

A Legal Appraisal of the Basel and Bamako Convention

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Abstract: *Due to the increase in technology and industrialization the transboundary movement of hazardous waste has become a progressively advanced phenomenon in developing countries especially Africa. Cases of movement of hazardous waste came to highlight in the 1970s and 1980s. As a result of this, several legal frame work were negotiated to curb the increase this transboundary movement of hazardous waste causes on plant, animals and human environment. This has resulted in negotiation of treaties like the Basel and Bamako Convention to control the movement of waste into developing countries. The aim of this study therefore is to examine the effectiveness of the conventions in developing countries with a view to ascertain if these treaties are effectively implemented and if not, possible ways to make the convention effective. Flowing from the above, the study shows that except these laws are domesticated and ratified into our laws they have no binding effect in Nigeria. As such section 12 of the Nigerian constitution should be reviewed to allow these treaties to be enforced especially as it relates to plant, animal life and human environment. The study has shown that there should be collaboration between policy makers, researchers, the corporate world and civil society, who are in interest/affected in environmental issues in Nigeria, in order to foster dialogue, sharing best practices, sensitizing the civil society on the danger of hazardous or toxic waste, and encourage access to environmental justice and liberalize environmental claim-procedure.*

Keywords: legal appraisal, Basel, Bamako convention

INTRODUCTION

Due to the innovation of technology, environmental degradation has become a peculiar harm, particularly because of its cross-boundary nature. The increase in the production of goods and services has brought about the rise of hazardous waste in developed countries and in doing so it has become one of the most serious threat to human life and environment¹. Over the past 20 years, there has been a number of well publicized cases focusing on the danger of growing trade as well

¹ M.G. Fikru, 'Trans-boundary Movement of Hazardous Waste: Evidence from a New Micro Data in the European Union'. *Review of European Studies*(2012) 4(1), 3-15.

as the problem of controlling the movement of hazardous waste from developed countries to developing countries².

Environmental consciousness and stricter regulation of toxic wastes movement from developed countries to developing countries coupled with the cost of disposing waste, waste managers began to seek for the disposal of hazardous waste in Eastern Europe and in the developing world where environmental degradation was much less regulated and enforcement mechanisms poor. It was against this background that certain treaties were put in place to curb the menace of waste degradation. Some of these treaties are the Basel and Bamako Conventions which were adopted to combat the toxic trade as it was termed.

The Basel Convention is an international agreement that regulate the transboundary movement of hazardous waste. While the Bamako convention is a regional agreement which gives a total ban on the transboundary movement of hazardous waste. While both the Basel and Bamako Convention share similar goals, the two conventions have some key differences in their approach to addressing this issue. The Basel Convention focuses on controlling the export of hazardous waste from developed countries to developing countries while the Bamako Convention has the total banning of export of hazardous waste from African countries altogether. This difference has led to some controversy and debate over which Convention is more effective in protecting the environment and human health.

Other domestic laws that were put in place to curb the menace are:

Harmful waste decree 42 of 1988³ now refer to Harmful Waste Special Criminal Provisions Acts of 1988.

Section 15 of the Act defines harmful waste as any injurious, poisonous, toxic or noxious substance and in particular include nuclear waste emitting any radioactive substance of the waste in such quantity, whether with any other consignment of the same or different substance, as to subject any person to the danger of death, fetal injury or incurable impairment of physical and mental health, and the fact that the harmful waste is placed in a container shall not by itself be taken to exclude peril which might be expected to arise from the harmful waste.

The act specifically targets the carrying, depositing or dumping of hazardous waste on land and territorial waters of Nigeria. The Act makes provisions for the acts or omission of persons relating to the dumping of hazardous waste on the waters or shores of Nigeria, as a criminal Act⁴ and such persons will be convicted with a punishment of imprisonment for life.⁵ Also, it goes further to state that where a crime is committed by a body corporate under the Act and it is proved that it was committed with the consent or connivance of or is attributable to any neglect on the part of

² J. Kruegar, 'The Basel Convention and the International Trade in Hazardous Wastes. In O.S. Tommessen, *Yearbook of International Co-operation on Environment and Development 2001/2002* (2009), (pp. 43-51). London: Earthscan Publications.

