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# Corruption, global environmental degradation and multinational corporations

## *– Is there a correlation?*

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# Contents

# Summary

The findings of this thesis suggest that there appears to be a bad spiral. In countries with a lot of natural resources and poorly developed socio-economic structures, there is a present tendency to lower environmental protection laws in order to attract foreign investors by creating market oriented regulations. Investors and managers of multinational corporations will reduce production costs by moving the production to countries with lower environmental protection. This perceived bad spiral results in a disincentive for the least developed countries in the world to raise their environmental standards. In combination with the overarching impediment of corruption, the development of international environmental law applied to multinational corporations seems constrained, and the global environmental degradation still remains.

There is empirical research showing the results of increased pollution in developing countries with high levels of corruption, in comparison to developing countries with lower levels of corruption. Specifically, a correlation has been found between corruption and environmental degradation on a micro level. These findings taken up on a macro level might show that the development in international environmental law with a focus on multinational corporations is similar to that seen in the example of Wal-Mart in Mexico.

By assessing the complex structure of corruption and the plethora for it, in combination with the global environmental protection in international law focused on multinational corporations, there might be ways of decreasing the level of corruption and therefore increase the international environmental protection by giving the regulations greater impact through making the rule of law impartial.

The way is still long, but the end-goal is not out of reach.

# Sammanfattning

Upptäckterna i den här uppsatsen föreslår att det finns ett mönster av en negativ spiral. I utvecklingsländer med omfattande naturresurser men mindre utvecklade socioekonomiska strukturer, finns det en tendens att sänka kraven i miljölagarna för att på så sätt kunna attrahera utländska investerare genom att applicera marknadsorienterade regler. Investerare och företagsledare för multinationella företag kommer att minska sina produktionskostnader genom att flytta produktionen till länder med lägre miljökrav, därför är också miljöskyddet lägre. Effekten av den negativa spiralen tar bort incitament för utvecklingsländer att höja miljöskyddet genom mer strikta miljölagar som skulle leda till en förhöjd miljöstandard. I kombination med korruption som ett övergripande hinder för utvecklingen i både samhällen och således också den internationella miljörätten, med fokus på multinationella företag, blir utvecklingen hämmad, och den globala degradationen av miljön är fortfarande närvarande.

Empirisk forskning från utvecklingsländer visar att utsläppen är större i länder med mer korruption, i jämförelse med länder där korruptionen är lägre. Mer specifikt har alltså den empiriska forskningen visat att det finns en korrelation mellan korruption och ökade utsläpp i utvecklingsländer på en mikronivå. Sett till nämnda resultat, upptaget på en makronivå, kan dessa påvisa att påverkan av korruption på den internationella miljörätten med ett fokus på multinationella företag är densamma sett till exemplet med Wal-Mart i Mexico.

Genom att bedöma hur den komplexa strukturen och botemedlet för korruption ser ut, i kombination med det globala miljörättsliga skyddet i internationell rätt, finns det ett par lösningar för att minska korruption, och på så sätt ge de internationella miljörättsliga reglerna större genomslag eftersom att ’the rule of law’ då appliceras opartiskt.

Vägen är fortfarande lång att gå, men slutmålet är inte helt utom räckhåll.

# Preface

To have had the honor of living in Lund and attending one of the best law schools in Sweden makes my heart filled with pride and humbleness. Writing this thesis marks an end of an era in Lund that I will forever take with me when diving into future endeavors.

I will look at this period of my life as a mark of what one can be capable of with the help of the right people, that makes you want to do more and enjoy life at the same time. A great cliché that needs to be cited, however, it is still a cliché for a very good reason.

Furthermore, without the support of my supervisor Moa De Lucia Dahlbeck, I would have not been able to go from idea to this final work that I am presenting to you with pride. Without your help and straightforward communication, my purpose and goal with this thesis would have gotten lost in translation.

Lastly, but far from least, an enormous ‘thank you’ to my friends and family who have proofread this piece, and by doing so, have helped me improve it in so many ways. I will not mention any names due to limit of space, but you know who you are.

I hope you will find this thesis interesting and eye opening; then I have fulfilled part of my purpose in writing this!

Ophelia Wigström,
Lund 23 may, 2018

# Abbreviations

| | |
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| CIEL | Centre for International Environmental Law |
| CPI | Corruption Perception Index |
| CSD | Commission on Sustainable Development |
| GDP | Gross Domestic Product |
| ILC | International Law Commission |
| ICJ | International Court of Justice |
| ICJ Statute | The Statute of the International Court of Justice |
| IT | International Transparency |
| MOU | Memorandums Of Understanding |
| NGO | Non-Governmental Organisation |
| OECD | Organisation for Economic Co-operation and Development |
| UICN | International Union for the Conservation of Nature |
| UNCAC | United Nations Convention Against Corruption |
| UNCED | United Nations Conference on Environment and Development |
| UNESCO | United Nations Educational, Scientific and Cultural Organization |
| VCLT | 1969 Vienna Convention of the Law of Treaties |
| WB | World Bank |

# 1 Introduction

It is commonly presumed that corruption is bad, but perhaps more rarely do we ask for the reason *why* corruption is bad. One reason is that corruption is known to be a large impediment for the development of a society.[1] The main non-governmental organisation (hereafter NGO) working in anti-corruption, Transparency International (hereafter TI), has affirmed this reason by defining that corruption is 'the abuse of entrusted power for personal gain', both in the public and private sector.[2]

In societies where high levels of corruption occur, citizens tend to rely less on the state's ability to provide justice. For Aristotle, justice meant 'treating every case alike',[3] which turned into modern terms, is the same as a states' 'effort to give each person his or her rights'.[4] Morigiwa agrees with this and has defined justice as 'the sustainable effort to give each person his or her rights'.[5]

Social and economic development in a society is dangerously impacted by corruption, leading to the constant state of the poorest in the world remaining poor.[6] In some countries with high levels of corruption, pollution has found to be increased in comparison to the pollution in less corrupted countries. It has been suggested that by decreasing corruption, developing countries might be able to improve their economic and environmental

[1] Yasutomo Morigiwa, '*Making Deivery a Priority:A Philosophical Perspective on Corruption and a Strategy for Remedy*' (2015) 6 The World Bank Legal Review 437.
[2] Transparency International 'what we do', retrieved: <https://www.transparency.org/what-is-corruption>
[3] Britannica Academic, '*justice'*, retrieved: 2018-02-19 <http://academic.eb.com.ludwig.lub.lu.se/levels/collegiate/article/472661>
[4] Cissé, Hassane, Doherty Teresa, Ninio, Wouters, Jan, 'The World Bank Legal Review Volume 6: Improving Delivery in Development – The Role of Voice, Social Contract, and Accountability' (2015,World Bank Group, Geneva) 438.
[5] Yasutomo Morigiwa, '*Making Deivery a Priority:A Philosophical Perspective on Corruption and a Strategy for Remedy*' (2015) 6 The World Bank Legal Review 438.
[6] Hana Ivanhoe, 'The next generation of 'fair trade' – A Human Rights Framework for Combating Corporate Corruption in Global Supply Chains' 157-181 in Bård A. Andreassen and Võ Khán Vinh, *Duties Across Borders – Advancing Human Rights in Transnational Business* (Intersentia Ltd, United Kingdom, 2016) 159.

performance.[7] Welsch has highlighted that reducing corruption can be of 'key importance for improving environmental quality, especially in developing countries'.[8]

From a micro perspective, corruption is an impediment for improving environmental standards in countries that need it the most. In a corrupt society, where each citizen's possibility of a fair and just treatment depends upon his or her status or position, and where the expectation of justice has been replaced by an expectation of similar treatment for everybody with the same *status*, there will become certain elite-groups that monopolize the powers of domination and sources of income.[9] Moving from a micro to a macro perspective, this systemic political behaviour might correlate with the slow development of international environmental protection in the aspect of multinational corporations.

Elis and Lee suggest that in some states, there has been a paradigm shift of power from states to large multinational corporations, where states 'may find themselves constrained in exercising freedom of choice in particular situations involving unequal power relations' between them and multinational corporations. In these situations, much of the control over private actors' activities has shifted from the states to the economic power state of multinational corporations. There are corporations that have larger annual revenues than the GDP of some countries. Such a company is for example General Motors that has larger annual revenue than the GDP of Thailand and Portugal.[10]

[7] Heinz Welsch 'Corruption, growth, and the environment: a cross-country analysis' (2004) 9 Environment and Development Economics 663.
[8] ibid 685.
[9] Alina Mungiu–Pippidi, 'Corruption: Diagnosis and Treatment' (2006) 17(3) Journal of Democracy 88.
[10] Juanita Elias and Robert Lee, 'Ecological Modernisation and Environmental Regulation: Corporate Compliance and Accountability' 163-181 in Sorcha MacLeod, *Global Governance and the Quest for Justice – Volume 2: Corporate Governance* (Hart Publishing, USA, 2006) 181 and 173.

Responding to this paradigm shift is a new type of re-regulation, so called 'market orientated regulations' that involves different types of interventions in the market. Significant for market oriented regulations, compared to standard regulations, is that instead of *requiring* corporations to comply with a specific regulation, the corporations are left to *respond* to it. There are always two sides of the regulation. The first side is that it 'weakens rule-directed models of corporate governance in favour of process altering'. The second side is that this type of re-regulation 'eases state direction of business'.[11] As a consequence, this tendency in less developed countries can lead to the result that domestic laws are being adapted in order to attract corporations from more developed economies, without precautions for environmental degradation.

## 1.1 Purpose and Research Questions

The purpose of this thesis is to investigate if (1) there is any type of correlation between corruption and the development in international environmental law, with a focus applied on the sustainability of multinational corporations. If any type of correlation is to be found, this thesis will (2) focus on if there could be any way to curb the development by using international legal instruments. To contextualise this, the focus of this thesis will lay on international environmental law and sustainable development, corruption and how it eradicates the social contract, and the responsibility of corporations pursuance of sustainable conduction in international environmental law.

Given the purpose of this thesis, the research questions are:

1. Is there a correlation between corruption and the development of international environmental law applied to multinational

[11] Juanita Elias and Robert Lee, 'Ecological Modernisation and Environmental Regulation: Corporate Compliance and Accountability' 163-181 in Sorcha MacLeod, *Global Governance and the Quest for Justice – Volume 2: Corporate Governance* (Hart Publishing, USA, 2006) 169-170.

corporations seen to the globally increased environmental degradation?

2. Would there be a way to curb the development of international environmental law applied to multinational corporations that would at the same time lessen corruption, through use of international legal instruments?

## 1.2 Methodology and Material

The methodology that I have chosen to apply on this thesis is sociology of law. The reason for this is that this method allows an investigation concerning the way of how rules are applied in practice, and furthermore, the effect of the application.[12] Sociology of law was chosen instead of using the traditional legal approach (the legal dogmatic method), which would have allowed only an investigation on the reason behind the laws and how to apply these, whilst sociology allow taking the assessment a step further. There are some elements of the traditional legal method, although it is not the main methodology used in this thesis. Furthermore, the methodology of sociology of law allows assessing international law, corruption and the role of multinational corporations from an external perspective.[13]

In order to make a just assessment of this broad subject, the material that has been used in investigating international law is first and foremost 'Brownlie's Principles of Public International Law', 8th edition, by James Crawford,[14] since this is a recent compilation of the work of a very well renowned scholar in international law, Ian Brownlie. Following, in the area of international environmental law, the material of Ulrich Beyerlin and

[12] Fredric Korling and Mauro Zamboni, '*Juridisk Metodlära'* (Studentlitteratur AB, Lund, 2013) 208.
[13] ibid 209.
[14] James Crawford, *Brownlie's Principles of Public International Law* (8th edition, Oxford University Press, United Kingom, 2012).

Thilo Marauhn, mainly 'International Environmental Law',[15] was of great value when examining the essential building blocks of international environmental law and soft law mechanisms.

The material used in order to assess corruption and contextualise the structure and obstacles of this phenomenon, the work by Bo Rothstein together with Marcus Tannenberg, such as 'Making Development Work: The Quality of Government Approach',[16] was of great use. This work in combination with the articles of Yasutomo Morigiwa,[17] and Alina Mungiu-Pippidi,[18] helped deconstruct corruption and explain how to find a plethora for it. These previously mentioned authors together helped contribute with structures, empirical research and theories on different ways of eradicating corruption and explain how corruption is an impediment to the development of a society.

Furthermore, the material used for assessing the effect of the contemporary international environmental laws, and the effect of corruption in correlation with the environment, was 'The Principle of Sustainability – Transforming Law and Governance' by Klaus Bosselmann.[19] Finally, the material of Juanita Elias and Robert Lee,[20] in combination with the revolutionary work by Polly Higgins,[21] was of great use in analysing potential strategies for making an improvement in strengthening international environmental protection rules.

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[15] Ulrich Beyerlin and Thilo Marauhn, *International Environmental Law* (Hart Publishing Ltd, USA, 2011).
[16] Bo Rothstein and Marcus Tannenberg, *Making Development Work: The Quality of Government Approach* (Elanders Sverige AB, Stockholm, 2015).
[17] Yasutomo Morigiwa, 'Making Deivery a Priority:A Philosophical Perspective on Corruption and a Strategy for Remedy' (2015) 6 The World Bank Legal Review 437-455.
[18] Alina Mungiu-Pippidi, 'Becoming Denmark: Historical Designs of Corruption Control' (2013) 80(4) Social Research – Corruption, Accountability, and Transparency 1259-1286.
[19] Klaus Bosselmann, *The Principle of Sustainability – Transforming Law and Governance* (Ashgate Publishing Ltd, England, 2008).
[20] Juanita Elias and Robert Lee, 'Ecological Modernisation and Environmental Regulation: Corporate Compliance and Accountability' 163-181 in Sorcha MacLeod, *Global Governance and the Quest for Justice – Volume 2: Corporate Governance* (Hart Publishing, USA, 2006).
[21] Polly Higgins, *Eradicating Ecocide – Exposing the corporate and political practices destroying the planet and proposing the laws to eradicate ecocide* (2nd edition, Shepheard-Walwyn (Publishers) Ltd, 2015).

## 1.3 State of research

There is a lot of material on the three different subjects separately, but not overwhelmingly much on how corruption is an impediment to the development of international environmental law applied on multinational corporations. However, there are elements, theories and patterns that can be combined in order to provide a solution. On all three different subjects there are a lot of material and I have tried to extract which scholars that are the most distinguished, mixed with new thoughts that to some extent can be considered to be a bit controversial and new.

