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INTERNATIONAL ENVIRONMENTAL LAW: PARTICULARITIES

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ABSTRACT

The article analyzes the legal instruments available under international law for the protection of the environment, seeking to show that there is an International Environmental Law in formation, which is beginning to be affirmed. Throughout the article, we analyze the main characteristics able to mark the peculiar position of this branch in the construction of the international legal order. The International Environmental Law is a new Law, which, however, has brought important news to the international legal order. The article highlights some of these modifications, e.g. the change of concepts of responsibility and sovereignty, the wide use of principles and the gradual transformation of the subjects of Public International Law. The article also highlights the political, social and economic difficulties for the effectiveness and implementation of this new branch of international law.

Keywords: environmentalism; International Environmental Law; globalization; public policy; sustainability.

DIREITO INTERNACIONAL DO MEIO AMBIENTE: PARTICULARIDADES

RESUMO

O artigo examina os instrumentos jurídicos disponíveis no âmbito do Direito internacional para a proteção do meio ambiente, buscando demonstrar que existe, em formação, um Direito Internacional do Meio Ambiente, o qual começa a ser afirmar. Ao longo do artigo são analisadas as principais características capazes de marcar a posição peculiar deste ramo em construção da ordem jurídica internacional. Admite-se que o Direito Internacional do Meio Ambiente é um Direito jovem, que, no entanto, vem aportando importantes novidades na ordem jurídica

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internacional. O artigo destaca algumas de tais modificações, e.g., a modificação dos conceitos de responsabilidade e soberania, a ampla utilização de princípios e a transformação gradativa dos sujeitos de Direito Internacional Público. O artigo ressalta, também, as dificuldades políticas, sociais e econômicas para a efetivação e implementação deste novo ramo do Direito Internacional.

Palavras-chave: *ambientalismo; Direito Internacional do Meio Ambiente; globalização; políticas públicas; sustentabilidade.*

INTRODUCTION

This article aims to analyze some of the peculiarities that allow us to affirm that the International Environmental Law (IEL) is increasingly recognized as an autonomous branch of the International Public Law (IPL). The protection of the environment is currently part of the global agenda and, in such a condition, one of the main themes discussed in the different international *fora*, allowed that, within the scope of IPL, a specific sector began to specialize (REI, 2018). In fact, since 1992, the United Nations (UN) has held several international conferences whose central theme was the discussion and deliberation on environmental issues. IEL is one of the responses given by the international community to the deterioration of environmental resources on a planetary scale. It is a legal response, originated in the common understanding of the subjects of International Law in the sense that only a uniform and articulated action between the different international actors is capable of solving problems that go beyond the frontier of a single state. IEL emerged in the 20th century, as did the environmental issue. It is a fact that, in the past, there have been some international agreements on common problems affecting natural resources. However, it was only in the last century that the concern became more eloquent and visible on the international scenario. However, it should be noted that interest in protecting the environment initially arises within each country and, from there it spreads to the international arena. An essential condition for IEL to develop is the existence of stable international institutions that express, at least, the desire for cooperation between States, since it is not conceivable to treat multilateral problems, without institutions that articulate them, in a peaceful and cooperative manner. The theme of environment and the right that affects it has a universal vocation (MORAND-DEVILLER, 2010) and as such, it needs to be addressed in a way that involves the international community and the various mechanisms created by it.

IEL can be defined as the set of rules (consistent or not), international principles and practices that create obligations and rights related to environment protection, nature and natural resources within the international community. It includes matters that are simultaneously of interest to multiple states, such as transboundary pollution, sea resources, global climate change and the protection of biological diversity, as well as matters of regional interest, e.g., protection of a particular international river or forests that spread over more than one country.

Geraldo Eulálio do NASCIMENTO e Silva (2002) claims that the United Nations General Assembly (UNGA), when calling the Rio de Janeiro Conference, used the expression "International Environmental Law," solving the problem related to the existence of a new branch of the IPL, regarding the designation, the practice has preferred to use International Environmental Law, adopted in this article.

IEL is made up of international treaties, conventions and declarations related to nature protection, making it very difficult to identify coherence between its different standards. Harmonization between the whole set is a very difficult, if not impossible, task. Thus, it is better to use the notion of its own sectors within IEL, that is, to seek harmonization between specific sets of international treaties and conventions. Likewise, one should not disregard the deep relations between IEL and international human rights law and, also, with international economic law, given the great interpenetration between them. Therefore, IEL is comprehensive and cannot be understood outside economic and social contexts. The Stockholm Declaration, proclaimed in 1972, is an eloquent demonstration of what is being argued. In the proclamation, the Conference states that the human environment has two aspects, namely: (1) the natural; and the (2) artificial (ONU, 1972). Both are essential for the Human Being to enjoy well-being and fundamental human rights and even life itself. Thus, protecting and improving it is a fundamental issue that affects the economic development of the whole world, being the desire of the peoples and obligation of governments.

Among the most striking characteristics of IEL are: (1) its novelty (MALJEAN-DUBOIS, 2008); (2) its sectorization; (3) its prospective character; (4) the modification of the concept of national sovereignty; and (5) the transformation of its constituent elements, such as the source system and its subjects. These are the points that the article intends to critically examine.

1 THE NOVELTY OF INTERNATIONAL ENVIRONMENTAL LAW

This topic will examine the novelty of IEL, that is, its novelty in the legal universe compared to the IPL, which is a law whose origins are lost in the mists of time. Francisco REZEK (2002) states that the first bilateral treaty proven to exist was the one signed between Hatusil III, Hittite king, and Ramses II, Egyptian pharaoh. It is believed that peace between nations was signed between 1280 and 1272 BC. IEL appeared at the time of global

pollution, with the concern of young people to break the barriers of a millennial legal model to find its full statement. As it will be seen, such a break will be made by the adoption of specific mechanisms that will be dealt with in the subsequent topics.