³ Harmful Waste Special Criminal Provision Act CAP H1, LFN2004

⁴ Sec 3(1) of Harmful Waste Special Criminal Provisions) Act CAP H1, LFN2004.

⁵ Sec 6 of Harmful Waste Special Criminal Provisions) Act CAP H1, LFN 2004.

the director, manager, secretary or any other person purporting to act in their stead, he as well as the body corporate shall be liable to be proceeded against and punished accordingly.⁶

National Environmental Standards and Regulations Enforcement Agency Act No. 25, 2007 of the National Assembly of Nigeria

This agency amongst others was enacted by the National Assembly to regulate environmental Standards, regulation, rules, laws, policies and guidelines. The agency has the responsibility for the protection and development of the environment biodiversity conservation and sustainable development of Nigeria's Natural resources in general and environmental technology on enforcement of environmental standards regulations, rules, laws policies and guidelines⁷.

This agency has the function to enforce compliance with laws, guidelines policies and standards on environmental matters⁸ with provisions of international agreements protocols, conventions and treaties on the environment, including oil, and gas, chemicals, hazardous waste, pollution and such other environmental agreement as may from time to time come into force.⁹

History of Transboundary Movement of Waste

The production of waste, especially hazardous waste has experienced an increasing growth since the industrial revolution until today. The history of transboundary movement of waste is marked by increasing awareness and regulation following incidence of toxic waste dumping in developing countries in the 1980s. In the 1970's, and 1980's stricter environmental laws in developed countries like the Resource Conservation and Recovery Act (RCRA) in the US made it more expensive to dispose of hazardous waste within borders. The cost increase led some waste generators to seek cheaper disposal options in developing countries, where regulations and enforcement were often weaker¹⁰. Also, the globalization of shipping made cross border movement of waste easier and the quest for foreign currency by developing nations, the financial incentive to participate in this global market became enormous for all parties. Waste traders, according to a Belgian environmentalist "can fabulous profits without the risk of drug smuggling or running gun."¹¹ Consequently the trade in hazardous waste particularly to poorer countries grew rapidly.

One of the foremost cases of the transboundary movement of waste was in October 1979, when the state department learnt that a Colorado firm had offered the president of Sierra-Leone up to 25 million dollars for permission to dispose of hazardous waste in that country. Under pressure from its citizens and neighboring countries like Nigeria and Ghana as well as the U.S State department, the Sierra-Leonean President had to announce in February 1980 that the plan was

⁶ Sec 7, Harmful Waste Special Criminal Provisions) Act CAP H1 LFN 2004

⁷ Sec 2 NESREA

⁸ Sec 7a NESREA

⁹ Sec 7c NESREA

¹⁰ Basel Convention, "Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal", <http://www.basel.int/countries/partiessignatories/tabid/4499/Default.aspx>> last accessed June 2016.

¹¹ The International Herald Tribune, May 25, 1988

‘fool-hardy’ and rejected it outrightly. This made other early waste trade deals that were made public to be rejected outrightly.

Another case of waste dumping recorded is the New York’s “garbage barge” the Mobro, which travelled for five months and 6,000 miles along the coast of the US and along the Caribbean, carrying 3,186 tons of solid waste from Long Island¹². From March 22, 1987, the vessels left Islip, New York and six US states, North Carolina, Alabama, Florida, Louisiana, Mississippi and Texas rejected the Cargo. In the following month, the ship was confronted by more refusals. The Mexican government bound the vessels and the Bahamas Police put out an alert for the vessel after a land developer attempted to unload the garbage on a nearby uninhabited island, Little San Salvador. On September 1, the barge returned to New York city where the garbage was unloaded and incinerated. The responses of the US states point to a ‘Not in my Backyard’ reaction that many citizens in industrialized countries adopted.