## 1.4 Delimitation

International law and international environmental law are enormously large subjects, hence, there are principles, treaties, resolutions, cases, material and much more that are not mentioned due to limitation of space and time in this thesis. The reason why sustainable development has been assessed thoroughly is because this is the founding principle in international environmental law. In addition to this, sustainable development is complemented and strengthened by the 'no-harm principle' and the' polluter pays principle', since these principles provide legal consequences for the state causing harm.

In the case of corruption, it has been given an overview, and not a deepening example of one country, since the focus of this thesis is on the international community. However, the patterns and theories given have been extracted from particular countries that have managed to lessen corruption and restore their social contract.

Finally, why there is a focus on multinational corporations, and not corporations in general, is because multinational corporations are those with

largest resources, and therefore are the ones of interest, since they can make the most impact if change is made.

## 1.5 Disposition

To begin with, chapter 2 provides a short section of definitions in order to orient the reader and clarify some key terms to facilitate further reading.

The following first part of this thesis, chapter 3, is divided into two parts: (1) an overview of the general international law, the most important sources of both international law and international environmental law, and (2) thereafter follows an assessment of sustainable development and its history, sources and interpretation of the concept of sustainable development. Both the importance of state sovereignty and the no-harm principle will be put forth, together with the respective functions of these founding principles. An overview is important in order to give the reader an understanding of the complexity of international law, in what way international environmental law has sprung out of it, they way sustainable development has gained importance the last 40 years, how soft law works and why the main part of international environmental law is built on soft law.

Following this, in chapter 4, a presentation of how corruption deteriorates societies and eradicates the social contract is given. This is contextualising the correlation between corruption and environmental degradation, which is twofold: (1) the lack of legal environmental protection, and (2) how corruption deteriorates these rules by eradicating the social contract, which leads to the effect that the rule of law becomes partial and therefore the rules are no longer respected by all citizens in a society.

Furthermore, in chapter 5, this thesis presents the ways in which multinational corporations can be held responsible in international law. In order to do this, an explanation of the relationship between the multinational

corporation's 'home state' and 'host state' is provided, and the difference in the perspective of responsibility for the multinational corporation. This is essential in order to understand which state bears the legal responsibility and right to hold a multinational corporation accountable for its damaging actions in its own, or another state.

The analysis in chapter 6 is built on what has been presented in earlier chapters and tries to (1) establish a correlation between corruption and increased global environmental degradation caused by multinational corporations, and if (2) it would be possible to curb this development through using international legal instruments, and in what way that would be possible.

The reason for the final chapter, 'concluding remarks', is to provide space to add some personal thoughts and reflections on the subject.

# 2 Definintions

In order to present my arguments in this thesis in the clearest way possible, and before I start to investigate the problem around which this thesis revolves, there are some terms that need to be clarified. The purpose of clarifying these terms is to show in what sense I will employ them in this thesis.

To begin with, the term *sustainable development* within international environmental law is a term that emerged from the report 'Our Common Future' (1987), which is commonly, referred to as the Brundtland Report.[22] It is defined therein as 'development that meets the need of the present without compromising the ability of future generations to meet their own needs'.[23] A development of this is 'emphasizing the importance of integrating environmental protection within economic activity',[24] both definitions will be of relevance.

Secondly, one of the key terms for the content of this thesis is: *corruption.* The definition of corruption that I will adhere to comes from TI, who defines corruption as 'the abuse of entrusted power for private gain'.[25] In comparison with the definition given by the World Bank (hereafter WB), which defines corruption as 'the abuse of public office for private gain',[26] there is an extension in the range of TI's definition because it captures *both* the public and the private sector.[27]

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[22] James Crawford, *Brownlie's Principles of Public International Law* (8th edition, Oxford University Press, UK, 2012) 358.
[23] World Commission on Environment and Development, 'Report of the World Commission on Environment and Development: Our Common Future' (Oslo, March 20, 1987) 41.
[24] James Crawford, *Brownlie's Principles of Public International Law* (8th edition, Oxford University Press, UK, 2012) 364.
[25] Martine Boersma, *Corruption: A Violation of Human Rights and a Crime Under International Law?* (Intersentia Ltd, UK, 2012) 27.
[26] ibid 28.
[27] ibid 27-28.

Finally, the third term that needs to be clarified is *corporate governance*. The Organisation for Economic Co-operation and Development (hereafter OECD) has taken their definition of corporate governance from the European Central Bank. They define it 'as the procedures and processes according to which an organisation is directed and controlled. The corporate governance structure specifies the distribution of rights and responsibilities among the different participants in the organisation – such as the board, managers, shareholders and other shareholders – and lays down the rules and procedures for decision-making',[28] which is the definition that will be used in this thesis, and will mainly be of importance for chapter 5.

[28] European Central Bank, 'Annual Report 2004' (ISSN 1725-2865, Germany, 2004) 220.

# 3 Sustainability in international environmental law

In order to be able to assess properly the instruments of international environmental law, I must first provide the reader with an overview of the structure of international law. I have divided this chapter in two parts due to the fact that international environmental law is sprung out of international law. It is more pedagogic to first provide a description of international law and then continue into international environmental law, how soft law works, sustainable development and the most important principles in international environmental law. This is important and will be used in order to provide solutions in the following analysis in chapter 6.

## 3.1 PART I – The structure of international law

International law is the legal structure for dealing with the relationship and interactions between states.[29] International law is created horizontally, which means that there is no supra-state law-maker but rather the states themselves that decide what rules they should be bound by through international customary law and/or international conventions and treaties.[30] International law for instance regulates issues concerning international borders between states, and the use of force among states.[31] During the course of the 20th century, international law expanded so to include international organisations of universal membership with treaty-making powers, such as the United Nations (hereafter UN). This development led *inter alia* to the possibility to settle international disputes in permanent

[29] Vaughan Lowe, *International Law – A Very Short Introduction* (Oxford University Press, UK, 2015) 18.
[30] ibid 19.
[31] ibid 18.

bodies (including disputes between states and private bodies) and to the recognition and emergence of international environmental law.[32]

International law is not just sets of rules; it has the characteristics of a system. The issues of sources of international law, legal personality, interpretation of treaties and rules, and state responsibility are providing a framework for where rules can be generated, how they can be applied and what body has the jurisdiction to adjudicate. According to Crawford, this system is institutionally deficient, due to the absence of 'a legislature with universal authority and the consensual basis for judicial jurisdiction that reinforce the voluntarist and co-operative character of most international law most of the time'.[33]

### 3.1.1 The main sources of international law

There are four sources of law listed in article 38(1) in the Statue of the International Court of Justice (hereafter ICJ Statute); (1) customary international law; (2) treaties; (3) general principles of law; and (4) 'judicial teachings of the most highly qualified publicists of the various nations, as a subsidiary means for determination of rules of law'.[34] These sources of international law are said to lack any hierarchy. Despite this, customary international law and treaties are usually considered as the two main sources of international law.[35]

#### 3.1.1.1 International customary law

There are two keys in establishing international customary law. The first one lies in the regularity of a certain, identified practice. It is of great importance that there is 'no significant divergent practice or opposition to

[32] James Crawford, *Brownlie's Principles of Public International Law* (8th edition, Oxford University Press, UK, 2012) 6.
[33] ibid 16.
[34] ibid 6.
[35] Vaughan Lowe, *International Law – A Very Short Introduction* (Oxford University Press, UK, 2015) 19.

the rule'.[36] The requirement for a practice to be considered customary international law is substantial uniformity, not complete uniformity. Nor is a long practice necessary, if the substantial uniformity is installed and if the practice has been 'extensive and virtually uniform of the provisions invoked'.[37]

The second key to create international customary law is *opinio iuris*. There are numerous ways to find out what *opinio iuris* is: see what state officials are saying in relation to the application of a certain rule, searching for clear statements from governments on the view of a certain rule, or in the literature of international law.[38] The ICJ construe *opinio iuris* from its own judgements, from other tribunals' judgements, from a general practice or from scholarly consensus.[39] Customary international law is a powerful instrument, although it can be imprecise and time consuming to create.[40]

#### 3.1.1.2 Treaties – codified international customary law

International law can be codified in treaties.[41] These codifications can be resolutions of the United Nations (hereafter UN), the conclusions of international conferences, and drafts adopted by the International Legal Commission (hereafter the ILC). The drafts adopted by the ILC 'have direct influence on the content of law'.[42]

The most common way to create a treaty is when states enter into bi- or multilateral negotiations, where the desirable outcome would consist of a

[36] Vaughan Lowe, *International Law – A Very Short Introduction* (Oxford University Press, UK, 2015) 21.
[37] James Crawford, *Brownlie's Principles of Public International Law* (8th edition, Oxford University Press, UK, 2012) 24.
[38] Vaughan Lowe, *International Law – A Very Short Introduction* (Oxford University Press, UK, 2015) 22.
[39] James Crawford, *Brownlie's Principles of Public International Law* (8th edition, Oxford University Press, UK, 2012) 26.
[40] Vaughan Lowe, *International Law – A Very Short Introduction* (Oxford University Press, UK, 2015) 28.
[41] ibid 25.
[42] Ian Brownlie, *Principles of Public International Law* (7th edition, Oxford University Press, United States, 2008) 12.

new treaty.[43] The essential source of obligations in international law is treaties,[44] which are agreements between states that are legally binding. States use treaties to set out their rights and obligations in a clear and precise manner. Even though some treaties have taken years to negotiate, making treaties are faster than waiting for new customary international law to arise.[45]

In the entering of a treaty, states have the possibility to make reservations through clauses on what not to apply from a treaty,[46] commonly known as 'opt-outs'.[47] This is a way of assigning more states to a treaty without having to compromise the content of the treaty; instead the width of application is compromised.[48] The modifications will only be applied in the relationship between the states that have agreed to enter into the treaty. Guidance on how to create, interpret, terminate and validate a treaty is governed by the 1969 Vienna Convention of the Law of Treaties (hereafter VCLT).[49]

The eighth paragraph of the preamble of the VCLT states that the rules of customary international law govern questions not regulated in the VCLT. However, the extent to exactly how much of the customary international law that is regulated by the VCLT is unclear, since states, non-parties of the VCLT, courts and tribunals rely upon the VCLT in negotiations and before concluding a treaty.[50] As of March 2017, only 114 states out of the UN's 193 members are parties to the VCLT. The United States signed the convention in 1970 but the Senate did not approve the convention as required by the UN, despite this the United States generally considers 'many

[43] Vaughan Lowe, *International Law – A Very Short Introduction* (Oxford University Press, UK, 2015) 28, 30-31.
[44] James Crawford, *Brownlie's Principles of Public International Law* (8th edition, Oxford University Press, UK, 2012) 30.
[45] Vaughan Lowe, *International Law – A Very Short Introduction* (Oxford University Press, UK, 2015) 28, 30-31.
[46] ibid 31-32.
[47] ibid 28, 32.
[48] ibid 31-32.
[49] ibid.
[50] Anthony Aust, *Vienna Convention on the Law of Treaties (1969)* (Max Planck Encyclopedia of Public Law, UK, 2015, MPEPIL 1498) F,1,14.

provisions' of the VCLT to constitute customary international law on the law of treaties.[51]

The general opinion of the history of the VCLT are that it constitutes a codification of the 'pre-existing practices, precedents and doctrines', however, some elements were added or created by the ILC with the intention of transforming them into an integral part of international customary law and the law of treaties with the intent that these provisions would 'involve progressive development in international law.[52] Through this division, the codification of international law and the provisions which involve progressive development of international law, the conclusion arises that not all provisions of the VCLT constitutes international customary law. This is the reason why the United States does not recognise 'all' provisions of the VCLT as customary international law, but only 'many provisions'. At the present time it is not clear exactly which provisions of the VCLT that constitute customary international and which do not.[53]

A state becomes part of a treaty by ratification.[54] As a result of not ratifying a treaty, a state cannot invoke the dispute settlement provisions in the treaty, nor can it be protected from other states misbehaving against the treaty. However, if a customary international rule is arguably the same as in the treaty, the state has the right to invoke the provision in question.[55]

The propositions from the ILC that do not become treaties can instead be adopted as *resolutions*, and become noted by the United Nations General Assembly (hereafter UN General Assembly). Resolutions from the UN General Assembly may be influential when referred to by courts, tribunals and diplomats, leading to the resolutions being considered as authoritative

[51] Chang-fa Lo, *Treaty Interpretation Under the Vienna Convention on the Law of Treaties – A New Round of Codification* (Springer, Singapore, 2017) 34-35.
[52] ibid 38.
[53] ibid 39.
[54] Vaughan Lowe, *International Law – A Very Short Introduction* (Oxford University Press, UK, 2015) 25.
[55] James Crawford, *Brownlie's Principles of Public International Law* (8th edition, Oxford University Press, UK, 2012) 33.

statements of international law.[56] Despite the referrals, a resolution cannot make international law. This does not mean that resolutions have no legal significance at all, since they are cited as convenient pronunciations of the rules within international law. Some resolutions bear an enormous amount of weight due to hard and long negotiations in attempts to try and articulate a foundation for international law.[57]

### 3.1.2 The main source of international environmental law

International law is the only tool at our disposal for addressing international environmental problems and the main part of the regulations consist of soft law. The environment is both indivisible and divided, at the same time it is shared and partitioned.[58] 'Soft law' qualifies as 'agreements without immediate international binding force'.[59]

International rules and principles from treaties and customary international law can be very broad. Hence the existence of other instruments that have worked out the technicalities and mediated these rules, in order to give a more detailed meaning when the rules are to be implemented. For example, would there be a difference between a ship that discharges 1 000 litres of oil during a world-wide voyage, or a ship that discharges the same amount into one port? In this case, detailed measures of implementation set out by industrial, commercial, scientific groups or NGOs can provide for the answer. This segment is referred to as 'civil society' in international law. Civil society articulates a collective opinion, which influences international law and in some cases the need to negotiate entirely new treaties.[60]

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[56] Vaughan Lowe, *International Law – A Very Short Introduction* (Oxford University Press, UK, 2015) 26.
[57] ibid 34.
[58] James Crawford, *Brownlie's Principles of Public International Law* (8th edition, Oxford University Press, UK, 2012) 333.
[59] Ulrich Beyerlin and Thilo Marauhn, *International Environmental Law* (Hart Publishing Ltd, USA, 2011) 16.
[60] Vaughan Lowe, *International Law – A Very Short Introduction* (Oxford University Press, UK, 2015) 36-37.

