need to prove the damage, in which the assumptions of application of liability are present, it would be up to the International Community or any State on its behalf to request the reparation of the damage, the return to compliance with the obligation by the violating State and the presentation of guarantees of non-repetition, in accordance with Article 42 of the ILC Project and Article 14 of the UNFCCC<sup>554</sup>.

The damage case, however, is more complex. Customary public international law provides that in the event of failure on the part of a State to prevent activities carried out in its territory from causing transboundary environmental damage to a third State, the omitted State shall be held liable for the damage caused to the third State or States, and this failure to comply with this obligation is considered an "*Act of State*" for the purposes of attributing liability.

This is the principle of non-harm or the principle of prevention, seen earlier, which is applicable to the legal regime of climate change, and can serve as a legal basis for international accountability, provided that the accused State does not take the necessary measures to comply with its international obligations<sup>555</sup>.

In this regard, in the *Trail Smelter* case<sup>556</sup>, the arbitral tribunal stated that:

*"... in accordance with the principles of international law as well as the law of the United States, no State has the right to use or permit the use of its territory in such a way as to cause damage by smoke in or to the territory of another or the property or persons contained therein, when the case is of grave consequence."*

In turn, in the case of *The Island of Las Palmas*<sup>557</sup>, the Permanent Court of Arbitration stated:

*"Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has as its corollary a duty: the obligation to protect in the territory the rights of other States, in particular their right to integrity"*

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<sup>554</sup> See Article 14 of the UNFCCC.

<sup>555</sup> MAYER, Benoit. *State Responsibility and Climate Change Governance: A Light through the Storm*. Oxford University Press. 2014, p. 552. See also: HUNTER, David; POWERS, Melissa; WOLD, Chris. *Climate change and the law*. Lexis Nexis, 2<sup>a</sup> Ed, 2013, p. 9.

<sup>556</sup> The United States took Canada to court for violating its sovereignty as a nation, and the resulting court decision established a fundamental principle for international environmental law. This case is known as "*Trail Smelter*". Case "*Trail smelter*". (United States vs Canada), Court of Arbitration, 16 April 1938.

<sup>557</sup> A territorial dispute over the Island of Palmas between the Netherlands and the United States. Case "*The Island of Las Palmas*". (Netherlands vs USA), Permanent Court of Arbitration, 4 April, 1928.

*and inviolability in peace and war, together with the rights that each State can claim for its nationals in foreign territory."*

As recently as 2021, in the *Pulp Mills* case<sup>558</sup>, the International Court of Justice stated that:

*"The State is therefore obliged to use all means at its disposal to prevent activities taking place on its territory, or in any area under its jurisdiction, from causing significant damage to the environment of another State."*

Moreover, this understanding was also corroborated by the Advisory Opinion on the Legality of the Use of Nuclear Weapons, previously issued <sup>559</sup> by the International Court of Justice, in which it stated:

*"The use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction, but represents the living space, the quality of life and the health of the human being, including the generations that have not yet been born. The existence of a general obligation on States to ensure that activities within jurisdiction and control respect the environment of other States and areas outside national control is now part of the corpus of international environmental law."*

It is therefore for the State to take all necessary measures to prevent activities occurring in its territory from causing damage to third States. However, there is no reason to conclude that the damage to be avoided does not include climate damage and its related adverse effects<sup>560</sup>.

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<sup>558</sup> The *Pulp Mills* case was a dispute between Argentina and Uruguay over the construction of pulp mills on the Uruguay River and their transboundary environmental effects. Case "*Pulp Mills*". (Argentina vs Uruguay), International Court of Justice, 20 April 2010.

<sup>559</sup> Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons issued in 1996 by the International Court of Justice (ICJ), following a request for an advisory opinion of the Tribunal by the United Nations General Assembly. *Legality of the Use of Nuclear Weapons*. Tribunal Internacional de Justiça (TIJ), 1996.

<sup>560</sup> According to MIRON, it is "an obligation of conduct, based on the principle of prevention and the rule of non-harm, belonging to customary law, which obliges every State to be diligent, within its capacities, to avoid such damages, namely through supervision, regulation, compliance with its international obligations and exercise of other State competences within its sovereign territory, either in relation to activities carried out by the State itself, or by activities carried out by private individuals within its territory.". In: MIRON, Raul. *Engaging international responsibility for damages suffered by states as an effect of climate change*. *Curentul Juridic, The Juridical Current, Le Courant Juridique*. Vol. 79, Faculty of Economics Law and Administrative Sciences and Pro Iure Foundation, Petru Maior University, p. 113.

In this sense, still in the *Pulp Mills* case, the ICJ affirmed, considering the principle of common but differentiated responsibility, that the individual capacity of each State must be considered in the analysis of its preventive conduct:

*"The requirements to fulfill the obligation to apply the prevention approach may be stricter for developed states than for developing sponsoring states. (...) What counts in a specific situation is the level of scientific knowledge and technical capacity that a given State has at its disposal in the relevant scientific and technical fields."*<sup>561</sup>

Therefore, the principle of prevention and the rule of non-harm, considering the principle of common but differentiated responsibility, can serve as a basis for imputing an unlawful act to a State, when its conduct, active or omitted, causes climatic damage to another State, States or even to the International Community, since, according to the legal regime of climate change, the fight against climate change is a common interest of humanity<sup>562</sup>, as set out in the UNFCCC and the Paris Agreement, and thus the obligation not to cause damage to the climate is an obligation of *an erga omnes* nature<sup>563 564</sup>, and is therefore an obligation owed by all States towards the International Community and the present and future generations.

Thus, the non-compliance with an obligation arising from the legal regime of climate change constitutes an unlawful act of the State that is in non-compliance with the current legal norm, being possible the application of international liability, regardless of intent, negligence or actual damage, elements that must be considered in the analysis of the concrete case, for the purposes of reparation.

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<sup>561</sup> Case *Pulp Mills on the River Uruguay*. (Argentina vs Uruguay), International Court of Justice, 20 April 2010.

<sup>562</sup> EGEA, Rosa M. Fernández. *State Responsibility for Environmental Harm: Revisited within the Climate Change Regime*. Em: *Académie de droit international de La Haye, La mise en oeuvre du droit international de l'environnement / Implementation of International Environmental Law*. Brill, Nijhoff, 2008, p. 167. See also: VOIGT, Christina. *State Responsibility for Climate Change Damages*. *Nordic Journal of International Law*. Vol. 77°, 2008, p. 7.

<sup>563</sup> On the principle of the common interest of humanity: *"The principle, on the one hand, obliges States to cooperate with each other in the solution of common problems that cannot be solved independently. However, going beyond the duties of cooperation, it has the potential to provide incentives to states to increase collective efforts in combating climate change. It is argued that a principle of Common Interest constitutes the normative basis and limits for States to take lawful unilateral actions with extraterritorial effects within the limits of international law, where international cooperation and joint action remain absent. The principle of Common Concern thus has the potential to add an important dimension not only to the law of international cooperation, but also to shaping the contours and scope of unilateral action by States, alone or in groups, in combating shared problems that are global in scale."* In: AERNI, Philipp; COTTIER, Thomas; KARAPINAR, Baris. *The Principle of Common Concern and Climate Change*. Universität Bern, Mohr Siebeck, 2014, 293–324, p. 296.

<sup>564</sup> BRUNNÉE, Jutta. *The Responsibility of States for Environmental Harm in a Multinational Context: Problems and Trends*. *Cahiers de Droit*. Vol. 34, 1993, p. 837.

### 7.3. Final considerations

The absence of a complete set of secondary norms in the legal regime of climate change leads to the application of the general regime of international responsibility, exposed notably in the Draft of the United Nations Commission on International Law, the ICL Project.

In the case of climate change, the failure to comply with obligations arising from the legal system of climate change, in particular in the light of the rule of non-harm or the principle of prevention, and considering the jurisprudence of international courts, it may rise to the international liability of the State or States responsible for an unlawful act in the light of the *in casu* regime.

The practical difficulties, notably the proof of a causal link between the breach of an obligation by a specific State and the climatic damage suffered by another, as well as the possible time lapse between an illicit conduct and the finding of the damage, are complex issues that require scientific technical support for a response, but even so the law cannot abstain from its role.

However, despite the UNFCCC's provisions on the peaceful resolution of conflicts, embodied in subsequent treaties linked to it, the international community has generally had little success in holding accountable States that fail to comply with their obligations under the climate change legal regime, as well as the largest GHG emitters. That's why, possibly, the General Assembly have requested the Advisory Opinion of the ICJ in this matter.

At the same time, scientific warnings point us to a grave reality that, if not well managed, can lead to a serious disruption of our way of life and even become a threat to international peace and security. In this scenario, it is up to the United Nations, which has as its main objective the maintenance of peace, the leadership in the conduct of States to avoid the worst of scenarios. In this sense, climate change in the context of the United Nations Charter and threat to international peace and security will be analyzed below.

## **8. THE CHARTER OF THE UNITED NATIONS AND CLIMATE CHANGE AS A THREAT TO PEACE AND INTERNATIONAL SECURITY**

30 years ago, on January 31, 1992, the United Nations Security Council presented the Presidential Declaration in which it stated that *"non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security."*<sup>565</sup>.

Since, several topics have been the subject of debates and votes in the organs of the United Nations, with regard to the maintenance of peace and international security, and in relation to climate change it has been no different and its relevance has only increased<sup>566</sup>.

Therefore, we will analyze in this chapter the relationship between climate change and the maintenance of international peace and security, within the organic system of the United Nations.

### **8.1. Maintenance of peace and international security in the Charter of the United Nations**

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<sup>565</sup> NATIONS, United. *Note by the President of the Security Council*. Security Council, United Nations, New York, 31 January 1992, p. 3. Doc. S/23500.

<sup>566</sup> For example, the recent debate in the Security Council in 2021, which will be discussed below.



It can be said that the maintenance of international peace and security is the main objective of the United Nations, exposed, notably, in paragraph 1 of Article 1 of the Charter of the United Nations (UNC) which provides that<sup>567 568 569</sup>:

*"Article 1 - The objectives of the United Nations are:*

*(1) To maintain international peace and security and to that end: to take effective collective measures to prevent and ward off threats to the peace and to suppress acts of aggression or any other breach of the peace and to reach, by peaceful means and in accordance with the principles of justice and international law, an adjustment or settlement of international controversies or situations which may lead to a disturbance of the peace;"*

The importance of the objective of maintaining international peace and security is mainly due to the historical period prior to the elaboration<sup>570</sup> and the entry into force of the Charter of the United Nations, formed by the scourge left by the two World Wars<sup>571 572</sup>. This time, throughout its text, the

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<sup>567</sup> Other objectives of the United Nations, in accordance with Article 1 (b), (c) and (d) of the Charter of the United Nations, are also the development of friendly relations between nations based on respect for the principle of equal rights and self-determination of peoples, as well as the adoption of other appropriate measures for the strengthening of universal peace; international cooperation, resolving international problems of an economic, social, cultural or humanitarian nature, promoting and encouraging respect for human rights and the fundamental freedoms of all, without distinction as to race, sex, language or religion; and to be a center for harmonizing the action of nations for the attainment of the common objectives of all the members of the United Nations.

<sup>568</sup> It is worth noting the other objectives set forth in Article 1 of the Charter of the United Nations, notably to develop friendly relations between nations and to take other appropriate measures to strengthen universal peace (No. 2, Art. 1); to achieve international cooperation by resolving international problems of an economic, social, cultural or humanitarian nature, by promoting and encouraging respect for human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion (paragraph 3, art. 1); and to be a center for harmonizing the action of nations to achieve these common objectives (n.º 3, Art. 1); as well as the mentions of the Preamble to the Charter, in which the peoples of the United Nations reaffirm their faith in the fundamental rights of man, in the dignity and worth of the human person, in the equal rights of men and women, as well as of nations, great and small; the decision to establish the conditions necessary for the maintenance of justice and respect for obligations arising from treaties and other sources of international law; the decision to establish the conditions necessary for the maintenance of justice and respect for obligations arising from treaties and other sources of international law; and the decision to promote social progress and better living conditions within a broader concept of freedom; among other provisions.

<sup>569</sup> As BOSCO explains: *"The term "United Nations" first appeared in December 1941 as the title for the broad alliance against the Axis powers. Britain, Russia, China, and the United States signed the United Nations Declaration on January 1, 1942, and 22 other countries followed suit the next day."* In: BOSCO, David L.. *Five to rule them all: The UN Security Council and the making of the modern world*. 1st Ed., Oxford University Press, 2009, p. 13.

<sup>570</sup> The Charter of the United Nations was drafted by the representatives of 50 countries present at the Conference on International Organization, which met from April 25 to June 26, 1945, in San Francisco, United States of America, and entered into force on October 24 of that same year. The Conference was preceded by several other summits and meetings, as well as other declarations of intent, such as the Declaration of St. James's Palace of 1941, the Atlantic Charter of 1941, the United Nations Declaration of 1942, the Tehran Conference in 1943, among others. See: BOSCO, David L.. *Five to rule them all: The UN Security Council and the making of the modern world*. 1st Ed., Oxford University Press, 2009.

<sup>571</sup> As can be seen from the 1st paragraph of the Preamble to the Charter of the United Nations: *"We, the peoples of the United Nations, resolved: To preserve future generations from the scourge of war which twice, in the space of a human life, has brought unspeakable suffering to humanity;"*.

<sup>572</sup> On the period immediately after the Second World War and its effects on the International Community, see: BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*, Coimbra, Almedina, 2003, p. 340-342.

UNC presents a great focus of its provisions on the objective of maintaining international peace and security<sup>573 574</sup>.

In achieving this objective, the United Nations and its members shall act in accordance with the principles set forth in Article 2 of the Charter<sup>575</sup>, of which the principle of the sovereign equality of its members, of good faith in the fulfillment of the obligations assumed in the Charter and of the peaceful settlement of disputes stand out<sup>576 577 578 579</sup>.

In addition, the principles are established according to which the United Nations shall make non-member States to act in accordance with the principles set forth in the Charter for all that is

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<sup>573</sup> MANI and PONZIO state that "*The Charter's emphasis on the peaceful settlement of disputes has been echoed and elaborated in subsequent declarations and resolutions. The "Declaration of Friendly Relations" established in 1970 in General Assembly Resolution 2625 (XXV), sought to specify the scope and content of the principle of the peaceful settlement of disputes. The Manila Declaration on the Peaceful Settlement of International Disputes of 1982 (adopted in General Assembly Resolution 37/10) provided a more detailed exposition as it defined the substantive duties of States in the peaceful settlement of disputes, as well as the competences of the relevant UN bodies. In its Resolution 40/09, the General Assembly solemnly appealed to all States to resolve conflicts and disputes by peaceful means. General Assembly Resolution 43/51 of December 1988, "Declaration on the Prevention and Removal of Disputes and Situations That May Threaten International Peace and Security and the Role of the United Nations in this Field," presents preventive measures and represents an important milestone. It departs from the narrower scope of Article 2(3), which deals only with existing disputes, not potential ones. Similarly, Boutros-Ghali's recommendations in "An Agenda for Peace," reaffirmed in General Assembly Resolution 47/120 of December 1992, highlighted in disputes for peaceful settlement the importance of preventive diplomacy, fact-finding and involvement of the General Assembly, and urged States to find rapid solutions to disputes by peaceful means. The 2005 World Summit Outcome document devoted four paragraphs to the "Peaceful Settlement of Disputes," reconfirmed periodically over the next decade by world leaders – underlining the importance of pacification in intergovernmental practice today.* In: MANI, Rama; PONZIO, Richard. *Peaceful Settlement of Disputes and Conflict Prevention*. In: DAWS, Sam; WEISS, Thomas G.. *The Oxford Handbook on The United Nations*, Second Edition, Oxford University Press, Oxford, 2018, p. 398.

<sup>574</sup> It should also be noted that the Charter of the United Nations had been preceded by the *Briand-Kellogg Pact*, signed in 1928 within the framework of the League of Nations, an international organization created in 1920, after the First World War and which preceded the United Nations, in which States affirmed their renunciation of war as a means of settling disputes. Evidently, as history shows, the *Briand-Kellogg Pact* was broken. Nevertheless, this is a historical development in terms of international treaties aimed at ending the war or prohibiting it. See: MAZZUOLI, Valério de Oliveira. *Curso de Direito Internacional Público*. 9ª Ed, Revista dos Tribunais, 2015, p. 1190.

<sup>575</sup> See Article 2 of the Charter of the United Nations: "Article 2 The Organization and its members, for the attainment of the purposes referred to in Article 1, shall act in accordance with the following principles: (1) The Organization shall be based on the principle of the sovereign equality of all its members; (2) The members of the Organization, in order to assure everyone in general of the rights and advantages resulting from their membership, shall carry out in good faith the obligations assumed by them in accordance with this Charter; (3) The members of the Organization shall resolve their international disputes by peaceful means so that international peace and security, as well as justice, are not threatened; (4) Members shall refrain in their international relations from resorting to the threat or use of force, whether against the territorial integrity or political independence of a State or otherwise incompatible with the objectives of the United Nations; (5) The members of the Organization shall give it every assistance in any action it takes in accordance with the present Charter and shall refrain from giving assistance to any State against which it acts in a preventive or coercive manner; (6) The Organization shall cause States which are not members of the United Nations to act in accordance with these principles in all that is necessary for the maintenance of international peace and security; (7) Nothing in this Charter shall authorize the United Nations to intervene in matters which fall essentially within the domestic jurisdiction of any State, or shall oblige Members to submit such matters for a solution in accordance with the present Charter; this principle, however, shall be without prejudice to the application of the coercive measures set out in Chapter VII."

<sup>576</sup> See Article 2(1) of the Charter of the United Nations.

<sup>577</sup> See Article 2(2) of the Charter of the United Nations.

<sup>578</sup> See Article 2(3), (4) and (5) of the Charter of the United Nations.

<sup>579</sup> SHAW, Malcolm Nathan. *International Law*. Eighth edition, Cambridge University Press, Cambridge, 2017, p. 925.

necessary for the maintenance of international peace and security<sup>580</sup>, and that no provision of the Charter authorizes the United Nations to intervene in matters which fall essentially within the internal jurisdiction of any State, or obliges its members to submit such matters to a solution in accordance with the Charter, however, this is without prejudice to the application of the coercive measures provided for in Chapter VII of the Charter<sup>581</sup>.

Also, in view of the maintenance of peace, States should seek the settlement of their international disputes by peaceful means, this being a duty and not only an option, along the lines of Article 33 of the Charter, refraining from the use of force<sup>582 583 584</sup>. In this sense, the content of Article 2, paragraph 4, of the Charter has assumed the nature of Customary Law, as affirmed by the International Court of Justice, and it's therefore binding on all members of the International Community, with the exception of the use of force by the United Nations for the purpose of curbing excesses on the part of

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<sup>580</sup> See Article 2(6) of the Charter of the United Nations. According to BAPTISTA "... there are some authors who maintain that Article 2(6) creates obligations towards non-member states. In fact, little in the Charter, including the letter of the precept, supports this conclusion." . In: BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*, Coimbra, Almedina, 2003, p. 349. Also in this sense, REKEZ states "... The fact that the UN has an "objective international personality" — which, moreover, other international organizations do not lack — does not, by itself, mean that it can be understood to be enforceable against States that have not expressed their consent to the institutional bond. One can ultimately interpret this paragraph not as generating obligations for third parties, but as a continent of a purpose that the organization proclaims in the face of itself and whose recipients are its members ("The Organization will cause ..."). The theory of the "sufficiently representative set of general interests" does not convince to the point of justifying the imposition of duties on third parties, since the principle of the prevalence of the majority will over minorities, valid in domestic systems, lacks consistency in the interstate sphere. Not least because the numerical minority may have a large defensive capacity — a reality that has always been present while the People's Republic of China has been on the fringes of the United Nations framework. In the abstract, the imposition of the institutional treaty on a third party is merely a *de facto* way, conditioned to the power of the organization, to the favorable conjunction of the political forces in its context, and finally to the weakness of the State that makes the object of the intended coercion." . In: REKEZ, Francisco. *Direito Internacional Público. Curso Elementar*. Ed. Saraiva, 2011, p. 298.

<sup>581</sup> See Article 2(7) of the Charter of the United Nations.

<sup>582</sup> As BAPTISTA points out, "*The decision to use force or not at the non-international level, once the assumptions that international law imposes for its use, arising from international human rights and humanitarian law, are respected, constitutes a question that each State has the right to resolve as it sees fit. That is, that it is part of its internal jurisdiction. Only slowly have the first precedents emerged of an attempt to extend this obligation with a view to avoiding or ending internal armed conflicts lasting or with serious consequences.*" . In: BAPTISTA, Eduardo Correia. *Direito Internacional Público*. Volume II. Editora AAFDL, 2015, p. 691.

<sup>583</sup> See Article 33 of the Charter of the United Nations: "*Article 33. Peaceful Settlement of Disputes: 1. The parties to a dispute which may constitute a threat to international peace and security shall seek first of all to reach a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial recourse, recourse to regional organizations or agreements, or any other peaceful means of their choice. 2. The Security Council shall, if it deems it necessary, invite the said Parties to settle their disputes by such means.*" .

<sup>584</sup> Not expressly provided for in the Charter, but present in international law, good offices are customary practices which, as BAPTISTA explains, "*do not exactly constitute a direct means of peaceful resolution, but a means of getting the parties to appeal... the negotiation. Thus, in the good offices there is a participation of a third party that brings the parties together, convincing them to negotiate directly in order to resolve the dispute. But this third party does not get to participate in the negotiations.*" In: BAPTISTA, Eduardo Correia. *Direito Internacional Público*. Volume II. Editora AAFDL, 2015, p. 695. MANI and PONZIO explain the other mixed forms of peaceful dispute resolution in the United Nations Manual for the Peaceful Resolution of Disputes, such as consultations and conferences, binding of the parties to the findings and solutions proposed by the report of the Conciliatory Commission, and the use of progressive mixed methods. See: MANI, Rama; PONZIO, Richard. *Peaceful Settlement of Disputes and Conflict Prevention*. In: DAWS, Sam; WEISS, Thomas G.. *The Oxford Handbook on The United Nations*, Second Edition, Oxford, Oxford University Press, 2018, p. 402.

States or regional organizations that by their actions jeopardize international peace and security or, pursuant to Article 51 of the Charter, in cases of self-defense in which it is necessary to repel a proven unjust aggression or danger of actual and imminent harm<sup>585 586 587 588 589</sup>.

As provided for in Article 7 of the Charter, the principal organs of the United Nations are the General Assembly, the Security Council, the Economic and Social Council (ECOSOC),<sup>590 591</sup> the

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<sup>585</sup> BAPTISTA, Eduardo Correia. *Direito Internacional Público*. Vol. II, Ed. AAFDL, 2015, p. 690. See also Antonio Remiro Brotons, for whom: "This precept has universal validity today and, as the ICJ recognized in the case of *Military and Paramilitary Activities in Nicaragua* (1986), it is not only a conventional norm, but also an integral part of customary international law. It is, moreover, without any doubt, a fundamental principle whose imperative character, *jus cogens*, seems to be settled today." In: MAZZUOLI, Valério de Oliveira. *Curso de Direito Internacional Público*. 9ª Ed, Revista dos Tribunais, 2015, p. 1166.

