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Hazardous waste and the right to a healthy environment: reflections on the *LIDHO* decision of the African Court on Human and Peoples' Rights

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ABSTRACT: The illicit transboundary movement of hazardous waste remains a serious global challenge and Africa remains a prime destination for hazardous waste generated in the Global North. This situation obtains despite the existence of international and regional legal frameworks regulating the transboundary movement of hazardous waste. Hazardous waste poses a serious threat to the enjoyment of human rights and specifically, the right to a healthy environment. Although not captured in a global treaty, the right to a healthy environment is provided for in the African Charter on Human and Peoples' Rights, the domestic constitutions of numerous African states and it was also recognised by the United Nations General Assembly in 2022. This case commentary interrogates the nexus between the illicit transboundary movement of hazardous waste and the enjoyment of the right to a healthy environment in the African context, focusing on the case of *Ligue Ivoirienne des Droits de l'Homme and Others v Côte d'Ivoire (LIDHO* case), decided by the African Court on Human and Peoples' Rights (African Court). Prior to the *LIDHO* decision neither the African Court nor the African Commission had considered the right to a healthy environment in the context of harm caused by hazardous waste. Taking a doctrinal legal approach, this case commentary considers how this decision contributes to the jurisprudential growth of the right to a healthy environment and the obligations of states and private entities in upholding this right, especially in the face of harm caused by hazardous waste. This commentary concludes that the *LIDHO* decision significantly expanded the jurisprudence on the right to a healthy environment inter alia by laying the foundation for extending the obligation to respect the right to a healthy environment to non-state entities and ordering far-reaching national legal and regulatory reforms.

TITRE ET RÉSUMÉ EN FRANÇAIS

Les déchets dangereux et le droit à un environnement sain : analyse de l'arrêt lidho de la Cour africaine des droits de l'homme et des peuples

RÉSUMÉ: Les mouvements transfrontaliers illicites de déchets dangereux représentent une problématique mondiale persistante, l'Afrique demeurant une destination privilégiée pour les déchets dangereux en provenance des pays du Nord. Cette situation perdure malgré l'existence de cadres juridiques internationaux et régionaux régissant ces flux. Les déchets dangereux constituent une menace significative pour la jouissance des droits de l'homme, en particulier du droit à un environnement sain. Bien que ce droit ne soit pas explicitement inscrit dans un traité international, il figure dans la Charte africaine des droits de l'homme et des peuples, dans les constitutions de nombreux États africains, et a été reconnu par l'Assemblée générale des Nations unies en 2022. Ce commentaire d'arrêt explore le lien entre les mouvements

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transfrontaliers illicites de déchets dangereux et l'effectivité du droit à un environnement sain dans le contexte africain, en s'appuyant sur l'arrêt rendu dans l'affaire *Ligue Ivoirienne des Droits de l'Homme et autres c. Côte d'Ivoire* (affaire *LIDHO*) par la Cour africaine des droits de l'homme et des peuples. Avant cet arrêt, ni la Cour africaine ni la Commission africaine des droits de l'homme et des peuples n'avaient abordé ce droit sous l'angle des dommages causés par les déchets dangereux. En adoptant une approche du positivisme juridique, ce commentaire examine comment cette décision enrichit la jurisprudence sur le droit à un environnement sain, tout en précisant les obligations des États et des entités privées. L'arrêt *LIDHO* se distingue par son rôle pionnier dans l'élargissement de l'interprétation de ce droit, notamment en envisageant son application aux entités non étatiques. De plus, il ordonne des réformes juridiques et réglementaires d'envergure aux niveaux nationaux, consolidant ainsi le rôle de l'Afrique dans la lutte contre les préjudices environnementaux causés par les déchets dangereux. Cette analyse conclut que l'arrêt *LIDHO* constitue une avancée majeure dans le développement jurisprudentiel du droit à un environnement sain, renforçant tant la responsabilité des États que celle des acteurs privés.

KEY WORDS: hazardous waste; right to a healthy environment; African Charter on Human and Peoples' Rights; Côte d'Ivoire; *LIDHO* case; African Court on Human and Peoples' Rights

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1 INTRODUCTION

The transboundary movement of hazardous waste is well-regulated.[1] Historically, hazardous waste was generated in the Global North and then shipped to the Global South for eventual disposal.[2] Arrangements between states and transnational corporations governed waste

1 Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal, 22 March 1989, reprinted in 28 I.L.M. 649 (1989) (Basel Convention); Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes (1991) 30 ILM 773 (Bamako Convention).

2 P-M Dupuy & JE Viñuales *International environmental law* (2018) 273. The Global North is hereinafter referred to as 'the North' and the Global South as 'the South'.

shipments.[3] The adoption of international legal instruments streamlined regulation of the transboundary movement of hazardous waste but has not eradicated the illicit movement of hazardous waste.[4] The tracking of the exact amount of hazardous waste that is illicitly shipped to developing countries also remains a challenge as the movements are conducted furtively and go unreported.[5] This state of affairs has been accentuated by the high cost of sound waste disposal in the North and weak laws in the South.[6] Countries in the South where hazardous waste is usually shipped often lack capacity to dispose of it in an environmentally sound manner. As a result, such waste poses a significant risk to human health and the environment in those jurisdictions.[7] By extension, damage to the environment and human health has direct negative implications for the enjoyment of human rights.[8] Hence, the relevance of the discourse on the right to a healthy environment. Although on the global stage, the right to a healthy environment only finds expression in 'soft law' instruments, in Africa the right is entrenched and justiciable as such under the African Charter.[9]

The illicit transboundary movement of hazardous waste infringes the right to a healthy environment. Given the recurrence of incidents of

3 United Nations Human Rights Council, Report of the Special Rapporteur on the Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights, Okechukwu Ibeanu, UN Doc. A/HRC/9/22 (13 August 2008) para 16.

4 Report of the Special Rapporteur on the Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights (n 3) para 15. See also, CA Anyinam 'Transboundary movements of hazardous wastes: the case of toxic waste dumping in Africa' (1991) 21(4) *International Journal of Health Services* 759-777.

5 Ieva Rucevska, Christian Nellemann, Nancy Isarin, Wanhua Yang, Ning Liu, Keili Yu, Siv Sandnæs, Katie Olley, Howard McCann, Leila Devia, Lieselot Bisschop, Denise Soesilo, Tina Schoolmeester, Rune Henriksen, Rannveig Nilsen, 2015. Waste Crime – Waste Risks: Gaps in Meeting the Global Waste Challenge. A UNEP Rapid Response Assessment. https://wedocs.unep.org/bitstream/handle/20.500.11822/9648/Waste_crime_RRA.pdf (accessed 19 December 2023).

6 Dupuy & Viñuales (n 2). See also Kaustubh Thapa & others 'Transboundary movement of waste review: from binary towards a contextual framing' (2023) 41(1) *Waste Management and Research* 52-67.

7 Report of the Special Rapporteur on the Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights (n 3) para 16.

8 Case Concerning the Gabčíkovo-Nagymaros Project [Hungary/Slovakia] 25 September 1997 (Judge Weeramantry). Retrieved on November 24, 2023, from https://www.icj-cij.org/sites/default/files/case-related/92/092-19970925-JUD-01-00-EN.pdf

9 See; UNGA, The human right to a clean, healthy and sustainable environment, A/RES/76/300 (28 July 2022) https://digitallibrary.un.org/record/3983329/files/A_RES_76_300-EN.pdf?ln=en accessed on 8 October 2024; UNGA, HRC, A/HRC/RES/48/13 (18 October 2021). https://undocs.org/A/HRC/RES/48/13 and 'Declaration of the United Nations Conference on the Human Environment', Stockholm, UN Doc. A/ CONF 48/14/Rev.1 (Stockholm Declaration), principle 1. Cf. the African Charter on Human and Peoples' rights (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), entered into force 21 October 1986) (African Charter) art 24.

dumping of hazardous waste from the North in African states, the *Ligue Ivoirienne des Droits de l'Homme and Others v Republic of Côte d'Ivoire (LIDHO* case)[10] presented a seminal opportunity for the African Court on Human and Peoples' Rights to pronounce itself on the effect of the illicit transboundary movement of hazardous waste on the right to a healthy environment and other rights, in general. As will be demonstrated herein, the Court broke new ground in its interpretation of the right to a healthy environment and the attendant obligations.

