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An Examination of International Environmental Racism Through The Lens of Transboundary Movement of Hazardous Wastes

ROZELIA S. PARK*

INTRODUCTION

Increasing accusations of environmental racism in the domestic context have led to allegations of environmental racism in the global context by activists, academics, and leaders of developing nations. Claims of international environmental racism arise when a government or corporation pursues policies that disparately impact minorities.¹ Conscious intent to continue racial subordination is not necessary.² “any action that has negative predictable consequences for racial minorities can be an act of environmental racism It is only important that the practice in question perpetuates the dominance of one race over another.”³

Domestic charges of racism in the United States are echoed in the language used to describe the *maquiladora*⁴ program when corporations from an “economically-superior and predominantly white” United States use Mexico as a “dumping ground for toxin-producing industries.”⁵ International environmental racism can be seen as “a practice in which the predictable

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1. Xavier Carlos Vasquez, *The North American Free Trade Agreement and Environmental Racism*, 34 HARV. INT'L L. J. 357, 367-68 (1993).

2. Gerald Torres, *Introduction: Understanding Environmental Racism*, 63 U. COLO. L. REV. 839, 840 (1992).

3. Vasquez, *supra* note 1, at 368-69.

4. The *maquiladora* program “refunds customs duties on raw materials or intermediate goods imported into Mexico for use in the production of goods that are to be immediately exported.” *Id.* at 360-61.

5. *Id.* at 369.

distributional impact of a decision to pollute contributes to the structural racial subordination that exists in the world today.”⁶

A major issue in international environmental racism is the phenomenon of transboundary movement of hazardous wastes. Governments and corporations, usually from developed nations, create hazardous waste in their country as a by-product of manufacturing and pay developing countries to dispose of this waste.⁷ The shipment of hazardous waste from developed to developing countries is environmental racism on an international scale.⁸

The most often cited reason why developed countries export their hazardous waste to developing countries is that the disposal of wastes is much more strictly regulated and, thus, more expensive in developed countries than in developing countries.⁹ Strict regulations in one country make it less expensive and more simple to ship it to another country, usually in the developing world, in order to dispose of the waste. Countries that agree to take the waste usually have inadequate waste disposal facilities, non-existent liability schemes, and insufficient enforcement mechanisms and personnel.¹⁰ In contrast to this often cited reason, environmental racism holds that developed countries are more willing to use developing countries as a dumping ground not because of cost or convenience but because of race and poverty.¹¹

This note will consider charges of international environmental racism by examining environmental racism theories from the domestic context and applying them to the phenomenon of transboundary movement of hazardous wastes from developed to developing countries. Part I isolates four

6. *Id.* Vasquez explains that: “[T]he United States practices international environmental racism when the actions of its government or corporations work to maintain the racial subordination and domination of the United States over Mexico.” *Id.* Vasquez charges that the U.S. government commits environmental racism by “failing to clean-up pollution along the border and by not requiring stricter standards for U.S. owned *maquiladora* industries.” *Id.* at 374.

7. Rev. Benjamin F. Chavis, Jr., *Foreword* to CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 3, 4-5 (Robert D. Bullard ed., 1993); BILL MOYERS, CENTER FOR INVESTIGATIVE REPORTING, GLOBAL DUMPING GROUND: THE INTERNATIONAL TRAFFIC IN HAZARDOUS WASTE 104-05 (1990) [hereinafter CENTER FOR INVESTIGATIVE REPORTING].

8. Hugh J. Marbury, Note, *Hazardous Waste Exportation: The Global Manifestation of Environmental Racism*, 28 VAND. J. TRANSNAT'L L. 251, 291 (1995).

9. *Id.*; Mutombo Mpanya, *The Dumping of Toxic Waste in African Countries: A Case of Poverty and Racism*, in RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS 204, 209 (Bunyan Bryant & Paul Mohai eds., 1992).

10. Mpanya, *supra* note 9, at 211-12. In Koko, Nigeria, an unknowing individual stored hundreds of rusting, leaking drums of toxic PCBs in an extremely unsafe manner on his property, endangering himself, his family, and the townspeople. CENTER FOR INVESTIGATIVE REPORTING, *supra* note 7, at 1-2.

11. One study reported that there is a “low level of appreciation for Africa and African people among Western business-people.” Mpanya, *supra* note 9, at 212.

characteristics of environmental racism. Part II turns to the less-developed international literature and examines the historical patterns of hazardous waste movement from developed to developing countries. It also describes and applies the analogous elements on the international level that correspond to the domestic factors previously discussed. Part III describes the international legal framework before the Basel and Bamako conventions and then presents a brief comparison of the two conventions. Finally, Part IV concludes that the characteristics of environmental racism do not adequately explain the current situation in the context of hazardous waste movement across international borders because of the development of the two conventions limiting the transboundary shipment of hazardous wastes. It also discusses how national sovereignty issues played a different role than in most international agreements, and how sovereignty and racial unity created solidarity and helped developing nations to garner more power for themselves.

I. THE THEORY OF ENVIRONMENTAL RACISM: DOMESTIC AND INTERNATIONAL LITERATURE ON ENVIRONMENTAL RACISM

A. *The Four Characteristics of Environmental Racism*¹²

There are four characteristics shared by American communities in which hazardous waste sites have been located. A study commissioned by the United Church of Christ¹³ concluded that it was “‘virtually impossible’ that the nation’s commercial hazardous waste facilities are distributed disproportionately in

12. Before I begin to summarize the results of these well-known studies, I should say that my objective is merely to present the general thinking on environmental racism. There are critiques of the studies I mention. Professor Vicki Been argues that the research does not support the claim that racism and classism in the siting process itself is the cause of the disproportionate burden that poor and minority communities bear in hosting locally undesirable land uses (LULUs). She argues that events subsequent to siting may lead to the current disproportion in the distribution of LULUs. Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383, 1385 (1994). Michel Gelobter has also examined the statistical variables one must consider when studying environmental racism and hazardous waste siting policies. Michel Gelobter, *Toward a Model of “Environmental Discrimination,”* in RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS, *supra* note 9, at 64, 73-76.

Summarizing these critiques is beyond the scope of this paper. My goal in presenting the conclusions of these studies is to show that race is a good indicator of where hazardous waste facilities are sited, and not to do a comprehensive analysis of the environmental racism literature.