Soft law norms have developed through norm-setting processes. Soft law has been set out in order to guide behaviour, but is not of binding character.[61] It is sometime hard to draw the line between 'hard' and 'soft' norms since soft law can be used in practical legal reasoning of courts, states and other international actors.[62]

The forms, functions and provenance are significantly different among soft law instruments. States, international organisations and international institutions make use of soft law instruments as tools to protect the environment. Actively involved international organisations in protecting the environment also adopt resolutions and declarations, which are non-legally binding.[63]

Within soft law there is a 'subtype' referred to as 'legally non-binding agreements' made between states, which have replaced the former notion of 'gentlemen's agreements'. This type of agreement was commonly made between states when there was an urge to reach rapid understanding without entering into legal commitments. Legally non-binding agreements have gained particular importance in the realm of international environmental law. These agreements can be categorised into following groups of arrangements; (1) accords on provisional treaty implementation; (2) codes of conduct replacing international legally binding rules; (3) political declarations on existing or emerging environmental principles and rules; and (4) political action programmes.[64]

Another subcategory of soft law is memorandums of understanding (hereafter MOU), which are adopted when organisations and/or members of environmental agreements wish to co-ordinate individual efforts or to

[61] Daniel Bodansky et al, *International Climate Change Law* (Oxford University Press, United Kingdom, 2017) 36.
[62] ibid 38.
[63] Ulrich Beyerlin and Thilo Marauhn, *International Environmental Law* (Hart Publishing Ltd, USA, 2011) 291.
[64] ibid 291.

undertake joint action in a specific matter.[65] MOUs have arisen through the fact that not all international organisations have the international legal capacity to enter into treaties, or for initiation of treaty-making. Even in cases where parties have the legal capacity required for treaty-making they might prefer entering into a MOU, since it is more flexible compared to a treaty that needs to be approved by, and ratified by the domestic government, which easily becomes a drawn-out process.[66]

The last subcategories of soft law are resolutions or declarations, which are used when international organisations express their will in documents of non-legal character. Resolutions and declarations do not fall under the scope of article 38(1) in the ICJ Statute, since they do not constitute any type of new or general source of international law. However, resolutions and declarations can have a powerful impact on the future and further development of international law, especially those adopted by consensus or unanimous vote in the UN General Assembly.[67]

Resolutions and declarations adopted by the UN General Assembly through consensus, or even through unanimous vote, results in giving the documents a lot of weight in the international community. The resolutions and declarations from the UN General Assembly are always of recommendatory character, but can be one out of two characters: either (1) they are imposing broad environmental or development policy goals, like the World Charter for Nature,[68] or (2) they are guidelines designed to steer the behaviour of states, like Resolution 62/98 named 'Non-Legal Binding Instrument on All Types of Forests'.[69]

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[65] Ulrich Beyerlin and Thilo Marauhn, *International Environmental Law* (Hart Publishing Ltd, USA, 2011) 291.
[66] ibid 294.
[67] ibid 295.
[68] United Nations General Assembly, 'World Charter for Nature' (A/RES/37/7, New York, 1982)
[69] Ulrich Beyerlin and Thilo Marauhn, *International Environmental Law* (Hart Publishing Ltd, USA, 2011) 296.

Beyerlin and Marauhn put forth that a minority of scholars have argued that some soft law instruments, such as the Stockholm Declaration and the Rio Declaration, might express an *opinio iuris*. They however agree that both declarations and resolutions 'contains an impressive corpus of existing and emerging norms of the Centre for International Environmental Law' (hereafter CIEL). The fact that some soft law instruments have functioned as catalysts for initiations of treaty-making makes the statement not entirely irrelevant. An example of such an instrument is the 1983 Food and Agriculture Organisation of the United Nations' International Undertaking on Plant Genetic Food and Agriculture, which led to the 2001 Treaty on Plant Genetic Resources for Food and Agriculture. In addition to this, another purpose of soft law is to urge actors operating in international law to take certain actions or to behave in a certain way.[70]

The Rio Declaration belongs to the various soft law instruments in international environmental law. It is however clear that that some of the Rio Principles are customary international norms, whilst other principles are much further down in the hierarchy of international environmental norms. If principles are able to 'produce direct or indirect steering effects on the addressees' behaviour', they can reach normative qualities and be considered to be part of customary international law. The principles considered to be part of customary international law are the 'no-harm principle', the 'polluter pays principle', the 'precautionary action principle', the 'common but differentiated responsibility', the concept of 'sustainable development', and the 'intergenerational equity principle', which are said to resolve the structure and objectives of international environmental law.[71]

Despite the fact that resolutions or declarations have been adopted unanimously, they cannot be used as a base for claiming them to be an expression of, nor evidence of, *opinio iuris*. The only way to argue that a resolution or declaration is an expression of *opinio iuris* is if the behaviour

[70] Ulrich Beyerlin and Thilo Marauhn, *International Environmental Law* (Hart Publishing Ltd, USA, 2011) 291-294.
[71] ibid 34.

enacted in the documents has been observed by states in consecutive practice.[72]

### 3.1.3 Why soft law?

One of the reasons why states prefer using soft law instruments could be that a current situation needs a quick solution. A soft law instrument is faster to negotiate, and often does not face difficulties in obtaining national parliamentary approval, or any other national process. Another reason might also be that this type of arrangement allows for action despite a state's unwillingness to enter into a legally binding arrangement. Following this, a non-legally binding agreement such as a soft law instrument can allow for a transitory solution for future entering into a legally binding agreement. Finally, it requires less effort to withdraw from a non-legally binding agreement than from one that is legally binding.[73]

Soft law is not to be understood as mere politics, since it has to meet the same criterion as hard law, in the sense that soft law needs to have the 'capacity to steer directly and indirectly the conduct of its addressees'.[74] Hence, hard law and soft law often complement each other. It is this normative quality of soft law that distinguishes it from being mere politics or moral ideals. Non-compliance with soft law does not provoke a legal response, which stands in contrast with hard law. It will however provoke an international moral order, which means that breaches of soft law are of political and not legal nature. Nonetheless, occasionally there is supervision put in place to ensure compliance of soft law instruments that will activate a remedy.[75]

[72] Ulrich Beyerlin and Thilo Marauhn, *International Environmental Law* (Hart Publishing Ltd, USA, 2011) 296.
[73] ibid 290.
[74] ibid.
[75] ibid.

## 3.2 PART II – The evolution of sustainable development in international environmental law

This second part of chapter 3 aims to deconstruct the concept and principle of sustainable development. Furthermore, in assessing the most essential principles that international environmental law revolves around, the purpose of this part is to provide an understanding of complexity of this area of international law. Lastly, this part will also contribute to build a foundation for the upcoming analysis in chapter 6.

### 3.2.1 Sustainable development – from then to now

Sustainable development is a concept sprung out of the field of international environmental law. In what follows I will present a timeline on how novel the concept is, how it came to be, and the contemporary interpretation and use of it.

A core principle in international environmental law is sustainable development,[76] which is argued to be 'a crucial political concept that governs virtually every sphere of activity aimed at balancing and integrating economic, social and environmental policies'.[77] In order to uphold this principle, the role of the state to actually achieving sustainable development is vital. Achieving sustainable development has been argued by Litfin to be threatened by issues of democracy,[78] which might correlate with the eradication of the social contract caused by corruption.

[76] Ulrich Beyerlin and Thilo Marauhn, *International Environmental Law* (Hart Publishing Ltd, USA, 2011) 35.
[77] ibid 76.
[78] Karen Litfin, *The Greening of Sovereignty in World Politics* (MA:MIT Press, Cambridge, 1998) 136.

From the first convention in international environmental law, Convention between France and Great Britain relative to the Fisheries (1867), up until 1972, a shift in theoretical approach from a 'utilitarian' (anthropogenic) to an 'ecological' approach in international environmental law can be detected.[79] Following this, two main characters can be subtracted from the International Environmental Law *pre* 1972, which are (1) important sub areas are not yet regulated by treaties and conventions such as air pollution and handling hazardous waste, and (2) environmental treaty making was dominated by industrial states, which meant there was no reference to the developing countries and their societies, economical or social needs.[80] The contemporary international environmental law contains growing consciousness of the environmental threats caused by unprecedented global economic development, such as technological changes, expanded economic activities and the changing of the philosophical and ethical consensus.[81]

The concept of sustainable development is novel; it dates back only to the beginning of the 1970s. The first landmark in the history of sustainable development was at the environmental conference in Stockholm 1972, when the linkage between environmental protection and economic development was acknowledged. This acknowledgement can be found in the UN Stockholm Declaration (1972), more precisely in principles 9,10 and 11. The principles in the declaration had to be understood as 'compatible and mutually reinforcing goals'. Eight years later, the UN stressed in the UN General Assembly Resolution 35/56 on the International Development Strategy for the Third UN Development Decade of 5 December 1980, paragraph 41, that accelerated development in developing countries was needed in order to enhance their capacity to improve their environment. Furthermore, the importance of avoiding more future environmental

[79] Ulrich Beyerlin and Thilo Marauhn, *International Environmental Law* (Hart Publishing Ltd, USA, 2011) 3-7.
[80] ibid 7.
[81] ibid 3-7.

degradation was put forth, in order to be able to provide future generations with a sound environment.[82]

The second landmark in the history of the concept of sustainable development followed in 1987, when the World Commission on Environment and Development released their report 'Our Common Future', which is commonly referred to as the Brundtland Report. The definition of sustainable development found in the report is as follows: 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[83] This is the most commonly cited definition of sustainable development,[84] and refers to improving the quality of life in communities and for human beings through a process of change. Crawford states that it is said to be sustainable development when the integration of environmental, economic and social considerations provide for and protect the wellbeing of populations in a long-term perspective.[85]

The third landmark in the history of the concept of sustainable development was at the 1992 United Nations Conference on Environment and Development (hereafter UNCED) in Rio de Janeiro, where the Stockholm Declaration and the Brundtland Report together amongst other factors, laid the foundation to the Rio Declaration (1992) and Agenda 21. The aim of the Rio Declaration and agenda 21 was to establish 'a new global partnership for sustainable development' in the world.[86]

The aim of the UNCED conference in Rio de Janeiro was to establish 'a new global partnership for sustainable development'. Agenda 21 led to the creation of the Commission on Sustainable Development (hereafter CSD)

[82] Ulrich Beyerlin and Thilo Marauhn, *International Environmental Law* (Hart Publishing Ltd, USA, 2011) 73.
[83] ibid 74.
[84] World Commission on Environment and Development, 'Report of the World Commission on Environment and Development: Our Common Future' (Oslo, March 20, 1987) 41.
[85] James Crawford, *Brownlie's Principles of Public International Law* (8th edition, Oxford University Press, UK, 2012) 358.
[86] Ulrich Beyerlin and Thilo Marauhn, *International Environmental Law* (Hart Publishing Ltd, USA, 2011) 74.

that was designated to enhance and rationalise the decision-making capacity on international environmental and development issues, and to ensure the pursuance of the conference in Rio de Janeiro. The UNCED marked the beginning of this new concept, and the creation of CSD showed a determination to implement it.[87]

The forth landmark in the history of the concept of sustainable development was in September 2000 when the UN General Assembly adopted the Millennium Declaration,[88] where goal 7 was entirely focused on environmental sustainability, which reaffirmed the UN General Assembly's support for sustainable development.[89] Following this, during the 2002 World Summit in Johannesburg, the UN declared sustainable development to be a key component for their activities. Furthermore in Johannesburg, it was established that the concept of sustainable development consisted of three components working as mutually reinforcing pillars, which are linked to one and another; (1) economic development; (2) social development; and (3) environmental protection,[90] reaffirming Crawford's statement.[91] The issue of corruption was highlighted at the Johannesburg conference as an impediment for the development of a society at the conference, where the participating states were given an opportunity to 'express their determination to attack corruption'.[92]

When the UN General Assembly unanimously adopted the 2030 Agenda in 2015, the three pillars of sustainable development were reaffirmed. The 2030 Agenda is meant to function as 'a plan of action for people, planet and prosperity', where 'eradicating extreme poverty in all its forms and dimensions, including extreme poverty, is [recognized to be] the greatest

[87] Ulrich Beyerlin and Thilo Marauhn, *International Environmental Law* (Hart Publishing Ltd, USA, 2011) 74.
[88] UNGA Res 55/2 (September 2000)
[89] Ulrich Beyerlin and Thilo Marauhn, *International Environmental Law* (Hart Publishing Ltd, USA, 2011) 75.
[90] ibid 76.
[91] Chapter 3.2.1, 23.
[92] United Nations, 'United Nations Convention Against Corruption' (New York, 2004) iv.

global challenge and an indispensable requirement for sustainable development'.[93]

The outcome of these four landmarks has concluded the definition of the concept sustainable development as a notion of; (1) the linkage between environmental protection and policy goals of social and economic development; (2) environmental protection as a qualified integral part of any development measure; and (3) the long-term perspective of 'state's intergenerational responsibility' that widens the dimension of sustainable development.[94] In addition, sustainable development has become an often included objective in regional integration treaties and general economic treaties.[95]

Since the states wanted to stay away from the ethics it would take to create a universal charter for sustainability, civil society took it upon itself to initiate the work and produce the Earth Charter (2000) as an ethical framework for a sustainable, just and peaceful future. According to Bosselmann, the creation of the Earth Charter brought back the true meaning of sustainability, which he means got lost after the Brundtland Report. The Earth Charter has been referred to as the 'universal charter' that has been needed ever since 1987. The two main building principles of the charter are (1) 'respect and care for community life', and (2) 'ecological integrity', which are said to shape and give meaning to the concept of sustainability. Both the United Nations Educational, Scientific and Cultural Organization (hereafter UNESCO) and the International Union for the Conservation of Nature (hereafter IUCN) have endorsed the Earth Charter, and it was also used for the United Nations Decade of Education for Sustainable Development (2004-2014). These endorsements and uses of the Earth Charter are significant. Bosselmann

[93] United Nations, 'Resolution adopted by the General Assembly on 25 September 2015 – Transforming our world: the 2030 Agenda for Sustainable Development' (A/RES/70/1, New York, 2015) preamble para 1.
[94] Ulrich Beyerlin and Thilo Marauhn, *International Environmental Law* (Hart Publishing Ltd, USA, 2011) 79.
[95] James Crawford, *Brownlie's Principles of Public International Law* (8th edition, Oxford University Press, UK, 2012) 358.

argues that sustainability has come to reach a status that allows for an examination of its legal status, he has even compared sustainability to be in the same rank as the fundamental norms of justice and freedom,[96] since 'sustainability has the historical, conceptual and ethical quality typical for a fundamental principle of law'.[97]

In the *Case Gabçikovo-Nagymaros Dam (Hungary/Slovakia)* from 1997 the ICJ agreed that sustainable development 'is a principle with normative value'.[98] By referring the parties to look at their case anew with consideration of the effects on the environment from the Gabçikov power plant, and in combination with previous statements, the ICJ did confirm that the concept of sustainable development has a legal function.[99]