The paper is divided into six parts with the introduction as part 1. Part 2 discusses the concept of hazardous waste through a theoretical framework. This part also frames toxic waste dumping as a human rights issue. Part 3 gives a comparative analysis of the international and regional (African) legal regime on hazardous waste. Part 4 delves into a discussion on the right to a healthy environment giving an analysis of the procedural and substantive dimensions of the right and its status under international human rights law, regionally (Africa), and nationally (focusing on Côte d'Ivoire). Part 5 focuses on the decision in the *LIDHO* case to evaluate and expound on how the illicit transboundary movement of hazardous waste impacts on the right to a healthy environment through the lens of the African Court. This part also evaluates the implications this decision has for further substantive and normative development of the right to a healthy environment, as well as the corresponding obligations of the state and private actors in the event of environmental harm caused by the dumping of hazardous waste. Part 6 is the conclusion.

2 THEORETICAL FRAMEWORK

2.1 Hazardous waste and 'the toxic trade'

The term 'hazardous waste' is defined under both the Basel Convention and the Bamako Convention.[11] The Bamako Convention's definition is however more elaborate and to that extent, preferable to that of the Basel Convention. According to the Bamako Convention, hazardous wastes include not only wastes listed under Annex I thereof and wastes defined as hazardous under domestic legislation of the state of export, import or transit, but also wastes with the characteristics listed under Annex II of the Convention; as well as hazardous substances which have been banned, cancelled or refused registration or voluntarily

10 Application 041/2016. The acronym 'ACtHPR' is used interchangeably in this paper to refer to the African Court on Human and Peoples' Rights.

11 Art 1(1)(a) & (b) of the Basel Convention provides: 'The following wastes that are subject to transboundary movement shall be "hazardous wastes" for the purposes of this Convention:

(a) Wastes that belong to any category contained in Annex I, unless they do not possess any of the characteristics contained in Annex III; and

(b) Wastes that are not covered under paragraph (a) but are defined as, or are considered to be, hazardous wastes by the domestic legislation of the Party of export, import or transit.' See also arts 2(1)(a)-(d) of the Bamako Convention.'

withdrawn from registration in the country of manufacture for *human health and environmental reasons*.[12]

Although the 'toxic trade' predates both the Basel and Bamako Conventions, it should be (legally) understood as trade in hazardous waste as defined thereunder. The inception of the international toxic waste trade is traceable to the late 1970s and grew through the 1980s onwards.[13]

Some scholars argue that international trade in hazardous waste among developed nations with the technical and technological know-how on handling such waste is a legitimate business venture.[14] However, the same cannot be said where hazardous waste is 'traded' or dumped in African countries which tend to lack the facilities to dispose of such waste in an environmentally sound manner.[15] The international trade in toxic or hazardous wastes in so far as it relates to and/or results into dumping of those wastes in (West) African countries has been presented as a question of morality.[16] However, I argue below, toxic waste is not merely a moral but also a human rights issue.

2.2 Toxic waste dumping: a human rights issue?

The nexus between hazardous wastes and their transboundary movement, and harm to human health and the environment has been acknowledged already in international and regional legal instruments.[17]

Although the dumping of hazardous waste in Africa (developing countries) had started as early as the 1970s, it only received much public attention in the 1980s.[18] Toxic waste dumping has been equated to *environmental racism*[19] and decried as a form of *toxic waste colonialism*.[20] According to Pratt, toxic waste colonialism occurs where 'underdeveloped states are used as inexpensive alternatives for the

12 As above (emphasis added).

13 J Clapp 'The toxic waste trade with less-industrialised countries: economic linkages and political alliances' (1994) 15(3) *Third World Quarterly* 505-18, 506.

14 SO Atteh 'The political economy of environmental degradation: the dumping of toxic wastes in West Africa' (1993) 20(1/2) *The African Review: A Journal of African Politics, Development and International Affairs* 19–38, 25.

15 Atteh (n 14) 20. This is further expounded on in Part 3.

16 As above, 19.

17 See Basel Convention (n 1) preamble, paragraph 1, the Bamako Convention (n 1), preamble and art 4(3(t) and the Commission on Human Rights, Resolution 1995/81 on 'the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights'

18 See KI Ajibo 'Transboundary hazardous wastes and environmental justice: implications for economically developing countries' (2016) 18(4) *Environmental Law Review* 267-283; Clapp (n 13).

19 P Mohai, D Pellow & JT Roberts 'Environmental justice' (2009) 34 *Annual Review Environment and Resources* 405–30.

20 LA Pratt 'Decreasing dirty dumping? a reevaluation of toxic waste colonialism and the global management of transboundary hazardous waste' (2011) 35 (2) *William & Mary Environmental Law & Policy Rev*iew 581

export or disposal of hazardous waste pollution by developed states'.[21] However, it is important to note that present day 'toxic waste colonialism' is predominantly perpetrated by multinational corporations from the North rather than states in concert with some corrupt officials and individual or corporate entities in the country where the waste is to be dumped.[22]

Toxic waste dumping negatively infringes the collective and individual human rights and fundamental freedoms of the residents of the areas where the waste is dumped. Hazardous waste invariably degrades and pollutes the environment of the places where it is dumped in addition to causing health problems and even death to the people in the affected areas.[23] Deductively, it is not difficult to see the direct correlation of hazardous waste and its contravention of a flurry of rights such as the right to a clean, healthy and sustainable environment, the right to life and the right to health.[24]

2.3 Hazardous waste and environmental justice

It is estimated that about 90 per cent of hazardous waste is generated in the North and much of this ends up in the South in Africa, Asia, and Latin America for elimination or disposal.[25] Previously, the hazardous waste 'trade' was justified on the premise that the Countries in the South where the waste was being sent had the spatial capacity to accommodate the waste and that they benefited economically.[26] However, the absurdity of this argument was that it ignored the fact that these countries lacked the capacity to handle this waste in an

21 Pratt (n 20) 583.

22 This is clearly demonstrated by the *LIDHO* case under discussion in this paper. The main culprit was a multinational corporation and not a state.

23 For an illustration of this assertion see, 'Ivory Coast: Victory at the African Court for victims of the TRAFIGURA toxic waste dump' (FIDH, 12 October 2023) https://www.fidh.org/en/issues/business-human-rights-environment/business-and-human-rights/ivory-coast-victory-at-the-african-court-for-victims-of-the-trafigura (accessed 9 October 2024).

24 These human rights are already recognised internationally under the art 6 (right to life) of International Covenant on Civil and Political Rights adopted on 16 December 1966 (ICCPR) and art 12 (right to health) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted 16 December 1966 and UNGA resolution on the right to a healthy environment (n 9). Regionally, art 24 (right to a general satisfactory environment), art 4 (right to life), art 16 (right to health) of the African Charter on Human and Peoples' Rights, 21 ILM 58 (1982) (African Charter), adopted on 1 June 1981.

25 KI Ajibo 'Transboundary hazardous wastes and environmental justice: implications for economically developing countries' (2016) 18(4) *Environmental Law Review* 267-283.

