



THE LEGAL RESPONSIBILITY OF A PRIVATE MILITARY COMPANY (PMC) IN AN INTERNATIONAL ARMED CONFLICT UNDER HUMAAPPLICATION OF THE PRINCIPLE OF COMMON BUT DIFFERENTIATED RESPONSIBILITIES IN FULFILLING STATE OBLIGATIONS FOR CLIMATE CHANGE UNDER THE PARIS AGREEMENT ON THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE

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Abstract

Climate change is now an international issue as it affects nations around the world. The Paris Agreement 2015 was established as a form of countries' efforts to reduce climate change. This research aims to find out the application of the principle of common but differentiated responsibilities in the Paris Agreement and its implementation in Indonesian law as a developing country. The research method used is the normative research method with statutory and conceptual approaches. The research results determined that the application of the principle of common but differentiated responsibilities in the Paris Agreement is based on a bottom-up approach. The approach gives the authority to determine targets for each country through the formation of nationally determined contributions containing action plans that will be implemented by a country within the next five years to realize the goals of the Paris Agreement. In its implementation in Indonesian national law, the principle of common but differentiated responsibilities is applied through the NDC which is then realized in several regulations governing capacity building, economic growth, and adaptation and mitigation.

Keywords: Paris Agreement, Common but Differentiated Responsibilities, Climate Change, State Obligations

A. INTRODUCTION

Earth as a place for humans to live has provided all the things needed by humans. Therefore, it can be universally agreed that humans as living beings who have obtained all their needs from the earth and nature should preserve the environment for the sustainability of humanity and prevent extinction. Given the importance of the existence of the environment to the lives of all humans and the rampant problems in the

environmental field, ranging from the occurrence of acid rain, depletion of the ozone layer, extinction of some species of flora and fauna, pollution of water sources and climate change, then as reasonable beings, humans began to make regulations that allow and prohibit certain things that have an impact on the existence of the environment.

As an effort to fulfill the obligations of the state in maintaining the welfare of society, to deal with climate change and environmental conditions, the international community has formed several international agreements to discuss this issue. The United Nations Framework Convention on Climate Change is the agreement used as the basis for international negotiations related to climate change.

Zunnuraeni et al (2023) explained that the purpose of this convention is to stabilize greenhouse gas concentrations in the atmosphere to a level that can prevent the dangers of anthropogenic interventions on the climate system.

In the *United Nations Framework Convention on Climate Change*, there are several principles or mechanisms in the formation of international agreements related to climate change, one of which is the principle of common but differentiated responsibilities, where each country has different obligations in carrying out its role to tackle climate change. This principle implies that development and environmental protection must be balanced with the needs of poverty alleviation and economic growth in developing countries. In addition, this principle also serves as a basic foundation in international negotiations and cooperation in preserving the Earth.

The United Nations Framework Convention on Climate Change has been ratified by 197 countries and resulted in treaties such as the Kyoto Protocol. The Kyoto Protocol is oriented towards reducing the concentration of greenhouse gas emissions by establishing specific targets for industrialized countries in reducing the amount of greenhouse gases. In the Kyoto Protocol there is also the implementation of the principle of common but differentiated responsibilities precisely in Annex I. Annex I states that industrialized countries have an obligation to strive to reduce greenhouse gas emissions, and special mandatory reporting must be carried out in relation to their activities in financial assistance and technology transfer. For these parties only, the convention sets out substantive obligations to establish new and additional financial resources to developing countries, while developing countries are included in Non-Annex I.¹

The implementation of the Kyoto Protocol has been less than successful. Reporting from Enerdata that the amount of carbon emissions from the six countries included in the Non-Annex I Kyoto Protocol, namely Indonesia, Iran, China, India, Brazil, and Russia account for 2/3 of the total world greenhouse gas emissions. China is the largest contributor to global emissions at 25%. Since 1990 the increase in emissions in Non-Annex I countries has increased by 2.8% per year and in 2000 there was an increase of 3% per year.²