13. UNITED CHURCH OF CHRIST, COMM’N FOR RACIAL JUSTICE, TOXIC WASTE AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987) [hereinafter UCCC Study]. This was the first national study of environmental racism to take income into account along with race.

minority communities merely by chance; therefore in all likelihood *underlying factors related to race* play a role in the location of these facilities.”¹⁴ These underlying factors include: 1) availability of cheap land; 2) lack of opposition to the siting of the facility due to lack of political resources and clout; 3) inability to “walk with their feet” or lack of mobility resulting from poverty and housing discrimination; and 4) poverty.¹⁵ The characteristics contribute to communities’ vulnerability to unfair sitings of waste and polluting industries and, thus, their disproportionate exposure to environmental risk.¹⁶

Industry and government actively seek out these characteristics when they make siting decisions.¹⁷ “The siting process commences when a corporation or governmental body begins a search for a proper location for a new facility. The ‘proper location’ is determined by a number of considerations . . . [including] the physical requirements of the facility itself and . . . the costs of siting, constructing and operating the facility.”¹⁸

First, cheap land is a factor because most corporations or governmental bodies are “economically rational actors” trying to minimize their short-term and long-term costs.¹⁹ Money is saved if the facility owner does not have to negotiate with communities because the communities are unable to effectively resist.²⁰

14. Paul Mohai & Bunyan Bryant, *Environmental Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards*, 63 U. COLO. L. REV. 921, 922 (1992) (emphasis added).

15. *Id.* The first three of these characteristics were isolated by Mohai and Bryant. The fourth is one that I added since all the thorough studies of environmental racism account for income levels. The same basic characteristics were listed by Godsil and Freeman in their article on community economic development. The characteristics they listed were as follows: (1) state of economic depression and/or high unemployment; (2) lack of effective political power; and (3) availability of inexpensive undeveloped or underdeveloped land zoned industrial or otherwise suitable for uses associated with environmental degradation. Rachel D. Godsil & James S. Freeman, *Jobs, Trees and Autonomy: The Convergence of the Environmental Justice Movement and Community Economic Development*, 5 MD. J. CONTEMP. LEGAL ISSUES 25, 26-27 (1994).

16. Godsil & Freeman, *supra* note 15, at 26.

17. *See* note 24 and accompanying text. “Several commentators argue that corporations have deliberately or unconsciously concluded that race, average income, average education and other socio-economic characteristics can and should be considered in selecting a suitable site.” James S. Freeman & Rachel D. Godsil, *The Question of Risk: Incorporating Community Perceptions into Environmental Risk Assessments*, 21 FORDHAM URB. L.J. 547, 553 (1994).

18. Godsil & Freeman, *supra* note 15, at 551.

19. *Id.* at 551 n.17.

20. *Id.* at 552.

Second, political power is important because it is necessary for a community to be able to marshal resources for effective protest of a siting decision.²¹ Lawmakers and administrators of government agencies are "more responsive to the demands of constituents who possess the greatest political influence."²² Middle to upper class communities have more resources, such as time, money, contacts, and knowledge of the political system,²³ than poor and minority communities to mount effective protests when their communities are sited for hazardous waste facilities. Naturally, corporations do not want to deal with opposition and, therefore, look to the paths of least resistance by siting their facilities in neighborhoods that are least likely to protest.

Third, lack of mobility is important because it means that minorities, often with high rates of poverty, do not have the option of buying their way out of their communities.²⁴ They cannot afford to move to communities where they would be out of danger from hazardous waste facilities. The result is that facilities are often sited in poor minority communities rather than poor white communities. Thus, people of color are stuck in communities in which they are doomed to suffer environmental dangers.

Fourth, poverty is at the foundation of most of the three other characteristics of environmental racism. All of the hazardous waste siting studies have shown that income is an important indicator of siting decisions. In most of the studies that accounted for race, investigators found that income was second only to race in explaining the outcomes. Low income and low educational level interact with the lack of resources, which results in low political representation and low participation in the decisionmaking process.

Environmental racism does not lend itself to being picked apart and forced into a well-defined theoretical framework. To do so would deny the subtleties and insidiousness of racism. For the purposes of this analysis, however, I will examine each factor individually on the international level.

21. *Id.*

22. Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 810 (1992).

23. Mohai & Bryant, *supra* note 14, at 924.

24. Vicki Been, *Market Dynamics and the Siting of LULUs: Questions to Raise in the Classroom About Existing Research*, 96 W. VA. L. REV. 1069, 1072-73 (1994).

B. Environmental Racism = Institutional Racism?

The United Church of Christ study noted that the mechanisms that allow the practice of environmental racism to exist, such as zoning and redlining, "represent institutionalized forms of racism."²⁵ One legal scholar stressed that the "racism" in "environmental racism" should be emphasized.²⁶ He argues that of the four characteristics listed, the racist aspect of environmental racism is often overlooked since none of these characteristics contains any specifically racist aspects. It is precisely the hidden nature of racism that makes it difficult to locate and change policies in order to put an end to discriminatory outcomes.²⁷ It is more helpful to look at the outcomes rather than the intent behind the policies because the initial racist intent often no longer exists.

Outcome considerations are the opposite of intent considerations. A lawsuit is one obvious solution to an environmental racism claim, but an equal protection violation requires proof of discriminatory intent—nearly an impossible standard—and claims of environmental racism under the equal protection clause have not succeeded in any U.S. court.²⁸

The Reverend Dr. Benjamin F. Chavis, Jr., Executive Director of the United Church of Christ Commission for Racial Justice, coined the phrase "environmental racism." He has described it as:

Environmental racism is racial discrimination in environmental policy-making. It is racial discrimination in the enforcement of regulations and laws. It is racial discrimination in the deliberate targeting of communities of color for toxic waste disposal and the siting of polluting industries. It is racial discrimination in the official sanctioning of the life-threatening presence of poisons and pollutants in communities

25. Mohai & Bryant, *supra* note 14, at 922.

26. See Torres, *supra* note 2, at 845.

27. For more on the subtleties of racism see Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOLOGY L.Q.* 619 (1992); Peggy C. Davis, *Law as Microaggression*, 98 *YALE L. J.* 1559 (1989); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *STAN L. REV.* 317 (1987).