### 3.2.2 The importance of state sovereignty

In the beginning of the 20th century state sovereignty was assigned unique value in the international sphere. At this point it was thought that international law was highly dependent on the express or limited consent of states, in the pretext that international law could not operate under the consent from human beings. Hence, states were thought to be the sole and exclusive subjects of international law.[100]

State sovereignty refers to the 'collection of rights held by a state', whereas the entitlement to exercise control over its territory and the capacity to represent the territory and its people internationally. Specifically, state sovereignty characterises 'powers and privileges resting on customary law which are independent of the particular consent of another state'. It is the

[96] Klaus Bosselmann, *The Principle of Sustainability – Transforming Law and Governance* (Ashgate Publishing Ltd, England, 2008) 2-3.
[97] ibid 4.
[98] *Case Concerning the Gabçikovo-Nagymaros Project (Hungary/Slovakia)*, 1997 ICJ, 37 ILM 162 (1998).
[99] Klaus Bosselmann, *The Principle of Sustainability – Transforming Law and Governance* (Ashgate Publishing Ltd, England, 2008) 56.
[100] James Crawford, *Brownlie's Principles of Public International Law* (8th edition, Oxford University Press, UK, 2012) 5.

basic constitutional doctrine of international law. This means that the doctrine governs 'a community consisting primarily of states having, in principle, a uniform legal personality'. Naturally, following from state sovereignty is a *prima facie* (presumptively) exclusive jurisdiction over a territory and its permanent inhabitants living there, the duty of non-intervention in the area of exclusive jurisdiction of other states, and the dependence upon consent of obligations arising from either treaties, or international customary law.[101]

From state sovereignty emerges equality of states. This is a *prima facie* (presumptively) exclusive jurisdiction over a territory and its permanent inhabitants living there, the duty of non-intervention in the area of exclusive jurisdiction of other states, and the dependence upon consent of obligations arising from either international customary law or treaties.[102]

Despite the established notion of state sovereignty, it is often a target for conflicts within international law and can be summed up in terms of the co-existence and conflict of state sovereignty. It is argued by Crawford that another perspective of state sovereignty can be that it implies discretionary powers within certain limited areas determined by law. Although the states' capacity of deciding the conditions for nationality and determining the conditions for their borders for the territorial sea, the powers to do so are still depending on the compliance and conditions of international law. The principle of sovereignty and sovereign rights are often referred to as the legislative competence of a state over its national territory, thus it is connected to the question of jurisdiction of the state. What distinguishes the term from the recognition of state sovereignty is that it is not something that depends upon the *consent* of other states – it is powers and privileges deriving from international customary law.[103]

[101] James Crawford, *Brownlie's Principles of Public International Law* (8th edition, Oxford University Press, UK, 2012) 447.
[102] ibid 447.
[103] ibid 448.

Surrendering some of the state sovereignty might facilitate problem solving when dealing with international environmental problems of transboundary nature. It is beyond the competence of a single state to defend itself from the damage, which is the reason for the creation of the complex structure of treaties and other bi- and unilateral agreements trying to solve and simplify the manner of solving international environmental problems. In environmental policy, state sovereignty has been defended by states at all costs and has become a bone of contention. The European Union (hereafter EU) exemplifies a structure where states have done otherwise, and surrendered some of their state sovereignty. This has given the EU strength in environmental diplomacy as a result of the willingness of each member state to transfer some environmental competencies.[104]

### 3.2.3 The principle of sustainability

The concept of sustainable development derives from the principle of sustainability, which has been used to give form and meaning to sustainable development. Sustainability has been argued to be one of the most, if not the most, fundamental principle in environmental law. Furthermore, the principle of sustainability is not to be confused with sustainable development, since the two terms do not mean, nor refer to the same thing. Sustainable development refers to a development that is sustainable,[105] and sustainability is the fundamental principle referring to 'the duty to protect and restore the integrity of the Earth's ecological system'.[106] The concept of sustainable development obtained 'its meaning and legal status to the principle of sustainability'.[107] The concept of sustainable development has

[104] Neil Carter, *Politics of the Environment: Ideas, Activism, Policy* (Cambridge University Press, United Kingdom, 2007) 267-268.
[105] Klaus Bosselmann, *The Principle of Sustainability – Transforming Law and Governance* (Ashgate Publishing Ltd, England, 2008) 62.
[106] ibid 57.
[107] ibid 62.

been classified as a legal principle of international law, based on the normative character of the principle of sustainability.[108]

The importance of international legal principles does not lie in their legal status, but in how they are interpreted by courts and governments. Despite their non-legal status, legal principles cause legal effects and can be enforced, hence their importance. Since international law is more complex than domestic law, it is widely understood and accepted that the spectrum of sources that are law-creating in international law, go beyond the sources listed in article 38 in the ICJ Statute. In the case of international environmental law, soft law is a great example of an important instrument of law. Even though soft law does not enclose legally binding qualities, it can generate in legal consequences and the steering of states behaviours.[109]

According to Beyerlin and Marauhn, it has not yet been possible to determine whether sustainable development has reached normative status and therefore has become part of customary international law. However, they do put forth that 'relevant doctrine shows a certain tendency towards considering sustainable development to be a concept somewhere in between a legally binding international principle and a mere political idea'.[110]

#### 3.2.3.1 The concept of sustainability

International environmental law emerges from the general international law, where specialised treaties on the environment have been inserted in order to veil the deficiency that international law does not provide targeted problem-solving for the environment.[111] The width of sustainability and environmental law depends on how the environment is legally determined, whether it is determined narrowly or broadly. A crucial point in addition to

[108] Klaus Bosselmann, *The Principle of Sustainability – Transforming Law and Governance* (Ashgate Publishing Ltd, England, 2008) 57.
[109] ibid 44-45.
[110] Ulrich Beyerlin and Thilo Marauhn, *International Environmental Law* (Hart Publishing Ltd, USA, 2011) 81.
[111] James Crawford, *Brownlie's Principles of Public International Law* (8th edition, Oxford University Press, UK, 2012) 353.

the determination of the environment is to understand the necessary ecological core of the sustainability concept. According to Bosselmann, there can be no sustainable development, there has to be an *ecological* sustainable development.[112] Sustainable development is accepted as an integrated part of the international environmental law, as well as global policy.[113]

Two essential consequences can be deduced form the concept of sustainability. (1) Sustainable development has been given direction and meaning, and (2) existing treaties, laws, and legal principles need to be interpreted in the light of the principle of sustainability.[114]

To begin with, the first consequence is interpreted by Bosselmann to mean that developed countries have a greater responsibility than developing countries do, in the sense that there is 'no free choice' between economic prosperity, social justice or sustainable development. There is only one political goal, which is that 'any use of natural resources has to be sustainable'.[115] The two other political goals are secondary, despite the fact that some scholars argue for the reading that sustainable development balances these three goals equally. Through the interpretation suggested by Bosselmann, developing countries are given less responsibility than developed countries. This perception derives from the Rio Declaration and is referred to as 'the principle of common but different responsibilities'.[116] The meaning of this principle is that developed countries bear a special, higher burden in comparison to developing countries for taking responsibility to eliminate, and reduce unsustainable blueprints in production and consumption patterns.[117]

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[112] Klaus Bosselmann, *The Principle of Sustainability – Transforming Law and Governance* (Ashgate Publishing Ltd, England, 2008) 23.
[113] ibid 24.
[114] ibid 41.
[115] ibid.
[116] United Nations, 'Rio Declaration on Environment and Development' (A/CONF.151/26, Rio de Janeiro, 1992) principle 7.
[117] Klaus Bosselmann, *The Principle of Sustainability – Transforming Law and Governance* (Ashgate Publishing Ltd, England, 2008) 41.

The second consequence of the concept of sustainability, is that it provides guidance on how to interpret legal norms and represents a foundational concept of emerging 'sustainability law'. This means that the key for this guidance is *ecological.* This is the reason why Bosselmann states that there can be no sustainable development, but only ecological sustainable development.[118]

#### 3.2.3.2 The no-harm principle

In cases where the damage leaps over borders and causes damage in another/ neighbouring state, is referred to as the *transboundary problem*. This type of damage is proven in practice to be puzzling to solve. In the *Trail Smelter case* (1942), a Canadian company entitled Trail Smelter pursued an activity that released sulphur dioxide into the air. This eventually led the United States to invoke Canada's state responsibility for damage caused by air pollution.[119] The arbitral tribunal in the Trail Smelter case defined the no-harm principle in such a way that no state has 'the right to use or to permit use of its territory in such a manner as to cause injury by fumes in or to the territory of another' state. The injury must be 'of serious consequence' and established by 'clear and convincing evidence'. Specifically, the no-harm principle establishes that states are responsible for causing transboundary harm to other/ neighbouring states' territory.[120]

There are two important features of the no-harm principle that was affirmed by the ICJ in the *Pulp Mills Case*.[121] (1) Due diligence is required by a state in its territory, meaning that a state is 'obliged to use all means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the

[118] Klaus Bosselmann, *The Principle of Sustainability – Transforming Law and Governance* (Ashgate Publishing Ltd, England, 2008) 41.
[119] *(United States v. Canada) (1938 and 1941)* 3 R.I.A.A. 1905.
[120] Daniel Bodansky et al, *International Climate Change Law* (Oxford University Press, United Kingdom, 2017) 40.
[121] *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 2010 ICJ, (2008) ISSN 0074-4441.

environment of another state',[122] which constitutes 'the rule of prevention'. (2) The rule of prevention further means that a state is not only obliged to adopt rules and measures in order to prevent transboundary harm to other states, but also to have 'vigilance in the enforcement and exercise of administrative control applicable to private and public actors'.[123]

Since 1941, the no-harm principle has been refined and included in both the Stockholm Declaration,[124] and in the Rio Declaration,[125] which both reaffirmed the weight and importance of the principle.[126] On numerous occasions the no-harm principle has been cited. A case which signifies the weight and importance of the principle, is the *Gabcikovo-Nagymaros Project (Hungary v Slovakia) case*, where the ICJ in their judgement recalled the 'the great significance that it [the no harm principle] attaches to respect for the environment, not only for States but also for mankind'.[127]

In case of breach or non-compliance with the no-harm principle, a state will be responsible for having committed an internationally wrongful act. It will have to cease this act of continuous and the state is obligated to make full reparation for the injury caused by the wrongful act.[128] Consequently, there is an entitlement of the victim state of significant damage to claim reparation from the state in non-compliance with the no-harm principle. This entitlement applies to all cases where states are pursuing wrongful acts, not only in cases where the no-harm principle is activated.[129]

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[122] *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay )*, 2010 ICJ, (2008) ISSN 0074-4441 para 101.
[123] ibid para 197.
[124] United Nations, 'Declaration of the United Nations Conference on Human Environment (Stockholm Declaration) (A/CONF.48/14/Rev.1, Stockholm, 1972) principle 21.
[125] United Nations, 'Rio Declaration on Environment and Development' (A/CONF.151/26, Rio de Janeiro, 1992) principle 2.
[126] Ulrich Beyerlin and Thilo Marauhn, *International Environmental Law* (Hart Publishing Ltd, USA, 2011) 39.
[127] ibid 40.
[128] International Law Commission, 'Draft articles on Prevention of Transboundary Harm from Hazardous Activities with commentaries' (Geneva, 2001) articles 30-31.
[129] Ulrich Beyerlin and Thilo Marauhn, *International Environmental Law* (Hart Publishing Ltd, USA, 2011) 46.

One of the fundamental problems of international environmental law that has been discussed in the literature is the acknowledgement of responsibility after the damage has occurred, rather than focusing on preventive actions.[130] There is, however, a clear trend of focusing on issue-specific areas in order to solve the problem of prevention. This has, for instance, been done through articulation of international soft-law principles in dispute resolution processes specific to international environmental law. Despite the fact that some principles have been established this way, they cannot address prevention in the same way that a law-making treaty can.[131]

However, the no-harm principle is deemed to have 'immediate prohibitive and preventive steering effects', and is classified as being of normative quality such as a rule rather than a principle. As a result of the wide use in international treaties, declarations of international organisations, in the codification work of the ILC, and in the jurisprudence of the ICJ – the no harm principle is considered to be a part of customary international law.[132]

### 3.2.4 The shortage of international environmental law

In comparison to other areas of international law, the area of environment has been perceived as underdeveloped. The reason for this perception appears to be that when international environmental law is compared to other areas of international law, there is a lack of a globally binding instruments in international environmental law that encloses fundamental rights and obligations established in writing is apparent.[133] For example, globally binding instruments exist in international labour law,[134]

[130] James Crawford, *Brownlie's Principles of Public International Law* (8th edition, Oxford University Press, UK, 2012) 354.
[131] ibid 364.
[132] Ulrich Beyerlin and Thilo Marauhn, *International Environmental Law* (Hart Publishing Ltd, USA, 2011) 44.
[133] Klaus Bosselmann, *The Principle of Sustainability – Transforming Law and Governance* (Ashgate Publishing Ltd, England, 2008) 57.
[134] International Labour Organization, 'Right to Organise and Collective Bargaining Convention 1949 (No. 98)' (Geneva, 1949).

international human rights law,[135] and international trade law.[136] Specifically, this means that 'environmental rights and obligations are not codified', except in certain areas, *inter alia* climate change and biodiversity.[137]

Bosselmann argues that one possible explanation for this underdevelopment is that the right to use the environment is an integral part of state sovereignty, meaning that it is a political area, and that no state wants to touch upon one of the most fundamental and important principle in international law – the principle of state sovereignty.[138]

The principle of sustainability and the concept of sustainable development are mentioned in several documents, from where states agreed upon finding solutions to certain problems for the global community. Amongst these documents are the Stockholm Declaration, the Brundtland Report, the Rio Declaration, the IUCN Draft Covenant on Environment and Development (1995),[139] the Earth Charter,[140] and the New Delhi Declaration (2002).[141]
The IUCN and the Earth Charter have the same structure as fully developed constitutions (although they are not constitutions). The New Delhi Declaration is very useful as a guide in navigating in sustainability and what it means, since it defines *some* principles of sustainable development.[142]

In the aftermath of the emergence of these documents, the UN has hosted the United Nations Conference on Sustainable Development. The conferences from 2012 and 2015, where the outcome was the Rio

[135] United Nations, 'The Universal Declaration of Human Rights 1949' (Paris, 1948)
[136] World trade organization, 'General Agreement on Trade in Service 1994' (Marrakesh, 1994).
[137] Klaus Bosselmann, *The Principle of Sustainability – Transforming Law and Governance* (Ashgate Publishing Ltd, England, 2008) 58.
[138] ibid 58.
[139] International Union for Conservation of Nature, 'Draft International Covenant on Environment and Development' (2-8317-0288-7, Gland, 1995).
[140] Earth Charter Commission, 'The Earth Charter' (Paris, 2000).
[141] International Law Association, 'International Law Association's New Delhi Declaration of Principles of International Law relating to Sustainable Development (New Delhi Declaration) (New Delhi, 2002).
[142] Klaus Bosselmann, *The Principle of Sustainability – Transforming Law and Governance* (Ashgate Publishing Ltd, England, 2008) 58.