However, the increase in greenhouse gas emissions in Non-Annex I countries is not accompanied by equal economic growth. For example, China is listed as a developing

1 Victor, David G, *The Collapse Of The Kyoto Protocol And The Struggle To Slow Global Warming*, Princeton, Princeton University Press, 2001, hlm. 32

2 Enerdata, *An In-Depth Look At GHG Trends In Non-Annex I Countries Ahead Of COP-26*, 10 Mei 2021, <https://www.enerdata.net/publications/executive-briefing/ghg-emissions-trends-developing-countries-cop26.html> , Diakses 18 Oktober 2023, pukul 11.35 WITA

country in the World Trade Organization, but has an economic power that surpasses industrialized countries by becoming the second largest economy in the world. This is due to the rules of the World Trade Organization, which can determine whether a country is a developing or developed country.³ So even though the percentage of Non-Annex I countries' emissions continues to skyrocket and their economies also increase, these countries remain in the category of developing countries and cannot participate in realizing the goals of the Kyoto Protocol. Thus it can be understood that the absence of participation from Non-Annex I countries is certainly one of the factors for the failure of the Kyoto Protocol.⁴

In 2015, the 21st United Nations Framework Convention on Climate Change conference in Paris was attended by 195 countries. The conference resulted in the Paris Agreement, which is legally binding on its member countries. The Paris Agreement has the main objective of keeping the increase in the earth's surface temperature below 1.5 to 2 degrees Celsius. The Paris Agreement was ratified by Indonesia through Law of the Republic of Indonesia Number 16 of 2016 on the Ratification of the Paris Agreement To The United Nations Framework Convention On Climate Change.

In international law, the act of ratifying a treaty has implications, namely the legal obligation of the ratifying party to implement the treaty as well as possible. This is stated in articles 26 and 27 of the 1969 Vienna Convention which states:

Article 26

“Pacta sunt servanda’ Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

Article 27

“Internal law and observance of treaties A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”

Thus, Indonesia's action to ratify the Paris Agreement certainly causes legal obligations, namely to implement the agreement as well as possible by forming policies that support the realization of the objectives of the Paris Agreement. The Paris Agreement also establishes the same principle as in the Kyoto Protocol, namely the principle of common but differentiated responsibilities, but considering the failure of the Kyoto Protocol, one of the factors is the absence of universal participation because developing countries are not obliged to take part, the Paris Agreement made changes related to the mechanism of applying the principle of common but differentiated responsibilities. In the Paris Agreement, it is agreed that all countries have an obligation to take part in realizing the goals of the Paris Agreement, both in adaptation and mitigation, but with different portions of responsibility tailored to their respective economic capabilities, so that this Agreement does not repeat the failure faced by the Kyoto Protocol.

³ Lin Yang, *China: We're Still a Developing Nation. US Lawmakers: No Way*, 8 April 2023, <https://www.voanews.com/a/china-we-re-still-a-developing-nation-us-lawmakers-no-way/7041814.html> , Diakses 19 Oktober 2023, Pukul 10.53 WITA.

⁴ Oberthur, Sebastian & Ott, Hermann. *The Kyoto Protocol : International Climate Policy For The 21st Century*, Berlin, Springer, 1999, hlm. 269

B. METHOD

This type of research is a type of normative legal research, or it can also be referred to as library legal research. There are several approaches used in this research, namely the Statute Approach and Conceptual Approach.

The Statutory Approach is carried out by examining various laws and regulations such as, examining the Paris Agreement or Law of the Republic of Indonesia Number 16 of 2016 concerning Ratification of the Paris Agreement To The United Nations Framework Convention On Climate Change, the Kyoto Protocol, and the Enhanced Nationally Determined Contribution Republic of Indonesia.

The conceptual approach is used by relying on views and doctrines that develop in law, especially in the fields of agreement law and consumer protection law.