28. See Cole, *supra* note 27 (arguing that litigation to remedy claims of environmental racism disempowers people of color by forcing them into a court system controlled by their business and government opponents, and by trusting strategic decisions to legal and scientific "experts" who tend to be paternalistic). See also Godsil & Freeman, *supra* note 15, at 30-31. Activists advocate that more political and community-based methods, rather than legal ones, should be taken to fight environmental racism. *Id.* at 33-35.

of color. And, it is racial discrimination in the history of excluding people of color from the mainstream environmental groups, decision-making boards, commission, and regulatory bodies.²⁹

This definition emphasizes the *institutional* aspect of environmental racism. Similarly, Professor Robert Bullard argues that the conditions that lead to the "creation and maintenance of the black ghetto and the drift toward two 'separate and unequal'" societies still exist.³⁰ Racism has been institutionalized in the policies of government and decision making bodies that hold power in our society. Policies reflect the attitudes of policymakers. Although the individuals who hold racist attitudes come and go, racist beliefs are reflected in policies that far outlast individuals. These policies, emanating from government agencies and other institutions, effectively continue to isolate and marginalize people and communities of color.³¹ Not only that, but government policies and corporate policies interact to reinforce each other. Industrial production is influenced by government policy.³² Thus, local governments in conjunction with urban-based corporations reinforce racially discriminatory practices.³³

Some use the language of domination and subordination to define environmental racism: environmental racism "contributes to the structure of racial subordination and domination that has similarly marked many of our *public policies* in this country."³⁴ Gerald Torres, Professor Bullard, and Reverend Chavis share the idea that institutionalized racism is the means by which environmental racism is practiced.

29. Chavis, *supra* note 7, at 3.

30. Robert Bullard, *Residential Segregation and Urban Quality of Life*, in ENVIRONMENTAL JUSTICE: ISSUES, POLICIES, AND SOLUTIONS 76, 77 (Bunyan Bryant ed. 1995).

31. Freeman and Godsfil argue that even agencies, which have a more impartial and neutral view and act as checks on corporate or governmental decisionmaking, are not immune to political influence. See Godsfil & Freeman, *supra* note 15, at 554-55. See also Lazarus, *supra* note 22, at 807.

32. Robert D. Bullard, *Anatomy of Environmental Racism and the Environmental Justice Movement*, in CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS, *supra* note 7, at 15, 18.

33. Bullard, *Residential Segregation and Quality of Life*, *supra* note 30, at 81. Bullard characterizes it in this manner: "[E]conomic development and environmental policies flow from forces of production and are often dominated and subsidized by state actors." *Id.*

34. Torres, *supra* note 2, at 840 (emphasis added).

Housing policies are a good indicator of how conditions arise to encourage hazardous waste siting. Through redlining,³⁵ discriminatory zoning policies,³⁶ lending practices, housing and real estate practices, and urban industrial development, people of color have been and continue to be ghettoized. Bullard describes this type of discriminatory housing policy as “[a]partheid-type housing,”³⁷ which results in “limited mobility, reduced neighborhood options, decreased environmental choices, and diminished job opportunities for African-Americans.”³⁸ Housing discrimination, in turn, also contributes to the “physical decay of inner-city neighborhoods” and denies African-American communities a “basic source of wealth and investment specifically through home ownership.”³⁹ It is no coincidence that the most polluted urban neighborhoods are those with a “crumbling infrastructure, deteriorating housing, inadequate public transport, chronic unemployment, high poverty, and an overloaded health care system.”⁴⁰

C. *International Literature*

International literature on environmental racism is very limited. There is, however, a great deal of information on the transboundary movement of hazardous wastes. Greenpeace has estimated that “industrialized nations produce approximately 300 million tons of hazardous waste per year.”⁴¹ The EPA has estimated that the United States exported approximately 160,000 tons

35. “A 1991 report by the Federal Reserve Board found that African-Americans were rejected for home loans more than twice as often as Anglos.” Bullard, *Residential Segregation and Quality of Life*, *supra* note 30, at 78.

36. Bullard argues that:

Zoning is probably the most widely applied mechanism to regulate urban land use in the United States Zoning ordinances, deed restrictions, and other land-use mechanisms have been widely used as a NIMBY [“Not in My Back Yard”] tool, operating through exclusionary practices Exclusionary zoning is “one of the most subtle forms of using government authority and power to foster and perpetuate discriminatory practices.

Id. at 81-82 (citations omitted).

37. *Id.* at 80.

38. *Id.*

39. *Id.* at 77.

40. *Id.*

41. Daniel Jaffe, Note, *The International Effort to Control the Transboundary Movement of Hazardous Waste: The Basel and Bamako Conventions*, 2 ILSA J. INT’L L., Spring 1995, at 123, 125 (1995) (quoting Teresa A. Wallbaum, *America’s Lethal Export: The Growing Trade in Hazardous Waste*, 1991 U. ILL. L. REV. 889, 892 (1991)).

of hazardous waste per year.⁴² This amounts to one percent of the waste generated in the United States.⁴³ "By 1983, a cargo of hazardous waste 'crossed a national frontier more than once every five minutes, 24 hours a day, 365 days a year' within Western Europe and North America, according to the Organization for Economic Cooperation and Development."⁴⁴ Although less than one percent of the United States' hazardous waste was shipped to the Third World, the volume of U.S. waste shipments have "shot up from 30 notices of shipments in 1980 to more than 400 in 1986. . . . the number of Third World destinations has increased each year."⁴⁵ Increased waste production has important implications for waste disposal in producer states, which has ramifications for waste disposal policies of every nation.

1. Hazardous Waste Movement from Developed to Developing Countries

Increased public opposition to hazardous waste siting, scarcity of disposal facilities, and stricter environmental rules lead to increased disposal costs. Thus, developed nations are looking for easier and less costly means of disposing of their waste.⁴⁶ Therefore, corporations follow the "path of least resistance", which means that corporations export their waste overseas to countries with less stringent environmental standards and lower disposal prices.⁴⁷ By exporting their waste, "corporations can avoid the tougher measures necessary to cut down on the use of harmful chemicals and to reduce waste production at home."⁴⁸ Until recently there was little incentive to slow

42. Keith White, GANNET NEWS SERVICE, July 12, 1989, available in LEXIS, NEWS Library, ARCNWS File

43. Jaffe, *supra* note 41, at 892.

44. CENTER FOR INVESTIGATIVE REPORTING, *supra* note 7, at 10.

45. Andrew Porterfield, *Dumping a Love Canal on the Third World?: American Firms Are Exporting Hazardous Wastes to Poor Nations Where the Risks Aren't Fully Understood*, NEWSDAY, Feb. 1, 1988, at 49 available in LEXIS, NEWS Library, ARCNWS File.