Resolution 'The Future We Want' (2012),[143] and the Resolution 'Transforming our world: The 2030 Agenda for Sustainable Development' (2015) (hereafter the 2030 Agenda).[144]

In the Rio Declaration it is stated that '[n]ational authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment'.[145] This is a statement of the 'the polluter-pays principle', one of the most important principles in international environmental law and a principle that actually leads to sanctions for the polluter.[146] The polluter-pays principle has been recognised as a general principle of international environmental law.[147] Furthermore, the states resolve in the 2030 Agenda to 'create conditions for sustainable, inclusive and sustained economic growth', and 'to ensure the lasting protection of the planet and its natural resource'.[148] The envisaged world whilst creating the 2030 Agenda is one where, amongst other goals, economic growth, consumption and production patterns are sustainable in a world that respects the rule of law.[149]

[143] United Nations, 'Resolution adopted by the General Assembly on 27 July 2012 – The Future We Want' (A/RES/66/288, Rio de Janeiro, 2012) preamble.
[144] United Nations, 'Resolution adopted by the General Assembly on 25 September 2015 – Transforming our world: the 2030 Agenda for Sustainable Development' (A/RES/70/1, New York, 2015).
[145] United Nations, 'Rio Declaration on Environment and Development' (A/CONF.151/26, Rio de Janeiro, 1992) principle 16.
[146] Gentian Zyberi, 'Ensuring the Protection of the Environment from Serious Damage. Towards a Model of Shared Responsibility between International Corporations and the States Concerned?' 67-90 in Bård A. Andreassen and Võ Khán Vinh, *Duties Across Borders – Advancing Human Rights in Transnational Business* (Intersentia Ltd, United Kingdom, 2016) 75.
[147] United Nations, 'Convention on the Transboundary Effects of Industrial Accidents, done at Helsinki, 17 March 1992, as amended on 19 March 2008' (ECE/CP.TEIA/25, New York and Geneva, 2013) preamble.
[148] United Nations, 'Resolution adopted by the General Assembly on 25 September 2015 – Transforming our world: the 2030 Agenda for Sustainable Development' (A/RES/70/1, New York, 2015) introduction para 3.
[149] United Nations, 'Transforming our world: the 2030 Agenda for Sustainable Development' (A/RES/70/1, New York, 2015) our vision para 9.

One way of assessing the problem of re-establishing the damage done by a polluter, is the creation of the International Oil Pollution Compensation Funds (hereafter IOPC Funds). If oil pollution occurs in any of the member states of the IOPC Funds, the IOPC Fund provides for compensation if the damages derive from an oil tank that has spilled. Of the great majority of cases that has come to the IOPC Fund, all claims have been settled without having to take them to court.[150]

[150] Gentian Zyberi, 'Ensuring the Protection of the Environment from Serious Damage. Towards a Model of Shared Responsibility between International Corporations and the States Concerned?' 67-90 in Bård A. Andreassen and Võ Khán Vinh, *Duties Across Borders – Advancing Human Rights in Transnational Business* (Intersentia Ltd, United Kingdom, 2016) 79-82.

# 4 Corruption and the environment

In this following chapter I will deconstruct corruption and show how it eradicates the social contract, why particularistic states need to change into universalistic states, how corruption correlates with larger amounts of pollution and how this can have an effect on a macro level. This will help to understand corruption and why it cannot be fought as a normal crime, how it is systematic and in how to find a plethora for it.

In countries with large amounts of corruption, pollution has found to be higher in comparison to pollution in less corrupted countries. Results are further showing that some developing countries have been able to improve their economic and environmental performance by decreasing corruption.[151] In addition to this, according to an estimate from the non-profit group Global Financial Integrity, as much as $ 1 trillion vanishes from the 'developing world economics' every year because of corruption.[152]

Amongst various soft law instruments, the United Nations Global Compact Principles is a significant source that suggests that 'sustainability begins with a principle-based approach to doing business'. The principles were created in order to make companies more sustainable in the longer-term by starting with a principle-based approach of doing business.[153] The 10th principle addresses the need for anti-corruption instruments not only within governments, but also in companies by stating that 'business should work against corruption in all its forms including extortion and bribery'.

[151] Heinz Welsch 'Corruption, growth, and the environment: a cross-country analysis' (2004) 9 Environment and Development Economics 663.
[152] Victoria L. Lemieux, '*Is technology good or bad in the fight against corruption?*', (2015) retrieved: 2018-04-11 <http://blogs.worldbank.org/governance/technology-good-or-bad-fight-against-corruption>
[153] United Nations Global Compact, '*The ten principles of UN Global Compact*', retrieved: 2018-04-24 <https://www.unglobalcompact.org/what-is-gc/mission/principles>

According to the UN, companies should be concerned and care about anti-corruption in a sense that they should first and foremost not be illegal, but also because of the reputational risk a company is taking by being corrupt and caught. Furthermore, the financial risks of being corrupt are huge; some countries lose up to $ 1 billion a year to corruption. This unethical behaviour leads to international mistrust against both the company and the home state.[154]

## 4.1 Why corruption is bad

In order to answer the question *why* corruption is bad, it is needed to first answer a pre-question: what exists in a liberal democracy but is missing in a corrupted one? The missing part in a corrupted state is the people's expectation that justice *actually* will be done. Corruption destroys this expectation, and as a consequence, the 'public trust in the powers that execute justice' is destroyed.[155] Corruption is known to be a large impediment for the development in a society.[156] In a corrupt society where the treatment of citizens depends upon each person's status or position, and where the expectation of justice has been replaced by the expectation of similar treatment to everybody with the same *status*, there will be certain groups that have monopolized the powers of domination and sources of income.[157] A corrupted state is no longer run for the benefit of its citizens, but in the interest of a primary beneficiary, or several primary beneficiaries.[158]

[154] United Nations Global Compact, '*Principles 10: Anti-Corruption*', retrieved: 2018-04-24 <https://www.unglobalcompact.org/what-is-gc/mission/principles>
[155] Yasutomo Morigiwa, 'Making Deivery a Priority:A Philosophical Perspective on Corruption and a Strategy for Remedy' (2015) 6 The World Bank Legal Review 438.
[156] ibid 437.
[157] Alina Mungiu–Pippidi, 'Corruption: Diagnosis and Treatment' (2006) 17(3) Journal of Democracy 88.
[158] Yasutomo Morigiwa, 'Making Delivery a Priority:A Philosophical Perspective on Corruption and a Strategy for Remedy' (2015) 6 The World Bank Legal Review 438-443.

### 4.1.1 How corruption eradicates the social contract

In order to examine whether corruption eradicates the social contract or not, it is necessary to provide a clarification of what the social contract is. The social contract is defined as an implicit agreement between the members of a society (hereafter citizens) and the state, in which the citizens have denounced some of their individual freedom in exchange for state protection. Hence, it is an agreement in which the citizens 'cooperate for social benefits'. In addition to this, the term social contract and the theory behind it has been used to describe the 'the origin of government and the obligations of subjects'.[159] Finally, the social contract can be applied not only to states, but also to corporations. The social contract is 'essential for *any* organised behaviour in a group or community that is unwritten but agreed upon and establishes responsibilities and rights'.[160] A state that is not corrupted is fulfilling its end of the social contract.[161]

Key elements for states to pursue, in order to uphold the social contract between them and their citizens, are *inter alia* accountability, participation and transparency in their work and implementation of the rule of law.[162]

The rule of law is what is controlling the social functions of a society. It is therefore essential that the rule of law is being upheld in order to create a functional society without any corruption. It is of great importance that the rule of law provides a matrix that gives incentives for public officials and managers of companies to make it rational to follow the law, more so than being corrupted. The unification of public interests is sprung out of the rule

[159] Oxford Dictionary, '*social contract'*, retrieved: 2018-04-12 <https://en.oxforddictionaries.com/definition/social_contract>
[160] The Law Dictionary, '*social contract*', retrieved: 2018-04-12 <https://thelawdictionary.org/social-contract/>
[161] Francis N. Botchway and Nightingale Rubuka-Ngaiza, 'The Constitutional Regime for Resource Governance in Africa – The Difficult March toward Accountability' (2015) 6 The World Bank Legal Review 169.
[162] ibid 151.

of law, which also maintains the functionality of a constitutional democracy and contributes to the upholding of the social contract.[163]

An example of the importance of upholding the social contract and one of its key elements is as follows. Provisions on the right to property has been said to be of key importance in order for a state to uphold the social contract, which in this context means that the state has limited powers to expropriate the land for public purposes, but also that the state is the 'guarantor' for these rights to be upheld. In essence, it is the obligation of the state to protect the rights of the people to own their own land, and to protect this ownership from the state to unrightfully take that land for public purposes without any particular reason.[164]

### 4.1.2 Particularism – a fatal system

A system characterised by corruption is commonly referred to as 'particularism'. Corruption is systemic in such a system and imbedded in the system of the society – it is everywhere, the system becomes 'a partial system of rule'. The opposite of particularism is 'universalism', which is characterised by being an 'impartial system of rule'. The plethora for reducing corruption requires a revolutionary change in all institutions. In Sweden, Denmark, Hong Kong and Singapore, the change in institutions involved 'all major political, economic, and social institutions', where they managed to reduce corruption. This type of change in all major institutions at the same time is referred to as the 'big push'.[165] The key behind these reformations was that they were not only of a monitorial- and sanctional nature, but also down to grass-root levels of the society, leading to a new trust for the system. In other words, the expectation of corruption was

[163] Yasutomo Morigiwa, 'Making Delivery a Priority:A Philosophical Perspective on Corruption and a Strategy for Remedy' (2015) 6 The World Bank Legal Review 455.
[164] Francis N. Botchway and Nightingale Rubuka-Ngaiza, 'The Constitutional Regime for Resource Governance in Africa – The Difficult March toward Accountability' (2015) 6 The World Bank Legal Review 151.
[165] Anna Persson et al., 'Why Anticorruption Reforms Fail – Systemic Corruption as a Collective Action Plan' (2013) 3 Governance An International Journal of Policy, Administration, and Institutions 465.

eradicated because wherever an actor turned, a resistance towards being corrupt was present. A trust for the other actors being honest and not corrupted emerged.[166]

In the more recent examples from Hong Kong and Singapore, the change was made from the top and down. High level politicians showed the way by actions and setting examples, and not just by implementing new rules that they themselves did not follow – they walked their own talk.[167]

The solution proposed by the anticorruption sector in order for particularistic countries to get a chance of improving and decrease the level of corruption in their countries, would be to duplicate the institutions of universalistic countries.[168] But, according to Mungiu-Pippidi et al. it is 'high time to realise' that such a solution does not work, based on the fact that the winners in a particularistic country would oppose such a transformation, since it is inevitable that they would lose from an anti-corruption reform. Following this, the only proposed way to make a successful transformation would be 'exposing and targeting predators'. An example could be by using media publishers that can see the benefits of exposing the corrupted actors, and in that way contribute to eradicate corruption.[169]

A particularistic society treats people by virtue of privilege, and not based on their individual and universal membership. The United Nations Convention against Corruption (hereafter UNCAC) has started an evolution of the state-society relationship by no longer tolerating the legitimisation of a particularistic state.[170]

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[166] Anna Persson et al., 'Why Anticorruption Reforms Fail – Systemic Corruption as a Collective Action Plan' (2013) 3 Governance An International Journal of Policy, Administration, and Institutions 465-466.
[167] ibid 465-466.
[168] Alina Mungiu-Pippidi et al., 'Chasing Moby Dick Across Every Sea and Ocean? Contextual Choices in Fighting Corruption' (2011) Draft report commissioned by Norad, c/o ANKOR in cooperation with the Evaluation Department HSOG – Contextual anticorruption, refnr. 1001232 115.
[169] ibid 116.
[170] Alina Mungiu-Pippidi, 'Becoming Denmark: Historical Designs of Corruption Control' (2013) 80(4) Social Research – Corruption, Accountability, and Transparency 1260.

In the UNCAC, it is put forth in article 12 that states shall ensure that private enterprises have tools such as 'internal auditing' and 'controls' in order to facilitate the process of detecting corruption within the enterprise.[171] Further, it has also been suggested by the UNCAC that states should make bribery illegal through their criminal laws within the private sector, covering both the offering and acceptance of bribes.[172] The scope of application for the UNCAC comprises 'public officials' in government and international organizations,[173] as well as the duty of a state to prevent corruption in the private sector.[174]

If two states are unable to solve a dispute related to the UNCAC, they are encouraged to first try to settle the case by negotiation, secondly by arbitration, and finally if the dispute is not solved through arbitration within 6 months, the parties have the right to submit the dispute to the ICJ.[175]

There does not seem to exist a direct cure for corruption, but one thing that is for sure is that both the citizens and the state need to work towards a common goal of eradicating corruption. In order for them to achieve any result, it is essential that reciprocal accountability exist to uphold the social contract and as a consequence, eradicate corruption.[176]

[171] United Nations, 'United Nations Convention Against Corruption' (New York, 2004) article 12, 2(f).
[172] ibid article 21.
[173] ibid article 2.
[174] ibid article 12.
[175] ibid article 66.
[176] Alina Mungiu-Pippidi, 'Becoming Denmark: Historical Designs of Corruption Control' (2013) 80(4) Social Research – Corruption, Accountability, and Transparency 1283.