1.1 Importance of environmentalism for the IEL formation

IEL is the result of environmentalism, which is a social and political movement, composed of different and even antagonistic thoughts about nature, its protection and its role in the modern world. According to the sharp vision of David Pepper (2000), it gives us the feeling that it comes from all sides, from the left, from the right, from the center, mixing with concepts from ecology. It contains biocentrism and anthropocentrism, and it is therefore difficult to concretely define green policy. This "*mélange*" (PEPPER, 2000), however, is a fact that has a great impact on the production of IEL. Environmentalism is based on a discourse (HANNIGAN, 2014) that is also a major contributor to the IEL formation. Such discourse is formed by a set of statements, many of them based on scientific arguments, about how nature should be, if certain practices that put it at risk were avoided, as a consequence of the accelerated urbanization and industrial growth in the post-war period in Europe and the United States, even mentioning "environmental revolution" (McCORMICK, 1992). In general, the environmentalist discourse tends to alarmism and the spectacular, dramatizing real problems.

The modern environmental discourse is based on two seminal works: *Silent Spring*, by Rachel Carson (2010) and in the Club of Rome's report, *The limits to growth* (MEADOWS et al., 1977). The opening chapter of *Silent Spring* has the symptomatic title of *A fable for tomorrow* in which, like children's tales, it is said that there was a city in the heart of the United States similar to the Garden of Eden, showing discomfort with the modern world and its problems. *Silent Spring* is certainly the most influential work in ecological thinking to date. It contains concerns about nuclear war and the pollution of the environment by chemicals, linking them with weapons of war and their use as a poison for suicides, etc. There is no issue on the current environmental agenda that was not present at *Silent Spring*. The manifesto addresses issues ranging from the threat of the atomic holocaust to the contamination of breast milk by chemicals. It talks about small communities and popular participation and the risks brought by modern

science. Alarmist, at a time when concerns about the cold war and thermonuclear explosions were real; radical in banning organochlorines, we can say that the Stockholm Convention on Persistent Organic Pollutants is a by-product of *Silent Spring*. The influence of R. Carson is also present in the speech of Former UN Secretary-General U Thant in stating that he did not wish to appear "excessively dramatic," but that his status as Secretary-General allowed him to conclude that members of the United Nations had "perhaps ten years" to control the arms race, improve the human environment and control the demographic explosion. In order to face the problems, he proposed the urgent creation of an international body, under the penalty of humanity losing control of the issue (MEADOWS et al., 1977).

1.2 A Right at the Crossroads

The legal treatment of the environment has generated perplexity in the legal community, because given its peculiar characteristics, it is not possible to insert it in the usual areas of law. Raphaël Romi (2010) states that Environmental Law is at the crossroads between Public and Private Law, between Internal and International Law. This occurs because the environment itself does not respect borders, and nor does the damage it suffers. Thus, environmental protection is not limited to a single legal path, nor to a single branch of law. All *legal* remedies are valid for environmental protection. Thus, its protection, from a legal point of view, is not made by the construction of a tower parallel to the various branches of law, but rather by the transversal perforation of the environment theme in any and all branches of law, even if it the existence of a specialized legal sector is recognized and admitted.

In this context, IEL plays a fundamental role, since most of the environmental problems faced by countries are global or regional, which requires a legal solution that is also global or regional. It is relevant to emphasize that IEL, in relation to internal rights, plays the role of locomotive (MALJEAN-DUBOIS, 2008), pushing national regulations towards a higher standard of protection.

The crossroads of Environmental Law are not limited to the internal aspects of the legal system, whether national or international. It is necessary to consider the external aspects (meta-legal in a positivist view) as essential in the construction and application of legal protection of the environment. The formulator of the standard and its applicator cannot fail

to consider the political, economic, scientific and social aspects involved in a concrete situation. Therefore, Law acts as a catalyst for diverse types of knowledge and moments that will materialize in a legal norm that is thought to regulate a current situation, and mainly to shape the future. These crossed paths are the basis of concrete difficulties for the implementation of Environmental Law, in whatever scope.

2 SECTORIZATION OF IEL

The environment is understood as a totality that encompasses all the so-called natural resources of the planet, as well as the works of human culture. Given the breadth of the concept, it becomes impossible to treat it in a unique way. The International Court of Justice (ICJ) in the famous decision in the case of Project Gabiciknovo-Nagyamaros (Hungary v. Slovakia) established that the environment is not an abstraction, but the space in which human beings live and on which their qualities of life and health depend on, including for future generations. However, from practical and normative points of view, there is a real difficulty in reaching a multilateral agreement that deals with “environment.” In this way, States have, in their concrete practices, signed international sectoral agreements, and the main ones concern (1) protection of biological diversity, including protection of flora, fauna and genetic resources; (2) protection of maritime and river water resources; (3) protection against transboundary pollution, including toxic products and chemical pollution; and (4) protection of the atmosphere, including with respect to climate change. As it will be seen in the next topic, IEL has made extensive use of so-called framework conventions, which are open and general agreements that require the adoption of subsequent measures for their effective implementation.

2.1 Environmental treaties and conventions

Treaties, as defined in the Vienna Convention on the Law of Treaties, article 1 (a), are formal and written international agreements, celebrated between States and subject to the rules of international law, may be concluded in a single document or in several related documents, regardless of *nomem iuris*. According to the observation of StéphaneDoumbé-Billé et al. (2013), the quantitative treaties are the most important norms of IEL. For the authors, the first environmental treaties date back to the 19th century,

although they were not focused on environmental protection in *itself*, but on other legal and economic assets, such as the Paris Convention of 1902 on the protection of birds that were *useful* for agriculture (VARELLA, 2009). In general, according to the Brazilian Ministry of Foreign Affairs, the term treaty is used for agreements intended to be attributed political importance (BRASIL, 2020). IEL makes extensive use of conventions that are multilateral acts on topics of general interest, the result of conferences, often used in commercial, industrial, human rights and environmental matters.