46. KATHARINA KUMMER, INTERNATIONAL MANAGEMENT OF HAZARDOUS WASTES 6 (1995). "[A]ccording to a study carried out in the late 1980s, the average disposal costs for one ton of hazardous wastes in Africa was between US \$2.50 and US \$50, with equivalent costs in industrialized nations ranging from US \$100 to US \$2,000." *Id.* at 6-7.

47. *Id.* at 6.

48. CENTER FOR INVESTIGATIVE REPORTING, *supra* note 7, at 104-05. Estimates of the amount of waste exported vary, but it seems clear that a lot of waste is exported from advanced nations each year. Greenpeace says that in 1992 alone, Western Europe and the EC has [sic] shipped toxic wastes to Brazil, Albania, Egypt, Indonesia, Mexico, Namibia and 11 other developing countries. The group estimates that these waste exports amounted to more than 74,000 tons, but warned that this figure represents only the "first wave" of a flood of global waste dumping. *Environment: Fears Expressed About Third World Becoming Waste Dump*, INT'L. PRESS SERVICE, Nov. 30, 1992, available in LEXIS, NEWS Library, ARCNWS File. Cf. "[A]

waste production and none at all to discontinue shipping hazardous waste to other countries.

Toxic wastes find their way from the developed world to the developing world because environmental regulations are less stringent or nonexistent in developing countries.⁴⁹ Some argue that “[a]t most a fifth of all toxic waste exchanges take place between developed and developing countries. . . . However, imports into the Third World are potentially the most dangerous because of a general lack of experience of handling and disposal.”⁵⁰ Developing countries do have environmental regulations and sometimes very good ones.⁵¹ The problem is that they are not enforced.⁵² Increasingly stringent regulations in developed nations also contribute to hazardous waste disposal in developing countries.

In 1989, in Africa, waste disposal costs were about forty dollars per ton. In contrast, the cost was four to twenty-five times this amount in Europe and in the United States, twelve to thirty-six times greater.⁵³ The effect, however, is the same: cheaper costs,⁵⁴ less bureaucratic red tape, and no local opposition to the dumping in developing nations.

recent survey by the Taiwan Institute for Economic Research . . . found that at least 230,000 tons of toxic waste was imported into Taiwan from advanced countries between 1989 and 1992.” *Taiwan Seeking Hazardous Waste Treatment Cooperation*, CENT. NEWS AGENCY, July 21, 1994, available in LEXIS, NEWS Library, ARCNEWS File.

49. Marbury, *supra* note 8, at 291.

50. Maria Elena Hurtado & Alan McGregor, *The Shame of Nations: Toxic Waste Dumping in the Third World*, S. MAG., June 1989, at 77.

51. “‘Green’ laws are often just as popular in the legislatures of Eastern Europe, Latin America and Asia as they are in the West. But often the laws are not as well enforced.” Steve Coll, *Free Market Intensifies Waste Problem: Rich Nations Dumping on Poorer Ones*, WASH. POST, Mar. 23, 1994, at A1.

52. “Inspections by health and safety agencies [in most Third World countries]—if they exist—are rare because of long travel distances and limited personnel and funds.” Joseph LaDou, *The Export of Environmental Responsibility*, 49 ARCHIVES ENVTL HEALTH 6, 7 (1994), available in LEXIS, NEWS, Library, ARCNEWS File.

53. Edwin Unsworth, *Environment Ministers Push Action to Control Hazardous Waste*, J. COM., Oct. 5, 1989, at 8B.

54. Disposal costs can be substantially lower in developing countries than in the U.S.

It costs them from \$250 to \$350 per ton to dispose of wastes in the U.S. under the new [Resource Conservation and Recovery Act] regulations. Some developing companies [sic] will accept wastes for \$40 per ton. Few of these countries have sophisticated laws or technical systems or the infrastructure to handle these wastes.

Nathaniel Sheppard, Jr., *West Shipping Waste Woes to Third World*, CHI. TRIB., July 11, 1988, at 1, available in LEXIS, News Library, ARCNEWS File (quoting Wendy Grieder from the E.P.A.’s Office on International Activities).

The people of the Third World have historically had even less control over the movement of these hazardous wastes than do communities of color in the United States. In the same way that domestic facility owners offer financial incentives to communities, multinational corporations that want to get rid of their hazardous wastes pay huge amounts of money to the governments of developing countries in order to export waste to the country. In addition, developing nations do not have the administrative capacity nor the technological expertise necessary to properly dispose of hazardous wastes.⁵⁵ Furthermore, the technology and funds transfer necessary to aid developing nations is inadequate.⁵⁶ Until the developing nations increase their knowledge about environmental and public health, developed nations must be aware of their responsibility to prevent hazardous waste dumping in developing countries.

Developed nations have been responsible for tragic events regarding hazardous waste dumping in developing countries. Several incidents have attracted international attention to covert, illegal, and immoral hazardous waste dumping in developing countries. The odyssey of a cargo ship called the *Khian Sea* is an infamous example. Because the original port refused to let the *Khian Sea* dock, this cargo ship, carrying tons of toxic incinerator ash generated by the City of Philadelphia, spent nearly two years wandering the high seas in search of a port in which to unload its toxic cargo. In 1988, the ship finally docked in Singapore, empty. Although there are many theories about what happened to the ash, no one, including the ship's crew and captain will confess to where the ash was finally dumped, although it is unlikely that the ash was dumped at sea.⁵⁷ Countries' refusals to accept waste for disposal and the secrecy of the wastes' final destinations reveal the extent to which hazardous waste dumping is viewed with disfavor.

55. Jaffe, *supra* note 41, at 125. Representative Jim Florio, a Democrat from New Jersey, compared waste to "water running downhill" which will "invariably be disposed of along the path of least resistance and least expense." Richard M. Hopen, *Message to the Third World*, SAN DIEGO UNION-TRIB., Jan. 23, 1985, at B7.

56. See John Ntambirweki, *The Developing Countries in the Evolution of an International Environmental Law*, 14 HASTINGS INT'L & COMP. L. REV. 905, 912, 918 (1991). Ntambirweki argues that technology transfer from North to South is an essential part of the new international economic order. *Id.* at 918.

57. CENTER FOR INVESTIGATIVE REPORTING, *supra* note 7, at 1. However, sources later revealed that Guinea agreed to take the ash.