<sup>586</sup> Nicaragua has filed a lawsuit against the United States of America, along with a request for interim measures, over a dispute concerning responsibility for military and paramilitary activities in and against Nicaragua. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua vs United States of America)*. International Court of Justice, 26 of June of 1986.

<sup>587</sup> MAZZUOLI, Valério de Oliveira. *Curso de Direito Internacional Público*. 9ª Ed, Revista dos Tribunais, 2015, p. 1166.

<sup>588</sup> See Article 51 of the Charter of the United Nations: "Article 51 Nothing in this Charter shall prejudice the inherent right of individual or collective self-defense in the event of an armed attack against a member of the United Nations until the Security Council has taken the measures necessary for the maintenance of international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be communicated immediately to the Security Council and shall in no way affect the authority and responsibility which this Charter confers on the Council to carry out, at any time, such action as it deems necessary for the maintenance or restoration of international peace and security."

<sup>589</sup> On the use of force, BAPTISTA explains that "The fact that, unlike most of the international instruments that preceded it, the Charter prohibits the use of force and not only war also suggests that it was aimed at prohibiting minor uses of force. The same conclusion can be drawn from its preamble when it states that "to ensure by the acceptance of principles and the institutions of methods, that armed force shall not be used, save in the common interest". And this conclusion also follows from Article 2(3) UNC, which obliges members to resolve their international disputes by peaceful means in order to prevent peace and security from being affected." In: Em: BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*, Coimbra, Almedina, 2003, p. 73.

<sup>590</sup> See Article 7 of the Charter of the United Nations: "Article 7. 1. The following shall be established as the principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court (\*) of Justice and a Secretariat. 2. Subsidiary bodies deemed necessary may be established in accordance with this Charter."

<sup>591</sup> As explained by SHAW,<sup>591</sup> "much of the work of the United Nations in activities encompassing the economic and social spheres is carried out by the Economic and Social Council (ECOSOC)." Under Article 61 of the Charter of the United Nations, ECOSOC consists of fifty-four members elected by the General Assembly for a period of three years, each member having one representative. As provided for in Article 67 of the Charter, each member has the right to one vote and the decisions of ECOSOC are taken by a majority of the members present and voting. Portugal was a member of ECOSOC in 1990, 1994 to 1996, 2000 to 2001, 2003, 2015 to 2017, and was elected for the term from 2021 to 2023. Among the functions performed by ECOSOC throughout the Charter of the United Nations, ECOSOC "may make or initiate studies and reports on international matters of an economic, social, cultural, educational, health and related nature, and may make recommendations on such matters to the General Assembly, to the members of the United Nations and to interested specialized organizations." It is important to emphasize that, as established by Article 60 of the Charter, the "General Assembly and, under its authority, the Economic and Social Council, which has for this purpose the competence conferred on it in Chapter X, are entrusted with the exercise of the functions of the Organization stipulated in this Chapter", that is, they are responsible for the international economic and social cooperation of the United Nations. ECOSOC may also, with the approval of the General Assembly, "provide such services as may be requested of it by the members of the United Nations and specialized organizations" and, in accordance with Article 65 of the Charter, "provide information to the Security Council and, at its request, assist it." ECOSOC has also created several programmes, including the Environment Programme, as well as bodies such as the Office of the UN High Commissioner for Refugees and the United Nations Conference on Trade and Development. The work developed by ECOSOC and its organs is published annually through the document called "annual ministerial review (AMR)". As stated by the Regional Information Centre for Western Europe, ECOSOC is the "main body for coordination, review and dialogue on policies and recommendations related to economic, social and environmental issues, as well as the implementation of

Trusteeship Council, the International Court of Justice (ICJ) and the Secretariat, and the creation of subsidiary bodies is admissible, if necessary<sup>592</sup>.

In order to guarantee international peace and security, the competences of its organs in this regard have been established in the Charter, and the General Assembly, the Secretary-General, the Security Council and, finally, the International Court of Justice, as a judicial body, are the organs with competences applicable to this object, as explained by MANI and PONZIO<sup>593 594</sup>

*"Various actors and organs of the UN system have responsibilities in the peaceful settlement of disputes. Although Chapters VI and VII of the Charter focus on the functions of the Security Council, it is by no means the only agent in the peaceful settlement of disputes. In fact, the main responsibility lies first with the parties to the conflict, who can resolve the dispute for themselves or refer it to any of the mandated international institutions. The secondary responsibility rests with the Security Council to call on the parties to resolve their disputes, including by the means set forth in Chapter VI. Article 99 empowers the Secretary-General to act to ensure the peaceful settlement of disputes. Finally, the ICJ offers the judicial remedy."*

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*internationally agreed development goals".* In: SHAW, Malcolm Nathan. *International Law*. Eighth edition, Cambridge, Cambridge University Press, 2017, pp. 930-931. See also: NATIONS, United. *UN bodies, Economic and Social Council*. Regional Information Center for Western Europe, United Nations. Available in: <https://unric.org/pt/orgaos-da-onu/>. Accessed January 15, 2022. NATIONS, United. *Sudsiary bodies of ECOSOC*. Economic and Social Council. United Nations. Available at: <https://www.un.org/en/ecosoc/about/subsidiary.shtml>. Accessed January 15, 2022.

<sup>592</sup> The *Trusteeship Council* was established by the Charter of the United Nations in its Chapter XIII for the purpose of internationally supervising trusteeship territories and ensuring that measures were taken to prepare these territories to achieve self-government or independence. By virtue of the independence of the last existing trust territory, Palau, on 1 October 1994, the Trusteeship Council suspended its operations on 1 November 1994 and amended its rules of procedure by eliminating the obligation to meet annually, it being agreed that the meeting would take place whenever necessary by decision of the Council or by decision of its President, or at the request of a majority of its members, the General Assembly or the Security Council. See: NATIONS, United. *Peace, dignity and equality on a healthy planet*. Trusteeship Council, United Nations. Available at: <https://www.un.org/en/sections/about-un/trusteeship-council/>. Accessed January 15, 2022. See also: NATIONS, United. *Trusteeship Council: Attainment of self-government or independence by the Trust Territories*. Sixty-first session, Trusteeship Council, United Nations, Doc. T/RES/2199, 1994., which established that, according to Article 83 of the Charter of the United Nations and considering the fact that Palau was considered a strategic zone under trusteeship, the responsibility would lie with the Security Council.

<sup>593</sup> It can be said that, in general, all the organs of the United Nations have a connection with the objective of maintaining international peace and security. However, the Economic and Social Council and the Guardianship Council do not have direct competence in this matter, but are more linked to other questions of a social, sustainable development, economic, human and political nature that may have a direct connection with the object *in casu*, but it is not a direct or express function as set out in Articles 62 and 87 of the Charter of the United Nations, Respectively.

<sup>594</sup> MANI, Rama; PONZIO, Richard. *Peaceful Settlement of Disputes and Conflict Prevention*. Em: DAWS, Sam; WEISS, Thomas G.. *The Oxford Handbook on The United Nations*, Second Edition, Oxford, Oxford University Press, 2018, p. 403.

Thus, in order to guarantee international peace and security, the competences of its organs were established in the Charter of the United Nations, highlighting the competences of the Security Council<sup>595</sup>.

## 8.2. The Security Council and the Maintenance of International Peace and Security

According to EINSIEDEL and MALONE<sup>596</sup>

*"The Security Council was intended to address some of the shortcomings that led to the inefficiency of its predecessor, the League of Nations Council, which was established after World War I but failed to prevent the second. The Charter then endowed the major powers of the moment—namely, the victors of World War II (the United States of America, the Soviet Union, the Republic of China, France, and the United Kingdom)—with special privileges and responsibilities, which were designed to ensure their lasting involvement with the organization."*

Accordingly, the members of the United Nations, i.e. the international community, through Article 24 of the Charter, have granted the Security Council the primary responsibility for the maintenance of international peace and security in the following terms<sup>597</sup>:

*"Article 24*

*1. In order to ensure prompt and effective action by the United Nations, its members confer on the Security Council the primary responsibility for the maintenance of international peace and security and agree that, in the discharge of the duties imposed by that responsibility, the Security Council shall act on their behalf."*

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<sup>595</sup> As MAZZUOLI rightly points out, <sup>595</sup>*"The mechanism brought by the Charter of the United Nations in this sense, of course, will depend on the very States that constitute it and, ultimately, on the understanding on the part of its member countries of the disaster that would be a Third World War. Following the history of international law, which has moved towards declaring the illegality of war, one must seek possible means of avoiding it on a permanent basis."* In: MAZZUOLI, Valério de Oliveira. *Curso de Direito Internacional Público*. 9ª Ed, Revista dos Tribunais, 2015, p. 1167.

<sup>596</sup> EINSIEDEL, Sebastian Von; MALONE, David M.. *Security Council*. In: DAWS, Sam; WEISS, Thomas G.. *The Oxford Handbook on The United Nations*, Second Edition, Oxford, Oxford University Press, 2018, p. 141.

<sup>597</sup> The name of the *Security Council* was proposed by the Soviet Union and was intended to show beyond any doubt the security character applied to the body. In: BOSCO, David L.. *Five to rule them all: The UN Security Council and the making of the modern world*. 1st Ed., Oxford University Press, 2009, p. 21.

In addition, through Article 25, as well as Articles 48 and 49 of the Charter, the Member States of the United Nations have agreed to accept and comply with the decisions of the Council, including by taking part, alone or jointly, when so determined<sup>598</sup>.

Therefore, Articles 25, 48 and 49 of the Charter establish the need for cooperation of Member States in the implementation of Security Council decisions, which becomes an enforceable limitation with which the Council must work, since *"ultimately the Council depends on others realizing that their decisions are sufficiently legitimate to comply with or ensure compliance with those decisions."*<sup>599</sup>.

In this sense, BOYLE, HARTMANN and SAVARESI

*"in relation to the climate change regime, the obligations of international law generally do not target non-state actors ex se, but rather place the onus on states to regulate the activities of non-state actors... as the Council does not have the means to enforce its resolutions directly, it has to rely on the cooperation of States and the implementation of international obligations in domestic law. Thus, even the obligations created by the Council are not self-executing and require state implementation."*<sup>600</sup>

Nevertheless, according to SHAW,<sup>601</sup> *"the Board intends to operate as an efficient executive body of limited members, functioning continuously."*<sup>602</sup>.

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<sup>598</sup> See Articles 25, 48 and 49 of the Charter of the United Nations: "Article 25. The members of the United Nations agree to accept and implement the decisions of the Security Council in accordance with the present Charter." ... "Article 48. 1. The action necessary to comply with the decisions of the Security Council for the maintenance of international peace and security shall be carried out by all or some members of the United Nations, as may be determined by the Security Council. 2. Such decisions shall be implemented by the Members of the United Nations directly and through their action in the appropriate international bodies of which they are members." ... "Article 49. The Members of the United Nations shall associate in the provision of mutual assistance in the implementation of the measures determined by the Security Council."

<sup>599</sup> KU, Charlotte; SCOTT, Shirley V.. *The UN Security Council and global action on climate change*. In: *Climate Change and the UN Security Council*. (Eds.) KU, Charlotte; SCOTT, Shirley V.. Ed. Elgar, 256 p., 2018, p. 10.

<sup>600</sup> BOYLE, Alan; HARTMANN, Jacques; SAVARESI, Annalise. *The United Nations Security Council's powers and climate change*. In: *Climate Change and the UN Security Council*. (Eds.) KU, Charlotte; SCOTT, Shirley V.. Ed. Elgar, 256 p., 2018, p.108.

<sup>601</sup> SHAW, Malcolm Nathan. *International Law*. Eighth edition, Cambridge University Press, Cambridge, 2017, p. 925-926.

<sup>602</sup> See Article 28 of the Charter of the United Nations: "Article 28. (1) The Security Council shall be organized in such a way that it can function continuously. Each member of the Security Council shall, for this purpose, at all times be represented at the headquarters of the Organization. (2) The Security Council shall hold periodic meetings at which each of its members may, if it so wishes, be represented by a member of the Government or by another specially appointed representative. (3) The Security Council may meet at such other places outside the headquarters of the Organization as it deems most appropriate to facilitate its work."

And to this end, under the terms of Article 23 of the Charter, the Security Council is composed of 15(fifteen) members, being 05(five) of them permanent members, that is, for life, namely: United States of America, Russia, China, France and the United Kingdom<sup>603</sup> <sup>604</sup>. The non-permanent members of the Security Council are elected by the United Nations General Assembly for a period of 2(two) years<sup>605</sup> <sup>606</sup>. Each member has the right to one vote, and the permanent members also have the right of veto over the decisions of the Council, which gives them considerably greater power than the non-permanent members<sup>607</sup> <sup>608</sup> <sup>609</sup>.

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<sup>603</sup> See Article 23, Chapter V, of the Charter of the United Nations: *"Article 23. (1) The Security Council shall consist of 15 members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council. The General Assembly shall elect 10 other members of the United Nations as non-permanent members of the Security Council, with a particular view in the first place to the contribution of the members of the United Nations to the maintenance of international peace and security and to the other objectives of the Organization and also to an equitable geographical distribution. (2) The non-permanent members of the Security Council shall be elected for a term of two years. In the first election of the non-permanent members, after the increase in the number of members of the Security Council from 11 to 15, two of the four additional members will be elected for a period of one year. No member who finishes his term of office may be re-elected for the immediate term. (3) Each member of the Security Council shall have one representative."*

<sup>604</sup> It should be noted that originally the Security Council was composed of 11 members, of which 06 (six) were non-permanent. In 1965, the Charter of the United Nations was amended and another four (4) non-permanent members were added to the Council.

<sup>605</sup> According to United Nations General Assembly Resolution 1991 (XVIII), of the seats in the Security Council allocated to non-permanent members, five (05) are allocated to Afro-Asian States, one (01) to Eastern Europe, two (02) to Latin America and two (02) to Western Europe and others. See: NATIONS, United. *United Nations General Assembly Resolution 1991(XVIII)*. United Nations, Doc. A/RES/1991(XVIII), 17 December 1963.

<sup>606</sup> As of January 1, 2022, the non-permanent members of the Security Council have been Albania, Brazil, the United Arab Emirates (UAE), Gabon, Ghana, India, Ireland, Mexico, Norway and Kenya.

<sup>607</sup> See Article 27 of the Charter of the United Nations: *"Article 27. (1) Each member of the Security Council shall have one vote. (2) Decisions of the Security Council in matters of procedure shall be taken by an affirmative vote of nine members. (3) Decisions of the Security Council on any other matter shall be taken by a favorable vote of nine members, including the votes of all permanent members, it being understood that, with regard to decisions taken pursuant to Chapter VI and paragraph 3 of Article 52, a party to a dispute shall abstain from voting."*

<sup>608</sup> In the performance of his or her duties, each member of the Council shall have the right to one vote. However, the permanent members of the Council have the power of veto in decisions, and, as provided for in Article 27 of the Charter of the United Nations, in matters dealing with procedures, notably those expressed in Articles 28 to 32, or in matters of a formal nature, such as the insertion of a topic on the agenda, decisions of the Security Council shall be taken by an affirmative vote of nine (9) members, the abstention of a permanent member, after practical developments by the Council and tacit amendment of the Charter, is not considered a veto. In other matters, the decisions of the Security Council must be taken by a favorable vote of 9 (nine) members, including the votes of all permanent members, and the abstention of one of the permanent members is also not considered a veto or a vote against. In addition, when voting on decisions taken on non-procedural matters pursuant to Chapter VI and paragraph 3 of paragraph 52 of the Charter of the United Nations, a member which is a party to a dispute shall abstain from voting. On the veto power of the permanent members of the Security Council see: BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*, Coimbra, Almedina, 2003, p. 652. SHAW, Malcolm Nathan. *International Law*. Eighth edition, Cambridge University Press, Cambridge, 2017, p. 926. EINSIEDEL, Sebastian Von; MALONE, David M.. *Security Council*. In: DAWS, Sam; WEISS, Thomas G. . *The Oxford Handbook on The United Nations*, Second Edition, Oxford, Oxford University Press, 2018, p. 141.

<sup>609</sup> Regarding the veto power provided for in the Charter, BAPTISTA thus explains: *"... the Charter retained the inherited characteristic of the Pact, the existence of permanent and non-permanent members in the Council, but made this distinction even more significant by establishing that for really important decisions (the non-procedural ones) unanimity among the former would be required (Article 27(3)). The veto of the permanent members was therefore created. He is a child figure of political realism. At the insistence of the five great victors of World War II, the remaining states opted for*



And for the exercise of its powers, the Council may also establish subsidiary bodies, as provided for in Article 29 of the Charter. Currently, it has 03(three) Standing Committees, the Committee of Experts on Rules of Procedure, the Committee for the Admission of New Members and the Meeting Committee of the Council Outside the Headquarters, as well as *ad hoc* Committees and Working Groups<sup>610</sup>.

The Security Council has powers that differentiate it from all other intergovernmental bodies, which are divided into two types of powers, the first referring to the legally binding character of its decisions in relation to the other members of the organization and, the second, related to its authority, capable of imposing its decisions through sanctions and the use of force, even if only in special cases related to the maintenance of international peace and security<sup>611</sup>.

Meanwhile, SHAW differentiates the powers of the Security Council between powers of peaceful settlement of disputes and powers of adoption of binding measures, set out in Chapters VI and VII of the Charter, respectively<sup>612</sup>.

The Security Council's powers of peaceful settlement of disputes are provided for notably between Articles 33 and 38 in the Chapter VI of the Charter. First, it is granted, if it deems appropriate, to invite the parties involved in a peaceful dispute to resolve the dispute in accordance with Article 33 (1)<sup>613</sup>, and the latter might, at any time in the course of the dispute or situation in question,

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*the lesser evil. In principle, oligarchic despotism, at least of a negative character, will be preferable to pure anarchy.*" In: BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*, Coimbra, Almedina, 2003, p. 652.

<sup>610</sup> For more information on the United Nations Security Council working groups, see: NATIONS, United. *Security Council: Subsidiary Bodies*. United Nations. Available at: <https://www.un.org/securitycouncil/content/subsidiary-bodies>. Accessed September 20, 2021.

<sup>611</sup> EINSIEDEL, Sebastian Von; MALONE, David M.. *Security Council*. Em: DAWS, Sam; WEISS, Thomas G. . *The Oxford Handbook on The United Nations*, Second Edition, Oxford, Oxford University Press, 2018, p. 141.

<sup>612</sup> SHAW, Malcolm Nathan. *International Law*. Eighth edition, Cambridge University Press, Cambridge, 2017, p. 927. BAPTISTA also sets out two possibilities for binding measures by the Council, in the light of Article 53(1), second part, concerning regional qualifications and Article 94(2), concerning the enforcement of judgments of the International Court of Justice. In: BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*, Coimbra, Almedina, 2003, p. 687.

<sup>613</sup> See Article 33, Chapter VI, of the Charter of the United Nations: "*Peaceful Settlement of Disputes. Article 33 1. The parties to a dispute which may constitute a threat to international peace and security shall endeavour first of all to reach a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial recourse, recourse to regional organizations or agreements, or any other peaceful means of their choice. 2. The Security Council shall, if it deems it necessary, invite the said parties to settle their disputes by such means.*".

recommend procedures or methods of dispute settlement as it deems appropriate for the peaceful settlement of the case, in accordance with Article 36 of the Charter<sup>614</sup>.

If the parties to the dispute do not reach an agreement pursuant to Article 33, they shall, as provided for in Article 37(1), submit it to the Security Council, which, if it considers that the continuation of the *in casu* dispute may constitute a threat to international peace and security, shall decide whether to act in accordance with Article 36, referring them to a new attempt under Article 33, or recommending the terms of solution it deems appropriate for the particular case, in accordance with Article 37(2) of the Charter<sup>615</sup>.

Nevertheless, Article 38 provides that the Security Council may, if all parties to a dispute so request, recommend what it deems necessary for the peaceful settlement of the dispute<sup>616</sup>.

In this sense, BAPTISTA teaches that <sup>617</sup>

*"Although both allow the Council to adopt recommendations on the substantive issue, the regime of Article 37(2) differs from that of Article 38 in that it allows the Council to take an initiative independently of the parties, while the latter depends on an agreement between them for the matter to be referred to it. By virtue of this possibility of unilateral intervention of the Council of its own motion, while Article 38 applies in relation to any dispute submitted to it by the parties, Article 37(2) can only be applied by the Council in relation to disputes the continuation of which is likely to endanger the peace, which is therefore typical of Chapter VI."*

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<sup>614</sup>See Article 36, Chapter VI, of the Charter of the United Nations: "Article 36. (1) The Security Council may, at any stage of a dispute of the nature referred to in Article 33, or of a situation of a similar nature, recommend appropriate procedures or methods of settlement. (2) The Security Council shall take into account any procedures for the settlement of a dispute which have already been adopted by the Parties. 3. In making recommendations in accordance with this Article, the Security Council shall also take into account that disputes of a legal nature shall, as a general rule, be submitted by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court."

<sup>615</sup>See Article 37, Chapter VI, of the Charter of the United Nations: "Article 37. (1) If the parties to a dispute of the nature referred to in Article 33 are unable to settle it by the means indicated in that Article, they shall submit it to the Security Council. (2) If the Security Council considers that the continuation of this dispute may in fact constitute a threat to the maintenance of international peace and security, it shall decide whether to act in accordance with Article 36 or to recommend such terms of settlement as it deems appropriate."

<sup>616</sup>See Article 38, Chapter VI, of the Charter of the United Nations: "Article 38. Without prejudice to the provisions of Articles 33 to 37, the Security Council may, if all parties to a dispute so request, make recommendations to the parties with a view to a peaceful settlement of the dispute."

<sup>617</sup> BAPTISTA, Eduardo Correia. *Direito Internacional Público*. Volume II. Editora AAFDL, 2015, p. 731-732.

In addition, in accordance with Article 34 of the Charter, the Security Council may investigate, by setting up committees of inquiry, any situation or controversy which may constitute a threat to the maintenance of international peace and security, and in accordance with Article 35(1) any member of the United Nations may draw the attention of the Council to a situation or controversy which falls within the scope of Article 34. In addition, a non-member State of the United Nations may also request the attention of the Council, or of the General Assembly, provided that Articles 11 and 12 of the Charter are respected, for a dispute to which it is a party, but must accept in advance and in relation to such dispute the obligations of peaceful settlement provided for in the Charter, as set forth in Article 35(2)<sup>618 619</sup>.

And on this point, BAPTISTA states<sup>620</sup>

*"... in accordance with Chapter VI, the Council may set up a commission of inquiry against the will of the State in whose territory the facts to be determined took place, and there is nothing to prevent it from carrying out investigations in accordance with Article 34, such as the hearing of victims, witnesses, the examination of which documents and other evidence, the examination of which does not entail the entry into the territory of one or both parties without their consent. But in order to go on the ground or obtain the cooperation of the State concerned, it will require its voluntary cooperation or a decision under Chapter VII."*

This time, the adoption of binding measures by the Security Council in cases of threat to the peace, breach of the peace or acts of aggression, are set out in Chapter VII of the Charter of the United Nations.