In environmental matters, framework conventions, such as the Convention on Biological Diversity, e.g., are documents of great relevance, given their condition of being broad agreements, allowing the accommodation of the different views of the Parties, in order to have a long life (SANDS; PEEL, 2017). Usually, given the complexity of the topic, States establish Protocols that are interpretative documents of treaties or conventions. In the case of the United Nations Convention on Climate Change, the Kyoto Protocol was signed (BRASIL, 2002), which entered into force on February 16, 2005, but failed due to political difficulties. It was replaced by the Paris Agreement, made possible by the fact of expressing *voluntary* commitments made by the Parties for the reduction of greenhouse gas (GHG) emissions. At this point it is relevant to note that the Montreal Protocol on Substances that Deplete the Ozone Layer, originating from the Vienna Convention for the Protection of the Ozone Layer, is largely successful, being "the only multilateral environmental agreement whose adoption is universal: 197 states made a commitment to protect the ozone layer" (BRASIL, 2019).

Lavielle, Delzangles and Le Bris (2018) divide environmental treaties into two major groups: a (1) combating pollution; and (2) the defense of natural resources. The first group consists of protective agreements for specific means, e.g., water, air, soil, etc. The second group, on the other hand, encompasses the so-called protection domains, e.g., biological diversity, or species of flora and fauna. The division is purely didactic, given the interdependence of the themes. If an agreement protects a given ecosystem from chemical pollution, it will certainly protect the biological diversity it contains.

Treaties and conventions may have a (1) universal vocation, that is, they seek to bring together all states around a single theme; or (2) regional vocation, covering only states geographically located in a region.

However, some regional agreements also accept the accession of States outside the original region, as in the case of the Aarhus Convention, Article 19 (3), which admits the accession of States with consultative status with the Economic Commission for Europe. Regarding the *effects* on the environment, Lavielle, Delzangles and Le Bris (2018) identify four types of conventions: (1) those entirely dedicated to the environment; (2) those dedicated to a specific region with environmental provisions, e.g., the Antarctic Treaty; (3) treaties that do not have an environmental nature, such as disarmament, that indirectly protect the environment; and (4) commercial treaties that, without proper environmental clauses, can generate harmful effects on the environment.

The production of environmental treaties and conventions over the past 40 years is impressive. The Register of International Treaties and other Agreements in the field of the Environment, 2005 edition indicates the existence of 50 main international treaties on the environment between the 1920s and 1970s; from 1971 to 2005, the total number of treaties in the publication reached 272, divided into several subjects (UNITED NATIONS, 2005). The total number of existing agreements at the regional and sub-regional level is not known exactly, however, it is estimated that they may exceed 2000 (SANDS; PEEL, 2017). The large number of international agreements, if on the one hand demonstrates a growing global concern with the subject, on the other hand is a complicating element, as it makes IEL extremely fragmented and difficult to apply and even merely symbolic, if there is no concrete implementation.

As a rule, the formation of environmental treaties and conventions is no different than what occurs in other sectors of the IPL. However, there are some peculiarities in environmental agreements that deserve to be highlighted. First, there is a common agenda between two or more States or, still, an international organization and that such actors are willing to discuss it, with a view to reaching some level of shared understanding. It is also necessary that the States have reached some level of internal consensus in relation to the policies to be adopted, because otherwise, it is practically impossible for coherent action at the international level. Especially due to the fact that currently the negotiation and elaboration of international treaties and conventions is no longer carried out under the exclusive sponsorship of the ministries of foreign affairs or foreign affairs, with the increasing intervention of specific government agencies in environmental matters in the negotiating team. In addition to the state actors

that are undoubtedly the main agents in international negotiations, it is important to note that in the environmental field, the intervention of non-state agents, such as Non-Governmental Organizations (NGOs), financial institutions, scientific societies, transnational corporations, indigenous peoples and traditional populations, and even individuals, although, finally, it is up to States and International Organizations to sign the agreements. However, from the point of view of concrete reality, it cannot be overlooked that, not infrequently, international corporations and NGOs have more real power than so-called *less developed countries* (UNITED NATIONS, 2019b). Economic disparities between States and different views on the very concept of the environment and development, including with regard to the concept of sustainable development, have served as a brake on the implementation of various agreements, mainly due to the vocalization of non-state agents, often, due to the lack of equity between the proposed terms (CORNWALL; EADE, 2010).

Framework conventions demand the creation of new structures for their implementation and inspection, resulting in costs and international bureaucracies. Such structures have different forms, which in general are: (1) secretariats; (2) conferences of the parties as physical structures. In documentary terms agreed: (1) annexes; and (2) other legal instruments.

The framework agreement defines the instruments that will be constituted when they enter into force. For example, the United Nations Framework Convention on Climate Change, in its article 2, establishes that the Conference of the Parties may adopt legal instruments in order to achieve the objectives of the Convention. In turn, articles 7, 8, 9, 10 and 11 establish a (1) Conference of the Parties; (2) a Secretariat; (3) a Subsidiary Body for Scientific and Technological Advice; (4) Subsidiary Implementation Agency; and (5) a financial mechanism linked to the Convention. The Conference of the Parties, created by the Convention [article 7 (2)], is the highest body of the Convention with the task of monitoring its implementation and that of any other legal instruments adopted by the Conference of the Parties, as well as making decisions, as its mandate for the effective implementation of the convention. It is true that the framework conventions gave rise to the creation of complex and expensive structures that have been the subject of much criticism on the part of NGOs that question the spending and its little effectiveness, given that the UN admits that global environment quality is deteriorating (UNITED NATIONS, 2019a).