26 Report of the Special Rapporteur on the Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights (n 7). According to the Special Rapporteur: 'The information on the contracts showed that transnational corporations based in developed countries were selling toxic wastes and hazardous products to states in the South, in particular in Africa, where small payments could secure ample land on which to dump such wastes.'

environmentally sound manner.[27] Nonetheless, this economic argument was entrenched and found support in the high echelons of power in international institutions like the World Bank.[28] Sadly, this cynicism has continued to pervade the discussions on the transboundary movement of hazardous waste from the North to the South.[29]

The perception of hazardous waste as an environmental (in)justice and legal problem and not merely an economic venture is traceable to the period of the environmental justice movement which emerged from the times of the Civil Rights Movement in the US.[30] It sprang up in response to the discriminatory practice at the time, of dumping hazardous waste in landfills near the homes of ethnic minorities.[31] A practice that came to be known as environmental racism.[32] A cardinal precept of environmental justice is that all people are equally entitled to the right to live in a healthy environment and that environmental harm should be shared equitably among social groups.[33] Fundamentally, the concept of environmental justice 'is premised on the right to a healthy and safe environment, equitable share of resources, the right not to suffer unfairly from environmental policies, laws and regulations including a reasonable access to justice, information and participation in decision making'.[34]

Besides the evolution of the environmental justice movement, the adoption of stricter environmental legal and regulatory regimes in the North and the high cost of disposing of waste in an environmentally sound manner incentivised corporations to look for dumping sites in the South with less stringent laws.[35] Some scholars argue that the treatment of the problem of the transboundary movement of hazardous waste as binary, focusing on the Global North (rich countries) dumping waste in the Global South (poor countries), is a generalised and simplistic approach.[36] However, the statistics suggest otherwise and overwhelmingly point to the fact that much of the toxic waste dumped in the South and particularly Africa originates from the Global North.[37] The several incidents of hazardous waste being dumped in countries in

27 As above.

28 JA Swaney 'So what's wrong with dumping on Africa?' (1994) 28(2) *Journal of Economic Issues* 367–377. The logic cited was that the Global South poor countries would obtain economic benefits since the rich countries were willing to pay to export pollution.

29 Ajibo (n 25), generally. Thapa and others (n 35) generally.

30 R Walters & MA Fuentes Loureiro 'Waste crime and the global transference of hazardous substances: A southern green perspective' (2020) 28 *Critical Criminology* 463-480, 464.

31 As above.

32 As above.

33 Ajibo (n 25) 269.

34 As above.

35 K Thapa & others 'Transboundary movement of waste review: from binary towards a contextual framing' (2023) 41(1) *Waste Management & Research* 52-67, 55.

36 As above, 61.

37 Ajibo (n 25).

the South from the North are self-evident.[38] The Koko dumping incident in Nigeria is one such incident and it catapulted the issue of dumping of hazardous waste in Africa to global publicity in the 1980s and highlighted the need for appropriate regulation.[39]

3 REGULATION OF HAZARDOUS WASTE AND ITS TRANSBOUNDARY MOVEMENTS IN AFRICA

Whereas there might be other international environmental agreements (IEAs) potentially applicable to the transboundary movements of hazardous waste in Africa, this paper limits its discussion to the Basel Convention because of its overarching applicability to the subject of hazardous waste and its fairly similar (albeit weaker) provisions to those of the Bamako Convention.[40] Regionally, the discussion will be centred around the Bamako Convention.

3.1 The Basel Convention: a historical perspective

In the 1980s Africa was fast becoming a dumpsite for hazardous waste from industrialised nations.[41] To address this illicit transboundary movement and dumping of hazardous waste from the North and in effect protect the South which had weak legal and regulatory frameworks, the Basel Convention was adopted.[42] The Basel Convention was adopted as an international legal framework to tackle the problem of dumping hazardous waste from the Organisation for Economic Co-operation and Development (OECD) countries to non-OECD countries.[43] However, preceding the adoption of the Basel Convention, the United Nations Environment Programme (UNEP) had earlier in 1981 already highlighted the 'Transport, handling and disposal of toxic and dangerous wastes' as one of the three areas that required global action in the form of guidelines, principles, or agreements.[44] Furthermore, after the first Montevideo Programme but

38 Thapa, and others (n 35) 56. See also, L Kone, 'The Illicit Trade of Toxic Waste in Africa: The Human Rights Implications of the New Toxic Colonialism' (2014), https://ssrn.com/abstract=2474629 (accessed 19 December 2023). Arguably, these incidents make the concept of environmental justice more relevant to the toxic waste dumping in Africa.

39 Ajibo (n 25) 271.

40 See foot note 67 below.

41 S Matemilola, O Fadeyi 'Bamako Convention' in SO Idowu and others (eds) *Encyclopedia of sustainable management* (2020) 1.

42 The Basel Convention (n 1).

43 Thapa (n 35) 52.

44 United Nations Environment Programme, Montevideo Programme for the Development and Periodic Review of Environmental Law I, Decision 10/21 of the Governing Council of UNEP, 31 May 1982. http://wedocs.unep.org/bitstream/handle/20.500.11822/20587/Montevideo-Programme-I.pdf?sequence=1&isAllowed=y (accessed 19 December 2023).

before the adoption of the Basel Convention, the UNEP governing council adopted the Cairo Guidelines in 1987 to serve as a point of reference for states in the process of developing policies for the environmentally sound management of hazardous wastes.[45] The Basel Convention was therefore predicated on these earlier developments.

The Basel Convention is hailed for having garnered international consensus to regulate the transboundary movement of hazardous waste.[46] It has provided a foundation for subsequent international, regional, and national legal instruments, guidelines, and protocols adopted on the subject of hazardous waste.[47] It is seen as the global regulatory yardstick for the international transboundary movement of hazardous waste.[48] Although praised for its spearheading role in the regulation of hazardous waste, the Basel Convention can be equally castigated for the apparent inadequacy in its definition of the term 'waste'. The Convention defines 'wastes' as 'substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law'.[49]

Without a clear definition of waste, policy and regulatory gaps are likely to arise since waste might mean different things to different people in different countries with different socio-cultural, political, and economic connotations.[50] For instance, what might be waste in one country, might only be second-hand goods in another.[51] However, although this criticism of the Basel Convention might hold some truth, the Convention sets clear parameters of what constitutes 'hazardous waste' which is the primary subject of the discourse in this commentary.

The Basel Convention adopts what is called the *list technique* or *approach*. It lists the various substances under Annexes. It goes on to distinguish 'hazardous waste' from 'other waste' (Annex II).[52] Hazardous waste is that which belongs to the category in Annex I unless it lacks any of the features in Annex III and it also includes waste designated as hazardous under domestic legislation of the state of export, import, or transit.[53] As for 'other waste' is that which falls under the category listed in Annex II.[54] Further clarification on the terms

45 Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes: Decision 14/30 of the Governing Council of UNEP of 17 June 1987.

46 AA Agbor 'The ineffectiveness and inadequacies of international instruments in combatting and ending the transboundary movement of hazardous wastes and environmental degradation in Africa' (2016) 9 *African Journal of Legal Studies* 235-267, 239.

47 As above.

48 Walters & Fuentes Loureiro (n 30) 467.

49 Basel Convention (n 1) art 2(1).

50 Thapa (n 35) 53.

51 As above.

52 Basel Convention (n 1) art 1(1) & (2).

53 Art 1(1)(a) & (b).

54 Art 1(2).

'hazardous waste' and 'other waste' was attained at the 1998 Conference of the Parties with the adoption of Annexes VIII and IX.[55] Annex VIII contains waste qualified as hazardous under article 1(1)(a) of the Convention and Annex IX lists waste not deemed hazardous and thus outside the Convention's purview unless it contains any of the substances listed in Annex I, in a quantity sufficient to exhibit any of the hazardous characteristics under Annex III. Therefore, by studying the different Annexes, one can ascertain which substances are 'hazardous waste'.