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<sup>618</sup> See Article 34, Chapter VI, of the Charter of the United Nations: *"Article 34. The Security Council may investigate any controversy or situation likely to cause friction between Nations or to give rise to a controversy in order to determine whether the continuation of such controversy or situation may constitute a threat to the maintenance of international peace and security."*

<sup>619</sup> See Article 35, Chapter VI, of the Charter of the United Nations: *"Article 35. 1. Any Member of the United Nations may draw the attention of the Security Council or the General Assembly to any controversy or situation of the kind provided for in Article 34. 2. A State which is not a member of the United Nations may draw the attention of the Security Council or the General Assembly to any dispute to which it is a party, once it has previously accepted, in relation to such dispute, the obligations of peaceful settlement provided for in the present Charter. 3. The acts of the General Assembly in respect of matters submitted to its attention in accordance with this article shall be subject to the provisions of articles 11 and 12."*

<sup>620</sup> BAPTISTA, Eduardo Correia. *Direito Internacional Público*. Volume II, Editora AAFDL, 2015, p. 721.

Article 39 grants the Council the power to determine the existence of a threat to the peace, breach of the peace or act of aggression and, subsequently, to decide on the appropriate coercive and binding measures, in the following terms:

*"Article 39*

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

Indeed, in order for the Security Council to take any action, it is first essential that the act constitutes a threat to international peace and security, or that it is beyond that, a *de facto* breach of peace or an act of aggression<sup>621</sup>.

Once this requirement is present and, considering that the principles expressed in the Charter<sup>622</sup> pursuant to Articles 1(1) and 24(2), the *Ius Cogens* and public international law in general, are applicable to all organs of the United Nations including the Security Council, the Security Council

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<sup>621</sup>SHAW notes that the Council also has secondary competences not directly or necessarily linked to the maintenance of international peace and security, including the definition of strategic areas in the territories under trusteeship; the recommendation to the General Assembly on the admission, suspension or expulsion of Member States; the ratification by all permanent members of amendments to the Charter; and the election of the member judges of the International Court of Justice who are elected by the Assembly and the Council. Nevertheless, it can be considered that to a large extent these other competences are either linked to the objectives of maintaining international peace and security, or are necessary by virtue of the fact that the permanent members of the Council with veto power are also members of the General Assembly, having the right to vote in both bodies. See: SHAW, Malcolm Nathan. *International Law*. Eighth edition, Cambridge University Press, Cambridge, 2017, p. 928.

<sup>622</sup>See Article 24 of the Charter of the United Nations: "Article 24. (1) In order to ensure prompt and effective action by the United Nations, its members confer upon the Security Council primary responsibility for the maintenance of international peace and security and agree that, in the discharge of the duties imposed by that responsibility, the Security Council shall act on their behalf. 2 - In the performance of these duties, the Security Council shall act in accordance with the objectives and principles of the United Nations. The specific powers granted to the Security Council for the performance of these duties are defined in Chapters VI, VII, VIII and XII. 3 The Security Council shall submit to the General Assembly annual reports and, where necessary, special reports."

shall be able to take the necessary measures, set out in Articles 41 and 42 of the Charter, in order to maintain or restore international peace and security<sup>623 624 625</sup>.

However, Article 40 of the Charter also allows the Council to propose or determine provisional measures to the parties of the dispute or situation, before deciding on the substance or measures to be adopted pursuant to Articles 39, 41 and 42, and it is for the Council to take note of any non-compliance with the provisional measures established by it by any of the parties involved in the situation. Furthermore, still in accordance with Article 40, provisional measures decided upon by the Council shall be without prejudice to the rights, claims or situation of the parties<sup>626 627 628 629</sup>.

In this sense, BAPTISTA

*"Therefore, Article 40 allows the adoption of mandatory measures, but does not empower the Security Council to use force, not even in case of non-compliance with*

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<sup>623</sup>BAPTISTA states that *"In any case, the Council in the exercise of this power to decide substantive issues is fully bound by international law, whether that of *Ius Cogens* or the operative part, and must fully respect the rights of the parties..."*. In: BAPTISTA, Eduardo Correia. *Direito Internacional Público*. Volume II. Editora AAFDL, 2015, p. 737.

<sup>624</sup>See Article 41, Chapter VII, of the Charter of the United Nations: *"Article 41. The Security Council shall decide on the measures which, without involving the use of armed forces, shall be taken to give effect to its decisions and may urge the Members of the United Nations to apply such measures. These may include the complete or partial interruption of economic relations, of the means of communication by rail, sea, air, postal, telegraph, radio, or any other kind, and the severance of diplomatic relations."*

<sup>625</sup> See Article 42, Chapter VII, of the Charter of the United Nations: *"Article 42. If the Security Council considers that the measures provided for in Article 41 are or have been shown to be inadequate, it may carry out, by means of air, naval or ground forces, such action as it deems necessary to maintain or restore international peace and security. Such action may include demonstrations, blockades and other operations by the air, naval or ground forces of the Members of the United Nations."*

<sup>626</sup> See Article 40, Chapter VII, of the Charter of the United Nations: *"Article 40. In order to prevent the situation from worsening, the Security Council may, before making recommendations or deciding on the measures provided for in Article 39, urge the parties concerned to accept such provisional measures as it considers necessary or advisable. Such provisional measures shall be without prejudice to the rights or claims or the situation of the parties concerned. The Security Council shall take due note of non-compliance with these measures."*

<sup>627</sup> Despite the use of the term "call", BAPTISTA explains that the Council may adopt mandatory measures on the basis of Article 40 by stating that "as regards the possibility of adopting binding acts in the light of Article 40, Article 40 merely states that the Council may "call" ("white") the parties to accept them.... However, this conclusion seems to make little sense in view of the teleology of Chapter VII and the very discretion that Article 39 gives the Council to choose between recommendations and decisions. If it can choose to take a binding decision when it finally resolves a substantive issue, why should it not be able to adopt decisions on precautionary measures? ... It is therefore believed that Article 40 can be interpreted systematically and teleologically in such a way as to allow binding decisions to be taken, even if the letter of the precept is not clear. The practice has clearly followed in the direction of its compulsion." In: BAPTISTA, Eduardo Correia. *Direito Internacional Público*. Volume II. Editora AAFDL, 2015, p. 740-741.

<sup>628</sup>BAPTISTA teaches that *"... Within legal issues, a distinction must be made between situations and controversies. The second presupposes an open divergence between international subjects on an aspect of fact or law. Therefore, in this one there is already a legal controversy externalized between them. On the contrary, a situation is just a state of affairs that can provoke a controversy..."* In: BAPTISTA, Eduardo Correia. *Direito Internacional Público*. Volume II. Editora AAFDL, 2015, p. 688.

<sup>629</sup>BAPTISTA, on the other articles of Chapter VII explains that *"Indeed, in this Chapter all the other articles, from 43 to 50, are instrumental; they do not confer any power for autonomous binding decision-making or this is directed exclusively in relation to United Nations forces (such as Article 46)." In: BAPTISTA, Eduardo Correia. Direito Internacional Público*. Volume II. Editora AAFDL, 2015, p. 693.

*precautionary measures. Of course, such non-compliance may in itself be classified as a threat to peace or lead to a breach of the peace or aggression, or be an element that allows the global situation to be reclassified in a more serious way. However, in any event, if the Council consequently decides to use force, such a decision will be based on Article 42 and no longer on Article 40. It is believed that this conclusion is drawn from the final part of Article 40 in which it is stated that the Council shall take note of non-compliance with the precautionary measures. That is, in the light of this article nothing more can be done."*<sup>630</sup>

Therefore, since the Council has determined the existence of a threat to the peace, breach of the peace or an act of aggression in accordance with Article 39, and since precautionary measures based on Article 40 have not been taken or because they have already been adopted and proved inept or because the Council has not applied Article 40, it may apply mandatory measures, binding on all Member States of the United Nations, which do not involve the use of armed force, been those notably of an economic, movement, communication, logistical, diplomatic, and other nature, in accordance with Article 41, or, if it considers that these measures provided for in Article 41 would be or, if previously adopted, were inadequate or insufficient for the purpose, it may exercise the use of force as necessary, by means of air, naval or ground forces, to maintain or restore international peace and security, as provided for in Article 42<sup>631</sup>.

The list of measures provided for in Articles 41 and 42 is not exhaustive or *numerus clausus*. Coercive measures without the use of force, i.e. on the basis of Article 41, and already adopted by the Council, include: creation of *ad hoc* tribunals (for the former Yugoslavia and Rwanda for example); disarmament and verification obligations (Iraq and others); suspension of trade and commercial activities with a given State (South Africa, Southern Rhodesia, Iraq); and requirement of domestic legislation to restrict financial and logistical support for terrorists activities (from Res. 1373/2001)<sup>632</sup>

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<sup>630</sup> BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p. 708.

<sup>631</sup> SHAW, Malcolm Nathan. *International Law*, Eighth edition, Cambridge University Press, Cambridge, 2017, p. 951.

<sup>632</sup> PENNY, Christopher K. *Climate change as a "threat to international peace and security"*. In: *Climate Change and the UN Security Council*. (Eds.) KU, Charlotte; SCOTT, Shirley V.. Ed. Elgar, 256 p., 2018, p. 27.

<sup>633</sup> PENNY suggests that "... the Security Council may decide what measures not involving the use of armed force shall be employed to give effect to its decisions, and may request Members of the United Nations to apply such measures. These may include the total or partial interruption of economic relations and transport by rail, sea, air, postal, telegraph, radio and other means of communication, and the severance of diplomatic relations. This authority has been interpreted broadly since the creation of the UN in 1945, and it is now accepted that the measures specifically outlined in Article 41 are not exhaustive, serving as "merely illustrative examples." In: PENNY, Christopher K. *Climate change and the security council: a preliminary framework for implementing remedial measures through chapter vii of the un charter*. *The CISDL Working Paper*. Center for International Sustainable Development Law (CISDL). 1 – 17 p., 2015, p. 11.

Therefore, the measures to be determined by the Council with a focus on Article 41 of the Charter are varied and may evolve with the practice of the Council. In the present case, the Council, acting on the basis of Article 41, could determine the establishment of an obligation to provide periodic reports on the measures adopted to combat climate change by States; it could establish a subsidiary committee to oversee the state implementation of legislative measures that would be mandatory; it could determine the domestic reduction of greenhouse gas production; it could create legislation, creating new obligations, or amending international treaties on climate change; it might order the freezing of assets of legal persons, whether public or private; it could create an international climate tribunal; among others<sup>634</sup>.

On the other hand, among the compulsory measures based on article 42, that is, which include the use of force, there are the traditional Peacekeeping Forces, Peace Enforcement Force or War Force. In all these cases, there is the use of military personnel and the degree of force to be used or even allowed will depend on the framework that this "*Force*" receives by the Security Council when determining it<sup>635</sup>.

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<sup>634</sup> Ver: PENNY, Christopher K. *Climate change and the security council: a preliminary framework for implementing remedial measures through chapter vii of the un charter. A CISDL Working Paper*. Centre for International Sustainable Development Law (CISDL). 1 – 17 p. , 2015. BOYLE, Alan; HARTMANN, Jacques; SAVARESI, Annalise. *The United Nations Security Council's powers and climate change*. In: *Climate Change and the UN Security Council*. (Eds.) KU, Charlotte; SCOTT, Shirley V.. Ed. Elgar, 256 p., 2018, 101- 130 p. , p. 105-108. KEENAN, Patrick J.; KU, Charlotte; SCOTT, Shirley V.. *The creation of a climate change court or tribunal*. In: *Climate Change and the UN Security Council*. (Eds.) KU, Charlotte; SCOTT, Shirley V.. Ed. Elgar, 256 p., 2018, p. 73.

<sup>635</sup> In this sense, "*Within the figure of the United Nations forces, different realities are also integrated. First of all, it is necessary to distinguish, on the one hand, the peacekeeping forces and, on the other hand, the peace-enforcement forces and the warlike forces, according to their powers regarding the use of force and compulsive character. As a general rule, forces subject to effective command by the United Nations have not been given the public power of war. With occasional exceptions, it has been peacekeeping forces and not peace-enforcement or war. As such, they can only use force on grounds of exclusion of illegality, maximum, legitimate public defense, and their installation on the ground depends on the consent of the main parties to the conflicts.... Another essential limitation is that they are obliged to act impartially and must treat all parties impartially. Differently, things happen with the so-called peace-enforcement forces. These are created specifically mandated to use force to enforce peace objectives agreed upon by the parties.... His regime is therefore different from the peacekeeping forces.... However, situations may arise in which there is no peace to impose, but rather it is necessary to resort to large-scale force to change a de facto situation caused by the unlawful use of force and which requires the installation of a United Nations Force despite the armed opposition of one of the parties. This force does not aim to impose peace, at least not any peace accepted by the parties, but to carry out an armed conflict to change a given situation and force a peace unilaterally imposed by force. These are forces that aim to implement in the most drastic way the coercive system established in Articles 42 et seq. of the Charter. Maximum, to impose peace terms established unilaterally by the Council in accordance with Article 39. They are simply United Nations military forces.*". In: BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p.740-744.

However, the control of the Council's discretion in determining the specific case and in adopting the abovementioned measures is complex, since the Charter gives it considerable discretion as to the political decision whether or not to act and as to the means to be used<sup>636 637</sup>.

But despite its discretion, the Council's action depends on the fulfilment of requirements and compliance with limits, otherwise we would be facing a body with unlimited powers<sup>638</sup>.

Thus, in addition to the aforementioned norms of *Ius Cogens*, the principles<sup>639</sup> of the Charter and international law in general, the Security Council, as well as the other organs of the United Nations in accordance with their respective competences, must notably observe the principles of necessity and proportionality when adopting their actions and measures<sup>640 641 642 643</sup>.

As for the principle of necessity, it is a principle expressed in the Charter that, despite the subjectivity to which its practical application is subject, has "*two sub-principles that concretize its*

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<sup>636</sup> BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p.970.

<sup>637</sup> In this regard also stated the *International Criminal Tribunal for the former Yugoslavia*, in the Tadic Case: "Article 39 leaves the choice of means and their evaluation to the Security Council, which enjoys broad discretionary powers in this regard; and it could not be otherwise, for such a choice involves the political evaluation of highly complex and dynamic situations." In: BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p.970.

<sup>638</sup> As the International Court of Justice stated in an advisory opinion requested by the General Assembly: "The primary place assigned to international peace and security is natural, for the fulfillment of the other purposes will depend on the attainment of those basic conditions. These purposes are indeed broad, but neither they nor the powers conferred to effect them are unlimited." ICJ. *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*. I.C.J Reports 1962, International Court of Justice, 1962. In: BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p. 1020.

<sup>639</sup> BAPTISTA explains that "The Charter constitutes the foundation of the power of the United Nations, since it is the title by which international public power has been conferred on this organization. But it is nevertheless a treaty subject to the imperative limits of international public order. Thus, its parties could not effectively relieve its organs of the duty to comply with mandatory customary international law, except on the basis of the same international law. If States cannot by treaty exempt each other from respect for these norms, neither should they be able to exonerate international organizations, since they are more important than they are." In: BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p.1006.

<sup>640</sup> In this sense, BAPTISTA exposes that "In relation to the international law provision, the Charter also unequivocally establishes that respect for international law is one of its purposes (preamble and article 1, paragraph 1) to which article 24 refers." In: BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p. 1020.

<sup>641</sup> It should be noted that the other organs of the United Nations are still bound by the Internal Law of the United Nations. For more see: BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p. 1047-1049.

<sup>642</sup> BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p. 1061.

<sup>643</sup> BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p. 972.



requirements in terms of means-end and means-consequence relationship: adequacy and minimization of damages." <sup>644 645 646</sup>.

By adequacy, it is required that "*the measures to be adopted must be able to pursue the desired purpose in terms of pure material effectiveness*", and "*the judgment of adequacy must be made with the elements that the body had at the time of adoption of the act*" <sup>647 648</sup>.

In turn, the minimization of damages presupposes that "*within the appropriate measures to pursue the objective pursued, the one that will have the least harmful consequences on other goods with which it relates is chosen. If all are equally apt to attain the desired end, the choice of any other than the least burdensome shall constitute a violation of the principle of necessity.*" <sup>649</sup>.

As for the principle of proportionality, it is a principle that, although not expressed literally in the Charter and been the subject of some doctrinal controversy, it's important "*as a limit to the exercise of any power.*" <sup>650 651 652</sup>.

This time, proportionality "*requires that there must be a proportion between the act adopted by the United Nations, or qualified entities, and the gravity of the situation and its consequences.*" <sup>653</sup>.

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<sup>644</sup> BAPTISTA points out that "*Thus, the Charter establishes its applicability not only to the internal action and organization of the organization (Articles 7, paragraph 2; 20; 22; 29; 68; 72, no. 2; 90, no. 2; 97; 101, paragraph 2), but also to its external action (cf. Article 2, paragraphs 6 and 59; as well as to its legitimacy, its immunities and those of its personnel: Articles 104 and 105, paragraphs 2 and 3; also Article 106) and, in particular, in relation to the Security Council in relation to the exercise of its public powers (Article 40; 42; 43; 48, No. 1; 51 and 94, no. 2; also Article 47(2)), but also when acting by means of mere recommendations (cf. Article 33(2)). It is true that the requirement made as to the necessity of action or of the various aspects involved in these precepts does not always assume the same nature. However, these references lead to the conclusion that this is indeed a general principle laid down by the Charter.*" In: BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p. 1063.

<sup>645</sup> BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p. 1065.

<sup>646</sup> BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p. 1063.

<sup>647</sup> BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p. 1064.

<sup>648</sup> *Ibis above*.

<sup>649</sup> *Ibis above*.

<sup>650</sup> BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p. 1067.

<sup>651</sup> *Ibis above*.

<sup>652</sup> On the application of the principle of proportionality, see: BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p. 1067-1074.

<sup>653</sup> BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p. 1072.

Therefore, BAPTISTA explains that <sup>654</sup>

*"The actions of exercise of the public power, in particular the force, must be weighed taking into account the damages caused by the act/situation against which it is reacted, as well as those that are still occurring or are imminent. The expected disadvantages of adopting certain reaction measures must be weighed in a judgment that takes into account all the elements, from the damage to the values and attributions of the organization (maximum peace, as a limit end for a decision to use force, but also the defense of human rights, as an argument in favor, or in contrary), to the expected material damage. Any unreasonable overstepping of this measure must lead to the exclusion of the reaction as unlawful."*

Therefore, in addition to the reservation of internal jurisdiction of States provided for in Article 2(7) of the Charter, which as seen has an express exception for acts adopted pursuant to Chapter VII of the Charter, and the international norms already cited, such as the *Ius Cogens*, the Charter and its principles, as well as the international law provision, it shall be for the Council, when adopting measures based on cases of threat to the peace, breach of the peace or acts of aggression, to observe the principles of necessity and proportionality.

Otherwise, this would be an act that is not in accordance with the Charter and therefore illegal. In this scenario, a Security Council resolution that *"exceeds its powers by offending the Charter or the Ius Cogens, allows states to refuse to obey it. The refusal to obey it can be manifested by individual states or in groups."*<sup>655</sup>.

Then, otherwise, acts manifestly and gravely inconsistent with the Charter or with *Ius Cogens* would remain obligatory, and, given that the powers delegated by the Member States of the United Nations to the Council and to the other organs are not unlimited, since by definition of all delegated power is limited, also considering the absence of direct judicial redress against the decisions of the

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<sup>654</sup> BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p. 1073.

<sup>655</sup> ORAKHELASHVILI, Alexander. *The Acts of the Security Council: Meaning and Standards of Review*. In: (Eds.) BOGDANDY, A. Von; WOLFRUM, R.. *Max Planck Yearbook of United Nations Law*. Vol. 11, Max Planck, 2007, p. 143-195, p. 191.

Council, the possibility of some form of resistance by States targeted by manifestly unlawful decisions is necessary, as the practice of the United Nations shows to be the case<sup>656 657 658 659</sup>.

In any case, before it can use its powers set forth in Chapter VII of the Charter, it is necessary for the Council to determine the existence of a threat to the peace. Therefore, we move on to the analysis of the *concept in casu*.

### **8.2.1. Concept of threat to peace**

According to WET, "the term '*threat to peace*' is not an state of the art term. It is not defined in the Charter of the United Nations and has no fixed meaning.", being the most comprehensive and least susceptible of precise conceptualization among the three figures provided for in Article 39 of

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<sup>656</sup> BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p.1098.

<sup>657</sup> ORAKHELASHVILI, Alexander. *The Acts of the Security Council: Meaning and Standards of Review*. Em: (Eds.) BOGDANDY, A. Von; WOLFRUM, R.. *Max Planck Yearbook of United Nations Law*. Vol. 11, Max Planck, 2007, p. 143-195, p. 192.

<sup>658</sup> BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p.1125.

<sup>659</sup>For examples, see: BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p.1097.

the Charter<sup>660 661 662</sup>, but that it is a less serious matter than the breaking of the peace or the act of aggression, since in that one there is still peace, while in the latter ones there is no more<sup>663 664 665 666</sup>.

However, when referring to the threat to peace, the Charter refers to the threat to international peace, since "*the fact that it always uses the expression in association with international peace leaves little doubt that it refers only to this one.*"<sup>667</sup>.

Thus, the Charter of the United Nations does not explore in depth the characterization of the concept of threat to peace, forcing us to seek such a definition in doctrine and practice.

In a view of conceptualization from the practice of the Board, SHAW states that <sup>668</sup>

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<sup>660</sup> WET, Erika. *Threat to Peace*. Oxford University Press, Oxford, 2009, p. 1.

<sup>661</sup> SHAW, Malcolm Nathan. *International Law*. Eighth edition, Cambridge University Press, Cambridge, 2017, p. 947.

<sup>662</sup> See Article 39, Chapter VII, of the Charter of the United Nations: "*Article 39. The Security Council shall determine the existence of any threat to the peace, breach of the peace or act of aggression and shall make recommendations or decide what measures shall be taken in accordance with Articles 41 and 42 in order to maintain or restore international peace and security.*"

<sup>663</sup> The act of aggression, as well as the crime of aggression, however, is today conceptualized by the Rome Statute that established the International Criminal Court, in the following terms: "*Article 8 bis3 - Crime of aggression: 1. For the purposes of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position to effectively exercise control or direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations. 2. For the purposes of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other way incompatible with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly Resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression: (a) The invasion or attack by the armed forces of one State of the territory of another State, or any military occupation, even if temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof; (b) Bombing by the armed forces of a State against the territory of another State or the use of any weapon by a State against the territory of another State; (c) the blockade of the ports or coasts of one State by the armed forces of another State; (d) An attack by the armed forces of one State on the land, sea or air forces, or on the sea and air fleets of another State; (e) The use of armed forces of a State which are in the territory of another State with the agreement of the receiving State, in violation of the conditions provided for in the Agreement or any extension of their presence in such territory beyond the termination of the Agreement; (f) The action of a State in allowing its territory, which it has made available to another State, to be used by that other State to perpetrate an act of aggression against a third State; (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries carrying out acts of armed force against another State of such gravity as to correspond to, or their substantial involvement in, acts listed above.*"

<sup>664</sup> The General Assembly of the United Nations, by means of Resolution No. 3314(XXIX), adopted at its Session of December 14, 1974, had already defined what is meant by "aggression" in the following terms: "*Article 1 ° - Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or any other attitude that is inconsistent with the Charter of the United Nations, as determined by this definition.*" In: NATIONS, United. *Resolution No. 3314(XXIX). United Nations General Assembly, United Nations, Doc. A/RES/3314 (XXIX), 14 December 1974.*

<sup>665</sup> It should be noted, however, that the Security Council is not *a priori* bound by the definition of an act of aggression in the Rome Statute or in Resolution 3314 (XXIX) of the General Assembly of the United Nations, thus maintaining the primary competence for the legal framework of a situation that can be defined as an act of aggression.

