**LEGAL AND REGULATORY ASPECTS OF**

**REGIONAL RADIOACTIVE WASTE MANAGEMENT**

**REGIMES: AFRICA AND THE SOUTH PACIFIC COMPARED**

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**Abstract**

The paper examines and compares, from a legal/regulatory point of view, the regimes for the management of radioactive waste in Africa and the South Pacific. Due to their vastness, both regions are attractive grounds for dumping/storing radioactive waste. Regarding Africa, the paper analyzes the Bamako Convention (signed in 1991), as reinforced by the right to a general satisfactory environment favourable to peoples’ development, enshrined in the African Charter on Human and Peoples’ Rights (1981). Regarding the South Pacific, the paper deals with the Waigani Convention (1995). Since they were established as regional regimes under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989), the paper appraises whether they exhibit similar characteristics. Their institutional set up, namely a Conference of the Parties, is also examined. Moreover, the important question of transnational criminal liability for violating regional norms is addressed. Here Africa is a world pioneer: the prohibited under the Bamako Convention trafficking in hazardous waste is considered an international crime and alleged perpetrators face prosecution before the African Court of Justice and Hunan Rights. The fact that not all States in the two regions participate in the respective regime is certainly an issue of note but is partly mitigated on account of the existence of several other multilateral instruments which, directly or indirectly, restrict and/or prohibit the movement of radioactive wastes. The paper concludes with suggesting which are the principal problems presently surrounding these two regional regimes.

1. INTRODUCTION

Almost all IAEA Member States generate radioactive waste with quantities ranging from a few grams to several hundred tonnes yearly [3]. In the latter half of the 20th century, poorer neighbourhoods and rural areas in industrialized countries were often favoured as sites for toxic (including radioactive) waste landfills and, in exchange, residents were offered money and jobs, both of which were in short supply. However, for a variety of reasons (e.g., stricter domestic environmental rules, introduction of rigorous controls and permits to transfer radioactive waste between developed states, very high costs for disposal, etc.) the whole operation was made increasingly difficult and complicated. At the same time, areas in countries of the developing world (sometimes referred as the Global South) were also actively sought as toxic waste sites, with those disposing the waste offering the same benefits, namely money (in this case hard currency for the states in question) and jobs for the local population. Various terms were even coined for these activities, including ‘toxic waste colonialism’ [1] and ‘international environmental racism’ [2]. But a worldwide campaign was mounted to prohibit the transboundary movement and disposal of hazardous wastes, especially in developing countries. It led to the adoption of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal in 1989, which entered into force on 5 May 1992[[1]](#footnote-1) [4].

Significantly, Article 11 of the Basel Convention envisages that contracting parties are free to enter into bilateral, multilateral, or regional agreements with third countries. The only condition is that they do not derogate from its norms and standards. In other words, the parties to the Basel Convention have agreed not to renegade on their obligations through the conclusion of other agreements and, consequently, they are not allowed to compromise the environmentally sound management of hazardous and other wastes created under this treaty.

The purpose of this paper is to examine and compare two regional treaties coming under Article 11 of the Basel Convention, namely the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (‘Bamako Convention’) and the Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region (‘Waigani Convention’); they were both adopted in the 1990s.

2. THE BAMAKO CONVENTION AND AFRICA

Even before the Bamako Convention was signed on 30 January 1991 (it entered into force on 22 April 1998),[[2]](#footnote-2) the right to a general satisfactory environment being favourable to the development of people, was already a regional norm. More specifically, it had been enshrined in Article 24 of the African Charter on Human and Peoples’ Rights[[3]](#footnote-3) (concluded in 1981, ‘African Charter’) and was applied in the seminal case of *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*.[[4]](#footnote-4) The Bamako Convention, which was concluded before the Basel Convention’s entry into force, had to deal with several issues, including the following three. First, the existence of vast ocean and inland water regions in Africa, perfect for large scale (and anonymous) dumping and incineration of hazardous and radioactive wastes with all the associated threats for people [5]. Second, the revelation that developed countries were already sending toxic wastes to the continent. Suffice to mention the so-called ‘Koko incident’ involving the illegal dumping of 2000 containers with hazardous wastes in Nigeria in 1988; claiming to fertilizers to help poor farmers, they caused death to the local community and rendered the immediate area inhabitable [7] Third, the fact that the Basel Convention does not actually outlaw the trade of hazardous waste with the developing world.