In 1990, OECD countries exported about 1.8 million tons of hazardous waste. Most of these wastes were shipped to developing countries, a number of high-profile incidents of hazardous waste dumping led to calls for regulation. One of such incidents was the KHIAN SEA waste disposal incident which took place in August 1986 where a Bahamas owned cargo ship carrying incinerator ash from the city of Philadelphia loaded with more than 14,000 tons of toxic incinerator ash attempting to dump its cargo in the Bahamas after failing to find a US State to accept its waste.¹³ The Khian sea ship sailed for many months changing its name several times, unable to unload the cargo in any port around the world and was rejected by at least 15 countries on 5 continents. In December 1987, the crew was believed to have dumped much of its load on the Haiti beach. After discovering the ash, Haiti ordered the ship to reload the ash in January 1988 before being forced away.

All these incidents occurred concurrently with the Koko incident between August 1987 and May 1988 in which five ships transported 3800 tons of hazardous waste from Italy to the small Nigerian town of Koko in the then Bendel state, now Delta state of Nigeria, under an agreement in which Italian waste trader persuaded a retired lumbar worker, Sunday Nana, to store the waste in a dirt lot near his home in exchange for 100 dollars monthly rent which was paid to him for the use of his farmland.¹⁴ The Nigerian authorities did not know of this scheme until June 2nd 1988, after some Nigerian students in Italy sent copies of the articles to their home country. At the end of August 1988, Italy helped remove the waste while Nigeria also considered legal actions against Italy. According to the justice minister, Prince Bola Ajibola, Nigeria would take the matter to the International Court of Justice.

All these have led to the development in international agreements like the Basel Convention to control the movement and disposal of hazardous waste. However, we could consider this as a consequence of economic development but on the other hand if these wastes are not properly

¹² Vaullete and Spaulding (n29) 295

¹³ Ibid, 21

¹⁴ Ibid, on the Koko Incidence and Environmental Implication.

handled, this could be detrimental to human health and its environment especially when it comes to hazardous and toxic waste. Rapid globalization in the economy has brought about the increase in economic growth. This again has brought positive as well as negative effect.¹⁵ Thus it is a well-known fact that economic growth often result to a high amount of waste production especially of toxic waste. The number of ill-waste that are generated every year is very impressive according to a UN report. This number is between 20-50 million UN Tons¹⁶ since the economic growth is experienced mostly in the developed countries. It will be just to say these are countries where the production of hazardous wastes are higher. In effect the developed countries cannot curtail or deal with all the wastes that they produce, as such they need to dispose them one way or the other.

In the past few years, many African countries have served as dumping ground for nuclear and industrial waste. Most of these wastes are generated for economic reasons. Stringent environmental regulations and heightened public awareness means that, if these wastes are generated, the cost involved will be quite enormous.¹⁷ Thus, they arrange for their disposal in countries with little or no knowledge of the dangers involved and in consideration of an amount which appears large to the cash trapped countries but which is a small fraction of what the company would have paid to dispose off the waste within its own territories.

Transboundary movement of wastes especially from developed nations to developing nations is therefore on the increase due to a number of interconnected reasons.

Primarily as a result of industrialization great and irreparable damage is done to the environment. Mankind is now faced with the fact that the current rate of destruction might lead to a very bleak or even nonexistent future for the earth and its inhabitants. The control and regulation of the issues of the environment by all nations is therefore essential.

Key Positions of the Basel and Bamako Convention

The Convention mandates several obligations for its signatory countries. These include a total ban on importation of hazardous and radioactive waste into Africa. Article 4(1) of the Bamako Convention shares more lights on the general obligations of parties in relation to hazardous wastes import ban, it states as follows:

All parties shall take appropriate legal, administrative and other measures within the area under their jurisdiction to prohibit the import of all hazardous waste for any reason, into Africa from non-contracting parties. Such import shall be deemed illegal and a criminal act.

¹⁵ Waste Framework Directive 2008/98/EC Art 3(1)

¹⁶C. Eze, 'The Bamako Convention on the Ban of the Import into Africa and the Control of the Transboundary Movement and Management of Hazardous Wastes within Africa: A Milestone in Environmental Protection?' *African Journal of International and Comparative Law* 208, (2007), 15.Ibid

¹⁷F.J.Wordsworth, 'The Evolution of the Bamako Convention: An African Perspective' *Colorado Journal of International Environmental Law and Policy*, (1993) 4, 324.