C. ANALYSIS & DISCUSSION

1. The Failure of the Kyoto Protocol and its Relationship to the Implementation of the Principle of Common But Differentiated Responsibilities

Kyoto Protocol in applying the principle of common but differentiated responsibilities uses an approach called the top down approach, while the Paris Agreement uses a bottom up approach. This top down approach is an approach that prioritizes regulation from the center or superior body to the parties below it. According to Rafael Leas, there are two indicators of a top-down approach. First, there is a target-based and scheduled system determined by a body. Second, there is a body in charge of determining the distribution of obligations, how to carry out obligations, and providing clear binding targets to the state.⁵

In Kyoto Protocol, the application of the top-down approach is in the form of the establishment of the Conference of the Parties and the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, where this superior body has the right to determine individual targets and then be implemented by Annex I countries. This is stated in Article 7 paragraph 4 of the Kyoto Protocol that

“...The Conference of the Parties serving as the meeting of the Parties to this Protocol shall also, prior to the first commitment period, decide upon modalities for the accounting of assigned amounts.”

However, the drawback of this top-down approach is that there is no fairness in setting targets by member states, making it more difficult to achieve the intended targets.

Member countries in the Kyoto Protocol are divided into developing countries and developed countries which are then divided into Non-Annex 1 countries and Annex I countries. Where Non-Annex I countries do not have binding obligations to reduce their greenhouse gas emissions while Annex I countries have obligations that must be fulfilled by 2008, the obligations are as stated in article 3 paragraph 1 of the Kyoto Protocol which states:

“The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases

⁵ Rafael Leas Arcas, *Top-down Versus Bottom-Up Approaches for Climate Change Negotiations: An Analysis*, The IUP Journal of Governance and Public Policy 6, No. 4, 2011

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.”

For simplicity, it can be understood that Annex I countries need to achieve two types of targets that have been set in the Kyoto Protocol, namely individual targets and collective targets, where individual targets can be interpreted as efforts that must be made by countries to achieve collective targets, and these individual targets are adjusted by each country how they want to achieve collective targets.

An example of individual annex I country targets is that the UK is required to reduce its emissions by 12.5 %, while Japan must reduce its emissions by 6 %. The targets apply to four greenhouse gases, namely carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), and sulfur hexafluoride (SF₆), as well as two gas groups, namely hydrofluorocarbons (HFCs) and perfluorocarbons (PFCs).⁶

As for the joint target of Annex I countries, it is stated in Article 3 paragraph 7 of the Kyoto Protocol, namely: “In the first quantified emission limitation and reduction commitment period, from 2008 to 2012, the assigned amount for each Party included in Annex I shall be equal to the percentage inscribed for it in Annex B of its aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A in 1990, or the base year or period determined in accordance with paragraph 5 above, multiplied by five. Those Parties included in Annex I for whom land-use change and forestry constituted a net source of greenhouse gas emissions in 1990 shall include in their 1990 emissions base year or period the aggregate anthropogenic carbon dioxide equivalent emissions by sources minus removals by sinks in 1990 from land-use change for the purposes of calculating their assigned amount.” Therefore, Annex I countries in meeting their collective targets must achieve a minimum 5 % reduction in emissions from 1990 levels so that the emissions produced by a country do not exceed their assigned amount.

2. The Impact of the Implementation of the Common But Differentiated Responsibilities Principle in the Kyoto Protocol on the Implementation of the Common But Differentiated Responsibilities Principle in the Paris Agreement on the United Nations Framework Convention on Climate Change

Departing from the failure experienced by the Kyoto Protocol, in preparing the Paris Agreement matters relating to the application of the principle of common but differentiated responsibilities must be implemented in a different way or approach to prevent failure as before, as well as due to the rejection of the differentiation system between countries applied in the Kyoto Protocol mechanism.