Compared to the Basel Convention, the regulation in the Bamako Convention is considerably stricter. Importantly, it prohibits the importation into Africa of *all* hazardous waste and does not include any exceptions, *e.g.* for radioactive materials, in other words it imposes a total ban [6]. Indeed, Article 2 of the Bamako Convention contains a very elaborate definition of ‘hazardous wastes’, namely those wastes, which: (a) are mentioned in Annex I thereof; (b) are considered to be hazardous under the domestic legislation of the state of export, of import or of transit; and (c) possess any of the characteristics mentioned in Annex II thereof or are categorized as hazardous substances that have been banned or refused registration by government regulation on account of human health considerations or for environmental reasons. Moreover, the Bamako Convention, to which no reservations are allowed, controls the transboundary movements of hazardous wastes within Africa, and further stipulates that any disposal of wastes must be carried out in ways that are environmentally sound. Finally, it establishes the precautionary principle, a manifestation of the risk management approach. It stipulates that, if there exists a possibility that a certain policy or action might cause harm to the public or the environment and, if there is no available scientific agreement on the matter, the policy or action in question should be avoided.

Presently, only half of the African states are contracting parties to the Bamako Convention (it has received 28 ratifications), a fact which diminishes its impact. Heavyweight states, like South Africa, Nigeria, and Morocco, have abstained and it is doubtful if other countries will join it anytime soon. However, this state of affairs is partly mitigated on account of two facts. First, there exist other multilateral treaties, which are applicable to several African countries and ban or restrict the movement of radioactive wastes. Suffice to mention (a) the Protocol to the (Barcelona) Convention for the Protection of the Mediterranean Sea against Pollution, on Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal,[[5]](#footnote-5) and (b) the Cotonou Agreement between the European Union and the African Caribbean Pacific Group of States.[[6]](#footnote-6) The latter stipulates that parties should refrain from discharging radioactive waste, because this would otherwise encroach upon state sovereignty, threaten the environment and endanger public health in other countries. Second, the existence of several sub-regional international organisations in Africa, the so-called African Regional Communities (RECs), some of which have already adopted relevant bans, for example the Economic Community of West African States (ECOWAS). In particular, Article 30 of the Revised ECOWAS Charter obliges its 15 Member States, individually and collectively, to take appropriate action prohibiting the importation, dumping, etc. of hazardous and toxic wastes in their territories and to establish a ‘regional dump-watch’.[[7]](#footnote-7)

The institutional dimension of the Bamako Convention comprises a Conference of the Parties (COP) and a Secretariat. The Conference, which consists of all contracting parties’ environmental ministers (Article 15), has so far held third sessions. The first took place was in Bamako, Mali, on 24–26 June 2013 (COP 1); the second in Abidjan, Côte d’Ivoire, on 30 January-1 February 2018, under the theme ‘The Bamako Convention: A platform for a Pollution Free Africa’ (COP 2); and the third in Brazzaville, Congo, on 12-14 February 2020, under the theme ‘From Decisions to Action: Working for Africa with a Safe Chemicals and Waste Future’ (COP 3). The First Conference adopted its Rules of Procedure and decided that the Secretariat’s functions, which are set out in Article 16, shall be carried out by the United Nations Environment Programme, and that the Commission of the African Union (‘AU’) will provide any necessary assistance.[[8]](#footnote-8)

Reference should be made to the verification system, which is created pursuant to Article 19 of the Bamako Convention. According to this system, any claim made by a contracting party alleging that another party has breached its obligations, shall authorize the Secretariat to verify the allegation and to submit a report to all parties. Until today, to the best of one’s knowledge, there has been no such claim.

Furthermore, Article 20 establishes a dispute settlement regime, which applies to disagreements among the parties regarding the interpretation, application, or compliance with the Convention. If the disagreeing parties do not solve their dispute through negotiations, its settlement could involve either arbitration by an ad hoc organ, which will be set up by the Conference, or submission to the International Court of Justice. Considering that the outcome of the verification process could lead to an inter-party dispute, it is not clear from the text of the Convention which is the relationship between the verification and the dispute settlement regimes and whether the latter could be considered as additional to the former.