The following precepts are identifiable as the cardinal building blocks of the Basel Convention namely; the reduction of the generation of hazardous waste to a minimum;[56] the environmentally sound disposal of waste as close to the source of generation as possible;[57] absolute prohibition of exports of hazardous waste to non-parties[58] and to other parties in certain cases i.e. to states which have prohibited imports[59] or lack capacity for appropriate disposal, or from an OECD state to a non-OECD state;[60] compliance with the prior informed consent (PIC) procedure established under the Convention when exporting hazardous waste;[61] reimport of hazardous waste.[62]

The Basel Convention obliges parties to designate relevant competent authorities for the purposes of implementing the provisions of the treaty.[63] These competent authorities are very instrumental to the PIC procedure under the Convention. It is the competent authorities of the respective states of import and export of hazardous waste that have to share correspondences and information before a waste consignment is approved for movement, when the competent authority of the state of export or the intending exporter has to notify the competent authority of the state of import about the intended waste consignment.[64] The notification has to be accompanied by all the relevant information and documentation concerning the waste consignment. It is after the competent authority of the state of import gives a green light to the consignment that the competent authority can then approve the intended export.[65]

This PIC procedure established under the Basel Convention ensures transparency and allows developing countries the opportunity to scrutinise hazardous waste before it can be shipped to their

55 Dupuy and Viñuales (n 2) 275.
56 Basel Convention (n 1) art 4(2)(a).
57 Art 4(2)(b)-(c).
58 Art 4(5).
59 Art 4(1)(b).
60 Art 4(2)(e) & (g).
61 Art 6.
62 Art 8.
63 Art 5(1).
64 Art 6(1).
65 Art 6(3)(a).

territories. Non-compliance with the PIC procedure has consequences.[66] Although beyond the scope of this essay, it is apt to note that hazardous chemicals may qualify as hazardous waste if they meet the elements listed under Annex I and Annex III of the Basel Convention. Hence, there's now synergy between the Basel Convention and the international legal regimes on hazardous chemicals.[67] In fact, the Basel Convention, the Rotterdam PIC Convention, and the Stockholm POPs Convention now have a single Secretariat serving the three conventions.[68]

3.2 The Bamako Convention: a comparison with the Basel Convention

As a flexibility tool, the Basel Convention allows for the adoption of bilateral, multilateral and regional agreements on the transboundary movement of waste provided such agreements do not stipulate less stringent measures.[69] In that case, the Basel Convention becomes the *lex generalis* while the other Agreement becomes the *lex specialis*.[70] This is what gave legal premise to the adoption of the Bamako Convention[71] which was intended to ban the import of hazardous waste into Africa. At the time, most African states felt that the Basel Convention did not go far enough, its primary objective being regulation rather than outright prohibition and reduction of generation rather than elimination of the transboundary movement of hazardous waste.[72] Although it gave discretion to states to adopt preventive and punitive measures against the illegal trafficking of hazardous waste,[73] the Basel Convention was chided for the lack of a robust enforcement

66 Art 9(1). Hazardous waste shipped in violation of the PIC procedure is deemed illegal traffic and may attract repercussions including but not limited to the reimport of the waste. However, the provisions of art 9 are watered down by the fact that implementation under art 9(5) is left to national authorities through legislation. This might lead to large disparities in implementation between countries with robust national legal frameworks and those with weak laws.

67 https://www.basel.int/TheConvention/Overview/Milestones/tabid/2270/Default.aspx (accessed 9 October 2024). Hazardous chemicals are regulated under, the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 2244 UNTS 337 (the Rotterdam PIC Convention) and the 2001 Stockholm Convention on Persistent Organic Pollutants, 40 ILM 532 (the Stockholm POPs Convention). The Stockholm POPs Convention in its preamble, directly alludes to the pertinence of the provisions of the Basel Convention.

68 https://www.brsmeas.org/Secretariat/Overview/tabid/3609/language/en-US/Default.aspx#:~:text=The%20Secretariats%20of%20the%20Basel,the%20United%20Nations%20(FAO) (accessed 9 October 2024).

69 Basel Convention (n 1) art 11.

70 Dupuy & Viñuales (n 2) 277.

71 Bamako Convention (n 1), para 11 of the Preamble.

72 Ajibo (n 35) 276. This was ostensibly the factual motivation for adopting the Bamako Convention.

73 Basel Convention (n 1) art 9(5).

mechanism to hold the 'dumpers' accountable for the harm resulting from their dumping activities.[74] The transboundary movement of hazardous waste is usually conducted clandestinely and hazardous waste is at times misrepresented as harmless items like fertiliser.[75] Therefore, the general feeling among African nations was that the Convention's regulatory objective left a lacuna which could be exploited by potential 'dumpers'.

UNEP has more succinctly described the inspiration for the Bamako Convention thus:[76]

> The impetus for the Bamako Convention arose also from the failure of the Basel Convention to prohibit trade of hazardous waste to less developed countries (LDCs); and [T]he realisation that many developed nations were exporting toxic wastes to Africa (*Koko* case in Nigeria, *Probo Koala* case in Ivory Coast).

The most distinctive stipulation of the Bamako Convention is the idea of banning the import of hazardous waste into Africa.[77] It obliges parties to take necessary legal, administrative, and other measures to ban or prohibit the import of hazardous waste from non-party states.[78] Where a party fails to comply with this obligation then it might be held responsible for any resulting human rights violations.[79] Imports of hazardous waste are *prima facie* deemed illegal and criminal.[80] The Bamako Convention also explicitly prohibits dumping of hazardous waste at sea or in the internal waters.[81] The Basel Convention has no equivalent provision. The Bamako Convention goes a notch higher than the Basel Convention not only recognising in its preamble but also its substantive provisions, the negative impact which the transboundary movement of hazardous waste movement potentially poses to both human health and the environment.[82]

The Bamako Convention provides for unrestricted joint and several liability against the generators of hazardous waste.[83] This provision permits the imposition of whatever damages are considered proper in the circumstances, including punitive damages.[84] This disincentivises

74 Ajibo (n 25) 275.

75 Agbor (n 46) 242.

76 UNEP, 'The Bamako Convention'. Accessed on 8 December 2023 from https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/meeting-international-environmental (accessed 19 December 2023).

77 Bamako Convention (n 1) art 4(1). Additionally, the definition of hazardous waste in the Bamako Convention is more elaborate compared to that in the Basel Convention. See the discussion on this in Part 2.1.

78 As above. As such all African countries that are signatory to the Convention are duty-bound to enact laws giving effect to the provisions of the Convention, not least implementing a ban on the import of hazardous waste.

79 *LIDHO* case (n 10) para 137.

80 Bamako Convention (n 1) art 4(1).

81 Bamako Convention (n 1) art 4(2). Art 1 of the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter proscribes dumping of waste at sea.

82 Bamako Convention (n 1) art 4(3)(u).

83 Art 4(3)(a).

84 Ajibo (n 25) 278.

the generation of hazardous waste thereby nipping the hazardous waste problem at source. The Convention also sets higher standards by stipulating the application of preventive and precautionary approaches in the generation and management of hazardous wastes.[85] This means that even without scientific evidence of harm to the environment, states and other stakeholders are nonetheless obliged to pay due regard to potential dangers posed by hazardous waste. Similar to the Basel Convention, the Bamako Convention has an equally elaborate PIC procedure as a condition precedent for any potential transboundary movement of hazardous waste.[86] However, the Bamako Convention is more stringent than the Basel Convention on the PIC procedural requirements. Whereas the latter Convention allows for the state of export to sanction the transboundary movement of hazardous waste if the state of transit does not respond to a notification within 60 days, the former (Bamako) convention, explicitly obliges the state of export to not allow [under any circumstances] the transboundary movement to commence until it has received the written consent of the state of transit.[87]

The stringency of the Bamako Convention's provisions and its overall objective of banning the transboundary movement or import of hazardous waste into Africa has been criticised as a hindrance to the economic activities associated with the trade in hazardous waste.[88] As opposed to a total ban, it has been proposed that minimal waste trade should be allowed where a developing country certifies the required competence backed by the presence of the requisite disposal facilities.[89] However, this argument is inherently problematic. It seems to ignore the fact that the economics on which it is predicated was the genesis of the problem of dumping in the first place i.e. developed countries dishing out monetary incentives in exchange for the developing countries agreeing to the dumping of hazardous waste.[90] The criticism also ignores the fact that most African states have not developed sufficient capacity to deal with hazardous waste.[91] Therefore, it would be disingenuous to wave the economic incentives card as if a magical wand to trump the environmental and human health cost attendant to the dumping of hazardous waste.[92] In the African context, the Bamako Convention, banning the transboundary movement of hazardous waste into Africa, though not a panacea, is a more appropriate legal solution to the dumping problem.