Researchers have also documented incidents in which toxic waste was mislabeled as humanitarian aid.⁵⁸ Even when drums were plastered with skull and crossbones labels, people exposed were not warned or educated about the potential harmful effects of the chemicals contained in the drums.⁵⁹ One reporter writes: "Some waste comes disguised as charity," and tells of "supposed medical charity shipped from Europe, Australia and the United States" to the "devastated Polish coal mining region of Katowice," which turned out to be "soiled Western hospital wastes and expired medicines that are then costly to dispose of under Polish environmental law."⁶⁰

Proponents of the racism theory argue that developed nations have policies that reflect their desire to dump wastes in the Third World in order to keep the First World beautiful. This returns to the notion that the developing world must internalize the externalities from which the rest of the world benefits.⁶¹ As landfill space becomes more precious, developed nations experience the Not In My Back Yard (NIMBY) syndrome just as U.S. communities have. Often, nations care little about whether the importing countries have the ability to dispose of the waste in an environmentally sound manner. Consequently, while developed countries claim that poor nations are being adequately compensated for disposing of developed nations' waste, wealthy nations know that the lack of disposal technology and environmental enforcement measures present a great danger to the land and the people of these countries.

2. Possible Explanations for Shipping Hazardous Waste to Developing Countries

a. Racism

Occasionally, explanations for this type of hazardous waste movement use the language of racism. For instance, the suggestion continues to arise that a form of racism causes developed nations to dump in Africa. A Third World research group called CETIM (Centre Europe-Tiers Monde) reports that there is a "low level of appreciation for Africa and African people among Western

58. *See id.* at 43-44.

59. *See id.* at 1-2.

60. Coll, *supra* note 51, at A26.

61. Mpanya, *supra* note 9, at 210-13. Mpanya argues that "U.S. and E.C. export policies do not make enough provisions for liability to third parties" and that "[b]oth rely on . . . overburdened customs officials for enforcement." *Id.* at 212.

business people.”⁶² Wendy Grieder, international affairs specialist at the U.S. Environmental Protection Agency (EPA), observed that early negotiations for the regulation of transboundary hazardous waste shipments “have already become a racism issue, a North-South issue.”⁶³

Leaders of African countries have realized the harm of accepting these hazardous waste shipments. Starting in the late 1980s, African leaders began to call for an end to “toxic terrorism.”⁶⁴ In 1988, the Organization of African Unity signed a resolution declaring toxic waste dumping a “crime against Africa and the African people.”⁶⁵ One month later, the Economic Community of West African States (ECOWAS) passed a resolution calling for stiff penalties upon parties that dump toxic wastes.⁶⁶ “The penalty in Nigeria for anyone convicted of illegal dumping is life imprisonment.”⁶⁷ Daniel Arap Moi, President of Kenya, called dumping “garbage imperialism.”⁶⁸ Morifing Kone, Minister of Environment of the Republic of Mali, said that First World waste exports were “morally reprehensible and criminal act[s].”⁶⁹ These calls for moral accountability blew the veil off secretive dumping.

Some argue that the U.S. export of hazardous waste to the Third World is merely an extension of the racist U.S. policy of selecting communities of color for hazardous waste sites.⁷⁰ Thus, waste export is motivated by the same factors that fuel charges of domestic environmental racism. Corporations choose developing countries for toxic waste siting for the same reasons that corporations in the United States locate their sites in communities of color.⁷¹ Rev. Benjamin Chavis states that “the international waste and pollution practices of U.S.-based corporations reflect the U.S. domestic policy of

62. Mpanya, *supra* note 9, at 212. Mpanya states that “Africa is perceived of as a continent of immense jungles, populated by naive people who are guided by a corrupt and unintelligent leadership.” *Id.*

63. Joel Millman, *Exporting Hazardous Waste*, 92 *TECH. REV.* (M.I.T. Alumni Ass’n), April 1989, at 6, available in LEXIS, News Library, ARCNWS File.

64. From 1980 to 1986, there were three known incidents of illegal dumping in Africa. In 1988-89, this number increased more than ten-fold. Mpanya, *supra* note 9, at 206.

65. *Id.* at 209.

66. *Id.* at 210.

67. Frank Nowikowski, *Not in My Backyard: Third World Is No Longer Content to Be a Cheap Dumping Ground for PCBs*, *S. MAG.*, Dec. 1990, at 118.

68. Marbury, *supra* note 8, at 268 n.124.

69. *Id.*

70. Marbury states that “the problem of selecting waste sites in the United States is a microcosm of the international issues raised by hazardous waste exportation.” *Id.* at 254.

71. *Id.*

targeting low-income, disenfranchised communities of color.⁷² Governments of developing countries are lured into accepting shipments of hazardous waste with money to build facilities such as railways and hospitals.⁷³ This is similar to “the pattern of targeted dumping on communities of color in the U.S.”⁷⁴

Undeniably, regulations in the United States and in other developed countries are more stringent than those in developing countries. For example, the provisions of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)⁷⁵ and the Resource Conservation and Recovery Act (RCRA)⁷⁶ all but encourage companies to dispose of hazardous waste abroad. RCRA, for instance, has a specific provision that allows companies to ship their waste abroad.⁷⁷ The statute requires that several criteria must be satisfied before hazardous waste can be exported: the shipment must conform to an international agreement between the United States and the receiving country *or* the exporter must notify the EPA of the types and quantities of waste exported, and the receiving country must consent to accept the shipment. According to Wendy Grieder of the EPA, the requests for permits to export waste act as a “credit card” which allows U.S. companies to dispose of waste in countries with lax standards.⁷⁸ Under the statute, the EPA is “under no obligation to check that the receiving country can manage the waste in an environmental [sic] safe manner. Even if it knows the disposal facilities are unsafe, the EPA has no authority to prohibit the shipments.”⁷⁹ Under CERCLA, the United States or U.S. corporations are no longer liable for

72. Chavis, *supra* note 7, at 5. See also Dana Alston & Nicole Brown, *Global Threats to People of Color*, in *CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS*, *supra* note 7, at 179. Marbury states that poor and developing nations are “targets” of hazardous waste exporting “because disposal in these nations is less expensive as a result of less stringent, or non-existent, environmental regulations.” Marbury, *supra* note 8, at 291.

73. Alston & Brown, *supra* note 72, at 185.

74. *Id.*

75. 42 U.S.C. §§ 9601-75 (1997).

76. *Id.* §§ 6901-92k.

77. *Id.* § 6938. Before RCRA was passed in 1985, there were no requirements that a U.S. corporation get the express consent of the receiving country or even that it apprise the U.S. EPA of plans to export waste. Richard M. Hopen, *Message to the Third World*, *SAN DIEGO UNION-TRIB.*, Jan. 23, 1985, at B7, available in LEXIS, News Library, ARCNWS File.