The Conference of the Parties has declared that it expects all contracting parties to implement the Convention’s substantive law provisions by developing national legislation, which should focus, inter alia, on the illegal traffic of hazardous and radioactive wastes. It also expects that those, who planned/carried out/assisted in the illegal traffic, shall be appropriately punished by the party or the parties which have jurisdiction. It follows that parties are under an obligation to exercise jurisdiction and of course to do whatever is possible to avoid impunity. On the other hand, parties can expect to receive assistance by the Secretariat in devising domestic legislation and administrative procedures to prevent, monitor, repress and remedy illegal traffic.[[9]](#footnote-9)

The Bamako Convention’s regulatory framework has been reinforced and applied by the following two regional treaties. The first is the African Convention on the Conservation of Nature and Natural Resources, which the AU adopted on 11 July 2003 and came into force on 10 July 2016. Presently, it has been ratified by only 17 AU Member States. Article XIII thereof demands that contracting parties, in collaboration with the competent international organizations, take all appropriate measures to prevent, mitigate and eliminate the detrimental effects on the environment that derive from radioactive and toxic substances and wastes [8]. The second is the African Nuclear-Weapon-Free Zone Treaty (Treaty of Pelindaba), which was adopted on 11 April 1996 and came into force on 15 July 2009[[10]](#footnote-10) The Treaty enjoys wide recognition as it has been ratified by 41 African states [9]. The prohibition of dumping of radioactive wastes is laid down in Article 7 thereof, pursuant to which contracting parties undertake to effectively implement the measures contained in the Bamako Convention. Finally, it should be noted that trafficking in hazardous wastes is also regarded as an international crime and comes under the ambit of the African Court of Justice and Human Rights, which, however, has not yet become operative. Based on this jurisdiction and given that radioactive waste falls into the ambit of hazardous wastes, those individuals and companies allegedly responsible for trafficking would face prosecution before the International Criminal Law Section of the African Court of Justice and Human Rights.

Prior to the holding of the Second Conference of the Parties in 2018, the Secretariat had published a Report on the status of the implementation of the Bamako Convention [10]. As regards illegal traffic in radioactive wastes, it was mentioned that no contracting party had reported to the Secretariat the promulgation of domestic legislation addressing this issue and that no information had been received on any alleged cases of illegal traffic, even though the Secretariat alongside the Secretariat of the Basel, Rotterdam and Stockholm Conventions had jointly carried out capacity building activities. What, however, the Report reveals is the inability of the regional regime to function properly due to a severe lack of funding. Thus, it was stated that the Secretariat was not receiving assessed contributions from the parties. To alleviate this situation, a Trust Fund was established by COP 1 to finance the materialization of its decisions and to which parties and non-parties are invited to make voluntary contributions. Moreover, the Revolving Fund, which is envisaged in Article 14(3) of the Bamako Convention as a means to offer assistance, on an interim basis, in cases of, inter alia, accidents arising from transboundary movements of hazardous wastes, had received no contributions from the parties.

3. THE WAIGANI CONVENTION AND THE SOUTH PACIFIC

The Waigani Convention was signed on 16 September 1995 and entered into force on 21 October 2001.[[11]](#footnote-11) It constitutes the regional implementation of the Basel Convention and, naturally, it is modeled on it. However, like Article 1(11) of the Bamako Convention, Article 1 of the Waigani Convention (a) expressly covers radioactive wastes, and (b) its territorial reach extends to the contracting parties’ Exclusive Economic Zones (i.e., 200 nautical miles from their baselines pursuant to the provisions of the UN Law of the Sea Convention (1982)) [[12]](#footnote-12) and not only to their territorial waters (12 miles), as is the case under the Basel Convention. This is probably explained by the fact that both Africa and the South Pacific are surrounded by very large areas of sea.

Like the Bamako Convention, the regulatory framework of the Waigani Convention is supplemented by two other (and rather similar) regional treaties. The first is the Convention for the Protection of Natural Resources and Environment of the South Pacific Region (the SPREP Convention or Noumea Convention), which was accompanied by an important instrument, the Protocol for the Prevention of Pollution of the South Pacific Region by Dumping.[[13]](#footnote-13) A 1996 amendment to the Protocol, which has not yet entered in force, confirms that the aforementioned precautionary principle as well as the “polluter pays” rule are general principles of international law and binding upon contracting parties. Presumably to strengthen even more the ban on dumping wastes, Article 4(1) of the 1996 amending Protocol has formulated the prohibition in an *a contrario* fashion, namely that the dumping of *all* wastes at sea is banned, except those listed in Annex 1. The second supplementary instrument is the Treaty establishing the South Pacific Nuclear Free Zone (the Rarotonga Treaty), which has been ratified by almost all countries of the region.[[14]](#footnote-14) Pursuant to Article 7 thereof, all contracting parties undertake not only not to dump but also to prevent the dumping of radioactive wastes at sea anywhere within the NFZ.