3 FINALISTIC AND PROSPECTIVE NATURE OF IEL

IEL, as it will be seen in this topic, is finalistic law, aimed at achieving objectives and shaping a future to be built according to the model of environmental, social and economic sustainability. It does not accommodate past situations but seeks to organize the future. These two elements, in conjunction, denote innovative and, at the same time, conservative particularities. Innovative, inasmuch as international agreements aim, as already seen, to improve current environmental conditions and to change production and consumption patterns; conservative, insofar as they aim at maintaining the environmental resources now existing for tomorrow's generations.

3.1 Finalistic nature

For Alexandre KISS (1989), as well as for Dupuy and Viñales (2015), the objective of IEL is the protection of the biosphere against major deteriorations and imbalances that disturb its normal functioning, which the authors recognize to be a complex task. However, when arguing about the final nature of IEL, Kiss recalls that the UNGA (Resolution 2749 (XXV) of December 17, 1970), had solemnly declared that the sea and ocean floor, as well as its subsoils, although beyond the limits of national jurisdiction, and the resources therein, "common heritage of humanity," and their exploitation and exploitation should be done for the benefit of humanity, regardless of the geographic situation of the States. The proclamation was incorporated into the United Nations Convention on the Law of the Sea, article 137 (2).

It is a fact that, currently, the term environment has become a commonplace (RÈMOND-GOUILLOUD, 1989) being used in a random and daily way by the press, politicians, environmentalists and countless people and entities, often without a clear agreement on its meaning. Therefore, the definition of the IEL's object will depend on what is understood by the environment. In Brazilian domestic law, for example, there are two definitions of the environment, the (1) constitutional one in Article 225 of the Constitution of the Republic that defines it as a good for the common use of the people, essential to a healthy quality of life; and (2) the legal one that defines it as the set of conditions, laws, influences and interactions of a physical, chemical and biological order, which allows, shelters and governs life in all its forms. The constitutional definition has

an anthropocentric character, while the legal one emphasizes ecological aspects.

At this point, the dichotomy between anthropocentrism and biocentrism cannot be avoided. Anthropocentrism has humanity as the center of importance over all phenomena, assuming that human beings are separate and independent from physical nature (EBLEN; EBLEN, 1994); in turn, biocentrism admits that every form of life is endowed with equal value. IEL has fluctuated between anthropocentric and biocentric positions, as evidenced from some of its relevant documents. The United Nations Convention concerning the Protection of World Cultural and Natural Heritage signed in Paris (November 16, 1972) simultaneously affirms both conceptions, in accordance with the provisions of its article 2, which protects both works produced by human genius, such as natural and scenic beauties, physical and biological formations that have exceptional universal value, whether from the aesthetic, scientific or conservation points of view.

The Stockholm Declaration, in its Principle 2, is anthropocentric and utilitarian, in saying that natural resources, in particular, representative samples of natural ecosystems must be preserved for the benefit of present and future generations. The Earth Charter, in its article 1, adheres to biocentrism in saying that living beings are interconnected, showing value regardless of their usefulness for Humans.

The World Charter for Nature (UNGA Resolution 37/7 of 28 October 1982) affirmed the importance of protecting ecosystems and nature for the survival of humanity, proclaiming that: (1) Humanity is part of nature, and the life is dependent on the uninterrupted functioning of natural systems, which guarantee the supply of energy and nutrients; (2) civilization needs nature, from which human culture and all artistic and scientific conquests were built, therefore, life in harmony with nature offers Humans the opportunities to develop all their creativity, including rest and leisure. Its five general principles are: (1) nature must be respected and its essential processes must not be harmed; (2) the genetic viability of the Earth must not be compromised; the population level, various forms of life must be at least sufficient for their survival and, to this end, the necessary habitats must be protected; (3) all land areas, terrestrial and maritime, shall be subject to the conservation principles and that special protection should be given for unique areas, for representative samples of all different types of ecosystems and for the habitats of rare species or threatened; (4) ecosystems and organisms, as well as terrestrial, marine and atmospheric resources, used by humans, must be managed in order to achieve and maintain optimal

sustainable productivity, but not in a way that threatens the integrity of other ecosystems or species with which they coexist, and (5) nature must be protected from degradation caused by wars or other hostile activities.

It is also worth mentioning the Earth Charter, which is the result of an initiative by the United Nations World Commission on Environment and Development (Brundtland Commission), which in 1987 launched the well-known report Our Common Future, which contains the concept of sustainable development. In 1994, initiatives taken by Maurice Strong and Mikhail Gorbachev, with the support of the Dutch government, launched the idea for the development of the Earth Charter. In 1997 the Earth Charter Commission was formed. Only in the year 2000 a consensus on its wording was reached, within UNESCO. The Earth Charter, although expressing an international view on environmental issues, is an *in fiere* right, without any normative force.

3.2 Prospective nature

IEL is a law that is not limited to present situations. It is more than a merely reactive Law; its claim is broader: it seeks to dispose for the future. However, this is not an easy task. The link between IEL and the future is made on an anthropocentric basis, as its discourse is basically aimed at "future generations," which has been understood as human generations. In fact, many authors (DUPUY; VIÑALES, 2015; CALVO, 2005) admit the existence of the principle of intergenerational equity, which in summary is the use of environmental resources by present generations, without exhausting them, allowing their future use. The Stockholm Declaration (Principle 1) states that humans have a solemn obligation to protect and improve the environment for current and future generations. The Rio Declaration (Principle 3) is clearer when it comes to intergenerational equity, stating that the right to development must be exercised in a way that equitably meets the needs of development, of the environment and of present and future generations. It is important to note that it is not only in *Soft Law* that the concern for tomorrow's generations can be found, e.g., the Convention on Biological Diversity (CBD) is also focused on the future.

4 NATIONAL STATES AND SOVEREIGNTY

The multilateralism of environmental issues makes it often the case that several States complain about the loss of their sovereignty

due to environmental agreements, as well as feeling harmed due to the growing existence of international organizations dedicated to the subject. This behavior is quite recurrent among emerging and less developed countries, which subsequently show distrust in relation to a new pattern of international governance. As expected in this topic, multilateralism is a characteristic of IEL and certainly cannot be confused with loss of sovereignty, but it is a new form of expression. It is also worth noting the fact that the peculiarities of the environmental theme lead to the entry of new actors on the international stage, such as diverse civil associations, indigenous and traditional peoples and even individuals.