In light of the foregoing, it can be deduced that the African (regional) legal framework regulating the transboundary movement of

85 Bamako Convention (n 1) art 4(3)(f).

86 Art 6.

87 Art 6(4). See also art 6(4) of the Basel Convention.

88 Ajibo (n 25) 279.

89 As above.

90 Agbor (n 46) 242.

91 Agbor (n 46) 239.

92 Report of the Special Rapporteur on the Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights (n 7) para 18.

hazardous waste is more stringent than the international framework. However, the recurrence of the illicit transboundary movement of hazardous waste raises questions as to the effectiveness of both legal regimes.[93]

4 THE RIGHT TO A HEALTHY ENVIRONMENT: ITS COMPOSITION AND STATUS INTERNATIONALLY, REGIONALLY (AFRICA), AND NATIONALLY (IN CÔTE D'IVOIRE)

4.1 International legal status

Presently, there are two opposing views under international human rights law about the right to a healthy environment.[94] One view is that the right to a healthy environment as a stand-alone right does not exist.[95] On the other hand, it is argued that the right does exist.[96] The former view is premised on the absence of any stipulation of the right in the main international human rights instruments.[97] The latter view associates itself with the fact that the right to a healthy environment already finds expression in national constitutions, regional treaties, and international 'soft law' instruments.[98] This view seems more tenable because although the right to a healthy environment only finds expression in 'soft' international legal instruments, this does not whittle down its normative weight and justiciability. Moreover, the non-binding nature of soft law instruments does not mean they are legally irrelevant.[99] On the contrary, these soft law instruments like United Nations General Assembly resolutions and Declarations often crystallise into hard law and even Customary international law.[100]

93 The 2006 Probo Koala incident is the most recent incident to be registered. It gave rise to the case study under review in this commentary i.e., the *LIDHO* case. Prior to that, there was the Nigerian Koko toxic waste incident of 1988. See SG Ogbodo 'Environmental protection in Nigeria: two decades after the Koko incident' (2009) 15(1) *Annual Survey of International & Comparative Law* 1.

94 KSA Ebeku 'The right to a satisfactory environment and the African Commission' (2003) 1 *African Human Rights Law Journal* 149-166, 149-151.

95 As above.

96 As above.

97 The ICESCR (n 24) and ICCPR (n 24).

98 Agbor (n 46) 151.

99 J Ebbesson 'International participatory rights and environment protection in Africa – powerful tools or "sleeping rights"?' in J-CN Ashukem & SM Sama (eds) *Human rights and the environment in Africa: a research companion* (2023) 99.

100 UNGA Resolution A/RES/76/300 (n 9). For further elucidation of this argument see, YT Chekera & VO Nmehielle 'The international law principle of permanent sovereignty over natural resources as an instrument for development: the case of Zimbabwean diamond' (2013) 6 *African Journal of Legal Studies* 69-101, 80.

However, the need to have the right to a healthy environment captured in a binding international legal instrument is equally important. Much as the existing Economic and Social Rights (ESRs) like the right to water and sanitation, the right to adequate housing, right to health and others help guarantee some of the cardinal attributes of a decent environment, the stipulation of the right to a healthy environment in an internationally binding treaty would make a positive addition to the corpus of ESRs i.e., a more explicit focus on environmental protection.[101] Otherwise, if the right to a healthy environment lacks legally binding status then it may easily be eclipsed by other more normative considerations like economic development and natural resource exploitation.[102]

There is no universal definition of the right to a healthy environment. However, UNEP and OHCHR have explained that the right to a healthy environment has both substantive and procedural dimensions or components.[103] The substantive elements of the right to a healthy environment include clean air; a safe and stable climate; access to safe water and adequate sanitation; healthy and sustainably produced food.[104] On the other hand, the procedural elements of the right to a healthy environment comprise what is collectively termed 'procedural environmental rights' or 'participatory rights' namely, access to information, the right to participate in decision-making, and access to justice and effective remedies, including the secure exercise of these rights free from reprisals.[105]

The ultimate objective of the right to a healthy environment as with most other rights seems to be more anthropocentric than anything else. This is deducible from this observation by the UN Special Rapporteur on Human Rights and the Environment:[106]

> All human beings depend on the environment in which we live. A safe, clean, healthy and sustainable environment is integral to the full enjoyment of a wide range of human rights, including the rights to life, health, food, water and sanitation. Without a healthy environment, we are unable to fulfil our aspirations. We may not have access to even the minimum standards of human dignity.

101 A Boyle 'Human rights and the environment; what next?' in B Boer (ed) *Environmental law dimensions of human rights* (2015) 221. This is a revised version of an article published in (2012) 23 *EJIL* 613-642.

102 As above.

103 Office of the United Nations High Commissioner for Human Rights (OHCHR), the United Nations Environment Programme (UNEP), and the United Nations Development Programme (UNDP)}, 'What is the Right to a Healthy Environment?', 9. https://www.undp.org/sites/g/files/zskgke326/files/2023-01/UNDP-UNEP-UNHCHR-What-is-the-Right-to-a-Healthy-Environment.pdf (accessed 22 November 2023).

104 As above.

105 As above.

106 United Nations Human Rights Office of the High Commissioner, 'About human rights and the environment'. https://www.ohchr.org/en/special-procedures/sr-environment/about-human-rights-and-environment#:~:text=All%20human%20beings%20depend%20on,unable%20to%20fulfil%20our%20aspirations (accessed 7 December 2023).

Although the concept of the right to a clean and healthy environment, as we know it today, was non-existent and undeveloped on the international stage before 1972, other rights linked to the environment and its protection such as the right to life, health, and others existed under international human rights law.[107] However, it was at the 1972 United Nations Conference on the Human Environment in Stockholm that the right to a healthy environment first received formal enunciation.[108]

However, save for spurring developments at the regional level, the events at the 1972 Conference did little to influence the crystallization of the right to a healthy environment under international human rights law.[109] Even the subsequent 1992 United Nations Conference on Environment and Development at Rio de Janeiro made a more procedural rather than substantive contribution to the right to a healthy environment.[110] Principle 1 of the Rio Declaration merely provided that '[h]uman beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature'.[111]

On the international stage, further substantive impetus was given to the right to a clean, healthy and sustainable environment in 2021 when it was recognised by the UN Human Rights Council as a human right.[112] This recognition of the right to a healthy environment has been optimistically touted as a reflection of UN member states' strong political commitment to such a right and that it could be a catalyst for further substantive development of the right, internationally.[113] Perhaps more significant was the subsequent recognition of the right to a clean, healthy and sustainable development by the United Nations General Assembly in 2022.[114] Given the symbolic, political, and relative legal weight of the UN General Assembly resolutions, it is expected that

107 J Ebbesson 'Getting it right: advances of human rights and the environment from Stockholm 1972 to Stockholm 2022' (2022) 52 *Environmental Policy and Law* 79-92, 80.