The provisions of the Convention goes further to ban the dumping of hazardous waste at sea, internal waters and water ways.

The Bamako Convention further adopts precautionary measures in preventing pollution problems or release of wastes substances into the environment by making parties to cooperate with each other in taking such appropriate measures to implement the precautionary principle to pollution prevention.¹⁸

A further obligation given by the convention is the prevention of the export of hazardous wastes to states which are prohibited by their legislation or international agreement of all such import where there is reason to believe that the waste will not be managed in an environmentally sound manner.¹⁹

Another distinctive obligation is that a party shall not permit hazardous waste to be exported to a state which does not have the facilities for disposing them in an environmentally sound manner.²⁰ There is a prohibition of persons under the national jurisdiction from transporting or disposing hazardous wastes unless such persons are authorized to do so. Parties are also to ensure that hazardous wastes that are subject of transboundary movement are packaged and labelled and transported in conformity with generally accepted and recognized international rules and standards in the field of packaging,²¹ such hazardous waste must be accompanied by a movement document, containing information specified in annexed ivB from the point of movement to the point of disposal.²²

Parties shall under take to enforce the obligation of this convention against offenders and infringements according to relevant national laws and or order to better protect human health and the environment.

A Comparison of both Conventions

Considering the fact that the two Conventions were adopted about the same historical time and that they have to a certain extent the same aspirations²³, it is not surprising that they are very similar in their key provisions, apart from the fact that with regard to the Bamako Convention they are generally more stringent.

In effect, the African nations adopted the Bamako Convention with the very purpose of addressing some provisions that they felt as lacks in the Basel Convention. For this reason, the two instruments

¹⁸ Art 4(3)F

¹⁹ Art 4(3)I

²⁰ Art 4(3)J

²¹ Art 4(3)Mii

²² Art 4(3)Miii

²³Adebola Ogunlade, 'Can the Bamako Convention adequately safeguard Africa's environment in the context of transboundary movement of hazardous wastes?' (2009/2010) 14 CAR Annual Review i, 6.

present several similarities and a few, although very striking, differences. According to Donald²⁴ these differences are the result of the concerns of the African Union, and Chukwuka²⁵ recalled that the drafters of the Bamako never meant to reproduce another Basel Convention and therefore they created more far-reaching and innovative provisions.

As for the similarities, both Conventions aim at achieving a reduction in the generation but in particular in the movements of wastes, and aim to protect the environment and human health from the detrimental consequences of the dumping of hazardous wastes.

To a certain extent, the Basel Convention anticipated the measures adopted by the Bamako Convention because in article 4 it takes into account the possibility for parties to issue import bans and prohibits export of wastes to countries that have issued such bans.

They also encourage the disposal of such wastes near the locus of generation and recognize the sovereignty of states to prohibit the import of hazardous wastes in their territories. Moreover, both Conventions don't prohibit the movement of waste within their state parties.

As for the scope of the Conventions, both exclude wastes generated by the normal operations of a ship.

Then, both the Basel and the Bamako set a duty to re-import a cargo of wastes in the case in which their disposal cannot be completed due to a breach in the contract.

When it comes to the divergences between the two Conventions, they are only minimal if we think about the real big matter that differentiates them. In the previous sections we have seen which are the purposes of the two Conventions. There is one purpose that really sets the difference: the Bamako Convention imposes a total ban on all imports of hazardous wastes into Africa from non-contracting parties and if they occur, they have to be considered as illegal. On the contrary, the Basel Convention doesn't prohibit the transboundary movement of hazardous wastes, but it only regulates them. Indeed, the Basel Convention allows these movements provided that there is a prior and informed consent, whereas the Bamako Convention adopts the prior and informed consent only within Africa.

The second thing that it is necessary to note is the fact that while the Basel is an international and global instrument, with many parties, the Bamako Convention is a regional instrument that has as its area of coverage only the African continent, and not even all the African nations have ratified it.

A third important difference concerns the scope of the Conventions. The Bamako Convention has a much broader scope than the Basel. In particular, art. 2 of the Bamako considers radioactive

²⁴Donald (n 39) 432.