78. Douglas Jehl, *Bush to Seek Curbs on Hazardous Waste Exports to Third World*, *L.A. TIMES*, Mar. 11, 1989, at 21.

79. *United States: Bid to Restrict Hazardous Waste Exports*, *INTER PRESS SERVICE*, May 15, 1991, available in LEXIS, News Library, ARCNWS File.

hazardous waste once it leaves U.S. territory.⁸⁰ Recent case law has held that in some instances, procedural provisions of the Endangered Species Act and the National Environmental Protection Act can apply extraterritorially.⁸¹

The EPA never insists, however, that it has its finger on all the hazardous waste disposal activity in the country. It is extremely difficult to catch violators: "The EPA does not know whether it is controlling 90 percent of the existing waste or 10 percent. Likewise, it does not know if it is controlling the waste that are most hazardous."⁸² Wendy Grieder has stated that, "[o]nce [the hazardous waste shipment] gets [to its dump site in a developing country], we don't know what happens to it."⁸³ Even the United States does not have the personnel or the expertise to effectively regulate growing hazardous waste exports: "Customs lacks the EPA's expertise in analyzing wastes, and the EPA lacks the personnel to patrol docks and border stations."⁸⁴

Internalization of the externalities of hazardous waste disposal is another explanation of the movement of hazardous waste from developed to developing nations. Some commentators ask whether developing countries shoulder the burden of living near and with hazardous waste in the same way that communities of color pay the costs of hosting hazardous waste sites while the rest of society benefits.⁸⁵ Communities of color are willing to host hazardous waste facilities in exchange for compensation such as jobs. On the international level, developing countries deeply in debt are enticed to take in and process hazardous waste in order to make money.⁸⁶

80. Marbury, *supra* note 8, at 259.

81. See Stanley W. Spracker & Ethan S. Naftalin, *Applying Procedural Requirements of U.S. Environmental Laws to Foreign Ventures: A Growing Challenge to Business*, 25 INT'L LAW 1043 (1991).

82. Porterfield, *supra* note 45, at 49.

83. *Id.*

84. *Id.* "Even if the EPA had the people, on-site tests are often inaccurate 'Most courts won't even take the case based on those kinds of tests.'" *Id.*

85. Marbury, *supra* note 8, at 291.

86. Bullard, *Anatomy of Environmental Racism*, *supra* note 32, at 23.

b. Economic Reasons

An alternative explanation for the movement of hazardous waste from developed to developing countries is the economic explanation. "The information system costs of recording and reporting compliance costs have declined, and compliance with some environmental regulations has become more expensive, more specific, and more time-consuming."⁸⁷ Naturally, corporations and governments look to other ways to cheaply dispose of hazardous waste. Jan Huismans of the United Nations Environment Programme (UNEP) says "published figures point to nearly one million tons of hazardous waste exports from Western Europe to Eastern Europe each year."⁸⁸

Movements of waste between racially similar regions (such as movements of waste from Western Europe to Eastern Europe) are less likely to be motivated by racism than are transfers of waste between racially different regions.⁸⁹ A possible explanation of the hazardous waste trade in Eastern European and developing countries is the enthusiasm of newly liberated ex-communist and developing economies to rejoin global trade after being closed for many years.⁹⁰

Cases of illegal export from countries of one race to a country of the same or similar race have been well documented: a 1992 scandal involving shipments from Germany to France; pesticides banned in Germany, shipped to Albania and Romania without consent;⁹¹ Japan illegally exporting wastes to developing countries in Southeast Asia (primarily to Indonesia); and Singapore illegally dumping toxic waste in Malaysia and Indonesia.⁹² These cases tend to show that economics, not race, is the primary factor in the movement of waste. The

87. Christopher H. Stinson, *Environmental Regulations and the Costs of Compliance*, TEX. BUS. REV., Dec. 1, 1994, at 4, available in LEXIS, News, ARCNWS File.

88. Burton Bollag, *Hazardous Waste is a Foreign Matter*, CHEMICAL WEEK, Dec. 7, 1988, at 45, available in LEXIS, News Library, ARCNWS File.

89. With such waste transfers, "[t]he pressure is mainly financial . . . [T]oday, the cost of disposing of hazardous industrial and mining waste can range as high as several thousand dollars per ton Shipping such material abroad often is much cheaper." Coll, *supra* note 51, at A26.

90. *Id.*

91. ELLI LOUKA, OVERCOMING NATIONAL BARRIERS TO INTERNATIONAL WASTE TRADE: A NEW PERSPECTIVE ON THE TRANSNATIONAL MOVEMENTS OF HAZARDOUS AND RADIOACTIVE WASTES 105 (1994).

92. *Id.* at 106-07.

economic explanation seems to be a plausible reason for some of this hazardous waste trade activity.⁹³

In the following section, I apply the four characteristics of environmental racism to the transboundary movement of hazardous wastes. The characteristics of the domestic phenomenon do not have analogies on the international level in all cases.

C. Application of the Four Characteristics of Domestic Environmental Racism on the International Level

1. Cheap Land

Cheap land is certainly available on the international level in the sense that costs of disposal are so much lower in developing nations. All siting decisionmakers attempt to lower costs, which make disposal abroad attractive. In the domestic context, cheap land is the result of discriminatory housing policies that ghettoize minority populations and drive down the price of land. On the international level, lower environmental standards, lack of technology, and lack of institutional structure combine to make regulations in Third World countries much less stringent than in developed countries. Less strict regulations or unenforced regulations mean less money spent on waste disposal. Therefore, the characteristic of cheap land does seem to have a counterpart on the international level.

93. Global developments may lead to more waste transfers:

For waste managers and traders, the sudden opening of Eastern Europe and the rapid rise of Asian economies present new vistas of opportunity, both in helping the developing countries process their own waste and in finding places to dispose of foreign refuse. The U.S. Commerce Department is leading delegations of environmental entrepreneurs across the former East Bloc. In Asia, "they've really hit a takeoff stage, and that translates into an industry for us."

Coll, *supra* note 51, at A26 (quoting Edwin G. Falkman).

2. *Lack of Political Power*

Third World countries traditionally have been characterized as poor and politically weak. They do not have a voice in the international environmental negotiations, sometimes because they have little to say about environmental protection issues and sometimes because their concerns are extremely different, and therefore, ignored by developed nations. In the same way that poor minority communities in the United States often have a low average educational level and few resources with which to organize to oppose hazardous waste sites, Third World countries suffer from similar ailments:

It is economic growth that has allowed developed countries to make advances in the eradication of mass poverty, ignorance, disease and as such to give high priority to environmental consideration. Mankind has legitimate needs that are material, aesthetic and spiritual. A country that has not yet reached minimum satisfactory levels in the supply of essentials is not in a position to divert considerable resources to environmental protection.⁹⁴

African countries cannot be expected to place as much emphasis as developed nations on environmental protection when so many more basic needs are not fulfilled.