The Paris Agreement was implemented on December 12, 2015 and then entered into force on November 4, 2016 when it was approved by the three largest emitters, the

⁶ Michael Hopkins, *Kyoto Protocol Comes Into Force*, 16 Februari 2005, <https://www.nature.com/news/2005/050214/full/news050214-7.html>, Diakses 19 Januari 2024, pukul 18.00 WITA

United States, India and China, which together account for 42 % of all Paris Agreement members.⁷

In its implementation, the Paris Agreement uses a bottom-up approach, which is the opposite of the Kyoto Protocol. In practice, the Paris Agreement's bottom-up approach is the opposite of the Kyoto Protocol. Bottom-up approach is basically an approach that prioritizes the involvement of the lowest possible level of organization in the formation of climate policy, which means as low as possible here at the local level but also at the regional and national levels. This approach prioritizes what is easier for a country to implement adaptation and mitigation.⁸

This is because the status quo of the largest emitting countries at the time of the Paris Agreement was different from the Kyoto Protocol era. This approach is based on the idea that policies in determining targets should come from each country and not from the central level, because of course officials in the region who better understand the conditions of the problems being faced.⁹ The implementation of the bottom-up approach is also considered more suitable with the principle of common but differentiated responsibilities because the authority to determine targets is given to each country so that of course the implementation of the principle of common but differentiated responsibilities will run more optimally.

The principle of common but differentiated responsibilities is contained in article 2, paragraph 2 of the Paris Agreement which states: "This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."

This article states the phrase "and respective capabilities, in the light of different national circumstances." This refers to the compromise reached between the United States and China. The compromise has shifted the interpretation of the principle of common but differentiated responsibilities. So that now the qualification of the principle with reference to 'different national circumstances' introduces a dynamic element to its interpretation along with the development of national situations, as well as the same but differentiated responsibilities of states.¹⁰ This is followed by a statement from article 3 which also confirms the application of the principle of common but differentiated responsibilities in the Paris Agreement, which reads:

"The efforts of all Parties will represent a progression over time, while recognizing the need to support developing country Parties for the effective implementation of this Agreement.

Thus, it is clearly reflected that the principle of common but differentiated responsibilities contained in the Paris Agreement is a form of understanding of the conditions that occur at the national scale of a country, which in its implementation

7 Ibid, hlm. 83

8 Steinar Andresen, *International Climate Negotiations: Top-Down, Bottom-Up Or A Combination?*, The International Spectator: Italian Journal of International Affairs, Vol 50, No 1, 2015, hlm. 4

9 Fischer, Miller, dan Sidney, *Handbook of Public Policy Analysis: Theory, Politics, and Methods*, Routledge, 2007, hlm. 92

10 The White House Office of the Press Secretary, *U.S.-China Joint Announcement on Climate Change*, 11 November 2014, [U.S.-China Joint Announcement on Climate Change | whitehouse.gov \(archives.gov\)](https://www.whitehouse.gov/the-press-office/2014/11/11/20141111-us-china-joint-announcement-on-climate-change), Diakses 19 Desember 2023, Pukul 08.56 WITA

uses a mechanism based on a bottom up approach and considers the special rights of each country to sovereign autonomy.

3. Mechanisms for Implementing the Common But Differentiated Responsibilities Principle in the Paris Agreement on the United Nations Framework Convention on Climate Change

The Paris Agreement implements a mechanism called Nationally Determined Contributions. This means that every country that agreed to the Paris Agreement is obliged to form a commitment made by every country that is a party to the Paris Agreement to reduce greenhouse gas emissions and reduce the impact of climate change. Each country party to the Paris Agreement is obliged to submit an NDC that contains emission reduction targets, policies, and actions that will be taken to achieve these targets. which are formed by the country itself and have been adapted to their respective capabilities in tackling the types of climate change problems they face.¹¹ The authorization for countries to form NDCs is a manifestation of the implementation of the bottom up approach and the principle of common but differentiated responsibilities, where each country has obligations but adjusted to their capabilities. In this case, the implementation of the phrase “tailored to their capabilities” is carried out by authorizing countries and state officials to determine their budgets and plans to deal with the climate change crisis.

a. Nationally Determined Contributions mechanism

Nationally Determined Contributions is a climate action plan that contains a country’s commitment to mitigate greenhouse gas emissions with the aim of adapting to climate change caused by greenhouse gases. The NDC outlines a clearly defined plan regarding how the mechanism will be taken to achieve the targets of the plan that the country will implement, such as outlining the system that will be used to monitor the implementation of mitigation and adaptation plans, verifying the progress of the country’s mitigation and adaptation plans, and the funding strategy that will be used to implement the plan.