²⁵Eze (n 7) 216.

wastes under its scope, unlike the Basel Convention. Moreover, the Basel Convention excludes from its scope household wastes, which on the contrary are included in the Bamako.

A fourth difference regards the provisions on liability for the damages deriving from illegal transboundary movements of hazardous wastes. As mentioned earlier in this chapter, the Basel Convention had postponed the resolution of this problem, adopting a Protocol that then has never been ratified. On the contrary, the Bamako Convention deals with the matter in article 12 and it states that: ‘strict, unlimited liability as well as joint and several liability shall be imposed on hazardous waste generators’²⁶.

Another difference between the two Conventions regards the illegal traffic of hazardous wastes, which is defined in article 9 of both the Conventions. It consists in any transboundary movement of hazardous or other wastes occurred without notification to all states concerned, without the consent of the state concerned or with a falsified consent. It can also consist in transboundary movement of waste that doesn’t conform in a material way with the documents or that results in deliberate disposal²⁷. Although both the instruments call for the parties to adopt national legislation preventing and punishing this traffic, only the Bamako Convention explicitly considers it as a criminal act²⁸.

Table 1: Comparison of Key Provisions of the Basel and Bamako Conventions

	BASEL CONVENTION	BAMA KO CONVENTION
Type of Instrument	International agreement	Regional agreement focused on Africa
Date of adoption	22 March 1989	30 January 1991
Date of entry into force	5 May 1992	22 April 1998
Number of parties	Signatories: 53 Parties: 191	Signatories: 35 Parties: 30
Reasons for adoption	- International community’s concern about the exports of hazardous wastes from industrial nations to developing nations. - Protection of human health and environment from the harmful	- Dissatisfaction of African states with the provisions of the Basel Convention. They were considered as too weak and benefiting only industrialized nations. - Protection of human health and the environment of Africa against the detrimental

²⁶Bamako Convention, art. 4(3)(b)

²⁷Art. 9 of Basel and Bamako Conventions.

²⁸Bamako Convention, art. 4(1).

	effects of this transboundary movement.	effects of the generation and transboundary movement of hazardous wastes
Obligations	‘ The regulation of hazardous waste generation and the promotion of environmentally sound management of hazardous wastes, wherever the place of disposal is permissible.	‘Prohibit the import of all hazardous and radioactive wastes into the African and establish the precautionary principle’ ²⁹ .
Scope	It regulates transboundary movement with certain requirements	Bans all import of hazardous and nuclear waste into Africa from any non-party state to the Convention
Waste Categories	Covers a range of hazardous wastes including explosive, flammable, corrosive, toxic, ecotoxic, household waste, incinerator ash, certain plastic waste, certain electronics and electrical waste, etc.	Radioactive, chemical wastes, pharmaceutical waste, waste from product or use of organic solvent etc as in Annex 1
Secretariat	It has a more passive Secretariat administered by the United Nation Environmental Programme	It has a more active Secretariat. The functions are carried out by the African Union jointly with the United Nations Economic Commission for Africa (ECA).
Main obligations of parties	Article 4 -It recognizes the right of parties to prohibit the import of hazardous waste for disposal.	Article 4 – Requires parties to adopt legal and administrative measures to control all carries from non-parties and prohibit dumping at sea, incineration and disposal in the sea bed.
Definition of hazardous wastes	Art. 1 of the Convention provides a list-based definition. - Hazardous wastes have to be contained in one of the categories listed in Annex I unless they	Article 2 of the Convention provides a list-based definition.

²⁹UNEP (n 123).

	don't possess any of the characteristics present in Annex III.	- Hazardous wastes have to be contained in one of the categories listed in Annex I. - They have to be considered hazardous by national legislations.
Prior and informed consent	The state of export employs the Prior Inform Consent procedure for exports requiring consent from importing and transit countries.	Article 4(3)(f). The state of export cannot send the waste until the state of import has not consented in writing to the shipment.
Illegal traffic of hazardous Waste	It is not explicitly considered as a criminal act.	It is explicitly considered as a criminal act.
Protocol on liability	Protocol on liability and compensation. Not yet into force.	Article 12 - Strict and unlimited liability must be imposed on hazardous waste generators.
Precautionary measures	Art 4(4) -Each party shall take appropriate legal, administrative and other measures to implement and enforce the provisions of this convention, including measures to prevent and punish conduct in contravention of the Convention.	Article 4(3)(f) - The parties shall prevent the release into the environment of substances that may cause harm to human health or the environment.
Disposal and incineration of waste in waters	It is not expressly prohibited.	It is explicitly prohibited in art.4(2).