108 Stockholm Declaration (n 10) Principle 1. See also, DR Boyd *The environmental rights revolution: a global study of constitutions, human rights, and the environment* (2011) 13 and Office of the United Nations High Commissioner for Human Rights (OHCHR), the United Nations Environment Programme (UNEP), and the United Nations Development Programme (UNDP), 'What is the Right to a Healthy Environment?', 8. https://www.undp.org/sites/g/files/zskgke326/files/2023-01/UNDP-UNEP-UNHCHR-What-is-the-Right-to-a-Healthy-Environment.pdf (accessed on 22 November 2023).

109 In Africa, the fruits of the 1972 Conference are exemplified by the adoption of the African Charter, particularly art 24. There is no equivalent internationally binding treaty of the right to a healthy environment.

110 Ebbesson (n 107) 82.

111 Rio Declaration on Environment and Development, found in the Report of the UN Conference on Environment and Development (UN Doc. A/CONF.151/26/Rev.1 (Vol I), 13 June 1992 (Rio Declaration).

112 UNGA, HRC, A/HRC/RES/48/13 (n 9).

113 European Parliament, 'A universal right to a healthy environment', https://www.europarl.europa.eu/RegData/etudes/ATAG/2021/698846/EPRS_ATA(2021)698846_EN.pdf (accessed 7 December 2023).

114 UNGA, A/RES/76/300 (n 9)

this recognition of the right to a healthy environment is bound to have catalytic effects and has great potential to nudge states and other stakeholders into action to give effect to the right.[115] This resolution could even serve as an authority for both the litigants and the courts in environmental litigation.[116]

4.2 Regional legal framework

The Aarhus Convention

As already noted, the Rio Declaration spawned the procedural constituents of the right to a healthy environment.[117] Principle 10 of the Rio Declaration provided the legal blueprint for the subsequent adoption of regional Multilateral Environmental Agreements (MEAs) on participatory rights in environmental matters.[118] Most notable is the 1998 Aarhus Convention.[119] It was tailored along the contours of Principle 10 of the Rio Declaration. It has three cardinal pillars namely, access to information, public participation, and access to justice in environmental matters.[120] Under the Aarhus Convention's implementation mechanism, the Compliance Committee,[121] concerned citizens including Non-Governmental organizations are empowered to complain against states that are not observing their obligations in ensuring participatory rights for all in environmental matters, without discrimination.[122]

115 Office of the United Nations High Commissioner for Human Rights et al (n 103) 6-7.

116 Ebbesson (n 107) 90.

117 Principle 10 of the Rio Declaration provides: 'Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.'

118 Ebbesson (n 107) 83.

119 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 2161 UNTS 447, adopted on 25 June 1998 'Aarhus Convention'. Although adopted under the auspices of the United Nations Economic Commission for Europe and covers Europe, the Caucasus, and Central Asia, it allows for any member state of the UN to accede to it; see art 19(3). This significantly means that even African countries can ratify the Convention. In fact Guinea-Bissau acceded to the Convention on 4 April 2023. See https://unece.org/climate-change/press/guinea-bissau-accedes-aarhus-convention-opening-new-horizons-environmental (accessed 18 October 2024).

120 S Kingston & others *European environmental law* (2017) 169.

121 Aarhus Convention (n 119) art 15.

122 Aarhus Convention Compliance Committee, Findings and recommendations concerning Germany, ACCC/C/2016/137, 23 July 2023; Aarhus Convention Compliance Committee, Findings and recommendations concerning Belarus, ACCC/C/2014/102, 18 June 2017. Both these communications were initiated by NGOs and they had significant implications for the state parties concerned.

The African Charter and the Algiers Convention

In the African context, besides the substantive provision for the right to a general satisfactory environment in the African Charter,[123] procedural environmental rights are provided for in the African Nature Conservation Convention as revised in 2003. State parties are obliged to adopt appropriate legislative and regulatory measures to ensure the timely and appropriate dissemination of environmental information, access of the public to environmental information, public participation in environmental matters, and access to justice.[124] Although not as detailed as the Aarhus Convention, the provisions of the Algiers Convention on procedural rights are couched in terms bold enough to ensure sufficient protection of those rights.[125]

In confirmation of the procedural dimension of the right to a healthy environment under the African Charter, the African Commission on Human Rights in the *SERAC* case, acknowledged that the right to a healthy environment entails obligations for states to ensure the enjoyment of procedural environmental rights for those affected by environmental decisions.[126] The Commission found that upholding the right to a satisfactory environment inter alia requires carrying out environmental and social impact studies and publicizing information from such studies before carrying out major industrial developments.[127] The right to a healthy environment is thus well entrenched in the African human rights instruments and is perhaps only paralleled by the most recent MEA for the Americas, the Escazú Agreement.[128]

4.3 National legal framework: Côte d'Ivoire

Apart from the highlighted international and regional developments, nationally, it is estimated that the right to a healthy environment finds some form of expression or formulation in the domestic constitutions

2 For instance, in the case involving Belarus, the state faced a lot of political pressure emanating from the Committee's ruling and it eventually found itself opting to withdraw from the Aarhus Convention.

123 African Charter (n 24) art 24.

124 Revised African Convention on the Conservation of Nature and Natural Resources, adopted on 11 July 2003 and entered into force on 23 July 2016, art 16(1)(a)-(d) (Algiers Convention). https://au.int/en/treaties/african-convention-conservation-nature-and-natural-resources-revised-version (accessed 7 December 2023).

125 Ebbesson (n 99) 102.

126 African Commission on Human Rights, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*, App. No. 155/96, 27 October 2001, para 53 (*SERAC* case).

127 As above.

128 The Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean' (4 March 2018, Escazú, Costa Rica). 'Escazu Agreement' It provides for the substantive right to a healthy environment under art 4(1) and the procedural (participatory rights) under arts 5, 6, 7 & 8.

of over 110 countries.[129] Over 35 African countries recognise a right to a healthy environment in their national constitutions.[130] The significance of the stipulation of the right to a healthy environment in National Constitutions cannot be over-emphasised. As noted by the UN Special Rapporteur on Human Rights and the Environment:

> Constitutional protection for human rights is essential, because the constitution represents the highest and strongest law in a domestic legal system. Furthermore, the constitution plays an important cultural role, reflecting a society's values and aspirations.[131]

Contextually, the right to a general satisfactory environment provided for in the African Charter enjoins states to adopt legislative and other measures to give effect to it.[132] The states' obligation is four-fold namely, respect, protect, promote and fulfill the right to a satisfactory environment.[133] In the *SERAC* case the African Commission held:[134]

> [T]he State is obliged to protect right-holders against other subjects by legislation and provision of effective remedies. This obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences.

The Commission further held:[135]

> The right to a general satisfactory environment under article 24 of the Charter, (…) imposes clear obligations upon a government. It requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.

Côte d'Ivoire: Laws on the right to a healthy environment

Both the African Charter and the Bamako Convention obligate Côte d'Ivoire to establish the relevant legislative and institutional framework to protect the human rights (more specifically the right to a healthy

129 United Nations General Assembly, HRC, 'Right to a healthy environment: good practices', Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, UN Doc A/HRC/43/53, 4.

130 The Road to Realizing Environmental Rights in Africa: Moving from Principles to Practice. https://accessinitiative.org/wp-content/uploads/2022/10/22.01_rep_access_initiative_v583-4.pdf (accessed 7 December 2023).

131 As above.

132 L Chenwi 'The right to a satisfactory, healthy, and sustainable environment in the African regional human rights system' in JH Knox & Pejan (eds) *The human right to a healthy environment* (2018) 70.

133 As above.

134 The *SERAC* case (n 126) para 46. Therefore, a state is obliged to protect its citizens' rights from third party violations by putting in place the requisite legal and institutional measures. Short of this, the state will be culpable for the violations, if any.