The NDC qualifications envisioned by the Paris Agreement require high targets, comprehensive coverage, and are based on robust and relevant analysis and data. This is because NDCs aim to assist countries in making transformative changes towards environmentally sustainable development and capacity, and to provide direction in implementing transformation towards environmentally sustainable industrial activities across all sectors of the economy.

Every five years the NDC must be updated by the country to increase the ambition to implement greater emission mitigation and implement adaptation on a larger scale to strengthen the mitigation and adaptation plans that will be implemented in the country to support the accelerated achievement of the Paris Agreement target of reducing the increase in earth’s surface temperature to 1.5 degrees Celsius.¹²

NDCs are updated every five years through a global stocktake. The global stocktake is a platform for Paris Agreement countries to evaluate the programs and plans they have implemented from their NDCs. In addition, the purpose of the global stocktake is

¹¹ United Nation, *All About the NDCs*, <https://www.un.org/en/climatechange/all-about-ndcs> Diakses 14 Desember 2023 Pukul 21.04 WITA

¹² Natural Resource Defense Council, *The Paris Agreement on Climate Change*, Desember 2015, <https://www.nrdc.org/sites/default/files/paris-climate-agreement-1B.pdf> , Diakses 18 Desember 2023, Pukul 20.27 WITA

to gather input from other countries to improve and strengthen their climate policies and commitments in their NDCs. The global stocktake is stipulated in article 14 of the Paris Agreement and was first implemented in 2021 with a data collection agenda and continued until 2023, where in October 2023 a global stocktake was held at the 28th Conference of the Parties held in the United Arab Emirates.¹³

In implementing the principle of common but differentiated responsibilities in the NDC of the Paris Agreement, differentiation adjustments must be made to each field to be implemented in the Paris Agreement such as mitigation, adaptation, finance, technology, capacity building and transparency. This then causes various forms of differentiation in various fields as a form of implementation of the principle of common but differentiated responsibilities.

1) Mitigation Field

The mitigation provisions in the Paris Agreement follow a limited self-differentiation model.¹⁴ Parties to the Paris Agreement, in submitting their NDCs, can determine the scope of their contributions, the form of their contributions, the form of their programs, and the information that will accompany them. This freedom to customize is called self-differentiation because the parties choose their own contributions and tailor them to their national conditions, capacities, and constraints. This allows them to differentiate their plans and programs from every other country. This form of differentiation has come to be known as self-differentiation. Moreover, it is the starting point for differentiation in the mitigation part of the Paris Agreement. However, such differentiation is 'constrained', as there are some normative expectations placed on member states.¹⁵

First, article 4, paragraph 2 of the Paris Agreement states

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

From the wording of the article, it can be understood that many provisions in the mitigation section are not differentiated, especially the main provisions governing behavioral obligations that are individually binding for the parties. Furthermore, the provisions that use differentiation are structured in the form of recommendations and are not binding.¹⁶

Parties are given considerable flexibility, but there are strong normative expectations attached to this flexibility, which serve to discipline and impose limits on the differentiation of responsibilities. There are normative expectations in relation to 'progress' and 'highest possible ambition', and leadership from developed countries.¹⁷

13 Carbon Brief, *What is the 'global stocktake' and could it accelerate climate action?*, 17 November 2023, <https://www.carbonbrief.org/qa-what-is-the-global-stocktake-and-could-it-accelerate-climate-action/>, Diakses 17 Desember 2023, Pukul 19.50 WITA

14 Lavanya Rajamani and Emmanuel Guérin, *The Paris Agreement on Climate Change Analysis and Commentary*, Oxford, 2017 hlm. 84.