The commitments assumed by the contracting parties to the Waigani Convention are laid down in Article 4(1) and (4). They include the following: to take all appropriate measures prohibiting the importation but also the exportation of hazardous and radioactive wastes to and from the Convention area, the definition of which is in Article 2(6)); to prohibit their dumping in the said area; and to ensure that adequate treatment and disposal facilities for the environmentally sound management of hazardous wastes are available. As regards specifically radioactive wastes, pursuant to Article 4(5), parties must consider implementing the IAEA Code of Practice on the International Transboundary Movement of Radioactive Wastes [11] as well as any other applicable international and national standards. While these standards must be connected to the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management,[[15]](#footnote-15) presently there are no contracting parties from the South Pacific to it (other than Australia).

The Waigani Convention contains elaborate provisions on the illegal traffic of hazardous wastes. In accordance with Article 9, any transboundary movement shall be deemed to be illegal, provided, inter alia, that: (a) it was carried out without notification to all countries concerned or without the consent of a country concerned; (b) the consent to perform it was obtained through falsification, misrepresentation or fraud; (c) it resulted in a deliberate disposal of hazardous wastes infringing the Convention; or (d) it breached the aforementioned prohibition of importation or exportation.

As in the Bamako Convention, a Conference of the Parties (COP) is established pursuant to Article 13 of the Waigani Convention as well as a Secretariat under Article 14, whose functions are carried out by the Secretariat of the Pacific Regional Environment Programme (SPREP)). The roles of the Conference can be summarized as follows: to promote the harmonization of all relevant legislation and policies; to approve amendments to the Convention as well as to adopt additional protocols; to agree on the budget; to establish subsidiary bodies; and to determine the rules and procedures for the acceptance of new contracting parties. In particular, under Article 23, accession to the Convention is opened to: (a) the members of the South Pacific Forum, an intergovernmental organisation, which was founded in 1971 (its name changed to Pacific Islands Forum (PIF) in 1999) and presently has 18 members; and (b) to non-member states having (dependent) territories in the area covered by the Convention.

The latter stipulation effectively means three Western states (France, the United Kingdom and the USA) as well as the Marshall Islands, none of which has availed itself of the opportunity to join it so far. COP meets in regular session every two years. Until now, it has met 10 times: the first session was in Majuro, the capital city of Marshall Islands, on 20 July 2002 and the last one took place on 30 August 2019. Presently, there is no rotational system for hosting COPs and all sessions are organized in Apia, the capital city of Samoa.

As regards verification and the settlement of disputes, the relevant clauses (Articles 19 and 20 of the Waigani Convention, respectively) are very similar to the corresponding provisions of the Bamako Convention, reference to which has been made above. The main difference is that Article 19 envisages the adoption of a protocol to provide detailed procedures for the verification of alleged breaches, but until now it has not been concluded. However, the Agenda of COP 9 (2017) included Item 5.3, which called for the establishment of a committee to administer the mechanism for promoting the implementation and compliance with the Convention. This proposal was carried on and discussed during COP 10 (2019) as Agenda Item 7.3, which contained the mechanism’s draft Terms of Reference (TOR). According to the latter, the mechanism, which is to be administered by a Committee consisting of representatives of all contracting parties, “shall be facilitative, transparent, cost-effective, simple, flexible, non-binding and oriented” and the aim is to assist parties to carry out the provisions of the Convention. As is the case with all decision-making under the Convention, the Committee shall reach agreement on all matters of substance by consensus. But if consensus fails and to ensure that finally agreement will be reached, decisions shall, as a last resort, be taken by a two-third majority of the members present and voting.

In July 2019, a Report was published evaluating various aspects of the Waigani Convention (it also covered the aforementioned Noumea Convention) [12]. Among others, the Report examined whether the Convention was being implemented at all levels and whether its objectives were being met by the actions undertaken by the contracting parties. The primary finding of the Report was one of “potential unfulfilled”. It was explained in the following terms: while there were impressive achievements by the Secretariat there was also “an unquantified body of work and unknown set of achievements from the parties … systemic under-reporting and a certain lethargy towards implementation [because] of lack of commitment to fund [the Convention] beyond the biennial [COP].” The Report was placed as Agenda Item 7.1 of COP 10 (2019), and parties were invited to endorse it and commit to implementing its recommendations. At the time of writing this paper (July 2021), the date for the next COP had not yet been set.

4. CONCLUSIONS

The requirement of effective and environmentally sound management of radioactive wastes was, is and will remain an issue of concern for both the developed and the developing worlds. The reality is that radioactive waste is produced every second of every hour of every day and somehow it must be stored, disposed of, reprocessed, etc. Given that its shipment will continue to countries and areas other than the countries of production, it is most fortunate that, for many years now, in both Africa and the South pacific sound regulatory regimes have been in place. Importantly, these regimes are not based on a single treaty (respectively, the Bamako Convention and the Waigani Convention) but are made up of several regional multilateral instruments. These instruments, which are rather similar in scope, tasks and goals, if taken as a whole with the primary Conventions, ensure the existence of adequate frameworks, provided of course that they are properly applied by the contracting parties.