<sup>666</sup> BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p. 977.

<sup>667</sup> BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p. 984.

<sup>668</sup> SHAW, Malcolm Nathan. *International Law*. Eighth edition, Cambridge University Press, Cambridge, 2017, p. 947.

*"The answer that has emerged in practice is that it depends on the circumstances of the case and also depends on the relationship of the five permanent members of the Council (United Kingdom, United States of America, Russia, China and France) with the issue under consideration, since a negative vote of any of the permanent members is enough to block all the resolutions of the Council, except the procedural ones."*

Nevertheless, BAPTISTA explains <sup>669</sup>

*"(...) Some authors have maintained that the concept of threat to peace is purely formal. It would be a mere procedural requirement without content. A threat to peace would be whatever the Council considered as such. However, this thesis is unacceptable.... This concept contains two notions. That of 'threat' and that of 'peace'. Despite the developments that the Charter has undergone in its application, it is believed that peace should continue to be defined negatively simply as the absence of armed conflicts between States or other entities subject to the prohibition of the use of force in international relations."*

And follows

*"... That is why it makes no sense to say that peace should be understood as encompassing respect within States for certain basic human rights or that peace implies respect for essential environmental limits, not to mention the question of development. Such a statement would imply that a violation of these parameters would not constitute a mere threat to peace, but a real breach of peace. In fact, anyone who considers that peace implies respect for the prohibition of acts of genocide will have to conclude that if there are acts of this kind, even outside a situation of internal armed conflict, there is no longer peace; that is, that there is a rupture of this and not a mere threat to peace."<sup>670</sup>*

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<sup>669</sup> BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p. 977-978.

<sup>670</sup> BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p. 979.

In fact, in some cases, the Security Council has described situations of human rights violations as a threat to peace rather than a breach of peace. That's because, as BAPTISTA explains<sup>671</sup> <sup>672</sup> "... the notion of threat, in a first approximation, should be understood as any question likely to create conditions which could reasonably predispose one or more States to use force to resolve it in a short period of time" and "... a threat to peace would be an issue of sufficient gravity to create a serious risk of provoking an armed conflict between states within a reasonable time."

However, it appears that "even in a simple interpretation of the Charter, it has always seemed the best solution to understand that an effective rupture of peace within a State, by the outbreak of a comprehensive civil conflict, should be qualified as a threat to international peace", either because of the instability that these conflicts cause, at least to neighboring States, or in humanitarian terms<sup>673</sup>.

Thus, it can be inferred from the practical cases in which there was the qualification of internal conflicts as a threat to peace, in relation to the extension of the application of the notion of threat to peace, that "the paradigmatic examples of this extension of the notion are related to situations of systematic and serious violations of human rights or destruction of environmental conditions with serious international consequences" and that "Only the broad interpretation progressively given to the notion of "threat to peace" causes these "measures" to be sometimes used to "sanction" gross violations of peremptory norms of a humanitarian character mainly."<sup>674</sup> <sup>675</sup> <sup>676</sup> <sup>677</sup>.

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<sup>671</sup> BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p. 979. The author stated that "(even) the extreme situation of the genocide in Rwanda was qualified by the aforementioned Resolutions 918 (1994) of 18 May and 929 (1994) of 22 June as a threat to peace and not as a breach thereof."

<sup>672</sup> BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p. 980.

<sup>673</sup> BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p. 986.

<sup>674</sup> BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p. 987. In which the author presents the examples that occurred in the Congo, in part of Rhodesia, in part of Bosnia and Herzegovina, in Somalia, in Rwanda, in Angola, in Kosovo, in East Timor, in Liberia and in Sierra Leone.

<sup>675</sup> BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p. 988. That provided that "(a) practice has not been limited to the confirmation of the interpretative extension of the notion of threat to peace to internal armed conflicts. It went further, probably by causing a change in the scope of this notion, by tacit amendment of the Charter and not simply by means of an extensive interpretation. The basis of this enlargement can no longer be regarded as predominantly peacekeeping, but at least as humanitarian."

<sup>676</sup> BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p. 989-990.

<sup>677</sup> MIRON, A.; PELLET, A.. *Sanctions*. In: WOLFRUMET, R.; OUTROS (eds.). *The Max Planck Encyclopedia of Public International Law*. Vol. IX, (2012 OUP), 1-15. In: *Memorandum from Mr Alain Pellet to Members of the Institut de droit international: A proposal for a New Commission on Unilateral Sanctions and International Law*, 2015. In: *Annuaire de l'Institut de droit international*. Séssion de Tallinn, Vol. 76, 2015, p. 2.

However, in order to speak of a threat to international peace and security, it is essential that we have the notion that "*this issue, whether a formal controversy or a situation, must be concrete and not general and abstract.*". This is because "*an abstract qualification of threat to peace would legitimise the recourse to formal legislative powers by the Council, which has no basis in the Charter*"<sup>678 679</sup>.

On the other hand, it urges us to clarify that in order for us to be faced with a threat to peace, it is not essential that we are facing only issues arising from a violation of international law, being certain that the United Nations should only act, as a rule, "*when a State has been responsible for a violation of its international obligations*", the final part of Article 2(7) of the Charter of the United Nations clearly provides that the reservation of internal jurisdiction of States "*shall not prejudice the application of the coercive measures contained in Chapter VII*", that is, "*that the purpose of peacekeeping must extraordinarily prevail over the rights of States*", including, since "*even lawful action may exceptionally be regarded as a threat to the peace*"<sup>680 681 682 683 684</sup>.

Therefore, the absence of a pre-defined or expressly established concept in the Charter has served as a safety net for the Council's action in situations where the conditions qualifying the breach of the peace or the act of aggression are not present<sup>685</sup>.

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<sup>678</sup> BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p. 980.

<sup>679</sup> *Ibis above*.

<sup>680</sup> BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p. 981.

<sup>681</sup> See Article 2(7) of the Charter of the United Nations: "*Article 2. The Organization and its members, for the achievement of the objectives mentioned in Article. 1, shall act in accordance with the following principles: (...) 7. Nothing in this Charter shall authorize the United Nations to intervene in matters which fall essentially within the domestic jurisdiction of any State, or shall oblige Members to submit such matters for a solution in accordance with the present Charter; this principle, however, shall not prejudice the application of the coercive measures set forth in Chapter VII.*"

<sup>682</sup> BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p. 981.

<sup>683</sup> BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p. 983.

<sup>684</sup> In principle, economic production, which generates greenhouse gas emissions, is not illegal. Another example is military movements and exercises, which are not unlawful *acts per se*, but which, in a concrete situation, can be considered a threat to peace.

<sup>685</sup> SHAW, Malcolm Nathan. *International Law*. Eighth edition, Cambridge, Cambridge University Press, 2017, p. 947-948.

Thus, since it was first applied, through Security Council Resolution 54 of 1948, the concept of threat to peace has been broadened<sup>686</sup>, in order to be applied not only to situations of traditional military bias, but also of humanitarian and public health issues<sup>687 688 689 690</sup>.

Finally, it remains to be concluded as to the classification of a situation under Article 39 of the Charter, that due to "... to the great autonomy of assessment, the dominant understanding is that when the Council invokes Chapter VII it has tacitly carried out such a classification", and that "in order for the Council to be able to exercise its powers in the light of Chapter VII it is always indispensable a classification under Article 39, express or implicit, but clear, which is not sufficient with only the use of the terminology in the resolution"<sup>691</sup>.

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<sup>686</sup> Security Council Resolution 54 of 1948 which determined that the conflict in the region of Palestine, in which Arab states entered the territory for the purpose of conducting acts of aggression against the State of Israel, constituted a threat to peace. See: NATIONS, United. *Resolution 54/1948*. Security Council. Doc. SC/RES/54/1948, United Nations, 1948.

<sup>687</sup> With regard to the extension of the concept and its use by the Council, Resolution 1373 of 2001, adopted after the terrorist attacks of 11 September, is important. In this Resolution the Security Council has generally acknowledged that acts of terrorism constitute a threat to peace, not referring to a specific act but to future acts, as WET explains: "*A recent development has been the determination by the UN Security Council of 'generic' threats to peace as a basis for Chapter VII action. The Council reaffirmed 'that such acts [such as the September 11 attacks], like any act of terrorism, constitute a threat to international peace and security.' Considering that all previous determinations of a threat to peace, including those relating to international terrorism, belonged to a concrete situation, Resolution 1373 (2001) was therefore directed not only at a specific past terrorist act, but at all future acts of terrorism.*". In: WET, Erika. *Threat to Peace*. Oxford University Press, Oxford, 2009, p. 3. By the generality of the resolution, many doctrinaires consider it illegal. See also: NATIONS, United. Security Council Resolution 1373/2001. Doc. SC/RES/1373/2001, United Nations, 2001.

<sup>688</sup> For example, Resolution 808 of 1993 on the former Yugoslavia in which the Security Council stated: "*Expressing once again its grave alarm at the continuing reports of widespread violations of international humanitarian law taking place on the territory of the former Yugoslavia, including reports of mass killings and the continuation of the practice of 'ethnic cleansing'. Determining that this situation constitutes a threat to international peace and security...*". In: NATIONS, United. Security Council Resolution 808/1993. Doc. SC/RES/808/1993, United Nations, 1993. And Resolution 955 of 1994 regarding Rwanda, in which it stated: "*Expressing once again its grave concern at reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda. To determine that this situation continues to constitute a threat to international peace and security...*". In: NATIONS, United. Security Council Resolution 955/1994. Doc. SC/RES/955/1994, United Nations, 1994.

<sup>689</sup> In January 2000, the Security Council discussed the impact of HIV/AIDS on security and peace in Africa and subsequently adopted Resolution 1308 of 2000. It should be noted, however, that on that occasion the Council did not adopt any conclusive measure for the implementation of Chapter VII of the Charter of the United Nations, nor did it define the situation as a threat to peace, as WET well explains: "*Much of the debate describes this pandemic as a 'security threat' and not a 'threat to peace'. Unless the notion of 'security threat' simultaneously implies a 'threat to peace,' the UN Security Council would not be able to take binding action, and the debate was inconclusive in this regard.*" In: WET, Erika. *Threat to Peace*. Oxford University Press, Oxford, 2009, p. 3.

<sup>690</sup> More recently, in relation to the COVID-19 pandemic, the Council adopted Resolution 2565 of 2021 to facilitate access to COVID-19 vaccines in situations of armed conflict and during complex humanitarian emergencies, among other determinations, in which it stated "*Considering that the unprecedented extent of the COVID-19 pandemic is likely to endanger the maintenance of international peace and security...*". In: NATIONS, United. *Resolution 2565/2021*. Security Council. Doc. SC/RES/2565/2021, United Nations, 2021. The Council had already adopted Resolution 2532 of 2020, in which it urged all parties involved in armed conflicts to immediately engage in a lasting humanitarian pause for at least 90 consecutive days in order to enable the safe, unimpeded and sustained delivery of humanitarian assistance, the provision of related services by impartial humanitarian actors, having stated on that occasion that: "*Considering that the unprecedented extent of the COVID-19 pandemic is likely to endanger the maintenance of international peace and security,*" In: NATIONS, United. *Resolution 2532/2020*. Security Council. Doc. SC/RES/2532/2020, United Nations, 2020.

<sup>691</sup> BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p. 989.



That been said, since 2007, climate change and its relationship with the maintenance of international peace and security have been the subject of formal debates in the Council, as we will analyze below.

### ***8.2.2. Climate change and threat to peace and international security in the Security Council***

As the 2009 UNEP report pointed out, at least 18 international armed conflicts and at least 40 percent of internal armed conflicts in the last 60 years prior to the report can be associated with natural resources. Therefore, disputes and armed conflicts for natural resources are well known<sup>692</sup>.

The somewhat *sui generis* character of climate change in the field of the maintenance of international peace and security, with its scattered and prolonged adverse effects over time, the vagueness as to its responsibility, the fact that it is mostly connected to lawful activities within the internal sphere of States, the problems related to the application of this concept to the functioning of the Council, as well as the lack of consensus even as to the very existence of a direct interconnection between these points, makes their analysis complex<sup>693 694</sup>.

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<sup>692</sup> UNEP. *From Conflict to Peacebuilding: The role of Natural Resources and the Environment*. Geneva, UNEP, 2009, p.8. Therefore, there is a clear difference between conflicts that originate in disputes over natural resources and conflicts that have at their source climate change, the former of which are already widely known, while the causal relationships related to the latter are not yet consensual. In fact, climate change, further impairing the availability of natural resources, may provide a breeding ground for increased competition for natural resources.

<sup>693</sup> In this sense, KU exposes that "*Anticipating the future scope of such climate events can be difficult because the effects of individual actions (e.g., carbon emissions into the atmosphere) can take centuries or even millennia to fully develop. This creates a particularly difficult political challenge for an international institution like the United Nations Security Council (UNSC), designed to respond to short-term political-military crises rather than long-term changes in the global ecosystem.*" In: KU, Charlotte. *The UN Security Council's role in developing a responsibility to respond to the climate change challenge*. In: *Climate Change and the UN Security Council*. (Eds.) KU, Charlotte; SCOTT, Shirley V. Ed. Elgar, 256 p., 2018, p. 163.

<sup>694</sup> BOYLE, HARTMANN and SAVARESI explain that "*the use of the Council's powers remains problematic. The exercise of the Council's legislative competence leaves much to be desired in terms of accountability, participation, procedural fairness and transparency in decision-making. If the Council were to assume the role of global legislator on climate change, most states would in fact be excluded from the law-making process.*" In: BOYLE, Alan; HARTMANN, Jacques; SAVARESI, Annalise. *The United Nations Security Council's powers and climate change*. In: *Climate Change and the UN Security Council*. (Eds.) KU, Charlotte; SCOTT, Shirley V. Ed., 256 p., 2018, p. 122.

Nevertheless, on the interconnection between climate change and international security, PENNY explains and exemplifies that<sup>695 696 697</sup>

*"It is important to note that to date there is little evidence that climate change is directly responsible for the initiation of any violent conflict. Nevertheless, its adverse implications suggest that it should still be considered as a "threat multiplier... Millions of people live in SIDS. This situation, therefore, is likely to lead to a large population displacement... While environmental migration may pose fewer security challenges than conflict-related displacement, and estimates of affected populations vary widely, there is still little doubt that this will pose major international challenges."*

In this sense, VOIGT states<sup>698</sup>

*"In the absence of absolute scientific certainty about the social and political impacts of climate change, the phenomenon is best seen as a threat multiplier that exacerbates existing trends, tensions and instability. Rather than rejecting the and the exact numbers, the risk of climate-related human displacement needs to be recognized and precautions taken. Climate change needs to be seen in the broader concept of human security, which focuses more on the effects on the individual. In line with this concept,*

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<sup>695</sup> PENNY, Christopher K. *Climate change as a "threat to international peace and security"*. Em: *Climate Change and the UN Security Council*. (Eds.) KU, Charlotte; SCOTT, Shirley V.. Ed. Elgar, 256 p., 2018, p. 31.

<sup>696</sup> SIDS, or Small Island Developing States (SIDS), are a group of 38 UN Member States and 20 Non-UN Members/Associate Members of United Nations regional commissions that face unique social, economic and environmental vulnerabilities. Its members include the Cook Islands, the Federated States of Micronesia, Kiribati, Nauru, Niue, Palau, the Republic of the Marshall Islands, and Tuvalu, among others. For more information see: NATIONS, United. *About Small Island Developing States*. United Nations. Available in: <https://www.un.org/ohrlls/content/about-small-island-developing-states>. Accessed February 11, 2022.

<sup>697</sup> In this case, the SIDS island states of very low altitude, once they have their territories submerged by sea level rise, they will be the first states to disappear due to the physical disappearance of their territory. The unprecedented disappearance in the modern history of a State in these conditions and the stateless condition to which its nationals would be subjected, not to mention even the condition of its legal persons, represent challenges that create high security risks, depending on a series of possibilities. See: KU, Charlotte; SCOTT, Shirley V. (Eds.). *Climate Change and the UN Security Council*. Ed. Elgar, USA, 2018. WEWERINKE-SINGH, Margaretha. *State Responsibility, Climate Change and Human Rights under International Law*. Ed. Hart, 2019, 01 - 189. And others.

<sup>698</sup> VOIGT, Christina. *Security In A "Warming World": Competences Of The Un Security Council For Preventing Dangerous Climate Change*. Em: *Security: A Multidisciplinary Normative Approach*. Series: International Humanitarian Law Series, Vol. 26, Brill, 2009, p. 294. See also: KU, Charlotte; SCOTT, Shirley V. (Eds.). *Climate Change and the UN Security Council*. Ed. Elgar, USA, 2018. BOURGHELLE, Valentine. *Climate change in the Security Council: On the road to qualifying climate change as "threat multiplier"*. Völkerrechtsblog, 2019. Disponível em: <https://voelkerrechtsblog.org/climate-change-in-the-security-council/> . Accessed in January 11, 2021. PENNY, on the other hand, states categorically that *"The characterization of climate change as a 'threat to international peace and security' would be consistent with this established practice of the Security Council."* Em: PENNY, Christopher K. *Climate change and the security council: a preliminary framework for implementing remedial measures through chapter vii of the un charter. A CISDL Working Paper*. Center for International Sustainable Development Law (CISDL). 1 – 17 p., 2015, p. 9.

*it is clear that many issues related to the impact of climate change on international security are intertwined requiring policy responses."*

Then, despite the absence of scientific consensus on the existence of a direct connection between climate change and the onset of violent conflicts<sup>699 700 701</sup>, the recent IPCC report of 2022 (AR6 – Working Group II)<sup>702</sup> stated with medium confidence that "*violent conflicts and, separately, migration patterns, in the short term, will be driven by socio-economic conditions and governance rather than by climate change*" and<sup>703</sup> which considers, in general, low the likelihood of a direct connection between climate and security, including migration, attributing to political, economic and social issues the status of main and direct factors for the initiation of violent conflicts and migration crises<sup>704 705</sup>,

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<sup>699</sup> MAYER and MÉGRET point out, for example, that the *IPCC Working Group II does not exclude the possibility of linking climate change with violent conflicts. However, most scientists consider government practices to be far more influential than climate variation. Similar changes in climate have not spurred conflicts of the same magnitude in neighboring regions, and that the past populations in Darfur have been able to cope with climate variations in order to avoid large-scale violent conflicts.*" In: MAYER, Benoît; MÉGRET, Frédéric. *Climate migration and the Security Council*. In: KU, Charlotte; SCOTT, Shirley V. (Eds.). *Climate Change and the UN Security Council*. Elgar, USA, 2018, p. 90. For his part, BUHAUG states: "*Climate change and its associated physical effects, such as higher temperatures and evaporation, more erratic weather patterns, melting glaciers and rising sea levels, may constitute the defining challenge of our time. Exposed societies that lack the capacity and knowledge needed to adapt successfully may face increasing asymmetries between demand and supply of subsistence resources (e.g., fresh water, pastures, crops) as well as basic public goods (sanitation, health, electricity). Some have also raised concerns about an associated increase in violent conflict. The present analysis gives little support to such speculation. The simple fact is this: climate characteristics and variability are not related to short-term variations in the risk of civil war in sub-Saharan Africa. The primary causes of civil war are political, not environmental, and while environmental conditions may change with future warming, general correlates of conflict and war are likely to prevail.*" In: BUHAUG, Halvard Buhaug. *Climate not to blame for African civil wars*. PNAS, Vol. 107, No. 38, Center for the Study of Civil War, Peace Research Institute Oslo (PRIO), Oslo, 2010. See also: GLEDITSCH, Nils Petter. *Conflict and Insecurity in the IPCC*. PRIO, 2018. Available in <https://blogs.prio.org/ClimateAndConflict/2018/01/conflict-and-insecurity-in-the-ipcc/>. Accessed in February 22, 2022.

<sup>700</sup> As already said, it's a different situation the connection between conflicts and natural resources.

<sup>701</sup> CAN, an organization focused on the national security of the United States of America, produced in 2007 a report in which it indicated the existence of a relationship between climate change and international security. <sup>701</sup>See: CNA. *National Security and the Threat of Climate Change*. The CAN Corporation, 2007. In the years 2014 and 2017, CAN Corporation produced new reports in which it confirmed its previous position.

<sup>702</sup> IPCC. *Climate Change 2022: Impacts, Adaptation and Vulnerability. Summary for Policymakers*. IPCC WGII Sixth Assessment Report of the Intergovernmental Panel on Climate. IPCC, WMO, UNEP, 2021.

<sup>703</sup> IPCC. *Climate Change 2022: Impacts, Adaptation and Vulnerability. Summary for Policymakers*. IPCC WGII Sixth Assessment Report of the Intergovernmental Panel on Climate. IPCC, WMO, UNEP, 2021, p. 15.

<sup>704</sup> IPCC. *Climate Change 2022: Impacts, Adaptation and Vulnerability. Summary for Policymakers*. IPCC WGII Sixth Assessment Report of the Intergovernmental Panel on Climate. IPCC, WMO, UNEP, 2021.