Even if they did have concerns regarding environmental issues, they might not have a forum in which to voice them. For all issues of international cooperation, especially for environmental issues, developing nations have little power in the agenda-setting process.⁹⁵ This is due, in part, to the sovereignty issues that arise when an agenda item is being articulated: “[N]ational priorities generally prevent consideration of the issue in a global fashion, and make it difficult for developing nations to force an equitable solution.”⁹⁶ For example, a European country concerned with air pollution from its own factories might lobby all countries to pay into an international fund to counteract effects of acid rain caused by air pollution. An African country that has no money to pay into

94. Ntambirweki, *supra* note 56, at 906.

95. C. Russell H. Shearer, *International Environmental Law Colloquium: International Environmental Law and Development in Developing Nations: Agenda Setting, Articulation, and Institutional Participation*, 7 TUL. ENVTL. L.J. 391, 415-16 (1994).

96. *Id.* at 416.

such a fund, and which is responsible for only a small amount of air pollution would not receive the kind of aid they need despite the fact that their economy is hard-hit by the effects of acid rain. A nation with capital has power in the agenda-setting process. This same nation has the power to stymie a developing nation's environmental awareness and growth.

However, in some situations, countries have found a way to make an end run around this dilemma. For instance, in the context of transboundary movement of hazardous wastes, developing nations in Africa have managed to band together to put their concerns on the international agenda. These states have not only managed to draw the attention of developed nations, but also have achieved radical changes in an existing treaty (the Basel Convention) to reflect some of their concerns.

Furthermore, three international examples also indicate that developing nations can band together in order to put their concerns on the international agenda. This shows that they can muster more political resources than was previously thought and that despite a lack of wealth, the developing nations are still concerned about the environment and public health. First, the Rio Declaration, the document that resulted from the Earth Summit,⁹⁷ reflects developing nations' concerns about development. Second, the existence of the Bamako Convention⁹⁸ speaks to the ability of the Organization of African Unity (OAU) nations, which includes some of the poorest nations in the world, to form a cohesive position to ban a potentially lucrative trade for the sake of environmental and public health. Third, the amendment of the Basel Convention to include Decision II/12⁹⁹ is a tribute to the ability of the OAU and the G-77 nations to affect an important treaty provision, despite initial

97. The United Nations Committee on the Environment and Development (UNCED) held a conference in Rio de Janeiro, Brazil, June 3-14, 1992. The main document that resulted from the conference is called the "Rio Declaration" and is a statement of general principles and obligations, but is not binding. Ileana Porras, *The Rio Declaration: A New Basis for International Cooperation*, in GREENING INTERNATIONAL LAW 20, 21 (Philippe Sands ed., 1994)[hereinafter Porras, *Rio Declaration*].

98. The Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement of Hazardous Wastes within Africa (Bamako Convention) was adopted by the Pan-African Conference on Environment and Sustainable Development in Bamako (Mali) on January 30, 1991. KUMMER, *supra* note 46, at 100. See also Bamako Convention on the Ban of The Import Into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa, *opened for signature* Jan. 29, 1991, 30 I.L.M. 773 (1991).

99. Conference Decision II/12, March 25, 1994. This amendment was formally adopted at the Third Meeting of the Conference of the Parties to the Basel Convention in Geneva, September 18-22, 1995. *Decisions Adopted by the Third Meeting of the Conference of the Parties to the Basel Convention*, U.N. Environment Programme, UNEP/CHW.3/35 (1995).

opposition from the United States and several EU nations.¹⁰⁰ The participation of the developing world in the leadership of the Third Conference to the Parties also shows that the developing nations have power and resources to bring to the international context.¹⁰¹ These developments in the policies of hazardous waste movement belie the seeming lack of political power of developing countries. The lack of political power in the domestic context does not seem to have a counterpart on the international level.

3. Lack of Mobility

Third World countries do not have the choice of escaping the cycle of poverty and powerlessness in which they find themselves. The developed world, in having control over the international agenda, naturally places the most emphasis on First World problems.¹⁰² Thus, Third World problems are often overlooked and continue to persist. Because developing nations lack political power and capital, they have difficulty putting their concerns on the international agenda, and their problems are never fully addressed by the international community. This is the cycle of poverty and powerlessness of the Third World.

On the other hand, the Third World countries have seen great success in drafting the Bamako Convention and forcing states to amend the Basel Convention. Although the OAU nations may not be able to change their status as Third World countries, they can argue that they have made the deliberate choice to get out of the hazardous waste trade. This may be harmful to them in terms of economic growth. However, their decision to promote environmental health and safety by not disposing of another country's hazardous waste for money might be seen as sacrificing development for the sake of environmental safety. Third World leaders may have made this choice consciously because they see the poor health of the public as a cost of low environmental standards and non-existent enforcement. The gains in development they might see by building numerous hazardous waste disposal sites are outweighed by the corresponding harm to public health. The country or government would then pay the cost of medicine and food for the ailing

100. KUMMER, *supra* note 46, at 45.

101. *Report of the Third Meeting of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal* (visited April 15, 1998) <<http://www.unep.ch/basel/sbc/cop/cop3-a.htm>>.

102. Shearer, *International Law Colloquium*, *supra* note 95, at 415-16.

populations as well as a loss of productivity. This characteristic does not have a strong counterpart on the international level.

4. Income/Poverty

Poverty is a major issue that will continue to dominate the Third World agenda. Lack of capital in Third World countries impedes development and progress in environmental awareness and standards.¹⁰³ Because Third World countries are often deep in debt, they are more vulnerable to offers of money and other incentives to dispose of hazardous waste. This factor was the driving force of the hazardous waste trade to the Third World.¹⁰⁴

In conclusion, the assumed lack of resources, mobility, and money has not prevented developing nations from achieving great change in international regulation of the transboundary movement of hazardous wastes. Thus, the characteristics of "lack of political power" and "lack of mobility" do seem to be strong indicators that environmental racism does not exist on the international level, at least with respect to the movement of hazardous wastes.