4.1 Role of national States

National states are endowed with sovereignty, that is, they exercise jurisdiction which implies the exercise of political and legal power over their territories and permanent dominion over their natural resources (UNITED NATIONS, 1962). The UNGA Resolution was adopted at the height of the decolonization process when young African nations especially sought to ensure that their natural resources remained under their control and, in theory, could revert in favor of their populations, affirming their independence in the face of ancient colonial powers. This concept has been reaffirmed in IEL, as demonstrated by Principle 21 of the Stockholm Declaration, Principle 2 of the Rio Declaration and Article 3 of the CBD, among other documents. However, in the environmental field, the traditional concept of sovereignty has undergone mitigations that deserve to be mentioned.

States, regardless of their territorial dimensions, economic capacities and population, are legally equal before the international community, as provided for in Article 2 (1) of the United Nations Charter. The peculiarity of the sovereignty concept in IEL originated in 1935, when a Canadian smelter located close to the border of the United States (State of Washington) emitted gases (sulfur dioxide), causing damage to plantations and forests across borders. The United States sued Canada before the Arbitration Court, which upheld the claim, condemning Canada to the payment of compensation and establishing the principle that no State has the right to use or allow its territory to be used in a way that causes damage to other countries or to properties and/or persons from other states. Thus, the concept of international responsibility of States was established.

The imposition of responsibility on States is an arduous issue, given the lack of a global power capable of executing it, at least in relation to the

great powers. In addition, there are evident economic, social and political differences in the international community. This is one of the reasons why there is enormous pressure and even distrust from Developing States and Least Developed Countries in relation to environmental responsibilities. The discussion on global climate change is an excellent example of what is being said, since the emerging and recently industrialized countries claim that most of the GHGs currently in the atmosphere have their origin in developed countries, which in turn maintain that, in the current days, the largest emitters are the emerging ones. In this regard, the outsourcing of emissions should not be disregarded, given the massive transfer of emission activities from developed to emerging countries.

This context serves as a basis for the concept of *common but differentiated responsibilities* that is present, e.g., in Principle 7 of the Rio Declaration, among other international agreements, such as the Paris Agreement in its article 2 (2).

4.2 Common but differentiated responsibilities

The international community recognizes that all its members have a duty to protect the environment and work to improve it. There is, therefore, a common responsibility to all. Differences in levels of consumption, income, use of environmental resources, etc., concretely prevent all States from being equally responsible for the recovery of damage to the environment, or even for its mitigation. It is indisputable that the largest consumers of environmental resources are developed countries, with the greatest responsibility for the necessary recovery and prevention and/or mitigation measures.

The common, however, differentiated responsibilities seek to establish a principle of distributive justice that imposes responsibility on each State, to the extent of its effective contribution to global problems and that distributes the burden for its solution in proportion to the contribution of each State. What is more, the principle recognizes the different capacities of technical, financial and human resources to face global issues, imposing on the better-off States the legal and moral obligation of cooperation, with regard to the transfer of resources in order to achieve the desired solution to global environmental problems.

5 NEW ACTORS ON THE INTERNATIONAL STAGE

The subjects of IEL are the entities endowed with legal personality of Interactional Law, which traditionally are the national States that, at least until the middle of the 20th Century, were basically the European States and those of the American continent. National states, as we know them today, are basically constructions of European origin. After the decolonization process, countless African and Asian States joined the international community autonomously, claiming their own space for action. The environmental issue, which arose in the 1970s at the international level, certainly generates more conflicts between the former colonial powers and the United States with the former colonies.

National States, together with International Organizations, even though they are the main *subjects* of IEL, have been assisted by numerous *actors*, whose roles in the construction and implementation of international agreements are increasingly relevant. Some questions can explain the phenomenon, among which the following can be highlighted: (1) the national States, as European construction, corresponded to the colonial powers and, therefore, were in small numbers and they had to dictate the interactional order; (2) the decolonization process experienced in the 20th century meant that new national states were added to the international scenario, most of them without any relevant military, economic or political capacity; (3) the globalization process has meant that, from a concrete point of view, intermediary groups have emerged in the international arena with economic, financial, political and technical capacities that are often superior to those of the vast majority of States. The Washington consensus, a set of economic measures[2] to be adopted internationally, inspired by the International Monetary Fund and the World Bank, contributed strongly to the reduction of the role and size of States, with repercussions on the international scenario, leading to the strengthening of intermediary institutions. Thus, there was a relativization of the role played by national states in the international context, with the reduction of their protagonism.

In the specific field of IEL, the *relativization* of the role of States presents itself in a dramatic way, since most of the environmental issues are regional or global, which determines that States must "relinquish" part

2 (1) fiscal discipline; (2) public spending focused primarily on health and education; (3) tax reform; (4) raising interest rates; (5) currency appreciation; (6) opening up international trade; (7) facilitation for foreign investments; (8) privatization of public companies; (9) deregulation of economic activity; and, finally (10) respect for private property rights.

of their sovereignty so that, in collaboration with the other parties to international agreements, they can tackle cross-border pollution or protect global biological diversity. This fact leads – as it has been seen in international practice – to the entry of new actors in the international legal scenario, which in a way has generated perplexities and misunderstandings expressed in ultranationalist reactions against a supposed loss of national sovereignty.

5.1 Non-governmental organizations

The participation of Non-Governmental Organizations in global society and international agreements is, as noted by Vernon I. TAVA (2015), part of the globalization process and a consequence of the diminished role of States, both domestically and internationally. Countless powers have been "returned" to society, leading to the idea of governance at the expense of government.