<sup>705</sup> In this regard, the 2022 Group II AR6 report on impacts, adaptation and vulnerability states that: "*Climate change is contributing to humanitarian crises where climate risks interact with high vulnerability (high confidence). Climate and climate extremes are increasingly driving displacement in all regions (high confidence), with small island states disproportionately affected (high confidence). Acute food insecurity and malnutrition related to floods and droughts have increased in Africa (high confidence) and Central and South America (high confidence). Although non-climatic factors are the dominant drivers of existing intrastate violent conflicts, in some regions assessed extreme weather and weather events have had a small and adverse impact on their duration, severity, or frequency, but the statistical association is weak (mean confidence). Through the displacement and involuntary migration of extreme weather and weather events, climate change has generated and perpetuated vulnerability (average confidence).*" p. 13; "*Regions and people with considerable development constraints have high vulnerability to climate risks (high confidence). Global hotspots of high human vulnerability are found particularly in West, Central and East Africa, South Asia, Central and South America, Small Island Developing States and the Arctic (high confidence). Vulnerability is greatest in places with poverty, governance challenges and limited access to basic services and resources, violent conflict, and high levels of climate-*

in addition to stressing that, with high confidence, *"increasing adaptation capacities minimizes the negative impacts of climate-related displacement and involuntary migration to migrants and sending and receiving areas,"* that *"some development reduces the underlying vulnerabilities associated with conflict,"* and that *"adaptation contributes by reducing the impacts of climate change on climate-sensitive conflict factors "*, concluding by stating that *"risks to peace are reduced, for example by supporting people in climate-sensitive economic activities and promoting women's empowerment"*<sup>706</sup>

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sensitive livelihoods (e.g., smallholder farmers, pastoralists, fishing communities) (high trust). Between 2010-2020, human mortality from floods, droughts and storms was 15 times higher in highly vulnerable regions, compared to regions with very low vulnerability (high confidence). Vulnerability at different spatial levels is exacerbated by inequality and marginalization linked to gender, ethnicity, low income or combinations of these (high trust), especially for many Indigenous Peoples and local communities (high trust). Current development challenges that cause high vulnerability are influenced by historical and ongoing patterns of inequality, such as colonialism, especially for many Indigenous Peoples and local communities (high confidence)." p. 14; "Short-term warming and increased frequency, severity and duration of extreme events will put many terrestrial, freshwater, coastal and marine ecosystems at high or very high risk of biodiversity loss (medium to very high confidence, depending on the ecosystem). Short-term risks to biodiversity loss are moderate to high in forest ecosystems (medium confidence), algae and seagrass ecosystems (high to very high confidence) and high to very high in Arctic sea ice and terrestrial ecosystems (high confidence) and - aquatic coral reefs (very high confidence). Continuous and accelerated sea level rise will encroach on coastal settlements and infrastructure (high confidence) and compromise low-lying coastal ecosystems to submersion and loss (medium confidence). If urbanization trends in exposed areas continue, this will exacerbate the impacts, with more challenges where energy, water and other services are limited (average confidence). The number of people at risk of climate change and associated biodiversity loss will progressively increase (average confidence). Violent conflicts and, separately, migration patterns, in the short term, will be driven by socio-economic conditions and governance rather than by climate change (average confidence)." p. 15; "In the medium and long term, displacement will increase with the intensification of heavy rainfall and associated flooding, tropical cyclones, droughts and, increasingly, sea level rise (high confidence). At progressive levels of warming, involuntary migration from regions with high exposure and low adaptive capacity (average confidence) would occur. Compared to other socioeconomic factors, the influence of climate on conflict is assessed as relatively weak (high confidence). Along long-term socioeconomic pathways that reduce non-climate factors, the risk of violent conflict would decrease (average confidence). At higher levels of global warming, the impacts of climate and climate extremes, particularly drought, increasing vulnerability, will increasingly affect violent intrastate conflicts (average confidence)." p. 17-18; "Climate and climate extremes are causing economic and social impacts across national borders through supply chains, markets and natural resource flows, with increasing cross-border risks projected in the water, energy and food (high confidence) sectors. Supply chains that rely on specialized commodities and key infrastructure can be disrupted by extreme weather events. Climate change causes the redistribution of marine fish stocks, increasing the risk of cross-border management conflicts among fisheries users and negatively affecting the equitable distribution of food supply services as fish stocks shift from lower to higher latitude regions, thus increasing the need for climate-informed cross-border management and cooperation (high trust). Changes in rainfall and water availability increase the risk of planned infrastructure projects, such as hydropower in some regions, with reduced productivity for the food and energy sectors, including in countries that share watersheds (average confidence)." p. 21; "Increasing adaptation capacities minimizes the negative impacts of climate-related displacement and involuntary migration for migrants and sending and receiving areas (high confidence). This improves the degree of choice under which migration decisions are made, ensuring safe and orderly movements of people within and between countries (high confidence). Some development reduces the underlying vulnerabilities associated with conflict, and adaptation contributes by reducing the impacts of climate change on climate-sensitive conflict factors (high confidence). Risks to peace are reduced, for example by supporting people in climate-sensitive economic activities (average confidence) and promoting women's empowerment (high confidence)." p. 28. In: IPCC. *Climate Change 2022: Impacts, Adaptation and Vulnerability. Summary for Policymakers*. IPCC WGII Sixth Assessment Report of the Intergovernmental Panel on Climate. IPCC, WMO, UNEP, 2021.

<sup>706</sup> IPCC. *Climate Change 2022: Impacts, Adaptation and Vulnerability. Summary for Policymakers*. IPCC WGII Sixth Assessment Report of the Intergovernmental Panel on Climate. IPCC, WMO, UNEP, 2021, p. 28.

<sup>707</sup> Therefore, climate change as a multiplier factor of pre-existing threats, and not the threat *per se*, continues to prove to be a more feasible and legally plausible form, even as it is sufficiently demonstrated by the best available science, in addition to complying with the principles of necessity and proportionality, as well as the Charter, other provisions and the *Ius Cogens*, from the point of view of the law applicable to the action of the United Nations in relation to the maintenance of international peace and security, while complying with the principles of prevention and precaution, proper to the legal regime of International Environmental and Climate Change Law.

Also, in the *paper*<sup>708 709</sup> issued by the High Representative of the European Union together with the European Commission to the Security Council, it was stated that<sup>710</sup>

*"Climate change is best seen as a threat multiplier that exacerbates existing trends, tensions and instability. The main challenge is that climate change threatens to overwhelm states and regions that are already fragile and prone to conflict. It is important to recognise that the risks are not just humanitarian in nature; they also include political and security risks that directly affect European interests. Moreover, in line with the concept of human security, it is clear that many issues related to the impact of climate change on international security are intertwined, requiring comprehensive policy responses."*

At this point, we highlight the mention of humanitarian or human security risks, differentiating them from other risks associated with the adverse effects of climate change, the latter more traditional, related to collective security, better known, such as internal and international armed conflicts, the disappearance of a State and the dispute over its territory or political control, or immigration as a

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<sup>708</sup> UNION, European. Climate change and international security: *Paper from the High Representative and the European Commission to the European Council*. 2008, p.2. Doc. S113/08.

<sup>709</sup> In this regard, United Nations General Assembly Resolution 66/290 of 2012 expresses that human security is an "approach to help Member States identify and address widespread and cross-cutting challenges to the survival, livelihood and dignity of their people" and that "it must be implemented with full respect... to the sovereignty of States, territorial integrity and non-interference in the internal affairs of States.". KU and SCOTT suggest, therefore, that the United Nations General Assembly does not recognize the use of force on the basis of Art. 42 by the Security Council in cases related to human security. In: KU, Charlotte; SCOTT, Shirley V. *The UN Security Council and global action on climate change*. In: KU, Charlotte; SCOTT, Shirley V. (Eds.). *Climate Change and the UN Security Council*. Elgar, USA, 2018, p. 13. NATIONS, United. *Resolution No. 66/290*. United Nations General Assembly, United Nations, 2012. Doc. A/RES/66/290, 2012.

<sup>710</sup> In this sense, CAMPRUBI states that "Germany's accession to the EU presidency in 2007 boosted the introduction of the security approach to climate change on the agenda of this regional organization, an innovative perspective that remained absent from the 2003 European Security Strategy. 30 The conclusions of President Hans Gert-Pottering explicitly marked the beginning of what was later referred to as the EU process on climate change and international security. Acknowledging that "it is increasingly evident that climate change will have a considerable impact on international security issues", Gert-Pottering also announced that "the European Council invites the High Representative and the European Commission to work closely together on this important issue and to submit a joint report to the European Council in spring 2008". In: CAMPRUBI, Alejandra Torres. *Securitization of Climate Change: The Inter-Regional Institutional Voyage*. Yearbook of International Environmental Law, Vol. 27, n.º 1, Oxford University Press, 2016, p. 87.



matter of protection by the States that receive these immigrants or refugees, among other similar situations<sup>711 712</sup>.

On human security, the United Nations General Assembly, through Resolution 66/290 of 12 September 2012, expressed that Member States agree that human security is "*an approach to help Member States identify and address widespread and cross-cutting challenges to the survival, livelihood and dignity of their people.*"<sup>713</sup>.

Despite the sometimes subjective conceptualization, human security is well explained while stating that <sup>714 715</sup> "*it is not a coherent or objective concept, but is part of an evolving conception of*

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<sup>711</sup> In this regard, FAR and YOUNGS explain that "*Regarding the European Union, it cites two relevant points: 'A recent report notes that climate security is increasingly 'overshadowed' by the EU's focus on traditional energy security; the Union's strong desire to increase hydrocarbon imports to replace Russia has pushed climate security further down the agenda. The second factor goes in the opposite direction: the geopolitical context of the EU suggests the need for more securitization. The EU is very close to a southern Mediterranean region that is beginning to show signs of high vulnerability to the impacts of climate change and inadequate adaptation capacity. It is estimated that several of these problematic and worrisome neighbors will suffer stronger impacts from climate change in the short to medium term. Consequently, its weak climate resilience exacerbates the EU's security vulnerabilities.'*" In: FAR, Shahrazad; YOUNGS, Richard. *The EU's distinctive approach to climate security*. In: KU, Charlotte; SCOTT, Shirley V. (Eds.). *Climate Change and the UN Security Council*. Elgar, USA, 2018, p. 150.

<sup>712</sup> According to NASU, collective security "*can be defined as the protection of the members of the system against a possible attack by any other member of the same system. At the heart of the UN collective security system is the normative foundation that prohibits the use of force, as well as the institutional foundation that designates the Security Council as the main collective decision-making body for the maintenance of international peace and security.*" In: NASU, Hitoshi. *The Place of Human Security in Collective Security*. Journal of Conflict & Security Law, Vol. 18, n.º 1, Oxford University Press, 2012, p. 101.

<sup>713</sup> NATIONS, United. *Resolution No. 66/290*. United Nations General Assembly, United Nations, 2012. Doc. A/RES/66/290, 2012.

<sup>714</sup> For example, the COMMISSION ON HUMAN SECURITY, in the document HUMAN SECURITY NOW, defines human security as "*protecting the vital core of all human lives in order to enhance human freedoms and human fulfillment. Human security means protecting fundamental freedoms—freedoms that are the essence of life. It means protecting people from critical (serious) and widespread (widespread) threats and situations. It means using processes that are based on people's strengths and aspirations. It means creating political, social, environmental, economic, military, and cultural systems that together give people the foundations of survival, livelihood, and dignity,*" a fairly comprehensive vision. In turn, the 1994 HUMAN DEVELOPMENT REPORT already stated "*Threats to human security are no longer just personal, local or national. They are becoming global: with drugs, AIDS, terrorism, pollution, nuclear proliferation. Global poverty and environmental problems do not respect national borders. Its grim consequences travel the world.*" In: COMMISSION ON HUMAN SECURITY. *Human Security Now*. Commission on Human Security, New York, 2003, p. 4. The 1994 Human Development Report already affirmed the connection between human security and global threats. In: UNDP. *Human Development Report*. United Nations Development Programme (UNDP), Oxford University Press, 1994, p. 2. See also: KNUR, Franziska. *The United Nations Human Rights-based Approach to Climate Change: Introducing a Human Dimension to International Climate Law*. 86 – 145 p. In: LANG, Peter. *Climate Change as a Threat to Peace: Impacts on Cultural Heritage and Cultural Diversity*. Dresden Papers on Law and Policy of the United Nations, PL Academy Research, University of Dresden, p. 473, 2014.

<sup>715</sup> NASU further explains that "*Although the idea of human security, at its core, precedes the formation of the Westphalian system, it was the United Nations Development Programme (UNDP) that captured the idea in political discourse in its 1994 Human Development Report. Human security has since been incorporated into key UN policy documents such as the 2000 United Nations Millennium Declaration, the 2004 Report of the Secretary-General's High-Level Panel, the 2005 In Larger Freedom Report, and the 2010 UN Secretary-General's Report on Security. In addition, the adoption of the 1997 Ottawa Treaty, the 1998 Rome Statute and the 2000 Optional Protocol to the Convention on the Rights of the Child were seen as legal developments motivated and facilitated by the adoption of the concept of human security and its prioritization over national security.*" In: NASU, Hitoshi. *The Place of Human Security in Collective Security*. Journal of Conflict & Security Law, Vol. 18, n.º 1, Oxford University Press, 2012, p. 97.

*security that reflects the impacts of different values and norms on international relations" and that it is<sup>716</sup> "a multisectoral security approach centered on the human being or people, which involves protecting people from critical and widespread threats and situations, and empowering people to increase their potential through joint efforts to develop norms, processes and institutions that systematically address insecurities."<sup>717</sup>*

That said, the concept of human security is important because it is one that forms the bases with which proponents of the thesis that climate change must be "*securitized*" make their approach<sup>718</sup>.

However, as said, the Security Council has been meeting since 2007, following the initiative of the United Kingdom, to discuss the connection between climate, peace and international security. After the first meeting in 2007, the Council addressed the issue again in the years 2011, 2013, 2017, 2018, 2019, 2020 and 2021, with climate change becoming a constant in the Council's debates in the last decade<sup>719</sup>.

The first debate, held in April 2007, took place under the Presidency of the United Kingdom and Northern Ireland in the Council. In general, at that time, most of the States and groups of States,<sup>720</sup> as well as the major powers, were in favor of maintaining the debate on climate change within the

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<sup>716</sup> NASU, Hitoshi. *The Place of Human Security in Collective Security*. Journal of Conflict & Security Law, Vol. 18, n.º 1, Oxford University Press, 2012, p. 99.

<sup>717</sup> NASU, Hitoshi. *The Place of Human Security in Collective Security*. Journal of Conflict & Security Law, Vol. 18, n.º 1, Oxford University Press, 2012, p. 97.

<sup>718</sup> VOIGT explains that "*Climate change needs to be seen in the broader concept of human security, which focuses more on the effects on the individual. In line with this concept, it is clear that many issues related to the impact of climate change on international security are intertwined requiring policy responses.*" In: VOIGT, Christina. *Security In A "Warming World": Competences Of The Un Security Council For Preventing Dangerous Climate Change*. In: *Security: A Multidisciplinary Normative Approach*. Series: International Humanitarian Law Series, Vol. 26, Brill, 2009, p. 295.

<sup>719</sup> MAERTENS, Lucile. *Climatizing the UN Security Council*. International Politics, Ed. 58, Springer, 2021, p. 642.

<sup>720</sup> The representative of the Group of 77 and China (a group of 78 states that oppose climate securitization) said: "*The Group considers that the primary responsibility of the Security Council is the maintenance of international peace and security, as set out in the Charter of the United Nations. On the other hand, other issues, including those related to economic and social development, are assigned by the Charter to the Economic and Social Council and the General Assembly. The increasing meddling of the Security Council in the roles and responsibilities of other major organs of the United Nations represents a distortion of the principles and purposes of the Charter; it also infringes on their authority and compromises the rights of the general members of the United Nations... The Group has consistently maintained that the United Nations Framework Convention on Climate Change provides the appropriate forum to consider the risks associated with climate change and the actions needed to address climate change in accordance with the principles enshrined in the Convention. We hope that the Council's decision to hold this debate will not set a precedent or undermine the authority or mandate of the relevant bodies, processes and instruments that are already addressing these issues.*" pp. 23-24; The representative of the United States of America thus pronounced: "*Internationally, climate and energy issues are being actively addressed through the United Nations Framework Convention on Climate Change and other locations with appropriate mandates.*" p. 11; For its part, China's representative stated: "*Climate change may have certain security implications, but in general it is, in essence, a matter of sustainable development. The United Nations Framework Convention on Climate Change established the framework and basic principles for the international community's response to climate change. Solutions to climate change require concerted efforts*

framework of the UNFCCC, the General Assembly and the other organs of the United Nations, while few developed States and the group formed by the Small Island States of the Pacific (SIDS) were in favor of the debate or even the action of the Security Council on the basis of Chapter VII of the Charter<sup>721</sup>.

Subsequently, in July 2011, under the German presidency of the Security Council, an Open Debate on the impact of climate change on the maintenance of international peace and security was convened.

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*by the international community. Discussing climate change in the Security Council will not help countries in their mitigation efforts. Nor will it help developing countries affected by climate change respond to it more effectively. Discussions on climate change must be conducted within a framework accessible to all parties. Developing countries believe that the Security Council lacks experience in dealing with climate change and is not the right place to make decisions with broad participation that lead to widely accepted proposals.* " p. 12-13.; In a similar stance, the Russian representative said: *"For the full consideration of the problem of climate change in all its aspects, including the analysis of new challenges and threats in this area, there are appropriate international forums and formats, such as the Conference of the Parties to the United Nations Framework Convention on Climate Change, the Conference of the Parties to the Kyoto Protocol, the World Meteorological Organization, the United Nations General Assembly and the United Nations Commission on Sustainable Development. The United Nations Security Council, for its part, should deal only with the consideration of issues directly related to its mandate"* p. 17. In: NATIONS, UNITED. *United Nations Security Council 5663rd Meeting*. Security Council, United Nations, New York, 17 April 2007. Doc S/PV.5663. Available in: <https://undocs.org/S/PV.5663>. Accessed November 11, 2021.

<sup>721</sup> The representative of France adopted a mixed stance, affirming the importance of the UNFCCC and the General Assembly, but also of the Security Council, exposing that: *"We believe that climate change is among the main threats to the future of humanity and its environmental security. It is a basic threat, the first consequences of which already affect the populations, in particular those of the most vulnerable countries. Its impact on international peace and security can take many forms. The Security Council is certainly not the number one forum for dealing with this issue. Nor, clearly, is it the only one. The United Nations Framework Convention on Climate Change and the General Assembly clearly have a central role to play here. But within its mandate, the Security Council cannot ignore the threats to international security caused by global warming. And I must say that institutional disputes are inadequate, given what is at stake. Exclusivity must give way to the contribution of all participants in the struggle; Everyone has a role to play."* p. 11; In a similar vein, the representative of Switzerland said: *"Climate change and conflict are closely linked. However, the problem of climate change constitutes only one important aspect of the broader problem of environmental degradation... As the Security Council has primary responsibility for maintaining international peace and security, Switzerland welcomes its readiness to examine the challenges that climate change and environmental degradation pose in terms of the causes of conflict. The resulting threat to international peace and security is interdependent and multidimensional; It thus has social and economic repercussions. We hope that this debate will give impetus, including with regard to the need to strengthen the coherence of the United Nations system and international environmental governance, within the framework of the General Assembly, the Economic and Social Council and other relevant entities of the system, including the Security Council."* p. 25; The representative of the Small Island States of the Pacific in turn: *"The dangers that small islands and their populations face are no less serious than those faced by nations and peoples threatened by weapons and bombs. The effects on our populations are just as likely to cause massive displacements of people as past and present wars. The impacts on social cohesion and identity are as likely to cause resentment, hatred and alienation as any current refugee crisis. The Security Council, charged with protecting human rights and the integrity and security of States, is the supreme international forum at our disposal. We do not expect the Security Council to get involved in the details of the discussions of the Framework Convention on Climate Change, but we do expect the Security Council to keep the matter under ongoing review to ensure that all countries contribute to solving the climate change problem and that their efforts are commensurate with their resources and capabilities. We also expect the Security Council to look at particularly sensitive issues, such as the implications for sovereignty and international legal rights arising from the loss of land, resources and people."* pp. 28-29. In: NATIONS, UNITED. *United Nations Security Council 5663rd Meeting*. Security Council, United Nations, New York, 17 April 2007. Doc S/PV.5663. Available in: <https://undocs.org/S/PV.5663>. Accessed in November 11, 2021.



After the debate, the Council agreed to a presidential statement, in which it stated that<sup>722 723</sup>

*"The Security Council recognizes the responsibility for sustainable development issues, including climate change, conferred on the General Assembly and the Economic and Social Council."*

*"The Security Council expresses its concern that possible adverse effects of climate change could, in the long term, aggravate certain existing threats to international peace and security."*

*"The Security Council expresses its concern that possible security implications may arise from the loss of territory of some States caused by sea level rise, in particular in small low-lying island states."*

*"The Security Council notes that in matters related to the maintenance of international peace and security under its consideration, conflict analysis and contextual information on, among other things, possible security implications of climate change are important, when such issues are causes of conflict, pose a challenge to the implementation of the Council's mandates, or endanger the peacebuilding process. In this regard, the Council requests the Secretary-General to ensure that his report to the Council contains such contextual information."*<sup>724</sup>

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<sup>722</sup> NATIONS, UNITED. *Presidential Declaration*. United Nations Security Council, United Nations, 20 July 2011. Doc. S/PRST/2011/15. Disponível em <https://undocs.org/en/S/PRST/2011/15>. Accessed in November 12, 2021.

<sup>723</sup> KU and SCOTT note that Council President Margaret Beckett has stated that *"climate change is a security issue but it is not strictly national – it has another dimension. It's about our collective security in a fragile and increasingly interdependent world."* KU and SCOTT mark the use of the term *"collective security"* which represents the philosophical underpinning of the Charter and the powers of the Council in accordance with Chapter VII. In: KU, Charlotte; SCOTT, Shirley V. *The UN Security Council and global action on climate change*. Q. 01-24, p. 12. In: KU, Charlotte; SCOTT, Shirley V. (Eds.). *Climate Change and the UN Security Council*. Ed. Edward Elgar Publishing, USA, 256 p., 2018.

<sup>724</sup> NATIONS, UNITED. *Presidential Declaration*. United Nations Security Council, United Nations, 20 July 2011. Doc. S/PRST/2011/15. Disponível em <https://undocs.org/en/S/PRST/2011/15>. Acesso em 12 de novembro de 2021.

Thereafter, several other formal debates or under the *Arria* formula<sup>725</sup> were held between 2013 and 2017, in<sup>726</sup> which the implications of climate change for international peace and security were the subject, and, in 2017, when dealing with the situation involving conflicts in Lake Chad, the Security Council, for the first time regarding a concrete case, made an interconnection between climate change and security, within the framework of one of its resolutions<sup>727</sup>.

In this resolution, the Council stated that

*"Recognizes the adverse effects of climate change and ecological change, among other factors, on the stability of the Region, including through water scarcity, drought, desertification, land degradation and food insecurity, and emphasizes the need for adequate risk assessments and risk management strategies by governments and the United Nations in relation to these factors;"*<sup>728 729</sup>

Subsequently, in 2018, in a resolution on the situation in West Africa and the Sahel Region, the Council once again affirmed the impacts of climate change on the stability of these localities by stating that *"The Security Council recognizes the adverse effects of climate change, ecological change and natural disasters, including through drought, desertification, land degradation and food insecurity, among other factors, on the stability of West Africa and the Sahel region"* and that<sup>730</sup> *"The*

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<sup>725</sup> In February 2013, at the initiative of the United Kingdom and Pakistan, a debate was held under the *Arria* formula with the subject *"Security dimensions of climate change"*. In June 2013, at the initiative of the United Kingdom, the Security Council held an open debate on the theme *"Conflict Prevention and Natural Resources"*. In June 2015, after an initiative by Spain and Malaysia, the subject *"Climate Change as a Threat Multiplier"* was debated under the *Arria* formula. Then, in July 2015, also under the *Arria* formula and after New Zealand's initiative, the theme *"Peace and security challenges faced by small island developing states"* was discussed. In 2016, climate change was also addressed at the meeting under the *Arria* formula and in the form of an open debate, following Senegal's initiative, under the theme *"Water, Peace and Security"*.

<sup>726</sup> Initiated in 1992 by Ambassador Diego Arria, Venezuela's representative to the Security Council, such informal meetings do not constitute a formal activity of the Council and are convened on the initiative of a member or members of the Council. Although derived from formal meetings of the Security Council, the *Arria* formula differs from typical Security Council meetings due to its informal nature, which allows meetings in this formula to not have the obligation to comply with the official requirements of Security Council meetings, such as the quorum of attendance of the 15 official members of the Council.