Implementation, Enforcement and Effectiveness of the Convention on Domestic Laws

The Basel and Bamako Convention have significantly, influenced domestic environmental law as it has shaped waste management measure in developing countries. Both conventions have prompted many nations to establish or strengthen their National laws in relation to waste management import and export regulation and environmental protection by developing stricter domestic regulations in Africa to prevent waste regulations on dumping of hazardous waste and promote environmentally sound practices.

Since the adoption of the Basel and Bamako Convention on the transboundary movement of hazardous waste both conventions complement one another and seek to prevent illegal dumping of hazardous waste in Africa.³⁰

The question now is whether adequate and sufficient mechanisms have been established for their compliance, implementation and enforcement of the convention by Domestic laws. A second question is how effective are these laws?

In all, certain factors which could undermine the effectiveness of certain treaties domestically includes;

1. Politics

Domestic political actors may interfere with the implementation of treaties by pressurizing or manipulating government agencies, courts or other relevant bodies. This can lead to selective enforcement where some treaty obligations are enforced while others are ignored. Also political support for corporate bodies especially as regards financial gains could reduce the effect of enforcing these treaties against certain corporate bodies where necessary. As such domestic politics can play a significant role in undermining the effect of international treaties by influencing their ratification, implementation and enforcement.

2. Financing

This is also a major hindrance to the effectiveness of international treaties as funding mechanism can create loopholes and pressures that undermine the intended effects of these agreements .Fluctuations in Government budget or economic crisis could impact the availability of funds thereby hindering the treatys implementation ..Additionally the threat or initiation of prolonged investor -state dispute can create a regulatory chill , thereby discouraging government from implementing policies that might be discouraging to foreign investors ,even if those policies are in the public interest.

3. Compliance

Non compliance with international treaties can significantly undermine the effectiveness of such treaties. If states fails to uphold their obligations it can erode the main purport of such treaties and weaken the intended impact to be achieved by such treaties, as such enforcing such international treaties can be challenging as there will be no central authority with the power to impose sanctions. In essence the effectiveness of treaties relies heavily on the commitment of states upholding their obligations. as where there is non compliance it could lead to more violations of rights and ultimately weaken the rule of law as regards international treaties amongst party states.

4. Justiciability

Some courts may exercise judicial restraint when presented with justiceable treaty provisions as they would not want to interfere with matters of foreign policy. The Nigerian constitution clearly state that no treaty will have its force in Nigeria except its been domesticated into our Nigerian laws. It goes further to state that treaties on my matters not

³⁰ E.C. Eguh, The Bamako Convention and First Meeting of the Parties: A Glance at implementation strategies. Reciel Vol. 7, Issue 3, 1998.

on the exclusive legislative list cannot be signed into law in Nigeria unless a bill to implement such treaty is rectified by the state houses of Assembly and assented to by the President³¹

CONCLUSION

Though, the Conventions are universally recognized as providing global framework for waste management and disposal, implementation is still poor as illegal movement of toxic waste is still a major concern especially into developing countries. Awareness on proper disposal and movement of hazardous waste is poor especially in Africa. Complaint and enforcement mechanisms are not functional hence there are not much cases on the disposal of waste.

The judicial attitude towards environmental claims by those affected by poor waste management is not very encouraging as procedural rule of technicality prevail to deprive victims of environmental harm.

It is recommended that parties should foster great collaboration involving developing countries to share knowledge, expertise and best practice in hazardous waste management. Also raising public awareness about the dangers of hazardous waste encouraging best management practices and sensitizing citizens about the dangers of toxic or radioactive waste and access to environmental justice is encouraged.

³¹ Section 12 of the Constitution of the Federal Republic of Nigeria, 1999