15 Ibid, hlm. 85

16 The United Nations, *Paris Agreement*, 2015, Article 4, Paragraph 3.

17 The United Nations, *Paris Agreement*, 2015, Article 13, paragraph 1, 2, 7 and 8.

Thus, the mitigation part of the Paris Agreement applies the principle of common but differentiated responsibilities through limited differentiation. Self-differentiation is a pragmatic choice for mitigation as it provides flexibility, privileges autonomy, and encourages broader participation.

2) Transparency Field

The transparency provisions of the Paris Agreement are based on a flexible system for parties tailored to their capacities. Parties support the adoption of a flexible framework to apply to all countries albeit with 'builtin flexibility' tailored to the different capacities of parties. These provisions place uniform information requirements on parties regarding mitigation and adaptation, but different requirements on support. As parties have different obligations in relation to the support to be provided, the information requirements and review process are also applied according to their respective capabilities. This is addressed in article 13, paragraph 9 of the Paris Agreement where it is explained that

“Developed country Parties shall, and other Parties that provide support should, provide information on financial, technology transfer and capacitybuilding support provided to developing country Parties under Articles 9, 10 and 11.”

Thus developed countries and other countries that provide assistance must provide information transparently in the fields of finance, technology transfer and development to support developing countries. As well as in article 13 paragraph 10 explained that

“Developing country Parties should provide information on financial, technology transfer and capacity-building support needed and received under Articles 9, 10 and 11.”

Therefore, developing countries must provide transparent information regarding aid in these areas to aid-giving countries.

3) Finance

The financial provisions of the Paris Agreement are perhaps the most 'conventional' in the form of differentiation they contain. Developed countries are required to facilitate the provision of financial resources to developing countries as a continuation of their existing obligations under the Convention. They are also required to take the lead in mobilizing climate finance. The Paris Agreement requires developed countries to periodically, every two years, submit information related to the provision and mobilization of finance.¹⁸ This information will be incorporated into a global inventory of collective progress.¹⁹

4) Compliance Division

The compliance committee has the responsibility to pay “special attention to the national capacity and situation of each party”. This is a 'differentiation for all', which can essentially give special consideration to developing countries, based on their capabilities and circumstances, but consideration for developing countries is not

18 The United Nations, *Paris Agreement*, 2015, Article 9 Paragraph 5.

19 The United Nations, *Paris Agreement*, 2015 Article 9 Paragraph 6.

explicitly stipulated. Although some parties have argued for a Kyoto Protocol-style compliance committee. Kyoto Protocol-style compliance committee with facilitation and enforcement branches, with facilitation and enforcement, with the first branch applying to all, and the second branch only to developed countries, the proposal did not gain traction. The compliance committee will take shape when the details are negotiated in the post-Paris negotiations. However, given the nuanced nature of differentiation in the Paris Agreement and the reliance on behavioral obligations rather than outcomes, differentiation in relation to the compliance committee is unlikely to mirror that seen in the Kyoto Protocol compliance committee.

D. CONCLUSIONS

The implementation of the principle of common but differentiated responsibilities in the Paris Agreement is carried out using a bottom-up approach that is in contrast to the top-down approach taken in the Kyoto Protocol. The implementation of this bottom-up approach can be seen from the mechanism chosen, namely the Nationally Determined Contribution, which is a series of action plans that will be implemented by countries to realize the goals of the Paris Agreement. This is a shift from the previous era. This difference is emphasized through the sentence “and respective capabilities, in the light of different national circumstances.” So that now the qualification of the principle by referring to ‘different national circumstances’ introduces a dynamic element to its interpretation along with the development of national situations, as well as the same but different state responsibilities.

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