<sup>727</sup> In 2017, two other debates were held, the first under the *Arria* formula, after an initiative by France, Italy, Japan, Sweden, the United Kingdom, the Netherlands and Peru, Germany, the Maldives and Morocco, with the theme *"Climate Change"* and, in the form of an open debate, after an initiative by Japan, with the theme *"Facing Complex Contemporary Challenges for International Peace and Security"*.

<sup>728</sup> NATIONS, United. *Security Council Resolution S/RES/2349 (2017)*. Security Council, 7911th meeting, United Nations, New York, 31 March 2017. Doc. S/RES/2349 (2017). In : <https://digitallibrary.un.org/record/863830>. Accessed on February 15, 2022.

<sup>729</sup> NATIONS, United. *Security Council Resolution S/RES/2349 (2017)*. Security Council, 7911th meeting, United Nations, New York, 31 March 2017. Doc. S/RES/2349 (2017). Disponible em: <https://digitallibrary.un.org/record/863830>. Accessed on February 15, 2022.

<sup>730</sup> For general information on the situation in the Sahel region, see, for example: PIRES, Raúl M. Braga. *What does the Sahel have?* Daily News, 28 February 2022. Available at: <https://www.dn.pt/internacional/o-que-e-que-o-sahel-tem-14632606.html>. Accessed on February 28, 2022.

*Security Council expresses concern about the overall humanitarian situation in the region, characterized by the impact of armed conflict and terrorism, extreme poverty, food insecurity, displacement, adverse effects of climate change and epidemics, which contribute to high levels of structural vulnerability, chronic and acute in the region and continue to affect populations, and require significant humanitarian and development actions.*"<sup>731</sup>.

And since then climate change has been introduced in dozens of Security Council resolutions and debated in open debates or under the *Arria* formula<sup>732 733</sup>.

Nevertheless, in addition to the absence of a scientific consensus on the direct connection between climate change and violent conflicts, States have used three other lines contrary to the Council's action in the field of climate change as a threat to international peace and security.

First, the Council's lack of *expertise* on climate change. Second, that climate change is not a matter of international security, but of sustainable development, core competencies of other United Nations bodies. Third, that the Council is not a body of universal composition and is unequal among its members, and that it would be inappropriate to act, since the UNFCCC has established that climate change must be dealt with on the basis of equity and in accordance with the principle of the CBDR and its capabilities<sup>734</sup>.

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<sup>731</sup> Security Council Resolution S/PRST/2018/3, p. 4. See also resolutions S/PRST/2019/7 and S/PRST/2020/7.

<sup>732</sup> See also resolutions on the situation in Somalia S/RES/2408, S/RES/2431, S/RES/2461, S/RES/2472, S/RES/2520, S/RES/2540 and S/RES/2568; resolutions on the situation in Mali S/RES/2423, S/RES/2480, S/RES/2531 and S/RES/2584; resolutions on the situation in Sudan S/RES/2429, S/RES/2524 and S/RES/2579; resolutions on the Central African Republic S/RES/2448, S/RES/2499 and S/RES/2552; resolutions on the situation in the Democratic Republic of the Congo S/RES/2502 and S/RES/2556; resolution "Silencing Guns in Africa" S/RES/2457; the resolution on "Women, Peace and Security" S/RES/2242; resolution on the situation in Iraq S/RES/2576; and resolution S/RES/2587 on the situation in Cyprus.

<sup>733</sup> In July 2018, at the initiative of Sweden, the Security Council held, in the form of an open debate, the debate on the theme "*Climate-related security risks*". In October 2018, under the *Arria* formula and from the initiative of Bolivia, Côte d'Ivoire, the Netherlands, Belgium, the Dominican Republic, Germany, Indonesia and Italy, the theme "*Water, Peace and Security*" was discussed. In January 2019, in the form of an open debate, the Council discussed, at the initiative of the Dominican Republic, the theme "*The Impacts of Climate-Related Disasters on International Peace and Security*." In July 2020, at the initiative of Germany, Belgium, the Dominican Republic, Estonia, France, Niger, Saint Vincent and the Grenadines, Tunisia, the United Kingdom and Vietnam, the Council discussed, in the form of an open debate, the subject "*Climate and Security*". In February 2021, from the initiative of the United Kingdom, and in September 2021, from the initiative of Ireland, the Security Council debated, in the form of an open debate, the subject "*Maintenance of international peace and security: climate and security*".

<sup>734</sup> KU, Charlotte; SCOTT, Shirley V.. *The UN Security Council and global action on climate change*. p. 12. In: KU, Charlotte; SCOTT, Shirley V. (Eds.). *Climate Change and the UN Security Council*. Ed. Edward Elgar Publishing, USA, 256 p., 2018. See also: PLEUGER, Gunter. *Climate Change as a Threat to Peace – The Role of the UN Security Council*. 79 – 86. In: LANG, Peter. *Climate Change as a Threat to Peace: Impacts on Cultural Heritage and Cultural Diversity*. Dresden Papers on Law and Policy of the United Nations, PL Academy Research, University of Dresden, 473 p., 2014.

However, despite the fact that the Council has never characterized climate change as a threat to peace under Article 39 of Chapter VII of the Charter, it has reiterated in its resolutions the multiplier effect that climate change has in the context of threats to international peace and security and the need for risk assessments and appropriate strategies for managing the risks associated with climate change and its adverse effects with regard to the implications for international peace and security<sup>735 736 737</sup>.

In fact, it could be said that the Council has acted indirectly, because although it does not spell out climate change as a direct basis for adopting the resolutions, it has included recommendations and notes on the topic in them<sup>738</sup>.

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<sup>735</sup> By example, in Resolution S/RES/2502 (2019) on the situation in the Democratic Republic of the Congo, the Council stated that "*Recognizing the adverse effects of climate change, ecological change, natural disasters and lack of access to energy, among other factors, on the stability of the DRC, including through increasingly frequent and extreme weather phenomena, floods, wildfires, irregular rainfall and food insecurity, welcoming the DRC's leadership in developing national strategies to address these issues and in preserving the Congo Basin forest.*". In resolution S/RES/2457 (2019) on the objective of silencing arms in Africa by the African Union, the Council stated "*Recognizes the adverse effects of climate change, ecological change and natural disasters, among other factors, on the stability of several AU Member States, including through drought, desertification, land degradation and food insecurity, and emphasizes the need for appropriate risk assessment and risk management strategies of the respective governments and the United Nations related to these factors.*". In Resolution S/RES/2568 (2021) on the situation in Somalia, the Council stated that "*Emphasizing the need for adequate risk assessment and risk management strategies by the FGS and the United Nations, climate change, other ecological changes, natural disasters and other factors on the stability of Somalia.*".

<sup>736</sup> Climate change is already so included in the Council's concept of security that, following a request by the Government of Iraq that the United Nations promote the monitoring of the elections held in October 2021 in that country, the Council, in its resolution agreeing to the monitoring, cites at more than one moment climate change, its adverse effects, and further mandates of the Special Representative of the Secretary-General and UNAMI to the advise, support and assist of the Government of Iraq "*in facilitating regional dialogue and cooperation, including on issues of border security, energy, trade, the environment, water, adverse impacts of climate change, infrastructure, public health and refugees.*" In: NATIONS, United. *Security Council Resolution S/RES/2576* (2021). Security Council, United Nations, New York, 2021. Doc. S/RES/2576 (2021).

<sup>737</sup> One of the initiatives in this direction is the program "*EU-UN Partnership on Land, Natural Resources and Conflict Prevention*", established in 2008 between the European Union and the United Nations and which also addresses issues related to climate change in its action. Available in: NATIONS, United. *Land, Natural Resources and Conflict*. United Nations. Available in: <https://www.un.org/en/land-natural-resources-conflict>. Accessed January 15, 2022. Another initiative focusing on preventing security risks from climate change is the UN *Climate Security Mechanism (CSM)* that was established in October 2018 as a joint initiative of DPPA, UNDP and UNEP. This mechanism provides the United Nations with an ability to connect and leverage existing resources and expertise across the system with the goal of addressing climate-related security risks. NATIONS, United. *Climate Peace and Security*. United Nations. Available in: <https://dppa.un.org/en/climate-peace-security>. Accessed January 16, 2022. The *Informal Expert Group of Members of the Security Council on Climate and Security* has been established and as of 2020. Information available at: <https://sipri.org/news/2020/sipri-inaugural-meeting-un-security-councils-informal-expert-group-climate-security>. Accessed February 1, 2022. Finally, in March 2021, the United States government informed the Permanent Representatives to the UNSC of its desire to join the Group of Friends on Climate and Security. In: SCOTT, Wyatt. *Climate Change, Peace and Security, and the UN Group of Friends*. New America. 05 May 2021. Available in: <https://www.newamerica.org/resource-security/natural-security-blog/climate-change-peace-and-security-and-the-un-group-of-friends/>. Accessed February 10, 2022.

<sup>738</sup> KU, Charlotte; SCOTT, Shirley V.. *The UN Security Council and global action on climate change*. p. 15. In: KU, Charlotte; SCOTT, Shirley V. (Eds.). *Climate Change and the UN Security Council*. Ed. Edward Elgar Publishing, USA, 256 p., 2018.

In addition, an *Informal Expert Group of Members of the Security Council on Climate and Security* was established and, as of 2020, began to assist the members of the Council<sup>739</sup> but not this one directly, because it is an unofficial group, with its work focused on security, conflict prevention and its interconnection with climate change.

On the other hand, most recently, in December 2021, the Council voted on a draft resolution on the systematic integration of climate-related security risks into the UN's conflict prevention, conflict management and peacebuilding work.

Also, under Ireland's presidency, the Security Council held an open high-level debate on "*Peacekeeping and International Security: Climate and Security*" in September 2021<sup>740</sup>, and Council members announced their intention to develop a draft resolution on the topic. The bill was presented in December 2021 by the then President of the Council of Niger and Ireland and was co-sponsored by a record of 113 other UN Member States<sup>741</sup>.

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<sup>739</sup> In this regard: "In the open virtual debate of 24 July 2020 on climate and security, Germany publicly announced for the first time its intention to create an informal group of experts. In the open debate, Belgium supported this initiative. Current Council member Ireland, which won a seat in the June 2020 elections for a 2021-22 term, also welcomed the creation of the Group during the meeting. Following the debate, ten members of the Security Council (Belgium, Dominican Republic, Estonia, France, Germany, Niger, Tunisia, Saint Vincent and the Grenadines, the United Kingdom and Vietnam) – as well as three of the new members of the Security Council (Ireland, Kenya and Norway) – released a joint statement in which they stressed the need for the Council to address climate security risks and for the UN system to strengthen its operational readiness in special cases in this regard. In the statement, the ten members of the Council announced that they would convene an "Informal Group of Security Council Experts to assist the Council in achieving a more comprehensive and systematic approach to climate-related security risks in situations on the agenda." On 27 August 2020, the ten members sent a letter to the Secretary-General in which they described their justification for the creation of the expert group, as well as their intended functions and working methods. They said that "the Council would benefit from a more systematic approach and more consistent attention to [climate-related security risks]... including during the formulation of mandates and consultations on their renewal" and "regular and systematic consultations between national experts and United Nations entities on climate-related security risks in order to improve understanding of the adverse effects of climate change on peace and security and to help strengthen the Council's efforts to integrate the climate and security agenda into its daily work." They also announced that Niger and Germany would act as initial co-chairs of the expert group for the remainder of 2020. Finally, they requested the Department of Political Affairs and Peacebuilding (DPPA), "in the context of the Climate Security Mechanism," to serve as the secretariat for the informal group of experts, coordinate the flow of information to Council members about their work, and facilitate the group's meetings. The creation of the Informal Group of Experts was controversial. China and Russia emphasized that the group had no formal status as a subsidiary body of the Council, noting its informal nature and the fact that its formation did not have the support of all Council members. The members of the Informal Group of Experts never claimed that the Group would be a formal subsidiary body of the Council; therefore, consensus was not a prerequisite for its formation. However, the ten members who launched the group agreed on a compromise, calling the new entity the "Informal Expert Group of Security Council Members on Climate and Security" rather than the "Security Council Informal Expert Group on Climate and Security." The inclusion of the term "members of" in the Group's title was intended to emphasize its informal position, just as informal products of the Council, such as press releases, are issued by "members of the Security Council," while the formal results of the body (resolutions and presidential statements) are adopted by the Security Council. ". In: REPORT, Security Council. *The UN Security Council and Climate Change*. Security Council Report, Research Report, N° 2, 2021, p. 10.

<sup>740</sup> NATIONS, United. *Differences Emerge over Appropriate Forum for Discussing Climate Change, as Delegates Hold Debate on Links between Global Crisis, Security*. Meetings Coverage, Security Council 8864th Meeting, 23 September 2021. Doc. SC/14644. Available at: <https://www.un.org/press/en/2021/sc14644.doc.htm>. Accessed January 5, 2022.

<sup>741</sup> CSEN. *Climate Security at the UNSC: A Short History*. Climate Security Expert Network, 2021. Available at: <https://climate-security-expert-network.org/unsc-engagement>. Accessed on 20, 2021.



Previously, it was held in an open debate in the Council where, Mohamed Bazoum, then President of the Council, stated that the objective of the proposed resolution was<sup>742</sup> *"to establish the obvious causal link between peace and security, on the one hand, and the fight against terrorism and the effects of climate change, on the other"*, and the approval of the resolution *"finally strengthen the understanding of the impact of climate change on peace and security"* and that, once adopted by the Council, the resolution *"will effectively contribute to integrating the consideration of climate risks into the work of peacekeeping and peacebuilding operations, as well as into conflict mediation and prevention efforts."*

In fact, the draft resolution uses terminology that recognizes climate change as a multiplier of risks or threats that can potentially influence or even create conflicts and threaten international security and peace, but it does not determine that climate change is a threat to peace, notably under Chapter VII<sup>743 744</sup>.

On the other hand, the draft resolution recognizes the UNFCCC and the Paris Agreement as the *"main international and intergovernmental forums for negotiating the global response to climate change"* and uses terms such as *"<sup>745</sup>encourages", "requests", "invites" and "acknowledges"* when

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<sup>742</sup> NATIONS, United. *People, Countries Impacted by Climate Change Also Vulnerable to Terrorist Recruitment, Violence, Speakers Tell Security Council in Open Debate*. Meetings Coverage, Security Council, United Nations. Available at: <https://www.un.org/press/en/2021/sc14728.doc.htm>. Accessed on January 31, 2022.

<sup>743</sup> NATIONS, United. Draft United Nations Security Council Resolution: *Climate Change*, United Nations, 2021. Doc. S/2021/990. Available at: <https://undocs.org/en/S/2021/990>. Accessed on February 15, 2022.

<sup>744</sup> The preamble to the draft resolution provided: *"Recognizing that there is a strong nexus between peace and security, humanitarian assistance and sustainable development and that the adverse effects of climate change can impede or reverse the peacebuilding and development gains of countries most affected by climate change, especially in nations characterized by a high level of fragility, and act as a risk multiplier in these contexts,..."* and *"Recognizing that the adverse effects of climate change, including, but not limited to, irregular precipitation, increasingly frequent and extreme weather events, more frequent and severe tropical cyclones, floods and droughts, diminishing freshwater resources, desertification, land degradation and sea level rise can lead to water scarcity, food insecurity, large-scale displacement, particularly affecting women, children, ethnic minorities and the most vulnerable, potentially leading to social tensions and exacerbating, prolonging or contributing to the risk of future conflict and instability and posing a fundamental risk to global peace, security and stability..."*. In: NATIONS, United. Draft United Nations Security Council Resolution: *Climate Change*, United Nations, 2021. Doc. S/2021/990. Available at: <https://undocs.org/en/S/2021/990>. Accessed February 15, 2022.

<sup>745</sup> The draft states: *"Recalling the Sustaining Peace resolutions and emphasizing the need for a comprehensive UN approach to dealing with climate change and its effects, including all relevant organs and entities of the United Nations in accordance with their respective mandates and, in this regard, recognizing the responsibility for development issues conferred on the General Assembly and the Economic and Social Council, and the importance of implementing the 2030 Agenda for Sustainable Development, and recognizing that the United Nations Framework Convention on Climate Change and the Paris Agreement adopted under the Convention are the main international and intergovernmental forums for negotiating the global response to climate change."* In: NATIONS, United. Draft United Nations Security Council Resolution: *Climate Change*, United Nations, 2021. Doc. S/2021/990. Available at: <https://undocs.org/en/S/2021/990>. Accessed February 15, 2022.

recommending new climate policy obligations or actions<sup>746</sup> to be incorporated into the United Nations collective security system, including under peacekeeping missions, and the request for research and information on the subject from the Secretary-General, among others.

Despite the strong support, the Council rejected the bill due to the vote against, or veto, of Russia, a permanent member of the Council which, under Article 27(3) of the Charter, is entitled, as well as any other permanent member, to the veto vote and has the privilege, or power, to single-handedly prevent the adoption of a resolution in the Security Council.

In the vote, there were 12 votes in favour and 2 against, these from India and the Russian Federation. The remaining vote was China's abstention, with Chinese abstention considered a non-veto. Notwithstanding the vote, in the open debate prior to the vote and in the vote itself, states disputed the causal link between climate and security, while others asserted that a body of limited composition such as the Council is not the most appropriate to solve the problem of climate change,

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<sup>746</sup> For example, the draft resolution provided that: "... 2. *Calls on the Secretary-General to integrate climate-related security risk as a central component in the UN's comprehensive conflict prevention strategies in order to contribute to reducing the risk of conflict recurrence due to the adverse effects of climate change*; 3. *Calls on the Secretary-General to report on the security implications for specific contexts of relevant countries or regions on the Council's agenda of the adverse effects of climate change, as well as recommendations on how climate-related security risks can be addressed, within twenty-four months of the date of this deliberation*; 4. *Calls also on the Secretary-General to integrate, where relevant, the security implications of the effects of climate change into conflict prevention strategies, conflict analysis, evaluation and planning of integrated missions, peacebuilding support, conflict risk reduction efforts, disaster risk reduction efforts and humanitarian response*; 7. *Encourages relevant special political missions, peacekeeping operations and UN national teams to incorporate, within their existing mandates, the security implications of climate change in their assessment, analysis and activities to prevent the recurrence of conflict*; 13. *Calls on the relevant special political missions, Peacekeeping Operations and UN national teams to consider the environmental impacts of their operations conducting mission management and, in this context, to manage them as appropriate...*; 14. *Recognizes the need to address the challenges related to the provision of specific information and recommendations on climate change-induced security risks in countries and regions on the Council's agenda, in order to inform and help strengthen Council decisions, and therefore welcomes the convening of the Informal Expert Group of Security Council members on Climate and Security to facilitate a more systematic and comprehensive approach to climate, Peace and Security within the work of the Security Council...*; 15. *Encourages Member States, regional organizations and the United Nations, including their field missions, to take into account, as appropriate, the security implications of the adverse effects of climate change in their activities, programmes and strategies in affected countries, including by developing comprehensive risk management strategies related to these factors; ...*". In: NATIONS, United. *Projeto de Resolução do Conselho de Segurança das Nações Unidas: Mudanças Climáticas*, United Nations, 2021. Doc. S/2021/990. Available at: <https://undocs.org/en/S/2021/990>. Accessed on February 15, 2022.

with the Framework Convention and the other UN bodies being more appropriate<sup>747</sup>, while others were in favor of a more direct action of the Security Council on climate issues<sup>748</sup>.

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<sup>747</sup> In this sense: RUSSIA - The representative of the Russian Federation stated that *"the situation in Africa is related to porous borders and socio-economic difficulties, exacerbated by the pandemic and weak authorities on the ground. Forcing climate change into peacekeeping operations and separating it from a scientific approach will have disastrous results. The link between terrorism and climate change is unclear, making it unsuitable for a debate in the Council and should be left to other United Nations bodies, including the Economic and Social Council."* INDIA - India's representative stated that *"climate change is already being addressed under the mandate of the United Nations Framework Convention on Climate Change (UNFCCC). A debate in the Security Council has the potential to disrupt discussions on such an important topic. "We do not deviate from an established and inclusive decision-making process with the participation of all developing countries," adding that "the report of the Intergovernmental Panel on Climate Change clearly states that the effect of climate variability on violence is contested. "* BRAZIL - Brazil's delegate *"urged caution in addressing climate change under a strict security prism, as it could distance the international community from an adequate response.... The Security Council's time and energy would be better spent promoting financial flows to support existing commitments and improve climate action. the need to avoid duplication of work and respect specific mandates and responsibilities within the United Nations system, he said the UNFCCC is properly equipped to discuss and address any specific concerns about climate change in an inclusive and balanced manner."* JAPAN - Japan's representative said that *"in conflict-prone areas, human insecurity, exacerbated by climate issues, becomes a multiplier of violent conflicts. He urged the international community to pay more attention to the human dimension of the security paradigm. Both terrorism and climate change must be addressed through institutions at the local and national levels, as they are most effective in preventing security risks, with their impartiality in the fields of security and justice being key to establishing the rule of law and combating impunity."* Noting that his delegation abstained, China's representative said that *"while climate change has the potential to impact peace and security, the nexus between the two is complex. Compared to the "microconcept" of climate change, factors such as environmental degradation, food scarcity, and unequal distribution of resources are more likely to generate tension and conflict. China will not avoid serious discussions in this area, he said, but stressed the need to avoid securitization of climate issues. The most important step in dealing with climate change is to significantly reduce greenhouse gas emissions until net zero emission is achieved. Common but differentiated responsibility is also an unshakable cornerstone of the global response."* Iran's representative stated that *"while your country has taken significant steps to address and mitigate the negative impacts of climate change, the imposition of illegal sanctions by the United States against Iran has impeded its access to the financial resources and technology needed to meet the challenges. associated with climate change. That country has also negatively affected Iran's national capabilities to make commitments in this regard. While terrorism constitutes a serious threat to international peace and security, climate change is a development issue, he stressed, adding that there is no scientific evidence establishing a direct link between climate change and international peace and security."* In: NATIONS, United. *People, Countries Impacted by Climate Change Also Vulnerable to Terrorist Recruitment, Violence, Speakers Tell Security Council in Open Debate*. Meetings Coverage, Security Council, United Nations, 2021. Available at: <https://www.un.org/press/en/2021/sc14728.doc.htm>. Accessed on January 31, 2022. NATIONS, United. *Security Council Fails to Adopt Resolution Integrating Climate-Related Security Risk into Conflict-Prevention Strategies*. Meetings Coverage, United Nations, 2021. Available at: <https://www.un.org/press/en/2021/sc14732.doc.htm>. Accessed on January 31, 2022.