135 The *SERAC* case (n 126) paras 52-53. However, the duty to respect the right to a healthy environment has since been interpreted by the African Court to extend to private non-state actors/entities. See also the discussion in part 5.

environment) of its citizenry from the adverse impacts of hazardous waste.[136]

However, it goes without saying that the aforesaid obligation goes hand in hand with the effective enforcement of the laws enacted by the relevant national institutions. The right to a healthy environment finds expression in both the country's national Constitution, the Environmental Code and the different Decrees which constitute subsidiary legislation.

Constitution of the Republic of Côte d'Ivoire of 8 November 2016

In its Preamble, the state expresses commitment to inter alia maintaining a healthy environment for future generations. Chapter one of the Constitution specifically provides for the Bill of Rights.

The right to a healthy environment is not couched as a right in the Constitution but rather as both a communal and individual duty for both natural and legal persons to protect the environment. To this end article 40 provides as follows: 'The protection of the environment and the promotion of the quality of life are a duty for the community and for each natural or legal person …'

The Environment Code, Law 96-766 of 3 October 1996 was the principal legislation giving effect to the Constitutional provisions on environmental protection. However, in the wake of the *LIDHO* decision, that Law was repealed by a new law namely, Law 2023-900 of 23 November 2023 relating to the Environmental Code hereinafter called 'the new Law'.

The new Law is more exhaustive and offers better environmental protection. It goes a notch higher than the previous Environmental Code in several respects. Particularly noteworthy is its definition of 'hazardous waste' as 'any waste that presents a serious threat or particular risks to the health, safety and security of living beings and the quality of the environment.'[137] This definition is a major development in so far as it domesticates the Bamako Convention (through a national definition of hazardous waste).

Article 3 sets out the new Law's stated objectives, which includes to guarantee all citizens an ecologically healthy and balanced living environment.[138] Article 11 proclaims that the right to a healthy environment is recognised throughout the national territory. This substantive right has to be read together with the procedural right of access to environmental information provided for under article 13.

136 See art 24 of the African Charter and art 4 of the Bamako Convention. Côte d'Ivoire's obligation to protect the fundamental rights of its citizens also flows from its membership to the Economic Community of West African States (ECOWAS). See The Revised Treaty of Economic Community of West African States (1993), Preamble, para 5 and art 4(g) https://ecowas.int/wp-content/uploads/2022/08/Revised-treaty-1.pdf (accessed 9 October 2024).

137 Art 1.

138 Art 3(8).

Relatedly, the Law under article 215 provides broad access to justice rights in case of claims for ecological damage to include environmental protection associations.

Article 22 sets out the obligation of the state to ensure compliance with its obligations under international environmental conventions by taking the requisite legal, administrative, economic and political measures. In line with the dictates of the Bamako Convention, article 160 criminalises the transit, importation, transport, storage and dumping of hazardous waste on the territory of Côte d'Ivoire.

The new law sets very stern penal sanctions both imprisonment terms and fines for both natural and legal persons who unlawfully engage in or cause the transit, importation, transportation, storage and dumping or otherwise deal in hazardous waste on national territory of Côte d'Ivoire.[139] The stringency of this Law illustrates that the fruits of the *LIDHO* decision are already being witnessed. However, it remains to be seen if its implementation will result in better protection of the right to a healthy environment.

Therefore, although not encompassed in an internationally binding treaty, the right to a healthy environment has normative weight and is justiciable at the (African) regional and national levels as explicated above and further demonstrated by the *LIDHO* case.

5 THE *LIDHO* CASE

The African Commission, established under the African Charter,[140] and the African Court, established under the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights (Court Protocol),[141] had in other contexts ruled on the right to a healthy environment and attendant state obligations.[142] However, in the *LIDHO* case, the Court for the first time had the opportunity to interpret the right in relation to illicit transboundary movement and dumping of hazardous waste in Africa.

The case concerns a 2006 incident involving a cargo ship, *MV Probo Koala*, chartered by Trafigura Ltd (a Singaporean-based oil and commodity shipping multinational corporation) which docked at the port of Abidjan with tons of toxic waste. The ship discharged the waste and dumped it at several sites in Abidjan. Consequently, air pollution ensued and a stench spread causing thousands of people to fall ill and

139 The prison sentences range from ten to twenty years while the fines range from ten (10.000.000.000) billion francs to one trillion (1.000.000.000.000) francs. See arts 248 -251.

140 Arts 30 and 45 of the African Charter.

141 Art 1 of the Court Protocol, which came into force on 25 January 2004.

142 As for the Commission, see the *SERAC* case (n 126) (the most notable case handled by the African Commission concerning the right to a healthy environment); and Communication 276/03, *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*, November 2009. As for the Court, see Appl 6/2012, *African Commission on Human and Peoples' Rights v Kenya*, 26 May 2017.

resulting in 17 deaths.[143] Trafigura's three corporate officers were criminally tried and convicted but they were set free after the government executed a Memorandum of Understanding (MoU) with Trafigura in terms of which the latter paid 95 billion CFA.[144] Only a handful of claims were allowed in the subsequent civil proceedings brought on behalf of the victims.[145] Even when the state set up a compensation programme, most of the victims did not receive any compensation. The applicants thereafter brought an application before the African Court on behalf of the victims alleging that Côte d'Ivoire violated the right to respect for life and physical and moral integrity under article 4 of the Charter, the right to an effective remedy, and to adequate compensation for damages under article 7(1)(a) of the Charter, the right to physical and mental health in article 16 of the Charter, and the right to a general satisfactory environment under article 24 of the Charter. They further alleged that Côte d'Ivoire violated the right to information under article 9(1) of the Charter.

Resolving the case and building on its earlier jurisprudence, the Court found that Côte d'Ivoire had violated all the rights of the victims as alleged. It affirmed that the state has a fourfold obligation, namely, to respect, protect, promote, and implement the right to a satisfactory environment.[146] It found that the state not only had a duty to prevent the dumping of hazardous waste but also to ensure full and effective decontamination once the waste had been dumped.[147] The Court concluded that by failing to put in place appropriate measures to prohibit the importation of hazardous waste on its territory and further failure to ensure that the dumping of waste was conducted in such a way as not to harm the environment, the respondent state had contravened both the provisions of the Bamako Convention and the right to a general satisfactory environment under article 24 of the Charter.[148]

The Court held that Côte d'Ivoire's obligation to guarantee and protect the environment was not lessened by the non-compliance of the entities charged with the dumping and treatment of the waste.[149] While recognizing the consequences of toxic waste on people and the environment, the Court broadly interpreted the right to information under the African Charter as imposing a duty on the state to provide persons affected or likely to be affected by the dumping of toxic waste with available, accessible, and practical information on an equal and non-discriminatory basis.[150] This duty was held to exist before, during,

143 *LIDHO* case (n 10) para 3.

144 Para 3-5.

145 Para 5-6.

146 Paras 131 & 183.

147 Para 183.

148 Paras 184-185.

149 As above.

150 Para 193. Providing information perfunctorily will not suffice, the information provided must be accurate and meaningful in the circumstances. See, paras 194-198. It must be observed here that dissemination and access to information is one of the procedural elements of the right to a healthy environment.

and after the dumping of toxic waste.[151]

Besides a finding of inadequate compensation for the victims,[152] the Court importantly extended the obligation to respect and observe human rights, and particularly the right to a healthy environment, to non-state entities.[153] Referring to the United Nations Guiding Principles on Business and Human Rights, the Court held as follows:[154]

> The responsibility of enterprises in the respect for human rights is independent of the capacity or the determination of states to protect human rights. Such a responsibility requires enterprises to commit themselves to public policies in prevention and reparation, due diligence in continuous identification of the consequences of their activities and lastly, setting up procedures aimed at solving problems caused by their action.