The second half of the twentieth century saw a profound change in international relations and, especially, regarding the environment. The great international environmental accidents,[3] the end of the cold war, the so-called international neoliberalism brought about by globalization, meant that there was a dramatic increase in the exchange of information between countries and people and groups, concomitant with an increase in the flow of capital between the various countries, the accelerated development of China and other Asian countries, with increasing needs for raw materials, implied enormous pressure on natural resources, leading to the emergence of what became known as global civil society that is basically composed of NGOs, indigenous peoples, grassroots activists, etc. Such circumstances had a profound impact on the formation of IEL and, notably, the legitimacy to participate in the different international decision-making processes regarding the preparation of environmental agreements and their accompanying documents.

Global Governance is the sum of the different ways in which individuals and institutions, public and private, manage their common businesses.

3 As examples, it can be cited: (1) pollution and poisoning of fishermen by mercury in the bay of Minamata, Japan in the 50s and 60s of the 20th century, the (2) large oil spills caused by the tankers Torey Canyon and Amoco – Cádiz on the European coasts in the 1960s, the (3) release of chemicals into the environment in Seveso in the 1970s, the (4) release of radiation by the nuclear power plant in Three Mile Island, United States in the 1970s, the (5) chemical pollution in the Love Canal, United States, 1980s, (6) release of chemicals into the environment in Bhopal, India with thousands of deaths, in the 1980s, (6) explosion of the nuclear reactor in Chernobyl, ex -Soviet Union, in the 80s, among many others.

It is an ongoing process by which diverse or conflicting interests can be accommodated and cooperative actions taken. It includes formal institutions and strengthened regimes to ensure that commitments are observed, as well as informal arrangements that people and institutions have agreed to or perceived as of interest to them, as defined by the Global Governance Commission in 1995. The Commission also understood that, at a global level, governance, until then, had been understood as government activity, however, since then, it has been seen as integrated by non-governmental organizations, citizens, movements, multinational companies and the capital market, with the interaction of the international media. The main criticism of global governance is that powers are certainly recognized for entities that do not have the legitimacy of popular vote. In recent years, the concept of governance has been challenged by nationalist movements that question the "loss of sovereignty" and the growing bureaucratization of the international order, as a result of multilateralism. However, it seems to be evident that it is in multilateralism that developing countries find the best way to express their common aspirations to the international community, as it is the only way to balance power in the face of the superpowers.

5.1.1 Legitimation of NGOs

There is much perplexity when observing the participation of NGOs on the international stage. However, there is a legal basis for such participation. The United Nations Charter (article 71) provides that the Economic and Social Council (ECOSOC) may consult with NGOs dedicated to the matters within its competence, through agreements with international organizations and, when applicable, with national organizations, after consulting with UN member states. Resolution ECOSOC 1996/31 establishes the requirements for an NGO to obtain consultative status, after certain requirements have been met, with emphasis on the following: that (1) the NGO has among its objectives a concern with issues within the competence of ECOSOC or its subordinate bodies, that (2) the NGO's objectives and purposes must conform to the spirit, purposes and principles of the UN Charter, that (3) the NGO supports UN action and promotes knowledge of its principles and activities, as its objectives and area of operation. There are currently more than 5,000 NGOs duly registered with ECOSOC. It should be noted that NGOs are not exclusively civil associations formed by militants of a public cause, as they are also admitted business associations formed to

defend legitimate business interests, as in the case of the World Business Council for Sustainable Development. It is also important to note that large international NGOs are global institutions that, to some extent, act in accordance with their institutional and corporate interests. In any case, the performance of NGOs is relevant, as they often operate in countries with low levels of development and, therefore, lacking financial, human and technological resources, compensating for these deficiencies.

NGOs are certainly controversial, as they are often accused of acting for the benefit of foreign powers at the expense of the national interests of the countries in which they operate. Although under the name of NGOs, there are extremely disparate associations between them, in many sectors and countries, environmental protection depends entirely on them. Entities such as WWF, IUCN and so many others have provided invaluable services to the cause of international protection of the environment, and it is certain that, in many regions of the globe, their performance is indispensable.

There is, in a large part of the criticism of the NGOs' actions, a nationalist rancidity and a mistaken view of economic development, unable to understand the urgency of global protection of the environment.

5.2 Individuals and Civil Society

The so-called global civil society, composed of different actors, increasingly plays an important role in the international context. Civil society is a broad concept that encompasses numerous institutions of a diverse nature, ranging from NGOs (aimed at protecting the environment and business) to informal associations, indigenous peoples and other minorities, as well as transnational companies. Individuals have also been recognized for the possibility of international action. Principle 1 of the Stockholm Declaration expressly recognizes the (fundamental) individual's right to enjoy adequate living conditions in an environment of such a quality that allows this individual to lead a dignified life. The Rio Declaration, in its Principle 10, states that the best way to manage environmental issues is to ensure the right of participation, in an appropriate manner, to all interested citizens. At the inter-American level, the Protocol of San Salvador recognizes, in Article 11 (1), the right of every person to live in a healthy environment, equipped with basic public services.

For the exercise of participation rights, several international agreements were established. At European level, the matter is dealt with in the

United Nations Economic Commission for Europe (ECE/UN) Convention on Access to Information, Public Participation in the Decision-Making Process and Access to Justice in Environmental Matters (Aarhus Convention) that establishes the mechanisms for (1) access to information; (2) public participation in decision-making processes; and (3) access to justice in environmental matters. In Latin America and the Caribbean, the Regional Agreement on Access to Information, Public Participation, and Access to Justice in Environmental Affairs of 2018 (Escazú, Costa Rica) was signed.

Transnational private companies also deserve special attention from IEL, being increasingly important actors. As noted by Doumbé-Billé et al. (2013) large corporations play a twofold role in environmental terms, either due to their polluting potential, or because of their technical and financial capacity to offer solutions to environmental problems. The role of companies was expressly recognized by the Johannesburg Declaration (item 29), and the heads of state agreed with the need for private sector corporations to implement their corporate responsibilities, in a transparent and stable regulatory context.