<sup>748</sup> The U.S. representative said that *"climate change is a challenge to all people, nations and continents, and a threat to international peace and security. The Security Council must address this as it is the only body that can ensure that climate change is integrated into other initiatives, including conflict prevention and humanitarian response."* FRANCE's representative said: *"The climate emergency increases security risks and poses a permanent danger to the world. The connection between climate change and insecurity is solidly established; it is seen in the Horn of Africa, the Sahel and the Middle East, where it affects access to water and natural resources and allows armed groups to thrive. In the Sahel, the impacts of climate change on agropastoral systems allow terrorist groups to instrumentalize interethnic and economic conflicts, he said, calling for natural resources to be better allocated. UNITED KINGDOM - "Many of the nations most affected by climate change are also among the most fragile in the world. The impacts of climate change act as a multiplier of the threats already faced by vulnerable populations. In addition, countries facing conflict are especially hard hit. With institutions under pressure, displaced communities and insecure societies, these nations are less equipped to deal with the impacts of climate change. The Council can play its part, and a good start is to report more frequently on the link between climate and security. Your delegation will continue to support further action at the United Nations, including the Council."* EUROPEAN UNION - As an observer, the European Union reiterated its *"support of the bloc for the adoption of a Security Council resolution on the subject and stated that the Union is increasing adaptation capacity, strengthening resilience and reducing vulnerability to climate change with a new and more ambitious adaptation strategy adopted earlier this year, he continued. The bloc is also committed to adopting preventive measures such as early warning systems, which is evident in the recently adopted Integrated Approach to Climate Change and Security Concept. On Africa, he stressed that climate change mitigation and environmental protection measures are structural conditions to address one of the root causes of insecurity in the Sahel region, the Lake Chad region and the Horn of Africa. In addition,*



Overall, it can be said that *"all current members of the Security Council recognize that climate change poses an existential threat to human civilization," that "all share the view that the United Nations Framework Convention on Climate Change is the primary international mechanism for dealing with the challenges of climate change mitigation and adaptation," and that "the main divide among the members of the Security Council is not, therefore, whether climate change exists or whether it has adverse socio-economic, developmental, or even security effects. The division is over what role the Security Council should play in combating this threat and under what circumstances..."*<sup>749</sup>.

And in this sense, according to VOIGT

*"Climate change is a global phenomenon and requires a collective response in the form of global partnerships. Solutions, to be effective, need to be based on a global consensus for global action. Security Council measures, especially coercive ones that may be imposed against the will of States, should therefore be considered only as a last resort."*<sup>750</sup>

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policymaking should be evidence-based, he said, highlighting the importance of analyzing the correlation between climate factors and terrorism and ensuring that policies consider the experiences of the communities most at risk and are not counterproductive. PORTUGAL - The representative of Portugal, Francisco Duarte Lopes, expressed "support for the adoption of the resolution on climate and security presented by Ireland and Niger and stated that peacebuilding efforts should be designed to strengthen the capacities of countries to adapt to the adverse impacts of climate change, adding that the mandates of peacekeeping operations and special political missions should continue to assess security risks climate-related and devise appropriate responses, including conflict prevention tools and considering climate risks in all planning and early warning processes. In addition, efforts should be made to reduce the environmental footprint of peacekeeping operations. He also encouraged the inclusion of the climate-security nexus in the Council's agenda, with a particular focus on the agendas of women, youth, peace and security." NORWAY - "Climate change can accelerate the factors identified as underlying drivers of terrorism – including displacement, weakened governance, food insecurity and competition for resources. Combined, they can create fertile ground for radicalization and recruitment. "The underlying factor is fragility," she emphasized, as climate change undermines communities' ability to cope with crises. Successfully combating climate change and combating terrorism depend on promoting good governance and reducing vulnerabilities." KENYA - The representative of Kenya stated that "The problem is not to convince the Security Council of the link between the effects of climate change and resource conflicts that may offer terrorists new opportunities for exploitation, but to convince the Council that African crises require and deserve that the Council fully fulfils its mandate. Emphasizing that adaptation to climate change is the most positive undertaking for peace in regions such as the Sahel, he also urged the private sector to design investment-ready projects according to environmental, social and governance criteria. In: NATIONS, United. *People, Countries Impacted by Climate Change Also Vulnerable to Terrorist Recruitment, Violence, Speakers Tell Security Council in Open Debate*. Meetings Coverage, Security Council, United Nations. Available at: <https://www.un.org/press/en/2021/sc14728.doc.htm>. Accessed on January 15, 2022. NATIONS, United. *Security Council Fails to Adopt Resolution Integrating Climate-Related Security Risk into Conflict-Prevention Strategies*. Meetings Coverage, United Nations. Available at: <https://www.un.org/press/en/2021/sc14732.doc.htm>. Accessed on January 31, 2022

<sup>749</sup> REPORT, Security Council. *The UN Security Council and Climate Change*. Security Council Report, Research Report, N° 2, 2021, p. 12.

<sup>750</sup> VOIGT, Christina. *Security In A "Warming World": Competences Of The Un Security Council For Preventing Dangerous Climate Change*. In: *Security: A Multidisciplinary Normative Approach*. Series: International Humanitarian Law Series, Vol. 26, Brill, 2009, p. 303.

Therefore, the connection between climate change and threat to international peace and security continues to be debated in the Security Council and by science. Although it has never been determined that they constitute a threat to peace, notably for the use of Chapter VII, but also for any other purpose provided for in the Charter, the Council has recognized in its decisions the role of climate change as a multiplier of risks and threats in specific situations, such as Lake Chad and its region since 2017, and, therefore, the need to manage the risks associated with climate change in the context of security, in addition to other specific actions, but without great depth so far.

Since the divergences continue as to the real relationship between climate change and international security, from the classical perspective, of traditional threats and outside the field of human security, we proceed to the analysis of the role of the other organs of the United Nations with competences related to the maintenance of peace and international security in this matter.

### **8.3. The General Assembly and the other competent bodies of the United Nations**

As the primary responsible for the maintenance of international peace and security, the other competent organs of the United Nations are subject to the primary, but not exclusive, competence of the Security Council. In this way, this responsibility is shared, but also not equally, with the other bodies competent in matters of international security, under the terms of the Charter.

We therefore proceed to the analysis of the use of this competence by the other organs of the United Nations with competence in relation to the object in question, starting from the most important of them, the General Assembly of the United Nations.

#### ***8.3.1. General Assembly and climate change as a threat to international peace and security***

The General Assembly of the United Nations, which under Article 9 of the Charter is composed of all the member states of the United Nations, is the representative body of these members,

materially constituting the International Community, considering that in it are present almost all the existing States of the world<sup>751 752 753 754</sup>.

Considering the fact that each member of the General Assembly has the right to one vote, as a general rule, the deliberation of the General Assembly is made by a simple majority of the members present and that vote in a determinate matter. However, under Article 18(2) of the Charter of the United Nations, decisions on important issues are taken by a two-thirds majority of the members present and that vote<sup>755</sup>.

The issues considered important are exemplified in paragraph 2 of Article 18, highlighting the recommendations relating to the maintenance of international peace and security. However, the General Assembly may consider new issues as important, as set out in paragraph 3 of that article<sup>756</sup>  
<sup>757</sup>.

In the United Nations system, the General Assembly presents itself as the only body endowed with absolutely generic competence, being allowed to examine<sup>758</sup> any questions or matters that fall within the scope of the objectives of the Charter, as provided for in Article 10 of the Charter of the United Nations<sup>759</sup>.

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<sup>751</sup> See Article 9 of the Charter of the United Nations: "*Article 9. General Assembly: 1. The General Assembly shall consist of all the members of the United Nations. 2. No member shall have more than five representatives in the General Assembly.*".

<sup>752</sup> The United Nations currently has 193 member states, according to information provided on the United Nations website. See: NATIONS, United. *Member States Index*. United Nations, 2022. Available at: <https://www.un.org/en/member-states/index.html>. Accessed on February 20, 2022.

<sup>753</sup> GOUVEIA, Jorge Bacelar. *Manual de Direito Internacional Público. Uma perspetiva de língua portuguesa*. 5ª Ed., Almedina, 2019, p. 512.

<sup>754</sup> BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p. 389.

<sup>755</sup> See Article 18 of the Charter of the United Nations: "*Article 18. Vote: 1 - Each member of the General Assembly shall have one vote. 2. Decisions of the General Assembly on important issues shall be taken by a two-thirds majority of the members present and voting. These matters shall include: the recommendations concerning the maintenance of international peace and security, the election of the non-permanent members of the Security Council, the election of the members of the Economic and Social Council, the election of the members of the Trusteeship Council in accordance with paragraph 1 (c) of Article 1. 86, the admission of new members of the United Nations, the suspension of the rights and privileges of members, the expulsion of members, questions concerning the functioning of the trusteeship regime and budgetary matters. (3) Decisions on other matters, including the determination of additional categories of matters to be debated by a two-thirds majority, shall be taken by a majority of the members present and voting.*".

<sup>756</sup> See Article 18(2) of the Charter of the United Nations.

<sup>757</sup> See Article 18(3) of the Charter of the United Nations.

<sup>758</sup> PEREIRA, André Gonçalves; QUADROS, Fausto de. *Manual de Direito Internacional Público*, 3ª ed., Coimbra, Almedina, 2018, p. 493.

<sup>759</sup> See Article 10 of the Charter of the United Nations: "*Article 10. The General Assembly may discuss any questions or matters which are within the purposes of this Charter or which relate to the powers and functions of any of the organs provided for therein, and, except as provided for in Article 12, may make recommendations to the Members of the United Nations or to the Security Council, or to the Security Council and to the Security Council, together, with reference to any of those issues or matters.*".

Accordingly, any Member State of the United Nations, the Security Council, or even a State which is not a member of the United Nations, can submit to the General Assembly any questions relating to the maintenance of international peace and security, and the General Assembly might discuss and make recommendations concerning any such matter to the State or States concerned or to the Security Council or to this and to those, except in cases where there is the application of article 12 of the Charter of the United Nations<sup>760</sup>.

This, because the General Assembly cannot make recommendations or even analyze a matter that is under discussion in the Security Council, in view of the prohibition established in art. 12 of the Charter, according to which a matter under discussion in the Security Council may not be the subject of consideration by the General Assembly while the Council is considering it, except when the Security Council so requests<sup>761</sup>. In this sense, although practice demonstrates a regular non-compliance with this issue, the General Assembly is also obliged to respect the reservation of internal jurisdiction of the States provided for in Article 2, paragraph 7, of the Charter, as well as the<sup>762</sup> *Ius Cogens*, and other principles arising from the Charter, among them the principle of necessity and the principle of proportionality.

However, when not in face of a case within the Article 12 and because its recommendations do not have binding force, pursuant to Article 11(1), and if it is a matter, the General Assembly may require "*concrete action, the General Assembly shall submit it to the Security Council, pursuant to Article 11, paragraph 2.*"<sup>763</sup>.

In this sense, PEREIRA and QUADROS explain that "*... within the scope of its general competence, the General Assembly does not take binding decisions, but simply issues*

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<sup>760</sup> See Article 35 of the Charter of the United Nations: "Article 35. (1) Any member of the United Nations may draw the attention of the Security Council or the General Assembly to any controversy or situation of the kind provided for in Article 34. 2. A State which is not a member of the United Nations may draw the attention of the Security Council or the General Assembly to any dispute to which it is a party, once it has previously accepted, in relation to such dispute, the obligations of peaceful settlement provided for in the present Charter. 3. The acts of the General Assembly in respect of matters submitted to its attention in accordance with this Article shall be subject to the provisions of Articles 11 and 12."

<sup>761</sup> See Article 12 of the Charter of the United Nations: "Article 12. (1) While the Security Council is exercising, in relation to any controversy or situation, the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with respect to such controversy or situation unless the Security Council so requests. 2. The Secretary-General, with the consent of the Security Council, shall communicate to the General Assembly at each session any matters relating to the maintenance of international peace and security which are being dealt with by the Security Council, and in the same manner shall report such matters to the General Assembly, or to the members of the United Nations if the General Assembly is not in session, as soon as the Security Council has completed its examination of those matters."

<sup>762</sup> BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p. 1059.

<sup>763</sup> PEREIRA, André Gonçalves; QUADROS, Fausto de. *Manual de Direito Internacional Público*, 3a. ed., Coimbra, Almedina, 2018, p. 493.

*recommendations, which are not binding on the member states."* , that is, the decisions made by the General Assembly, including its resolutions, have a recommendatory character, and it is not possible to attribute to them the effects of mandatory compliance or even to execute them<sup>764</sup>.

Nevertheless, the exercise of the function<sup>765</sup> listed in Chapter IV of the Charter of the United Nations by the General Assembly was reinforced by the provisions of United Nations General Assembly Resolution 377(V) of 3 December 1950, which provided that<sup>766</sup>

*"Should the Security Council, by reason of a lack of unanimity among the permanent members, cease to exercise its primary responsibility for the maintenance of international peace and security, in all cases where there appears to be a threat to the peace, a breach of the peace or an act of aggression, the General Assembly shall immediately consider the matter with a view to making appropriate recommendations to Members on the collective measures to be taken, including cases of breach of the peace or act of aggression, the use of armed force when necessary to maintain or restore international peace and security."*

And in order for the General Assembly to exercise the provisions of the Union for Peace Resolution, two Commissions were created, the Commission for Observation for Peace and the Commission for Collective Measures, with the General Assembly remaining with the function of making recommendations in cases of threat to the peace, breach of the peace or act of international aggression. It should be noted, however, that the Union for Peace Resolution is criticized, notably for conferring on the General Assembly powers which are expressly taken away from it by the Charter, and cause it's currently in disuse<sup>767</sup>.

In this sense, based on Article 22 of the Charter, the General Assembly has established several subsidiary bodies to study and report on specific issues, such as peacekeeping, the environment, disarmament, economic development and human rights, having six main Committees,

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<sup>764</sup> *Ibis above.*

<sup>765</sup> See Article 10 of the Charter of the United Nations.

<sup>766</sup> NATIONS, United. *United Nations General Assembly Resolution 377 (V)*. United Nations General Assembly, United Nations, 3 December 1950. Doc. A/RES/377(V). Available in: [https://undocs.org/en/A/RES/377\(V\)](https://undocs.org/en/A/RES/377(V)). Accessed January 11, 2022. See also: DAWS, Sam.; WEISS, Thomas G.. *The Oxford Handbook on The United Nations*, Second Edition, Oxford University Press, Oxford, 2018, pp. 125-126. SHAW, Malcolm Nathan. *International Law*. Eighth edition, Cambridge University Press, Cambridge, 2017, p. 937.

<sup>767</sup> BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p. 636 -645.

and according to Article 24(3), the Security Council is obliged to submit annual reports and, if necessary, special reports, on the exercise of its functions and powers set forth in Article 24 of the Charter, for consideration by the General Assembly at its sessions<sup>768 769 770 771 772</sup>.

Regarding the conceptualization or definition of a situation as a threat to the peace, as well as in relation to the breach of the peace or act of aggression, since it is allowed to debate or recommend on any matter pertinent to the Charter, the General Assembly "*has the same interpretative autonomy as the Council in the qualification of situations*" and the Charter recognizes the Assembly as competent to carry out such qualifications, notably, by Article 11(3) that "*allows it to consider that certain matters are of a nature to endanger international peace*".<sup>773 774</sup>

And as for climate change as a threat to international peace and security, the Assembly has been debating the security implications related to the adverse effects of climate change, continuing with its record of defending the international environment.<sup>775</sup>

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<sup>768</sup> See Article 22 of the Charter of the United Nations: "*Article 22. The General Assembly may establish such subsidiary bodies as it deems necessary for the performance of its functions.*".

<sup>769</sup> SHAW provided about the Committees of the General Assembly that: "*It has six main committees covering, respectively: disarmament and international security; economic and financial; social, humanitarian and cultural; special policy and decolonization; administrative and budgetary; and legal issues. In addition, there is a procedural General Committee that deals with the issues on the agenda and a Credentials Committee. There are also two Standing Committees that deal with inter-session administrative and budgetary issues and contributions, and several subsidiary, ad hoc and other bodies that deal with relevant topics, including the International Law Commission, the United Nations Commission on International Trade Law, the United Nations Institute for Training and Research, the Namibia Council and the United Nations Relief and Works Agency. The Human Rights Council, established in 2006, is elected and reports to the Assembly.*". In: SHAW, Malcolm Nathan. *International Law*. Eighth edition, Cambridge University Press, Cambridge, 2017, p. 930.

<sup>770</sup> See Article 20 of the Charter of the United Nations: "*Article 20. The General Assembly shall meet in ordinary annual sessions and in extraordinary sessions whenever circumstances so require. Extraordinary sessions shall be convened by the Secretary-General at the request of the Security Council or a majority of the members of the United Nations.*".

<sup>771</sup> In accordance with the provisions of Article 20 of the Charter, the General Assembly has one ordinary session per year and extraordinary sessions which are convened by the Secretary-General according to the circumstances, at the request of the Security Council or of the majority of the members of the United Nations. According to SHAW, "*Special emergency sessions may also be convened under the mechanism of the Union for Peace,*" that is, extraordinary emergency sessions. In: SHAW, Malcolm Nathan. *International Law*. Eighth edition, Cambridge University Press, Cambridge, 2017, p. 930.

<sup>772</sup> As an example of this possibility, the author mentions ten sessions that dealt with situations related to the Middle East in 1956, 1958, 1967, 1980 and 1982, and a continuous session beginning in 1997, others for Afghanistan in 1980 and for Namibia in 1981. In: SHAW, Malcolm Nathan. *International Law*. Eighth edition, Cambridge University Press, Cambridge, 2017, p. 930.

<sup>773</sup> BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*, Coimbra, Almedina, 2003, p. 975.

<sup>774</sup> *Ibis above*.

<sup>775</sup> In 1972, the General Assembly also adopted, *inter alia*, the Resolution 2995, in which it recognized the obligation of States to provide prior information on activities potentially causing environmental damage, with the aim of avoiding significant damage to other bordering States, and the Resolution 2996, in which it clarified that no resolution adopted at the conference could affect the provisions regarding the international responsibility of States in matters in accordance with principles 21 and 22 of the Stockholm Declaration.



In 2009, the General Assembly requested, through Resolution 63/281 and after the initiative of the SIDS, that the relevant organs of the United Nations intensify, within their competences, their efforts on climate change, including in relation to international security issues. The resolution also asked the Secretary-General to prepare a report on the possible implications of climate change for international security. That report was prepared by the Secretary-General and he made conclusions to the effect that this relationship existed.<sup>776</sup>

Thus, in relation to the competence of the organs of the United Nations regarding climate change and its connection with international security, notably the Security Council, by requiring these bodies to intensify their efforts, within their competences, with this resolution "the *Assembly recognized the competence of the Security Council, but made it clear that it should be exercised within the limits of its competences and without undermining the action of the other organs of the Nations United States*," while stating that it would also remain attentive to the security issues that may arise from the adverse effects of climate change.<sup>777</sup>

Through Resolution 63/281, while acknowledging the role and competencies of the Security Council in relation to climate change and its connection to international security, the General Assembly did not characterize climate change as a threat to peace under the Charter, but stated that it was concerned about the possible security implications that could arise from the negative effects of climate change. On the other hand, it expressed the primacy of the UNFCCC, the General Assembly and the Economic and Social Council in the field of sustainable development, which includes climate change.<sup>778 779 780</sup>

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<sup>776</sup> NATIONS, United. *General Assembly Resolution A63/281*. United Nations General Assembly, United Nations, 2009. Doc. A/RES/63/281.

<sup>777</sup> KU, Charlotte; SCOTT, Shirley V.. *The UN Security Council and global action on climate change*. p. 01-24. Em: KU, Charlotte; SCOTT, Shirley V. (Eds.). *Climate Change and the UN Security Council*. Ed. Edward Elgar Publishing, USA, 256 p., 2018, p. 15.

<sup>778</sup> Resolution 63/281: "Reaffirming that the United Nations Framework Convention on Climate Change is the key instrument to address climate change... in accordance with their common but differentiated responsibilities and respective capacities and their social and economic conditions... recognizing the respective responsibilities of the principal organs of the United Nations, including the primary responsibility for the maintenance of international peace and security conferred on the Security Council and the responsibility for sustainable development issues, including climate change, conferred on the General Assembly and the Economic and Social Council...". In: NATIONS, United. *General Assembly Resolution A63/281*. United Nations General Assembly, United Nations, 2009. Doc. A/RES/63/281.

<sup>779</sup> KU, Charlotte; SCOTT, Shirley V.. *The UN Security Council and global action on climate change*. p. 01-24. Em: KU, Charlotte; SCOTT, Shirley V. (Eds.). *Climate Change and the UN Security Council*. Ed. Edward Elgar Publishing, USA, 256 p., 2018, p. 15.

<sup>780</sup> In this regard, BURKE states that the Council's rejection of the draft resolution tabled by Niger and Ireland opens a new opportunity for action by the Assembly in view of the United for Peace Resolution. See in: BURKE, Joseph. *Climate change, a threat to international peace and security?* Universal Rights Group, February 15, 2022. Available at: <https://www.universal-rights.org/blog/climate-change-a-threat-to-international-peace-and-security/>. Accessed February 25, 2022.

Therefore, these being the main considerations, we proceed to the analysis of the Secretariat, as an United Nations body with competence in the matter of maintenance of international peace and security.

### 8.3.2. United Nations Secretariat

The Secretariat is, pursuant Article 97 of the Charter, represented by the<sup>781</sup> Secretary-General, the principal administrative official of the United Nations and<sup>782</sup> its administrative head, also referred to as "*diplomat and lawyer in equal parts*", "*civil servant and CEO*", "*symbol of the ideals of the United Nations*" and "*spokesperson for the interests of the peoples of the world, in particular the poor and vulnerable among them*". The current Secretary-General, and the ninth occupant of the office, is Mr. António Guterres<sup>783</sup> from Portugal, who took office on January 1, 2017.

As will be seen, the Secretariat, through the Secretary-General of the United Nations who represents it, has been a strong player in the field of maintaining international peace and security and its relationship with the adverse effects of climate change in recent decades.

This is because Article 99 of the Charter grants this competence to the Secretary-General by providing that he "*may draw the attention of the Security Council to any matter which in his opinion may threaten the maintenance of international peace and security*."<sup>784</sup>.

As BAPTISTA explains, the powers of the Secretariat in this field are considerable

*"The Secretary-General also has important political powers of his own... it may also draw the attention of the Security Council to any matter (i.e. situation or controversy)*

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<sup>781</sup>See Article 97 of the Charter of the United Nations: "*Article 97. The Secretariat shall be composed of a Secretary-General and such staff as required by the Organization. The Secretary-General shall be appointed by the General Assembly on the recommendation of the Security Council. He will be the principal administrative officer of the Organization.*".

<sup>782</sup> The current Secretary-General, and the ninth occupant of the office, is Mr. António Guterres of Portugal, who took office on January 1, 2017. He was preceded by Ban Ki-moon in the period between 2007 and 2017 and by Kofi Annan in the period between 1997 and 2007.

<sup>783</sup> NATIONS, United. *The role of the Secretary-General*. United Nations. Available at: <https://www.un.org/sg/en/content/the-role-of-the-secretary-general>. Accessed on January 30, 2022.

<sup>784</sup> See Article 99 of the Charter of the United Nations: "*Article 99. The Secretary-General may draw the attention of the Security Council to any matter which in his opinion may threaten the maintenance of international peace and security.*".



*which it considers may threaten international peace or security (Article 99 UNC and Articles 3 and 22 of the Council's Rules of Procedure). The same can be done before the General Assembly... It is now possible to give rise to powers of political appraisal of the international situation and of gathering information on it.*"<sup>785</sup>

Therefore, the Secretariat has the power to classify a situation as a threat to peace, in the same terms as the General Assembly, to request the attention of the General Assembly or even of the Council on a situation or controversy, and may also produce reports on these situations or controversies, either on its own initiative or by the request of the organs of the United Nations. It can also to carry out investigations, in this case provided that with the consent of the parties involved<sup>786</sup>  
<sup>787</sup>.