However, both regional regimes appear to face some common problems, the most significant ones may be summarized as follows. First, not all countries forming part of the respective regions have joined the corresponding regime, this being particularly problematic in the African region. Second, there is scarce analysis of and literature on these regimes and, as years go by, there is arguably a decreasing academic interest on them. While the respective Secretariats and Conferences of Parties are active, their work remains largely unknown within the two regions, while it does not have much perceptibility in the international community. Third, both regimes suffer from lack of adequate funding. This prevents them to carry out their mandate, a fact which was specifically noted both in the Report on the implementation of the Bamako Convention and in the Report on the performance of the Waigani Convention. However, it should be noted that insufficient funding has become an issue of concern for many international and regional institutions, it is a more generalized problem. Even though sometimes it is alleviated by third partners, donors, etc., this cannot be a long-term solution. Fourth, the supervision of the actions or the inaction of participating states is another open issue and one which, arguably, requires stringent procedures and rigorous mechanisms.

In 2018, the UN Secretary General produced a Report on international environmental law. In it, he said, among other things, that there was a proliferation of instruments on environmental protection but, at the same time, a fragmentation in the regulatory regimes. In his opinion, this required not only institutional coordination and cooperation, but also the implementation of the various legal instruments in a mutually supportive manner [14]. This argument may be true if applied to both the African and South Pacific regimes. In addition, one could add the cost involved in maintaining all the bodies and entities, which are created by the various treaties and conventions dealing with the environment. However, it is also true that the more relevant instruments there exist the more protection they offer. This is of particular significance when having to counter (often complicated) cases of illegal smuggling and trafficking in radioactive wastes.

Based on these considerations, two suggestions will be made. The first is that there should be a campaign to popularize the regimes, which are in operation in Africa and in the South Pacific, both regionally but also internationally, and perhaps accompanied by calls to raise urgently needed funds. The second is that their regulatory framework should undergo a process of revision and of codification. The necessary know-how could be given by the African Union, the IAEA, the UN, the EU, and other international organisations. As has been argued by a commentator, what characterizes the regimes dealing with the environment is that they are dynamic and that they alter constantly after their initial formation [15].

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1. 1673 UNTS 57. [↑](#footnote-ref-1)
2. 2101 UNTS 177. [↑](#footnote-ref-2)
3. Concluded on 27 June 1981, entered into force on 21 October 1986, 1520 UNTS 217. [↑](#footnote-ref-3)
4. African Commission on Human and Peoples’ Rights, Communication 155/96, 15th Activity Report 2001-2002, para. 68. [↑](#footnote-ref-4)
5. The Convention was adopted on 16 February 1976, entered into force on 12 February 1978, 1102 UNTS 27, while the Protocol was signed on 1 October 1996, entered into force on 19 December 2007, 2942 UNTS 155. [↑](#footnote-ref-5)
6. Signed on 23 June 2000, entered into force on 1 April 2003, presently extended until 30 November 2021. [↑](#footnote-ref-6)
7. Signed on 24 July 1993, entered into force on 23 August 1995, 2373 UNTS 233. [↑](#footnote-ref-7)
8. See COP 1, Decision on ‘Institutional arrangements for the implementation of the Convention - Establishment of a Secretariat’, Doc. C1 - DEC. 6 (2013). [↑](#footnote-ref-8)
9. See COP 1, Decision on ‘Illegal Traffic’, Doc. C1 - DEC.14 (2013). [↑](#footnote-ref-9)
10. International Legal Materials 35 (1996) 698. [↑](#footnote-ref-10)
11. 2161 UNTS 91. [↑](#footnote-ref-11)
12. 1833 *UNTS* 397. [↑](#footnote-ref-12)
13. Both the Convention and the Protocol were adopted on 24 November 1986, entered into force on 22 August 1990, InternationalLegal Materials 22 (1987) 41. [↑](#footnote-ref-13)
14. It was signed on 6 August 1985, entered into force on 11 December 1986, 1445 UNTS177. [↑](#footnote-ref-14)
15. It opened for signature on 9 September 1997 at IAEA Headquarters, entered into force on 18 June 2001, 2153 UNTS 303. [↑](#footnote-ref-15)