5.3 International Organizations

According to the lessons of Dupuy and Viñales (2015), there are four types of IO, according to the model of their legal creation and their competences. The first (1) is formed by the entities created by a constitutive treaty, with mandate and its main management bodies defined, e.g., (a) International Maritime Organization, (b) World Meteorological Organization and (c) Organization of United Nations for Food and Agriculture. There are organizations (2) created by treaties, however, such treaties do not have the constitution of an IO as primary objective, but the standardization of a sector of international activity, such as, for example, biological diversity; in these cases the institution is created to manage the treaty or convention. Usually conferences of the parties or secretariats are created. A third (3) model is a “by-product” of the previous two, leading to the creation of subsidiary bodies to the agreements, as the case of UNGA or the United Nations Environment Program (UNEP). The fourth (4) model of the International Organization is more informal, since they are not the products of treaties or conventions, directly or indirectly. G20 can be mentioned as an example[4]. International Organizations play an important

4 Informal group made up of the 19 richest countries in the world and the European Union.

role in articulating the international protection of the environment, since the formation of consensus in the sense that protecting the environment globally requires coordination between the different countries and economic blocs.

6 THE LEGAL-ENVIRONMENTAL PRINCIPLES

The general principles of law are sources of law. Guido Fernandes da Silva SOARES (2001) identifies five sources of law, namely: (1) *Jus Scriptum* divided into (a) multilateral treaties and conventions on the environment and (b) acts of intergovernmental organizations; (2) international custom; (3) the general principles of law; (4) International Doctrine and (5) international jurisprudence. For the purposes of this article, only the general principles of law will be examined, insofar as they contribute to the study of IEL principles.

The Statute of the International Court of Justice (ICJ), in its article 38 (a) establishes that the ICJ will decide the cases based on international conventions, whether general or special, that stipulate rules that are expressly recognized by the disputing States. In turn, the letters (b), (c) and (d) of the same article, authorize ICJ to decide based on (b) international custom, as proof of a general practice accepted as being right and in (c) general principles of law, recognized by civilized nations and, furthermore, (d) subject to the provisions of article 59 of the ICJ Statute, judicial decisions and the doctrine of the most qualified jurists from different nations as an auxiliary means for determining the rules of law (ICJ, [s.d.]).

All the sources presented above are subject to the influence of factors outside the law, such as, (1) scientific knowledge; (2) major environmental accidents; (3) the environmental movement; and (4) the economic context. Among the different IEL sources, the principles are the most controversial due to their enormous fluidity and tendency to constant expansion. It aggravates the fact that, in matters of IEL, the word “principles” is used differently in the various international agreements (DOUMBÉ-BILLÉ et al., 2013).

6.1 General principles of law

In short, it can be said that the general principles of law aim to fill the gap between the legal rule and the concrete reality (GARCIA, 2015). They

reflect the consolidation of legal practices and understandings that have been used by the legal community for a long time, mirror the different existing systems of law. The ultimate foundations of a given legal order are called upon to intervene to provide a solution to a specific case if the positive rule does not offer an evident solution. It should be remembered that, among the sources of International Law recognized in the Statute, the general principles of Law are the "most vague" (NASCIMENTO E SILVA, 2002).

However, after the end of the colonial cycle and the recognition of local rights that were subjugated to the colonial order, the question remains: What Law do we speak of and what principles? The fact is that the contemporary legal order, international or domestic, is kaleidoscopic (HESPANHA, 2009).

The conception of law that serves as a basis for discussing general principles is fundamentally the Western one and, in the IPL, that which resulted from colonial structures and the period immediately after the World War 2. Such a situation is clearly expressed in Article 38 (1) (c) of the ICJ Statute when recognizing as general principles of law only those of the "civilized nations." The norm, to all evidence, starts from the assumption that the peoples submitted to the colonial regime did not have structures of social control and organization of life in society that could be classified as Law (KELSEN, 1979), let alone as "Civilized Law." At this point, it is worth recalling Soares' (2001) observation that the drafters of the Statute of the Permanent Court of International Justice (PCIJ), predecessor of ICJ, in the inter-war period, "believed themselves to be representatives of civilization in such a way" that they adjective general principles of law. Kiss (1989) also adds that the concept of civilized nation is contested and controversial.

Western law, the "law of civilized nations" is no longer as sovereign as it was at the time of colonization or intended to be. Nowadays, the indigenous rights have been increasingly recognized, as for example, occurred in the so-called Mabo cases (1 and 2), judged by the Australian Supreme Court, involving lands belonging to the Merian people, an aboriginal group that postulated rights over the Murray Islands, considered *nullius land* (HCOURT, 2019). In Mabo (1) the Australian Supreme Court declared that Australian lands, before the arrival of the English colonists, were not *terrae nullius*, and the Merian people were their rightful owner. In Mabo (2) the Court adopted the doctrine of the native title of property, recognizing

that the aborigines were legitimately expropriated from their traditional lands, admitting the existence of a plural legal order (HESPANHA, 2013). At the international level, Convention 169 of the International Labor Organization on Indigenous and Tribal Peoples (ILO Convention) recognizes peoples "whose social, cultural and economic conditions distinguish them from other sectors of the national community, and which are governed, totally or partially, by their own customs or traditions" (article 1 (1) (a).

The exclusive model of Western law is no longer supported, as anthropology shows us that any society, however "barbaric" and "primitive" it may be, brings with it a sense of order, without which "there is no humanity possible" (ASSIER-ANDRIEU, 2000, p. 98), nor law. The multiplicity of Rights is now a recognized fact and, therefore, the definition of a set of general principles valid for each legal system is an increasingly difficult, if not impossible, task. It follows that the simple recognition of the general principles of law "of civilized nations" is anachronism incompatible with modern reality.