## 4.2 Micro level – correlation between corruption and increased levels of pollution

For those who pursue corruption, it is rational on a micro level. The rationality lies in the personal gain that the person who accepts, or offers, a bribe will get. This might be a higher salary, a larger bonus or a corporate deal before anyone else. This type of corruption is referred to as 'situational corruption', and in order to combat this type of corruption it requires that society make corruption irrational. In order to make corruption irrational, changes and restructuring of the political institutions have to take place. Hence, a restructuring of the rule of law is required. The reason the rule of law must be changed correlates with the fact that it is the law that ensures equal rights for everyone and it takes away the concept of 'if you scratch my back I'll scratch yours', which prevails in a corrupted and particularistic society.[177]

It is a question of curing the motivational drive for corruption. The society must, through laws and other measures, ensure its values, and make these abundantly clear in order to create a milieu where corruption is no longer rational. Governments and corporations can either increase sanction to deter corruption, or increase wages and bonuses so that the corrupt individual would not make a profit out of being corrupt, or do both.[178]

The impact of corruption has been measured in two different areas: (1) the direct effect, which is the reduced stringency of environmental laws and their enforcement, and (2) the indirect effect, which is the reduced levels of per capita income in the country. Seen to the (2) indirect effect, depending on the income levels, corruption might reduce or increase pollution. To be

[177] Yasutomo Morigiwa, 'Making Deivery a Priority:A Philosophical Perspective on Corruption and a Strategy for Remedy' (2015) 6 The World Bank Legal Review 446.
[178] ibid 447-448.

noted is the fact that the (2) indirect effect reinforces, in many cases, the (1) direct effect. It has been proven, that in some lower income countries corruption reduces income, which leads to lower income and higher levels of pollution.[179]

The conclusion is that a reduction of corruption in lower income countries can lead to raise the affordances of a more environmentally friendly lifestyle, which the contemporary situation of corruption puts out of reach. Furthermore, a decrease in corruption is highly likely to also contribute to stricter environmental laws, and more rigid enforcements of those laws. Therefore, reducing corruption is perceived by Heinz to be of 'key importance for improving environmental quality especially in developing countries'.[180]

The empirical results of why anticorruption actions fail have been put forth to be due to the 'collective action problem',[181] which highlights the problem of when, despite monitoring actions and sanctions, the citizens think that everyone else is corrupted. As a consequence, the incentives of being corrupted derive from the conviction that all of the other citizens allegedly are being corrupt.[182]

The problem turns into a collective action problem when anti-corruption actions are to be implemented, where the obstacle is found in the 'coordination problem, where the equilibrium that emerges depends on shard expectations about others' behaviours'. Once again, the conclusion falls back on the problem of what the actors expect the other actors to do. Persson even suggests that failed attempts to change the incentives for corruption can negatively affect the development in corrupt societies, since

[179] Heinz Welsch 'Corruption, growth, and the environment: a cross-country analysis' (2004) 9 Environment and Development Economics 684.
[180] ibid 685.
[181] Anna Persson et al., 'Why Anticorruption Reforms Fail – Systemic Corruption as a Collective Action Plan' (2013) 3 Governance An International Journal of Policy, Administration, and Institutions 463.
[182] ibid 457.

it might enhance the perception and mistrust in the governance. A perception that most probably ends up strengthening the beliefs about other actors being corrupted, and in the end, that there is supposedly no cure for corruption. The actors in a corrupted state or organisation feel trapped in the bad spiral.[183]

The UN Human Rights Council stated in 2009 that there is a duty for companies to prevent corruption in their supply chains through proactive action, since corruption has more recently been recognised as a violation against human rights.[184] Social and economic development in a society are dangerously impacted by corruption, leading to the constant state of the poorest in the world remaining poor.[185]

In a society, people have the right to self-determination, which is taken away in the presence of corruption. There is a right to live in a society free from corruption. As a consequence of the absence of self-determination, the right of a people to exercise sovereignty over their natural resources perishes.[186]

Rothstein invented a new term: *quality of government*,[187] which requires impartiality. In order to explain the term quality of government, a short introduction of the thought patterns behind it is needed. Governance consists of a relationship between the state and its citizens divided into two dimensions: (1) input, and (2) output. The (1) input, presents 'rules about elections, party financing, the right to stand for office, and the formation of cabinets'. The (2) output, on the other hand, reveals the way the 'political

[183] Anna Persson et al., 'Why Anticorruption Reforms Fail – Systemic Corruption as a Collective Action Plan' (2013) 3 Governance An International Journal of Policy, Administration, and Institutions 463-464.
[184] Hana Ivanhoe, 'The next generation of 'fair trade' – A Human Rights Framework for Combating Corporate Corruption in Global Supply Chains' 157-181 in Bård A. Andreassen and Võ Khán Vinh, *Duties Across Borders – Advancing Human Rights in Transnational Business* (Intersentia Ltd, United Kingdom, 2016) 172.
[185] ibid 159.
[186] ibid 163.
[187] Bo Rothstein, *The Quality of Government* (The University of Chicago Press, USA, 2011) 9.

authority is exercised'. It is in (1) input, where the access to political power lies and where the political content is forged. The founding regulatory principle of politics articulates that there is a need for political equality, which means that impartial treatment is essential in order to reach quality of government. If a state can manage to reach quality of government it will also reach a state of impartiality, which would bring back the trust in the system.[188]

## 4.3 Macro level – a systemic political behaviour taken up a level

When we are born, we inherit rights and obligations arising from the jurisdiction we were born into. As an example, it is illegal to steal from another person, to take something that does not belong to you. If everyone were to take the things they felt they had the right to, chaos would arise. Therefore, a society built on laws which constitute both obligations and rights, generates consequences when an individual oversteps the law. If a person steals something, they go to court and have to face the consequences of the action by paying a fine or going to prison. Specifically, all wrongful actions need to have consequences. It is the responsibility of a person living in that society to respect the law. The society has taken a stand of non-tolerance against that particular crime in order to steer the individuals living in that society. This is the normative way of fighting and getting rid of crimes.[189] However, corruption cannot be fought in the same way, which has been shown in the sections above, because it is imbedded on a systemic level in particularistic societies and requires different actions in order to be eradicated.

[188] Bo Rothstein, *The Quality of Government* (The University of Chicago Press, USA, 2011) 13.
[189] Polly Higgins, *Eradicating Ecocide – Exposing the corporate and political practices destroying the planet and proposing the laws to eradicate ecocide* (2nd edition, Shepheard-Walwyn (Publishers) Ltd, 2015) 104-105.

A particularistic state will 'self-correct to maintain its corruption following a purge'; in the same way as a universalistic state 'will self-correct to deal with corrupt individuals and the legislative or political flaws that facilitated their corruption'.[190] This type of self-regulatory mechanism is what is holding systemically corrupted societies back from development and the ability to create democratic governance with an impartial rule of law.[191]

In the field of corruption, a discussion has emerged initiated by Daniel Kaufmann on implementing the concept of 'legal corruption' in the definition of corruption. This might seem like a paradox, but what Kaufmann is aiming at is 'how elites collude and purchase, or unduly influence the rules of the game, shape the institutions, the policies and regulations and the laws for their own private benefits'. According to Kaufmann, there should be no differentiating between if the corruption is pursued illegally or legally since the effect of the actions are the same – impediment to the development of a society and a partial application of the rule of law. The reason for this discussion is the financial crisis in 2008,[192] which does not have anything to do with the environment, but portrays how states have prioritized profit over the benefit of its citizens.

Moreover, in the preamble of the UNCAC, an expressed concern about how corruption is 'jeopardizing sustainable development and the rule of law' was expressed, and a conviction that 'corruption is no longer a local matter but a transnational phenomenon that effects all societies, making international co-operation to prevent and control it essential'.[193] The scope of application for the UNCAC comprises 'public officials' in government and international organizations,[194] as well as the duty of a state to prevent corruption in the

[190] Harris Robert, *Political Corruption in and Beyond the Nation State* (Routledge, UK, 2003) 63.
[191] ibid 13.
[192] Bo Rothstein, *The Quality of Government* (The University of Chicago Press, USA, 2011) 207.
[193] United Nations, 'United Nations Convention Against Corruption' (New York, 2004) preamble.
[194] ibid article 2.

private sector.[195] Hence, corruption has been recognised to be a problem on a macro level and no longer an impediment that needs to be solved by states on a micro level.

[195] United Nations, 'United Nations Convention Against Corruption' (New York, 2004) article 12.

# 5 Corporations and a questionable system

The aim of this chapter is to show what type of responsibility that can be put on multinational corporations, how market oriented regulations has emerged as an effect of the eradication of the social contract and how the principle of superior responsibility and corporate social responsibility can be used in favour of sustainable development and put responsibility on corporations and states to eradicate corruption. This is put forth in order to come to a solution on how to improve the environmental responsibility of multinational corporations and how to eradicate corruption in the upcoming analysis.

It has been put forth that there has been a paradigm shift of power from states to large multinational corporations. Much of the control over private actors' activities has shifted from the states to the economic power state of multinational corporations. There are corporations that have larger annual revenues than the GDP of some countries. Such a company is for example General Motors that has larger annual revenue than the GDP of Thailand and Portugal.[196]

Corporations might be able to double their dividend due to a pursuance of environmental protection, which is suggested not to be known to the industry. This has been proposed to be the reason why environmental governance within the industry today is mostly optional and not strictly regulated.[197]

[196] Juanita Elias and Robert Lee, 'Ecological Modernisation and Environmental Regulation: Corporate Compliance and Accountability' 163-181 in Sorcha MacLeod, *Global Governance and the Quest for Justice – Volume 2: Corporate Governance* (Hart Publishing, USA, 2006) 181 and 173.
[197] ibid 180-181.

Elias and Lee argue that some states are pursuing regulations of the liberalised kind in order to attract foreign investors, by creating so called 'market orientated regulations'[198]. These types of regulations are more open to corporate influence, such as the voluntary nature of some international regulations. One example of this is the UN's Global Compact Principles, which originates from the creators being aligned with the expansion of capitalism, instead of with environmental protection.[199]

The danger when governments start to be driven by economic gain is that the risk of neglecting the ecological losses from activities approved by the governments, increases in the pursuit for profit. The long-term perspective tends to be forgotten, and with it the long lasting damages on the environment from the profit-driven activities. A corporation seeking approval from a government is unlikely to not ponder the risks of long lasting damage to the environment due to their activities, if the government is not paying attention to environmental damages.[200]

## 5.1 Market oriented regulations

A market can be divided into three dimensions: (1) law and regulations, (2) practices and standards, and (3) norms and beliefs. The first dimension refers to laws passed by the government, regulations are more detailed rules derived from the laws passed by not only governments, but also by courts, agencies, self-regulatory organisations and the enforcement by these. The second dimension refers to practices as private sector behaviours, for example credit agencies, monitoring and bank groups, whilst standards refers to conventions in corporate governance, codes of conduct or technical

[198] Juanita Elias and Robert Lee, 'Ecological Modernisation and Environmental Regulation: Corporate Compliance and Accountability' 163-181 in Sorcha MacLeod, *Global Governance and the Quest for Justice – Volume 2: Corporate Governance* (Hart Publishing, USA, 2006) 181.
[199] ibid 180-181.
[200] Polly Higgins, *Eradicating Ecocide – Exposing the corporate and political practices destroying the planet and proposing the laws to eradicate ecocide* (2nd edition, Shepheard-Walwyn (Publishers) Ltd, 2015) 104.

and accounting standards. The third dimension refers to norms as 'encompassing values' like shareholder value, moral codes and company loyalty. The beliefs, however, refer to the political ideologies controlling the market, such as market liberalism, legal doctrines like the rule of reason, theories and efficient market thesis.[201] According to Vogel, it is obvious that markets require regulations, not in order to function and flourish, but in order to avoid collateral damage such as environmental damage.[202] Seeing this in the perspective of corruption, it might seem meaningless to try to regulate markets when the rule of law, more or less, perishes in particularistic societies where it becomes partial.[203]

Market orientated regulations are a new type of re-regulation, involving different types of interventions in the market. What separates market orientated regulations from standard regulations, is that instead of *requiring* corporations to comply with a specific regulation, the corporations are left to *respond* to it.[204] Corporations are left to respond to the intervention in the sense that there are always two sides of the regulation. The first side is that it 'weakens rule-directed models of corporate governance in favour of process altering', and the second side is that this type of re-regulation 'eases state direction of business'.[205]

For example, with a new tax reduction, a company can either choose to avoid it by moving its business to another country, or choose to stay and comply with the new regulation. In addition to this, the effect from the whole industry must be weighed against the environmental benefit of the

[201] Steven K. Vogel, 'Marketcraft: How Governments Make Markets Work' (2018) ISBN-13: 9780190699857 Oxford Scholarship Online 1-184 11-13.
[202] ibid 14.
[203] Anna Persson et al., 'Why Anticorruption Reforms Fail – Systemic Corruption as a Collective Action Plan' (2013) 3 Governance An International Journal of Policy, Administration, and Institutions 465.
[204] Juanita Elias and Robert Lee, 'Ecological Modernisation and Environmental Regulation: Corporate Compliance and Accountability' 163-181 in Sorcha MacLeod, *Global Governance and the Quest for Justice – Volume 2: Corporate Governance* (Hart Publishing, USA, 2006) 171.
[205] ibid 169-170.

regulation in order to make sure that the environmental gain is larger than the economic loss.[206]

Market oriented regulations have further been argued to be liberalised, to favour rule altering, and to weaken rule directed models of corporate governance. As a result, market oriented regulations are said to have started to straddle jurisdictions, such as regulations starting to be based on international rules instead of domestic ones. The new generation of regulation more often than not share a common base in EU and international law, hence the fact that the difference between different states' regulations is less than before.[207] The result of market orientated regulations is that the states are moving to indirect forms of regulations, instead of the original direct form,[208] in their pursuance of attracting foreign investors.[209]

In the pursuance of attracting foreign investors,[210] some states have moved from direct regulations to indirect regulations such as market oriented regulations. When states take a 'less interventionist approach to regulation', instead of an interventionist approach that is creating incentives to act, and when states become self-restrained from such an interventionist approach, they create a 'power vacuum which powerful multinational business can easily fill'. Such an effect arises from the fact that multinational corporations are not, through market oriented regulations, being subject to the discipline of the market in terms of enforcement and property rights. This effect is supported by global studies that have confirmed that some states are losing parts of their regulatory power to control the events in the

[206] Juanita Elias and Robert Lee, 'Ecological Modernisation and Environmental Regulation: Corporate Compliance and Accountability' 163-181 in Sorcha MacLeod, *Global Governance and the Quest for Justice – Volume 2: Corporate Governance* (Hart Publishing, USA, 2006) 171.
[207] ibid 169-170.
[208] ibid 171.
[209] ibid 174.
[210] ibid 174.

market within their borders, due to the power of multinational corporations.[211]

### 5.1.1 The principle of superior responsibility and CSR

Duties and obligations increase with rang, which has been recognised in international law through the principle of 'superior responsibility', where officers and military leaders of higher rank in military conflicts have been held accountable for actions they have committed. This principle has its origin in the World War II Nuremberg trials, where it was established by the courts. The court targeted individuals not only in the military, but also applied the principle to industrialists with higher rank, and in government. Hence, according to Higgins, this principle is applicable to the higher ranked people in corporations taking decisions that have led to the corporation pursuing damaging activities for the environment that are illegal. A corporation in itself cannot be liable for an illegal action, but the person responsible behind the decision can be.[212]

Multinational corporations have a reputation of being able to avoid legal or fiscal regulation due to their global character of making business.[213] When approaching this area of good business behaviour, it is important to remember that bad business behaviour is in fact more costly than good business behaviour.[214]

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[211] Juanita Elias and Robert Lee, 'Ecological Modernisation and Environmental Regulation: Corporate Compliance and Accountability' 163-181 in Sorcha MacLeod, *Global Governance and the Quest for Justice – Volume 2: Corporate Governance* (Hart Publishing, USA, 2006) 171.
[212] Polly Higgins, *Eradicating Ecocide – Exposing the corporate and political practices destroying the planet and proposing the laws to eradicate ecocide* (2nd edition, Shepheard-Walwyn (Publishers) Ltd, 2015) 108-109.
[213] Patrik Birkinshaw, 'Global Trensparency' 137-161 in Charles Sampford et al., *Rethinking International Law and Justice* (Ashgate Publishing Ltd., UK, 2015) 137.
[214] Güler Aras, 'The business case for taking human rights obligations seriously' 91-107 in Bård A. Andreassen and Võ Khán Vinh, *Duties Across Borders – Advancing Human Rights in Transnational Business* (Intersentia Ltd, United Kingdom, 2016) 107.