However, the Court cautiously concluded that Côte d'Ivoire bore the ultimate responsibility for the human rights violations resulting from the dumping.[155]

5.1 Significance of the Court's orders

The Court's reparative orders are far-reaching. They aimed to not only provide justice for the victims but also cause comprehensive structural, and institutional shifts to ensure that such an incident would never recur. The orders are expounded on below. Interestingly, Côte d'Ivoire attempted to evade the Court's jurisdiction by withdrawing its instrument deposited under article 34(6) of the Court Protocol.[156]

Having found that Côte d'Ivoire had violated the rights of the victims by authorising the dumping of hazardous waste and failing in its due diligence obligation to check the toxicity of the waste and also failing to ensure that a proper clean-up was made, the Court found the state liable to provide compensation to the victims for the prejudice they had suffered as a result.[157] The Court ordered the state to set up a compensation fund in consultation with the victims.[158] It extended the pool of those to benefit from the fund to 'all victims without

151 As above.

152 Para 213.

153 Para 142.

154 As above. This was a very bold statement by the Court in so far as it, for the first time, propounded that the duty to respect the right to a healthy environment extends to multinational corporations. This was a significant development because neither the Court nor the African Commission had in their earlier jurisprudence expansively interpreted this duty as enjoining private entities.

155 Para 143.

156 Para 2. It had lodged the instrument with the Chairperson of the African Union Commission on 29 April 2020 withdrawing from the Protocol to the African Charter on the Establishment of an African Court. However, the Court stood its ground holding that the withdrawal had no effect on this case which was filed before the entry into force of the withdrawal.

157 Para 52.

158 Para 212.

exception'.[159] The significance of this holding is inherent in the fact that it enables those victims who were or could have been denied compensation on the technical ground of having never participated in the court proceedings at the national level. For the Court, the basis for compensation had to be the *prejudice suffered*.[160]

The Court ordered the state to pay the ninety five billion francs received from Trafigura into the compensation fund and this obligation extended to supplementing the fund with resources from the state itself 'in case the money received from Trafigura is insufficient'.[161]

The Court's order concerning the compensation fund tightens the loopholes which would have otherwise enabled the state to wash itself clean of the obligation to compensate the victims after injecting the Trafigura monies in the compensation fund. By the order of the Court, the state had an extensive duty to ensure that *all* the victims received compensation even if this meant digging into state coffers. Such an order is not only equitable but also serves as a cautionary tale to all state parties to the African Charter that dereliction of the duty to respect, protect and fulfil the rights of their citizens will have repercussions, including economic ones.

Besides the foregoing orders on compensation, the applicants also requested the Court for non-pecuniary compensation. These included orders for an independent investigation into the alleged facts aimed at establishing individual criminal liability and prosecution of the perpetrators, the implementation of legislative and regulatory reforms outlawing the import and dumping of hazardous waste and stationing an official of the Ministry of the Environment at all ports with power to inspect waste on board ships.[162]

The Court observed that to ensure the non-repetition of the violations enumerated in this particular case it was pertinent to address the 'structural causes'.[163] The Court therefore ordered Côte d'Ivoire to implement legislative and regulatory reforms prohibiting the import and dumping of hazardous waste in its territory as obligated under the Bamako Convention.[164] The Court went further to order the respondent state, within one year, to amend its national laws to ensure that corporate entities including multinationals like Trafigura can be held liable both under civil and criminal law for their harmful acts to the

159 As above. This went beyond just the victims who were party to proceedings in the domestic courts.

160 As above.

161 Paras 214 and 215. The Court also awarded the victims a nominal award of one CFA to symbolically compensate them for the moral prejudice suffered as a result of the state's actions and omissions. See paras 220 and 221 of the judgment. According to the Court, the state could not be allowed to retain the said monies since they were proceeds of violation of the victims' rights. See paras 213-214.

162 Paras 58-60.

163 Para 244.

164 Para 245. This order had to be complied with within one year from the date of notification of the Judgment. See para xvii, 65.

environment and the handling of toxic waste.[165] It is fair to observe with a measure of optimism that with these legal reforms, if fully implemented, comes stronger legal empowerment of the victims of similar human rights violations (in Côte d'Ivoire). It also becomes harder if not impossible (in the future) for the state to undermine the victims' pursuit for justice by entering into questionable compromises with the culprits of environmental crimes and human rights violations.

The state was further ordered to station at least a representative at all its ports with power to monitor waste removal from ships.[166] However, stationing inspectors at each port is one thing and them executing their duties incorruptibly is another. But again, this perhaps goes back to both the Court's orders for legislative and regulatory reforms and organising training for civil servants.[167] The Court directed Côte d'Ivoire to submit a report every six months until the Court is satisfied that full implementation of its decision has been achieved.[168] This measure aims to protect against the potential of noncompliance.

Taken as a whole, the Court's dictum on the obligation of private business entities to respect human rights significantly lends normative (legal) weight to the 2011 United Nations Guiding Principles on Business and Human Rights as an accountability tool for human rights violations. It also sets a seminal precedent with the potential to spur further accountability actions against multinational business entities that infringe on the right to a healthy environment and other rights. Although the Court did not itself explicitly declare or hold Trafigura responsible for the human rights violations suffered by the victims of its hazardous waste, ordering Côte d'Ivoire to amend its laws to ensure that victims can both civilly and criminally hold corporate entities liable is a significant development. This development is also a clear signal to other African state parties to the Bamako Convention and the African Charter to overhaul their legal and regulatory frameworks lest they find themselves in the undesirable situation in which Côte d'Ivoire found itself.

Furthermore, the Court's far-reaching orders on both pecuniary and non-pecuniary reparation demonstrate the gravitas which it accords to protection of human rights. The extensive manner in which it ordered Côte d'Ivoire to effect systemic legal, institutional and regulatory reforms is commendable as it does not only superficially solve the case at hand but ensures the non-repetition of the impugned violations.

165 Para 247. This order had to be complied with within one year from the date of notification of the Judgment para xviii, 65.

166 Para 255.

167 *LIDHO* case paras 225 & 249.

168 Paras 260 & 261.

6 CONCLUSION

While a global legal framework regulating transboundary movement of hazardous waste is in place, Africa has an even more stringent regional treaty which outrightly bans the importation of hazardous waste. These legal frameworks notwithstanding, the transboundary movement of hazardous waste into Africa from the Global North has persisted, albeit furtively. This has resulted mainly from a lack of adequate domestic legal and regulatory safeguards, and lacklustre implementation. Hazardous waste has caused unspeakable damage to both human health and the environment and with negative implications for the enjoyment of the right to a healthy environment and a flurry of other rights as exemplified by the Probo Koala incident. Although the right to a healthy environment is not encapsulated in any internationally binding treaty, it is recognised in several international 'soft law' instruments, the African Charter, and national constitutions. In Africa, the right to a general satisfactory environment as it is called under the African Charter has been applied and upheld by both the African Commission and the African Court.

However, the *LIDHO* case presented the first opportunity for the African Court to pronounce itself on the nexus between the illicit transboundary movement of hazardous waste and the right to a healthy environment. The Court generously interpreted the state's obligation to respect, protect, promote, and fulfill the right to a clean and healthy environment vis-à-vis the obligation to ensure that hazardous waste is not dumped in its territory. Marking a remarkable development from earlier jurisprudence, the Court seminally interpreted and extended (albeit cautiously) the duty to respect human rights to private entities, particularly, multinational companies. This decision not only contributes to the jurisprudential growth of the right to a healthy environment but the extensive reparative orders issued against Côte d'Ivoire also serve as a cautionary tale for African states that were hitherto neglecting their obligations under the Bamako Convention. It remains to be seen, however, how this decision will be applied or adopted in causing more accountability for multinational companies and states that indulge in or facilitate the illicit transboundary movement of hazardous waste and other activities with harmful repercussions for the environment. On a more promising note, Côte d'Ivoire repealed its Environmental Code and replaced it with a more comprehensive new one as ordered by the Court.