6.1.1 Principles in IEL

As Alexandre Kiss warns us with regard to IEL, the legislative texts "swarm" (1989), and it is necessary for its principles to be identified that there is a consolidation of such documents, with exhaustive research in order to identify the ideas underlying them.

The term "principle" has spread widely in international environmental law, being used interchangeably in documents with varying legal force. For the purposes of this article, the 1972 Stockholm Declaration, which contains 26 principles, is considered as the first major international document to deal with IEL principles. In turn, the 1992 Rio Declaration contains 27, as noted by Handl (2012). It seems evident that such a proliferation of principles, even if proclaimed through non-mandatory documents, indicates that care is taken more about affirming political guidelines than legal norms. It is noteworthy that the Preamble of the English version of the Stockholm Declaration speaks of "common principles to inspire and guide" the peoples, which indicates their inexhaustible guiding nature and no more than that. The Rio Declaration is ambiguous, because despite proclaiming 27 principles, it establishes that principles 15 (precaution) and 16 (polluter pays) are, according to the English language, "approaches"[5] that

5 The Portuguese language versions adopted by Brazil inexplicably translate *approach* by principle.

should be considered by the national authorities. It seems clear that the major environmental conferences, aware of their political and legal limitations, did not use the word principle, as equivalent to "general principles of law" as specified by Article 38, (1) (c) of the ICJ Statute. In fact, such care is clear in the wording of principles 15 and 16 of the Rio Declaration, with the inclusion of the word "approach" in the original version, which also occurs in the French version that uses the term "mesures" (measures) (ANTUNES, 2016).

Environmental agreements also reflect the ambiguity already mentioned. The Stockholm Convention on Persistent Organic Pollutants uses the word approach (article 1), although it refers to Principle 15 of the Rio Declaration; the CBD, in turn, using the word *principle* (article 3), does so in a traditional way, indicating principles fully established in the IPL, such as: (1) sovereignty, " States, in accordance with the United Nations Charter and with the principles of international law, have the sovereign right to exploit their own resources in accordance with their environmental policies," (2) international responsibility, "responsibility to ensure that activities under their jurisdiction or control do not harm the environment of other States or areas beyond the limits of national jurisdiction."

Therefore, *principle* in IEL, it is a polysemic word whose legal value corresponds to that of the international document in which it is inserted. However, it is important to note that there is no consensus in international legal doctrine on (1) the number of principles of International Environmental Law; and (2) on what are the IEL principles. However, the political difficulties that are usually present in the elaboration of international agreements recommend the adoption of open formulas. The more difficult the negotiation, the more open the document that will emerge from it.

It is possible, therefore, to observe that in environmental agreements with mandatory force (treaties and conventions) the use of the term *principle* tends to be made in a conservative and traditional way, being limited to consensual concepts. On the other hand, when it comes to *declarations*, political text and no legal force, the expansion of principles seems to be the rule.

Thus, the cogent agreements recognize principles such as: (1) the principle of sovereignty over natural resources and of not causing damage to third states, goods or people; (2) principle of cooperation; (3) principle of common but differentiated responsibility; (4) the principle of sustainable development. Political declarations, in turn, embrace broader and

more controversial principles such as (1) the precautionary principle; and (2) polluter pays principle. Ultimately, the existence of a list of principles within the framework of international agreements, as defined by the Permanent Court of Justice in the famous Lotus Case, depends on the will freely manifested by the States. At this point, it is convenient to recall the acid criticism formulated by Martine Rèmond-Gouilloud (1989, p. 37) when talking about an "inflation of false sources" and of "great formulas" that, although well-constructed, have no mandatory force. Thus, it is important to avoid a principled metastasis that will be of little use, if any, for the effective application of International Environmental Law.

CONCLUSIONS

IEL is a new branch of IPL that has established itself in the last decades as one of the most innovative instruments for protecting the environment on a global level. It has been constituted over the past 50 years from concrete demands that originate in the phenomenon of transboundary pollution, whose first recognition happens before the second half of the 20th century, resulting from the dispute between two developed countries. The international responsibility of States for damages caused to third parties, due to pollution from their territory, is now widely accepted. However, the disparity between the different members of the international community meant that the concept of international responsibility was mitigated in order to understand that there is a responsibility of all States for environmental protection, which, however, must be proportional to the pollution caused by each Individually considered State and, equally, to its different capacities to face it. Here, one should not forget the question of the sovereignty of States over their natural resources, recognized in mandatory agreements.

International experience has proven the practical impossibility of addressing the environmental issue in a unitary manner, generating the sectorialization of agreements, either by geographic regions or by thematic area. However, the multiplicity of agreements creates concrete difficulties for their implementation, given the lack of harmonization between them, in addition to political, social and economic factors. The construction of specific bodies for the management and implementation of the agreements is another important point of IEL. The structural changes in global economies under the aegis of the Washington consensus, with the weakening of state

entities, brought new actors to the international scene (NGOs, indigenous peoples, etc.) that, in environmental matters, play a relevant role, as well as multinational corporations.

IEL is a principled right, that is, it tends to resort to open principles as a way of accommodating different views on the environment. The principles, however, will be consistent or not, depending on the nature of the international document in which they are inserted. Therefore, there is no need to talk about principles with equal legal value.

The diverse particularities of IEL certainly elevate it to the dignity of an autonomous branch of IPL that gains importance in the modern world. The new conceptions related to development, the participation of society and sovereignty are relevant, as they seek accommodation between States with great differences between them, which, effectively, need to be minimized so that there can be peace between nations and that, through cooperation, serious environmental and social problems can be adequately managed in multilateral *fora*.

IEL, however, is still an immature Law, as its structures still lack the necessary consolidation and stability that allow the Law to offer security to the parties. Finally, it concerns a Law that is a hope for a peaceful solution to the serious environmental problems that plague the planet, as well as a hope for an egalitarian understanding between nations, with a view to solving their common problems.

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