The term CSR, corporate social responsibility, is being used broadly and covers multiple areas, such as labour rights and human rights. In addition, it also contains a dimension of environmental responsibility. This dimension concerns *inter alia* pollution, waste management and climate change.[215]

In the extension when a person commits the crime bribery, which is wrong and illegal, it is does not stop there. Extensive bribery can lead to an 'indirect distortion of economic development', leading to a decreased access to both health care, education and welfare for a population that becomes deprived due to its corrupt citizens.[216]

## 5.2 The responsibility of corporations

Today we are consuming and using resources equivalent to 1.6 Earths. Furthermore, the World Business Council of Sustainable Development (hereafter WBCSD) has predicted that nearly 3 billion people will join the consuming middle class by 2030. This means, *inter alia*, that all stakeholders have a responsibility – including the corporations. In order to obtain a sustainable lifestyle, institution, rules, values and norms will have to change.[217]

From the perspective of the protection of the environment, the responsibility of corporations becomes interesting as they are not states, nor citizens. When discussing state responsibility for a corporation, the notions of 'home state' and 'host state' need to be clarified. The home state is the state in which the corporation is registered, and the host state is the state in which the corporation is pursuing its economic activities. Corporations' damaging economic activities will fall under the responsibility of both the host state

[215] Güler Aras, 'The business case for taking human rights obligations seriously' 91-107 in Bård A. Andreassen and Võ Khán Vinh, *Duties Across Borders – Advancing Human Rights in Transnational Business* (Intersentia Ltd, United Kingdom, 2016) 92.
[216] ibid 92.
[217] World Business Council of Sustainable Development, 'Futures Thinking – A guide to using futures to help drive corporate resilience and transformational innovation' (2014, Geneva, Switzerland) 10.

and the home state. Another parameter to be added in the discussion of who is responsible, is whether the corporation is owned fully or partially by the state, or if it is independent from state-owning – a private international corporation.[218]

In the case where multinational corporations cause harm to the environment, the problem becomes multidimensional in terms of norms being mixed both nationally and internationally, as well as between the public and private spheres. In addition to legal principles, international treaties and legal practices relevant for the application of international environmental law, it is also important to pay attention to bilateral investment treaties (hereafter BIT).[219]

In the Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (2003),[220] it is established that a corporation only has responsibilities 'within their respective spheres of activity and influence'.[221] The norms reflect customary international law and are therefore of importance.[222] Further, when discussing the responsibility of a multinational corporation it is crucial to differentiate between state owned, mixed capital and private corporations. A state owned corporation is a corporation fully owned by the state, whilst a mixed capital corporation is partially owned by the state, and finally when

[218] Gentian Zyberi, 'Ensuring the Protection of the Environment from Serious Damage. Towards a Model of Shared Responsibility between International Corporations and the States Concerned?' 67-90 in Bård A. Andreassen and Võ Khán Vinh, *Duties Across Borders – Advancing Human Rights in Transnational Business* (Intersentia Ltd, United Kingdom, 2016) 90.
[219] ibid 70.
[220] United Nations, 'Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (E/CN.4/Sub.2/2003/12/Rev.2, 2003)
[221] ibid principle 1.
[222] Gentian Zyberi, 'Ensuring the Protection of the Environment from Serious Damage. Towards a Model of Shared Responsibility between International Corporations and the States Concerned?' 67-90 in Bård A. Andreassen and Võ Khán Vinh, *Duties Across Borders – Advancing Human Rights in Transnational Business* (Intersentia Ltd, United Kingdom, 2016) 74.

referring to a private corporation in this context, it is a corporation owned entirely by private parties.[223]

The legal complexity of environmental cases lies in the issue of deciding what is an unacceptable risk, causation, classifying and identifying the victims who are to be compensated. Adding another layer of complexity in environmental cases is the need to prove that the specific activity in the case is causing harm to the environment. Since most environmental disputes need only an objective evaluation in order to prove their case, it is very difficult to do so when the scientific evidence is conflicting. For any adjudicatory body it is a challenging task lying ahead.[224]

Multinational corporations work in different countries, and will therefore be affected by different jurisdictions. Another obstacle when trying to hold multinational corporations accountable for environmental damages is the doctrine of *forum non conveniens*.[225] This is a common law doctrine that allows a court to deny jurisdiction at its own discretion on the basis that there is another court more appropriate as forum for the resolution of the dispute.[226]

It might be easy to presume that a state's responsibility to prevent environmental damage is limited to its own territory. This, however, is not correct since a state, through the no-harm principle, is required to take responsibility for cross-border environmental damage as well. This was affirmed by the ICJ in the advisory opinion 'Reports of Judgments, Advisory Opinions and Orders – Legality of the Threat or Use of Nuclear

[223] Gentian Zyberi, 'Ensuring the Protection of the Environment from Serious Damage. Towards a Model of Shared Responsibility between International Corporations and the States Concerned?' 67-90 in Bård A. Andreassen and Võ Khán Vinh, *Duties Across Borders – Advancing Human Rights in Transnational Business* (Intersentia Ltd, United Kingdom, 2016) 73.
[224] ibid 75.
[225] ibid 78.
[226] James Crawford, *Brownlie's Principles of Public International Law* (8th edition, Oxford University Press, UK, 2012) xxviii.

Weapons',[227] where it was established that '[t]he general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment'.[228]

Furthermore, the most important role of the host state is to ensure compliance of the domestic environmental legal framework. This obligation includes having appropriate legislation and effective enforcement, and to protect citizens from damaging acts that 'can be perpetrated by private parties'.[229] If a state refrained from taking necessary measurements to prevent serious damage caused on the environment through the conduct of a corporation, the state in such a case, could be held liable for the conduct of the corporation. An even stronger case can be made if the corporation is state-owned, or mixed capital.[230]

There have been a couple of attempts to hold multinational corporations liable in their home states for economic activities pursued abroad that have caused environmental damages, but so far there has been no success due to 'jurisdictional hurdles'.[231] Despite this fact, the home state does, according to Zyberi, have a responsibility to a forum for adjudicating environmental disputes.[232]

In cases where the host state is either unwilling or unable to hold a corporation accountable for the environmental damage it has caused, the accountability of the state reveals a gap where actors that do not respect that law can slip through. Zyberi argues that in order to ensure compliance with

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[227] International Court of Justice, 'Reports of Judgments, Advisory Opinions and Orders – Legality of the Threat or Use of Nuclear Weapons' (ISBN 92-1-070743-5, Hague, 1996).
[228] ibid para 29.
[229] Gentian Zyberi, 'Ensuring the Protection of the Environment from Serious Damage. Towards a Model of Shared Responsibility between International Corporations and the States Concerned?' 67-90 in Bård A. Andreassen and Võ Khán Vinh, *Duties Across Borders – Advancing Human Rights in Transnational Business* (Intersentia Ltd, United Kingdom, 2016) 79-81.
[230] ibid 80.
[231] ibid 82.
[232] ibid 89.

the minimum environmental standard, it is a responsibility that should be shared between the home state, the corporation and the host state.[233] Despite the fact that the legal process is complex and protracted, companies have been held liable for serious environmental damage.[234]

### 5.2.1 The limited effect of soft law

The terminology of 'soft law' is an instrument or provision that holds such importance in the legal framework of international legal development that it requires particular attention.[235] Soft law and hard law have in common the capacity to steer directly, or indirectly, the conduct of their addressees, which is known as having 'normative quality'. It is this normative quality that distinguishes soft law from mere ideals and politics.[236]

Despite the quite impressive amount of international soft law regulating how multinational corporations should conduct their business in order to be sustainable and environmentally friendly, the effect of the regulations in practice is limited. The reason for the limited effect has been argued by Bonfanti to be (1) the *non-binding status* of soft law, in combination with (2) the lack of an adjudicatory body to supervise how the countries are following their commitments. The result is a dependence on the goodwill of companies to follow the soft law established in the international community.[237]

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[233] Gentian Zyberi, 'Ensuring the Protection of the Environment from Serious Damage. Towards a Model of Shared Responsibility between International Corporations and the States Concerned?' 67-90 in Bård A. Andreassen and Võ Khán Vinh, *Duties Across Borders – Advancing Human Rights in Transnational Business* (Intersentia Ltd, United Kingdom, 2016) 84.
[234] ibid 76.
[235] Malcolm N. Shaw, *International Law* (7th edition, Cambridge University Press, United Kingdom, 2014) 83.
[236] Ulrich Beyerlin and Thilo Marauhn, *International Environmental Law* (Hart Publishing Ltd, USA, 2011) 290.
[237] Angelica Bonfanti, 'Accountability of Multinational Corporations for Human Rights and Environmental Abuse: How Far Can Extraterritorial Jurisdiction Go? 151-178 in Charles Sampford et al., *Rethinking International Law and Justice* (Ashgate Publishing Ltd., UK, 2015) 151.

In an attempt to try to constitute a definition of a crime against future generations called *ecocide* and move away from soft law, Higgins has put forth the necessity of a clear phrasing such as 'conduct which places the very survival of life at risk should be prohibited and prosecuted as an international crime'. An inclusion of this definition into the Rome Statute would not only make it illegal across the world to deplete and exploit natural resources to the extent where nature no longer can reconstruct itself, but it would also give the ICJ jurisdiction to try such a crime, since it could constitute a causal link that is missing today. An inclusion would also lead to an obligation for a member state to 'investigate, arrest and prosecute perpetrators'.[238]

### 5.2.2 Wal-Mart in Mexico and bribery

Wal-Mart Stores Inc, one of the largest retail companies in the world, is under scrutiny for corruption in Mexico. There has been an alleged accusation of building permits obtained through bribery that has had negative consequences for Mexico. These permits have included at least one environmental permit that led to the construction of a building in a flood basin which was classified as 'environmentally fragile'. The corrupt payments are estimated to have reached an amount of $ 24 million.[239]

More often than not, multinational corporations are not subject to international law, but only to the law of the home state, despite the fact that the home state might not be the country of operation. As a result of the Maastricht Principles on Extra-territorial Obligations of States in the Area of Economic, Social and Cultural Rights (hereafter the Maastricht Principles), multinational corporations can now be held accountable for

[238] Polly Higgins, *Eradicating Ecocide – Exposing the corporate and political practices destroying the planet and proposing the laws to eradicate ecocide* (2nd edition, Shepheard-Walwyn (Publishers) Ltd, 2015) 154-155.
[239] Hana Ivanhoe, 'The next generation of 'fair trade' – A Human Rights Framework for Combating Corporate Corruption in Global Supply Chains' 157-181 in Bård A. Andreassen and Võ Khán Vinh, *Duties Across Borders – Advancing Human Rights in Transnational Business* (Intersentia Ltd, United Kingdom, 2016) 160-161.

violations of human rights abroad from the jurisdiction of their home state. Unfortunately, the lack of an adjudicatory body that can supervise the implementation creates a flaw within the principles, which results in a dependence of the goodwill of the states to choose whether to follow the principles or not.[240]

[240] Ebenezer Durojaye, 'The viability of the Maastricht principles in advancing socio-economic rights in developing countries' 135-153 in Bård A. Andreassen and Võ Khán Vinh, *Duties Across Borders – Advancing Human Rights in Transnational Business* (Intersentia Ltd, United Kingdom, 2016) 152-153.

# 6 Analysis

In the following analysis I have attempted to conclude all of the findings of this thesis in order to contextualise how the global degradation of the environment, corruption and multinational corporations are interlinked in a problematic area where there is a need for change.

## 6.1 Being smart and business oriented, or neglecting the social contract

As mentioned in the previous chapter, market oriented regulations are argued to be liberalised, to favour rule altering, and to weaken rule directed models of corporate governance. As a result, market oriented regulations are said to have started to straddle jurisdictions, in the sense that regulations have started to be based on international rules which has led to a decreased difference in states' regulations.

As a result, in the pursuance of attracting foreign investors, some states have moved from direct regulations to indirect regulations such as market oriented regulations. When states take a less interventionist approach to regulation, it has been put forth that they create a power vacuum which powerful multinational business can easily fill. Such an effect arises from the fact that multinational corporations are not, through market oriented regulations, being subject to the discipline of the market in terms of enforcement and property rights. This effect is supported by global studies that have confirmed that some states are losing parts of their regulatory power to control the events in the market within their borders, due to the power of multinational corporations. Following this, the effects of market oriented regulations are twofold: (1) it 'weakens rule-directed models of corporate governance in favour of process altering', and (2) it 'eases state

direction of business'. Multinational corporations are in a situation where they are left to choose how to respond to a regulation: if the regulation does not please their perceived preeminent way of making profit, the corporations are free to move their business elsewhere – to a host state.

Market liberals argue that governmental regulation of the market it threatens to the personal liberty of the actors in the market (i.e. multinational corporations), and that such regulations can be better suited to capture those actors who are in the market to find the system most beneficial for their own benefit. Furthermore, private actors may seek monopoly benefits by lobbying the government to favour them. A market less regulated can potentially be an open playing field where the strongest would survive, and where a society based on status would dominate, since such a structure would allow for primary beneficiaries making the rule of law partial to arise.