Nevertheless, the powers of the Secretariat do not include the creation of United Nations forces, although it is routinely designated by the Security Council to organize UN peacekeeping operations, including the creation in 1992 of the Department of Peacekeeping Operations, and its declarations are not enforceable against Member States, serving in the same way as General Assembly resolutions, as recommendations<sup>788 789</sup>.

And this time, in the year 2006, during the Conference of the Parties (COP12) in Nairobi, the then Secretary-General of the United Nations, Kofi Annan, considering the risks that the negative impacts of climate change may entail for society and the economy, as well as its implications for international peace and security, declared that climate change is a threat to international peace and

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<sup>785</sup> BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p. 792.

<sup>786</sup> BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p. 793.

<sup>787</sup> *Ibis above*.

<sup>788</sup> *Ibis above*.

<sup>789</sup> Ver também: NATIONS, United. *Addressing the Impact of Climate Change on Peace and Security*. United Nations. Available at: <https://dppa.un.org/en/climate-peace-security>. Accessed on February 1, 2022.

security. Kofi Annan's statement was<sup>790 791</sup> reaffirmed by the United Nations Secretaries-General who followed him, Ban Ki-moon and António Guterres<sup>792 793</sup>.

Moreover, after the General Assembly Resolution 63/281 requested the Secretary-General to produce "*a comprehensive report ... on the possible security implications of climate change, based on the views of Member States and relevant regional and international organizations*," the report was presented in 2009 and stated that climate change should be seen as a multiplier of threats or risks, considering the human aspect of security<sup>794 795 796</sup>.

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<sup>790</sup> Kofi Annan cited the study by the former chief economist of the World Bank, Sir Nicholas Stern of the United Kingdom, which considers climate change "the *largest and broadest market failure ever seen*," with the potential to reduce the global economy by 20% and cause economic and social disruption on a par with the two World Wars and the Great Depression. For a deeper look at Sir Nicholas Stern, see: STERN, Nicholas. *The Economics of Climate Change. The Stern Review*. Cambridge, 2006. Available at: <https://www.cambridge.org/pt/academic/subjects/earth-and-environmental-science/climatology-and-climate-change/economics-climate-change-stern-review?format=PB&isbn=9780521700801>. Accessed February 1, 2021.

<sup>791</sup> According to Secretary-General Kofi Annan, "*Climate change is also a threat to peace and security. Changing rainfall patterns, for example, can increase competition for resources, triggering potentially destabilizing tensions and migrations, especially in fragile states or volatile regions. There is evidence that some of this is already occurring; More may be to come.*". NATIONS, United. *Graft from UN Secretary-General Kofi Annan's speech at the Climate Change Conference*. United Nations, United Nations, Nairobi, 15 November 2006. Available at <https://www.un.org/press/en/2006/sgsm10739.doc.htm>. Accessed February 1, 2021.

<sup>792</sup> See, for example, the statement made in a debate held at the United Nations Security Council in 2011. Available at: <https://www.un.org/sg/en/content/sg/speeches/2011-07-20/remarks-security-council-impact-climate-change-international-peace>. Accessed February 22, 2021.

<sup>793</sup> See for example the declaration made on the International Day of Peace, 21 September 2019. Available at <https://news.un.org/en/story/2019/09/1046862>. Accessed February 22, 2021.

<sup>794</sup> General Assembly Resolution 63/281: "... *Requests the Secretary-General to submit a comprehensive report to the General Assembly at its sixty-fourth session on the possible security implications of climate change, based on the views of Member States and relevant regional and international organizations....*".

<sup>795</sup> NATIONS, United. *Climate change and its possible security implications: report of the Secretary-General*. UN Secretary-General, United Nations, 2009. Available at: <https://digitallibrary.un.org/record/667264>. Accessed on March 3, 2021.

<sup>796</sup> According to the report produced by the Secretary-General: "*Many proposals from Member States recognize that the possible security implications of climate change must be examined in the context of pre-existing social, economic and environmental threats or tensions, which are key factors for the security of individuals, communities and states. These include the factors that were highlighted by the Millennium Summit—the persistence of poverty, hunger, and disease; the rapid growth of informal urban settlements with poor shelters and inadequate infrastructure and services; high unemployment, particularly of young people; and the growing scarcity of land, water and other resources... The magnitude of specific threats, the resilience of individuals, communities and societies and their ability to adapt effectively to these threats – all of these affect the security implications of climate change. Where the threats of climate change to human well-being are expected to be severe, particularly where people are especially vulnerable due to low levels of human development and weak institutions of governance, the security implications tend to be more pronounced, including the possibility of political tensions and armed conflict. On the other hand, many Member States have expressed the view that threats can and should be reduced through sustainable development, including legitimate and effective governance institutions, as well as the peaceful resolution of disputes. In this sense, it is useful to think of climate change as a threat multiplier, namely as a factor that can work through various channels (see figure below) to exacerbate existing sources of conflict and insecurity. Similarly, conditions, policies, institutions, and actions that serve to relieve and manage stress effectively can be considered threat minimizers.*". In: NATIONS, United. *Climate change and its possible security implications: report of the Secretary-General*. UN Secretary-General, United Nations, 2009. Available at: <https://digitallibrary.un.org/record/667264>. Accessed March 3, 2021.

Subsequently, in 2011, under the secretariat of Ban Ki-moon stated, in an open debate held in the Security Council, that "*climate change not only increases the threats to international peace and security, it is a threat to international peace and security.*"<sup>797</sup>.

Ten years later, already in September 2021, Secretary-General António Guterres, in an open debate in the Security Council, stated, in view of the conclusions of the IPCC's Sixth Assessment Report of 2021 and earlier ones, that "*the world is facing unprecedented risks from climate change and that all regions are affected – as a code red for humanity*" and that "*climate-related disasters have displaced more than 30 million people in 2020.*"<sup>798 799</sup>.

Subsequently, in December 2021, in a debate in the Council where the draft resolution presented by Niger and Ireland was discussed, the Secretary-General was called to integrate climate-related security risk as a central component of the United Nations comprehensive conflict prevention strategies. In that opportunity, the Secretary-General António Guterres stated that

*"We are in a race against the clock and no one is safe from the destructive effects of climate disruption. The World Food Programme (WFP) estimates that climate change could increase the risk of hunger and malnutrition by up to 20% by 2050. Similarly, the World Bank predicts that climate change could lead to the displacement of more than 200 million people in that timeframe. The regions most vulnerable to climate change also suffer from insecurity, poverty, weak governance and the scourge of terrorism. Of the 15 countries most exposed to climate risks, eight host a special political or peacekeeping mission of the United Nations."*<sup>800</sup>

Therefore, the Secretariat, through the Secretary-General, acts broadly in the context of the maintenance of international peace and security, qualifying situations, even without any application of the Chapter VII and the use of force, producing reports and cooperating with the other organs of

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<sup>797</sup> NATIONS, United. *UNSC Provisional Verbatim Record*. UN Secretary-General, United Nations, 20 July 2011, p. 29. Doc. S/PV/6587.

<sup>798</sup> António Guterres, among other acts in his capacity as Secretary-General of the United Nations, produced the Report of the Secretary-General of the United Nations on "*Building Peace and Sustaining Peace*", on which much of the sustainable peacekeeping action of the United Nations is based, and the Report "*Our Common Agenda*", on the future of global cooperation.

<sup>799</sup> NATIONS, United. *Differences Emerge over Appropriate Forum for Discussing Climate Change, as Delegates Hold Debate on Links between Global Crisis, Security*. Meetings Coverage, Security Council 8864th Meeting, 23 September 2021. Doc. SC/14644. Available at: <https://www.un.org/press/en/2021/sc14644.doc.htm>. Accessed on January 5, 2022.

<sup>800</sup> NATIONS, United. *People, Countries Impacted by Climate Change Also Vulnerable to Terrorist Recruitment, Violence, Speakers Tell Security Council in Open Debate*. Meetings Coverage, Security Council, United Nations. Available at: <https://www.un.org/press/en/2021/sc14728.doc.htm>. Accessed on January 31, 2022.

the United Nations for the achievement of the objective of peacekeeping, including with the organization of peace operations, having so far been a bearer of warnings about the dangers and risks associated with the adverse effects of climate change on international peace and security.

### **8.3.3. International Court of Justice (ICJ)**

According to Article 92 of the Charter, the International Court of Justice (ICJ) is "*the principal judicial organ of the United Nations*," and that "*all members of the United Nations are ipso facto parties to the Statute of the Court*" and "*undertakes to conform to the decisions of the Court... in any case in which it is a party.*"<sup>801 802 803 804</sup>.

Nevertheless, membership of the Court is not automatic, as its Statute depends on acceptance by the Member States. Currently, 73 States have deposited their Declarations of Acceptance from the

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<sup>801</sup> See Article 92 of the Charter of the United Nations: "*Article 92. The International Court of Justice shall be the principal judicial organ of the United Nations. It shall operate in accordance with the attached Statute, which is based on the Statute of the Permanent Court (\*) of International Justice and forms an integral part of this Charter.*".

<sup>802</sup> See Article 93 of the Charter of the United Nations: "*Article 93. 1. All members of the United Nations are ipso facto parties to the Statute of the International Court (\*) of Justice. 2. A State which is not a member of the United Nations may become a party to the Statute of the International Court (\*) of Justice under conditions to be determined in each case by the General Assembly on the recommendation of the Security Council.*".

<sup>803</sup> Statute of the International Court of Justice. Available in: <https://www.icj-cij.org/en/statute>. Accessed February 10, 2022.

<sup>804</sup> See Article 94 of the Charter of the United Nations: "*Article 94. 1. Each Member of the United Nations undertakes to comply with the decision of the International Court (\*) of Justice in any case to which it is a party. (2) If one of the parties in a given case fails to fulfil its obligations under a judgment of the Court (\*), the other shall have the right to appeal to the Security Council, which may, if it deems it necessary, make recommendations or decide on measures to be taken for the execution of the sentence.*".

jurisdiction of the ICJ as binding *ipso facto* and without special agreement, with reciprocity in relation to any other State that accepts the same obligation<sup>805 806 807</sup>.

Thus, considering the universal adherence to the Paris Agreement as well as to the UNFCCC, more than one third of the Parties have accepted the jurisdiction of the International Court of Justice in relation to disputes that may arise from the treaties, even though it has never been adopted and the Parties to these treaties have never resorted to the action of the Court.

The Court's jurisdiction is divided into two categories. The first of a contentious nature, represented by the claims that States, and only these under the terms of Article 35 of the Statute, may submit before the Court in accordance<sup>808</sup> with Articles 92 to 95 of the Charter and the Statute, and the second, of an advisory nature, open only to the organs of the United Nations, on the basis of Article 96, which provides that the General Assembly or the Security Council may request the Court to give an advisory opinion on any legal question.<sup>809</sup>

The advisory opinion has a distinctive feature arising from the special nature and purpose of the Court's advisory function. Although not binding, the Court's advisory opinions have great force

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<sup>805</sup>According to COUTINHO and RIBEIRO, "The International Court of Justice is the main judicial organ of the United Nations. It is based in the Dutch city of The Hague and consists of 15 members elected by the General Assembly and the United Nations Security Council. The most important jurisdiction of the Court concerns the adjudication of disputes between States. Although all the Member States of the United Nations are parties to the Statute of the Court, the exercise of the judicial function is dependent on whether the States in dispute have previously accepted the jurisdiction of the Court and whether the dispute falls within the material scope of that acceptance.". In: COUTINHO, Francisco Pereira; RIBEIRO, Manuel de Almeida. *Jurisprudência Resumida do Tribunal Internacional de Justiça (1947-2015)*. Dom Quixote, Alfradige, 2016.

<sup>806</sup>See Article 36 of the Statute of the International Court of Justice: "Article 36: 1. The jurisdiction of the Court shall comprise all cases to which the parties refer and all matters specifically provided for in the Charter of the United Nations or in treaties and conventions in force. 2. The States Parties to this Statute may, at any time, declare that they recognize as binding *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all disputes concerning: the interpretation of a treaty; any question of international law; the existence of any fact which, if proven, would constitute a breach of international obligation; the nature or extent of the reparation to be made for the breach of an international obligation. 3. The declarations referred to above may be made unconditionally or on condition of reciprocity by several or certain States, or for a specified period. 4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the Parties to the Statute and to the Secretary of the Tribunal. 5. Declarations made pursuant to Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be considered, between the Parties to this Statute, as acceptance of the binding jurisdiction of the International Court of Justice for the period remaining to run and in accordance with its terms. 6. In the event of a dispute concerning the jurisdiction of the Court, the matter shall be settled by decision of the Court."

<sup>807</sup> ICJ. *Declarations recognizing the jurisdiction of the Court as compulsory*. ICJ. Available at: <https://www.icj-cij.org/en/declarations>. Accessed on February 5, 2022.

<sup>808</sup>See Article 35(1) of the Statute of the International Court of Justice: "Article 35: 1. The Court shall be open to the States Parties to this Statute."

<sup>809</sup>See Article 96 of the Charter of the United Nations: "Article 9 6. 1. The General Assembly or the Security Council may request an advisory opinion from the International Court (\*) of Justice on any legal question. (2) Other organs of the United Nations and specialized organizations which are at any time duly authorized by the General Assembly may also request advisory opinions from the Court (\*) on legal issues arising within the sphere of its activities."

because of its legal authority. Moreover, "*consultative opinions also contribute to the clarification and development of international law and thus to the strengthening of peaceful relations between States.*"<sup>810 811</sup>.

In this regard, the Republic of Palau has been trying to obtain in the General Assembly the necessary support for a request for an advisory opinion from the ICJ on the issue of the liability of States for transboundary damage caused by the emission of greenhouse gases<sup>812</sup>.

Furthermore, on 29 March 2023, the General Assembly of the United Nations adopted resolution A/RES/77/276 in which, referring to Article 65 of the Statute of the Court, it requested the International Court of Justice to give an advisory opinion on "the obligations of States in respect of climate change"<sup>813 814</sup>.

If successful, it can generate several effects, because<sup>815</sup>

*"An advisory opinion of the International Court of Justice would promote international efforts to reach an agreement within the UNFCCC negotiation process... it would imply moral authority and establish a new legal basis for the UNFCCC, articulating a "clear legal standard applicable to all states.". This would put all states on an equal footing in terms of their obligations to reduce greenhouse gas emissions under international law.*

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<sup>810</sup> BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p. 1123.

<sup>811</sup> ICJ. *Advisory Jurisdiction*. International Court of Justice. ICJ. Available at: <https://www.icj-cij.org/en/advisory-jurisdiction>. Accessed on February 20, 2022.

<sup>812</sup> NATIONS, United. *Palau seeks UN World Court opinion on damage caused by greenhouse gases*. United Nations, 22 September 2011. Available at: <https://news.un.org/en/story/2011/09/388202>. Accessed on January 30, 2022.

<sup>813</sup> "The following questions are put to the Court by the General Assembly in its resolution:

"Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment,

(a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations;

(b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:

(i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?

(ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?"

<sup>814</sup> The request for an advisory opinion was transmitted to the Court by the Secretary-General of the United Nations by a letter dated 12 April 2023, which was received in the ICJ Registry on 17 April 2023.

<sup>815</sup> KYSAR, Douglas A.. *Climate Change and The International Court of Justice*. Center for Environmental Law and Policy, Yale, 2013, p. 103. See also: KOSTAKOS, Georgios; VEENING, Wouter; ZHANG, Ting. *Climate Security and Justice for Small Island Developing States. An Agenda for Action*. The Hague Institute for Global Justice, 2014.



*Even if the Advisory Opinion did not support a finding of legal liability, this would hardly cause the Parties to abandon the commitments. The UNFCCC is a long-standing process that began in 1992..."*

And as for the power to review the decisions of other organs of the United Nations, the Charter does not establish this competence to the Court, expressing its jurisdiction over States, which may be Parties of a disputes before the Court, but not over the organs of the United Nations and its decisions, notably those of the Security Council on a situation involving a threat to international peace and security, in accordance with Chapter VII of the Charter<sup>816 817</sup>.

Finally, the growth of climate lawsuits in the world, especially in the scope of national jurisdictions, demonstrates the possibility of judicialization of the climate issue also at the international level. In spite of the differences and access to international courts, in particular the International Court of Justice, it is possible that in the face of non-compliance with international treaties, or even on the basis of an advisory opinion, the Court may exert its influence on the legal regime of climate change and, perhaps, even on the issue of climate change as a threat to international peace and security<sup>818</sup>.

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<sup>816</sup> BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*. Coimbra, Almedina, 2003, p. 1125. On the other hand, there are those who maintain an opposite view. In this regard, ORAKHELASHVILI states that the ICJ "has never ruled out the possibility of judicial review of decisions of other major organs of the United Nations" and that "the decision of the ICTY Board of Appeals in the Tadić case may provide useful guidance. Having concluded that "neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law)," the court went on to examine the question that falls directly within the scope of the Council's powers under Article 39 of the UN Charter. The Court examined the Council's determination of a "threat to peace," questioned whether the concrete situation dealt with by the Council was in fact a "threat to peace," and issued its own judgment on all these issues. In: ORAKHELASHVILI, Alexander. *The Acts of the Security Council: Meaning and Standards of Review*. In: (Eds.) BOGDANDY, A. Von; WOLFRUM, R.. *Max Planck Yearbook of United Nations Law*. Vol. 11, Max Planck, 2007, p. 192-194.

<sup>817</sup> Nevertheless, it is possible that by incidental means the Court exercises some judicial control over the decisions of the organs of the United Nations. See: BAPTISTA, Eduardo Correia. *O Poder Público Bélico em Direito Internacional: o uso da força pelas Nações Unidas em especial*, Coimbra, Almedina, 2003, pág. 1126.

<sup>818</sup> STEPHENS, Tim. *See you in court? A rising tide of international climate litigation*. Lowy Institute, 30 October 2019. Available in: <https://www.lowyinstitute.org/the-interpreter/see-you-court-rising-tide-international-climate-litigation>. Accessed February 11, 2022. See also: SABIN. *Global Climate Change Litigation*. Sabin Center for Climate Change Law. Columbia University, 2022. Available at: <http://climatecasechart.com/climate-change-litigation/>. Accessed February 11, 2022.

## 9. CONCLUSION

The legal regime of climate change was founded by the United Nations Framework Convention on Climate Change, an international treaty signed in 1992 that has universal adherence. The treaties that followed it, notably the Kyoto Protocol and the Paris Agreement, are the instrumentalization of the objectives outlined in the Framework Convention.

The main objective of the climate regime is to prevent human action from having dangerous effects on the climate system, in order to ensure that food production is not threatened and to allow the economic development to proceed in a sustainable manner. For these goals to be achieved, efforts are needed to maintain the temperature increase at the maximum limit of 2°C, or ideally at 1.5°C, above pre-industrial levels.

The principles that govern the legal regime of climate change are quite their own, such as the principle of common responsibility but differentiated according to their respective capacities, and the regime has been established as a non-punitive common cooperation regime that takes into account the special circumstances of each Party.

Nevertheless, the results obtained under the Convention have not always been the most satisfactory, and as the concentration levels of greenhouse gases remain high and the studies presented so far by the IPCC and other institutes show a disturbing reality, the debate on the effectiveness of the Framework Convention, the Kyoto Protocol and the Paris Agreement becomes inevitable.

The absence of a compliance control mechanism in the climate regime represents in fact a difficulty for the regime to be more effective in achieving its objectives and thus, political movements and States, sometimes with factual reason at least, as in the case of SIDS, have requested the intervention of the United Nations Security Council on the climate issue, in order to recognize its link with international security, notably on the basis of the matter of human security, from the perspective of immigrants or environmental displaced persons.

On the other hand, despite the Council resolution on Lake Chad, which recognizes the adverse effects that climate change can have in conflict situations, as a "*threat multiplier*", the question of the



direct link between climate change and conflict remains open, in the classical notion of collective security, in the scientific field and also in the political-legal level of the Security Council.

In addition, the States Parties to the UNFCCC and its treaties, the United Nations General Assembly, and the Security Council itself, support the priority role of the UNFCCC, and therefore of the Conference of the Parties (COP), as well as the other organs of the United Nations, in relation to climate change.

It is difficult to predict what the future holds for climate change in the Security Council. In any case, its action, even if indirect, is already a reality, and the Council's action along the lines of Chapter VII might be necessary in the future, which would be on the basis of the Council's relatively recent but contested decisions on terrorism following the attacks of 11 September, for example.

The General Assembly, as well as the Secretariat through the Secretary-General, has dealt in its functions with climate change issues, including its engagement with international peace and security, and with the recent Advisory Opinion request for the ICJ on the responsibility of States on climate change. It is indeed relevant that the other organs of the United Nations can address the issue, specially as they are an alternative to the Council, even if their decisions are not binding, but also because they are more democratic bodies that reach more Parties of the UNFCCC.

In its turn, the participation of the International Court of Justice has just been formally requested with the Advisory Opinion, considering the possibility of applying the legal regime of the responsibility of States for an unlawful act to States under the climate change legal regime and other international instruments.

Nevertheless, through the Conference of the Parties (COP), any issue related to climate change, including its relationship to international security, can be discussed. Despite the difficulty of obtaining the necessary unanimity in its votes, the Conference of the Parties is still the most appropriate forum for debate and decision-making in the field of climate change, with a focus on sustainable development, reduction of GHG emissions, adaptation and mitigation actions, that means investment in policies to combat climate change and its adverse effects, since it is the legal regime of climate change and has the participation of all stakeholders, the entire International Community.

Furthermore, the risks associated with climate change pointed out by the IPCC and other scientific groups are very serious for the planet and humanity, and it is therefore relevant to include

this issue on the agenda of the Security Council and, where appropriate, in its resolutions, at least indirectly, with the recognition of situations in which climate change may become a multiplier of threats or even conflicts, providing guidance and assistance to Member States, recommendations and monitoring the issues related to climate change and international peace and security.

However, "*securitizing*" the climate issue may in fact hinder the sustainable development of the resilience and adaptation needed to address the matter, depending on how the issue is addressed by the Council. "*Securitizing*" climate issue cannot mean prioritizing the Council's action to the detriment of the UNFCCC and the other bodies involved with climate and sustainable development, as it would be contrary to what is recognized by States, and even by the Council, regarding the current priority in leading the environmental and climate issue.

The problem of political legitimacy of the Security Council, given that among its permanent members with veto power are great powers that are also the biggest polluters, in addition to the political differences between them, hinders the Council's action in the climate field, also because the Council needs the cooperation of States to comply with its decisions, while the Conference of the Parties (COP), the General Assembly of the United Nations and the Economic and Social Council, are more universal, democratic, egalitarian and open bodies, seen as more suitable for the debate on climate change by a considerable part of the States, notably those that are part of the so-called developing States.

The General Assembly, as well as the Secretariat through the Secretary-General, has dealt in its functions with climate issues, including its engagement with international peace and security. It is indeed relevant that the other organs of the United Nations can address the issue, including as they are an alternative to the Council, even if their decisions are not binding, as well as being more democratic bodies that reach more Parties of the UNFCCC.

Finally, there are still a lot to be understood about the linkage of climate change and security, as the studies in this field are recent. Therefore, the debate is still open, as is the future of the debate over climate change as a factor of threat to peace and international security.

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