According to Vogel, it is obvious that markets require regulations, not in order to function and flourish, but in order to avoid collateral damage such as environmental damage. Seeing this in the perspective of corruption, it might seem meaningless to try to regulate markets when the rule of law, more or less, perishes in particularistic societies where it becomes partial. The social contract is fulfilled only in universalistic states, and not in particularistic states. Some of the required key elements to uphold the social contract are accountability, participation and transparency. Following this, to create a plethora for corruption the state needs to make corruption irrational by eradicating the incentives to be corrupt and doing this through accountability, participation and transparency. This is essential for a society that wants to uphold the social contract, and therefore its social functions, through having rule of law that is impartial. A matrix needs to be provided so that public officials and managers of multinational corporations do not (1) have a reason to be corrupt, and (2) do not expect anyone else to be corrupt.

This way of acting corresponds with the examples presented from Hong Kong and Singapore, who both managed to lessen corruption in their societies, by making the change from the top and down. High-level politicians in these states showed the way by actions and example-setting, not just by implementing new rules that they themselves did not follow – they walked their own talk and by doing so, decreased the expectation of everyone else being corrupt. It is crucial to change the citizens' perception that everyone else is corrupt into the expectation that everyone else is not being corrupt by making the rule of law impartial.

A solution proposed by the anticorruption sector in order for particularistic countries to get a chance of improving and decreasing the level of corruption in their countries, would be to duplicate the institutions of universalistic countries. But as mentioned in chapter 4, according to Mungiu-Pippidi et al. it is 'high time to realise' that such a solution does not work. This statement is based on the fact that the winners in a particularistic country would oppose such a transformation, because it is inevitable that the winners would lose from an anti-corruption reform. The only way to make a transformation successful would be by 'exposing and targeting predators'. An example of this could be by using media publishers who comprehend the benefits of exposing corrupted actors on the way to eradicate corruption, and are willing to take the risk.

Since corruption eradicates the social contract in a society, the natural question that follows is how to reconstruct the social contract in a corrupt society. After having assessed empirical research, Rothstein and Tannenberg have proposed a solution based on 'reasonably well-established empirical indicators' that involves changes in five essential institutional devices: (1) a functioning system of taxation, (2) universal education, (3) meritocracy, (4) gender equality, and (5) national auditing. The main common consequence of changes within these institutional devices is impartiality, which leads to trust and the perception that everyone is treated equally no matter their origin or status. The founding idea is that a society should treat every citizen

with equal respect and concern, and an impartial application of the rule of law makes this possible. This empirical research has a clear connection to the successful changes made in Singapore and Hong Kong, where the top politicians led the change and understood the importance of impartiality. Specifically, that everyone in a society is equal to the law, that every case should be treated alike, and that each and every citizen should get his or her rights.

Rothstein comes to a conclusion pointing out the fact that 'there can be a market for anything as long as there is not a market for everything'. The essence of the conclusion is, as long as there will be a market for corruption where everything is for sale, the markets will not reach their ultimate economic efficiency and, therefore, poor countries will remain in poverty. The solution provided in order to eradicate corruption on a micro-level is to make it irrational for the actors: would it be possible to apply the same solution on a macro-level in order to eradicate corruption at an international level?

The UN highlighted at the World Summit in Johannesburg 2002 the importance of eradicating corruption due to the obstacle it poses to the development of societies; an opportunity was given to the participating countries to express their determination to attack corruption. In the Johannesburg Declaration, corruption was declared to pose a severe threat to sustainable development, hence, sustainable development has a connection to corruption and it has been recognised at an international level.
Furthermore, the UNCAC is perceived to be the start of an evolution of the state-society relationship by aborting the legitimisation of particularistic states. In the foreword of UNCAC, it is stated that corruption 'undermines democracy and the rule of law, leads to violations of human rights, distort markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish'. Moreover, in the preamble of the UNCAC, an expressed concern about how corruption is 'jeopardizing sustainable development and the rule of law' was expressed, and a

conviction that ‘corruption is no longer a local matter but a transnational phenomenon that effects all societies, making international co-operation to prevent and control it essential’. As the scope of application for the UNCAC comprises ‘public officials’ in government and international organizations, as well as the duty of a state to prevent corruption in the private sector, it can be applied on a macro level in order to target multinational corporations that pursue damaging environmental activities.

From my objective perspective, this portrays an awareness of the problem at an international level, and a willingness to make an effort of eradicating corruption from the international community. An effort is made to change the perspective of business from not only profit, but also to the environment, sustainable development and the future of our society. In addition to this, eradicating corruption would help reconstruct the social contract in states where it vanished a long time ago. This would bring back justice, a trust for the state and give every person his or her rights back which they have previously been denied. In doing so, the citizens would get back their right to live in a sustainable environment that would be protected accordingly to the existing rules of environmental protection.

## 6.2 Walking the talk – using international law to curb the development

Customary international law is a powerful instrument, although it can be imprecise and time consuming to create. Today, the most common way to create new rules in international law is through the making of treaties, which is also perceived to be both faster and more precise than relying on customary international law. The key of making corruption seem irrational is to impel actors to abide the law for the sake of their own interests. Following this, treaties might be the solution for eradicating corruption on an international level, and in doing so, allow for the environmental standards to be raised.

A way to eradicate, and try to reform, a corrupted society lies in a theory put forth by Rothstein, who was inspired by the so called 'evolutionary gaming theory', which brings about a realistic notion of how humans make decisions and enact them into the world. The 'evolutionary gaming theory' is based on the fact that humans do not always know everything, and can therefore not make rational decisions. Everywhere one turns, there must be a new perception about corruption – that it is not accepted under any circumstances and that no one pursues corruption anymore. In order to make this change possible, it has to happen everywhere at the same time through a 'big push'. This theory stands in contrast to former theories in the anti-corruption sphere that have promoted changes to be made gradually, which, according to Rothstein, only leads to moving the corruption into another institution.

The goal is to move from 'particularistic practices to universalism and impartiality', which can be done through a 'big push'. Since a particularistic state will 'self-correct to maintain its corruption following a purge'; in the same way as a universalistic state 'will self-correct to deal with corrupt individuals and the legislative or political flaws that facilitated their corruption', it is crucial make the change through a 'big push' so that the system do not get time to self-correct itself.

So is there a solution? Bringing forth this example from Ecuador, the only country to have made the Universal Declaration of Human Rights part of their constitution, has through that incorporation at the same time made the rights of the nature part of their constitutional protection. Through a project called the Yasuní-ITT initiative, Ecuador managed to remove all oil extraction from the Yasuní National Park in order to preserve one of the most biodiverse regions on Earth, in combination with being number 117 on the Corruption Perception Index (CPI) 2017 from TI, this achievement is remarkable. This poses the question whether Ecuador has managed to curb the constraint development of environmental protection by implementing an

international declaration into their constitution? Would it be possible to duplicate this action and in that way give the environment better protection and at the same time decrease corruption, which would allow multinational corporations to pursue environmental damaging actions in a state? Ecuador has for certain raised the protection of the Yasuní National Park by implementing the protection of the park into their constitution. However, if the corruption has lessened in the country, and if the environmental protection rules are being applied with stringency, is hard to establish. On a second note, it might even be easier to proceed with corruption behind a large improvement like this due to the fact that the outer world might not expect it, which could be taken advantage of.

Due to the fact that more often than not, multinational corporations are not subject to international law, but only to the law of the home state, the emergence of the Maastricht Principles arose. Multinational corporations can now be held accountable for violations of human rights abroad from the jurisdiction of their home state. Unfortunately, the lack of an adjudicatory body that can supervise the implementation creates a flaw within the principles, which results in a dependence of the goodwill of the states to choose whether to follow the principles or not.

If a violation of the environment took place in Ecuador, it would constitute a crime against human rights as a result of the implementation of the human rights charter in their constitution. Following this, it would give jurisdiction to prosecute the corporation operating in a host state and provide the link to the Maastricht Principles that is missing today, which would give the ICJ jurisdiction of such a violation.

Using legal instruments in international law, such as the no-harm principle, the polluter pays principle and the principle of superior responsibility, is another way of leading up to legal consequences for a polluting state. However, these principles will only solve environmental problems and are furthermore the next step after having attacked the problem of corruption.

The correlation between corruption and environmental degradation is present and needs to be handled as one problem, since they are interlinked in many cases, but not exclusively interlinked. Specifically, there can be corruption without environmental degradation, and there can be environmental degradation without corruption. The issue of interest is when these two are interlinked and when corruption has weakened the environmental protection and increased the environmental degradation as a result of corruption.

## 6.3 What can we do different?

The sources listed in article 38(1) of the ICJ Statute, constitute the base for the jurisdiction of ICJ; international treaties; international customary law; general principles of law; and 'judicial teachings of the most highly qualified publicists of the various nations, as a subsidiary means for determination of rules of law'. A consequence of a non-participating state in a treaty is the inability to invoke a dispute based on the treaty towards that particular non-participating state. International disputes can only be invoked between parties to a treaty. Although, if an international customary rule is arguably the same as that contained in the treaty this problem might not arise.

The judgements from the ICJ are not considered to be a source of law in the strict sense. However, with a coherent body of judgements, they are regarded as evidence of law. It is stated in article 59 of the ICJ Statute that the judgements of the ICJ have 'no binding force except between the parties and in respect of that particular case'. According to Crawford, this refers to the particular question of intervention, and not to major questions that form a judicial precedent.

The importance of the sources of the ICJ is relevant if the ICJ were to have jurisdiction in environmental and corruption cases. In such a case, the ICJ

would be the missing adjudicatory body that could put up a coherent body of judgements within both environmental crimes and corruption. In some cases, like with Wal-Mart, the ICJ would have the chance to give guidance in cases where an environmental crime had been committed through corruption.

In her attempt to try to constitute a definition of *ecocide*, Higgins has put forth the necessity of a clear phrasing such as 'conduct which places the very survival of life at risk should be prohibited and prosecuted as an international crime'. An inclusion of this definition into the Rome Statute would lead to an obligation for a member state to 'investigate, arrest and prosecute perpetrators'. According to Bonfanti, this is part of the solution required to increase the alleged lack of effect of soft law in the international community. In combination with the pursuance of UNCAC and its recognition of corruption as an impediment to sustainable development, this would provide a base for starting the eradication of corruption and as a result, provide increased protection of the environment against multinational corporations.

Important to bear in mind is however that corruption cannot be eradicated in the same way as traditional crimes, since it is imbedded in the system of how a society works. It will require 'revolutionary change in institutions' in order to change the perception of how the actors in a society will act, specifically, to change the expectation that all other actors are corrupt. The citizens in a particularistic state have to realise that there is a 'new game in town'. Trust and reciprocity in combination with monitoring and sanctioning are vital in the progress of change, following this – both formal and informal mechanisms of control are needed in the revolutionary change that attempts to eradicate corruption. Unfortunately, the question of how to make this type of change is unanswered, the conclusion is that the international community will have to serve as an 'external principal' until

the answer to this question has been found.[241] What has been noticed in this area is that the examples mentioned in this thesis: Sweden, Denmark, Hong Kong and Singapore, are all small states which made it easier to make a revolutionary change. The conclusion of this observation leads up to question of how to duplicate this systemic change on a larger scale.

## 6.4 A *non-interest* of development

Within the principle of state sovereignty is the territorial sovereignty principle, which is today prioritized above the welfare of our global world. The territorial sovereignty principle is a guarantor of state-control over the territory within its borders. Protecting ones interests by using environmental laws in a state does not mean protecting the environment, it means protecting the *interests* of the state *within* the territory of the state. Consequences arising from this state-centred system are a dominance of rich states over poor states because of the focus on state territoriality. We are borrowing from the next generation by prioritizing the needs of today, with no intention of paying back what we have borrowed. The human need is put before environmental needs, and the needs of future human generations.

International law has created new obligations beyond treaty law, which has set out some limitations for the state sovereignty. Taking this concept further, Bosselmann suggests an idea where the state acts as a trustee or guardian, in order to limit the territorial sovereignty. This idea is based on the approach that the environment is not territorial, but global, hence the states should have responsibility over the entire environment and not only over the environment covered by state territoriality. The entire environment meaning not just what is perceived to be of global importance, but the entire environment. An approach like this would capture the environment within

[241] Anna Persson et al., 'Why Anticorruption Reforms Fail – Systemic Corruption as a Collective Action Plan' (2013) 3 Governance An International Journal of Policy, Administration, and Institutions 466.

the territorial jurisdiction, since this solution does not creates a difference in the state guardianship if the state has rich or poor natural resources.[242]

In addition to this, the discussion initiated by Kaufmann on implementing the concept of 'legal corruption' in the definition of corruption is very interesting. According to Kaufmann, there should be no differentiating between if the corruption is pursued illegally or legally since the effect of the actions are the same – impediment to the development of a society and a partial application of the rule of law. The reason for this discussion is the financial crisis in 2008, which does not have anything to do with the environment, but portrays how states have prioritized profit over the benefit of its citizens. Kaufman has attempted to extend the definition of corruption in the purpose of catching all types of behaviour that can be perceived as being corrupt. The question that he tries to answer, according to my own reflections is, why should be distinguish corruption pursued by only public officials, when the behaviour of top managers have a lot in common with the behaviour of a corrupted public officials.

Furthermore, such a definition of corruption could help implement multinational corporations into the concept of corruption when managers take decisions to move the production to developing countries in order to exploit their environment so that they can increase their profits. Today, it is legal to have a home state and operate in a host state because the host state provides legally more beneficial standards in order to make a larger profit. Specifically, in the host state, which allegedly has lower environmental standards, the method of production might be allowed, but assessing it from a holistic perspective with the 2030 Agenda, the actions do not align with those purposes. Following this, with such a definition as the one proposed by Kaufmann, this type of behaviour would be seen as corrupt and would be illegal.

[242] Klaus Bosselman, *The Principle of Sustainability – Transforming Law and Governance* (Ashgate Publishing Ltd, England, 2008) 168.

# 7 Concluding remarks

We are borrowing from the next generation by prioritizing the needs of today, with no intention of paying back what we have borrowed. The human need is put before environmental needs, and the needs of future human generations.

The inclusion of the importance of fighting corruption on an international level and moving from the local level is exactly what is needed in order to understand the importance of eradicating corruption. An effort is made to change the perspective of business not only from profit, but also to the environment, sustainable development and the future of our society.

Fighting corruption in the world is essential if we want to reach the level of sustainable development that the international community is aiming for. In Sweden, we tend to forget our history of being a particularistic society and how we made a shift from that into being the universalistic country we are today.

The correlation between corruption and the constrained development in the international environmental law does correlate, but it is not because of its lack of regulations or principles that aim to protect the environment. It is because of how corruption turns the rule of law into being applied partially, only when someone with the right status decides it should be applied, or not applied for that matter. The fact that the UN no longer recognises particularistic states as a legit way of conducting a society, is a great start and it is moving in the right direction. The following step is to figure out how to actually implement the ‘big push’ on a larger scale, something that I might be able to answer in the future.

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