III. APPLICATION OF INTERNATIONAL ENVIRONMENTAL RACISM THEORY TO THE TRANSBOUNDARY MOVEMENT OF HAZARDOUS WASTES

A. International Legal Framework

*1. General Principles of Customary International Law*¹⁰⁵

Several principles dominate the operation of international law. First, the doctrine of sovereignty holds that each state exercises exclusive jurisdiction

103. *Id.* at 397-98.

104. It will probably continue to be a major force in Asia, where the Asian countries have not expressed as strong a dedication to the environment. They have not banded together and drafted a convention to ban the import of hazardous wastes like the nations of the OAU. We can conclude that Asian countries seem to be more willing than the OAU nations to trade off some environmental safety for an infusion of capital.

105. Customary international law is defined as general and consistent state practice supported by *opinio juris*. Charles Allen, *Civilian Starvation and Relief During Armed Conflict: The Modern Humanitarian Law*, 19 GA. J. INT'L & COMP. L. 1, 77.

within its territory.¹⁰⁶ In the environmental context, this means that a state has exclusive control over the precious resources located in its territory. That state has complete control over the use or exploitation of that resource and no other nation may interfere.¹⁰⁷ Thus, any state can refuse a shipment of hazardous waste into its territory or require explicit permission before hazardous waste passes through its territory.¹⁰⁸

On the other hand, the doctrine of abuse of rights recognizes the exclusive territorial jurisdiction of the polluting state, but subordinates its sovereignty to a superior rule of international law which forbids sovereignty to be exercised in an abusive manner.¹⁰⁹ Abuse can consist of the arbitrary exercise of the right such as the absence of an acceptable motivation for actions when the activity prejudices another state.¹¹⁰ It can also result from acts whose benefits are negligible when compared to the consequences produced in the other state.¹¹¹ “The ‘receiving’ state has the same range of exclusive territorial competences as does the polluting state.”¹¹² “[I]t is not obliged to accept deterioration of its environment due to acts taking place on the territory of other states. This right is no less absolute than that of the polluting state to utilize its own territory.”¹¹³

However, no rule of customary international law [CIL] states that nations may not work together to find the most efficient and mutually beneficial way to exploit a resource. Thus, the principle of cooperation requires that all countries work together on an equal footing.¹¹⁴ Cooperation encourages bilateral and multilateral agreements to share natural resources.

Further, in the process of transfrontier movement of some of these resources, carelessness or lack of foresight could result in dangerous mishaps. The duty to notify of emergency situations holds that “states should immediately inform other states likely to be affected of any sudden situation or event which

106. ALEXANDRE KISS & DINAH SHELTON, *INTERNATIONAL ENVIRONMENTAL LAW* 119 (1991).

107. KUMMER, *supra* note 46, at 20. Kummer expresses concern regarding the dangers of foreign hazardous wastes and the implications for the sovereignty of nations, “especially where there is an economic and regulatory imbalance between the states involved.” *Id.* at 33.

108. *Id.* at 20.

109. KISS & SHELTON, *supra* note 106, at 120.

110. *Id.*

111. *Id.*

112. *Id.* at 121.

113. *Id.*

114. *Id.* at 131.

could cause harm to their environment and provide that state with all pertinent information."¹¹⁵

Related to the duty to notify is the duty to inform, or the principle of prior information on projects which could cause transfrontier pollution,¹¹⁶ which has also been included in several treaties and non-binding agreements. This principle is tricky, since it is not well-settled *when* a state must provide such information. An unfortunate lack of timeliness could easily result in serious environmental harm.

This principle is not to be confused with prior informed consent, which is emerging as a rule of customary international law.¹¹⁷ But customary international law does oblige "the source state to negotiate in good faith with the state affected by the harmful activity."¹¹⁸ Prior informed consent requires that a state give express consent to movements of hazardous waste within its territories, "based on information provided to it by the perpetrating state."¹¹⁹

Finally, the duty to consult often accompanies the duty to inform.¹²⁰ The obligation to enter into consultation signifies that the state which is the potential polluter must be willing to discuss the information with the potential victim state, which may make observations concerning the pollution.¹²¹

These principles have been articulated time and time again in both binding and nonbinding international law documents.¹²² Repetition in this way is part of the means by which these principles come to be accepted as rules of customary international law.

115. *Id.* at 132.

116. *Id.* at 138.

117. KUMMER, *supra* note 46, at 24. Kiss calls it a "fundamental principle" of international environmental law, and seems to stop short of calling it a rule of customary international law. KISS & SHELTON, *supra* note 106, at 129.

118. KUMMER, *supra* note 46, at 20.

119. *Id.* at 24.

120. KISS & SHELTON, *supra* note 106, at 139.

121. *Id.*

122. See e.g. KUMMER, *supra* note 46, at 217. The Cairo Guidelines were elaborated by a UNEP working group and set out major principles of hazardous waste management in general terms. "As a non-binding legal instrument, they are primarily designed to assist governments in the development and implementation of their national management policies for hazardous wastes." *Id.*

2. State Responsibility

State responsibility is the notion in international law that a state is responsible for the damages caused by any activity it pursues or permits¹²³ that violates an international obligation. It is the flip side of state sovereignty. While sovereignty allows a state to exploit its resources in accordance with its national policies, state responsibility requires that states be held accountable for the consequences of those exploitations. Thus, every breach of international law gives rise to an obligation to make reparations. State responsibility usually concerns “the treatment of aliens and their property.”¹²⁴ However, in the environmental context, it holds that “states may be held liable to private parties or other states for pollution that causes demonstrable damage to persons or property.”¹²⁵

The notion of state responsibility for environmental harm may first have been articulated in Principle 21 of the Stockholm Declaration¹²⁶ (which is nonbinding), and has since been included in other international texts, like Principle 2 of the Rio Declaration on Environment and Development¹²⁷ as well as in other, binding instruments.¹²⁸ Many legal scholars argue that Principle 21 is now generally recognized as a rule of customary international law and is included in section 601 of the Restatement of the Foreign Relations Law of the United States.¹²⁹

123. “[A state] is also responsible for such acts carried out by private operators acting within its area of jurisdiction or under its control, if the state has breached its obligation to control or prevent such acts.” *Id.* at 217.

124. KISS & SHELTON, *supra* note 106, at 348.

125. *Id.*

126. Principle 21 states: “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.” KUMMER, *supra* note 46, at 17.

127. The Rio Declaration was adopted by the UN Commission on the Environment and Development (UNCED) in Rio de Janeiro, Brazil in 1992. United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/Conf. 151/S/Rev. 1(1992), reprinted in 31 I.L.M. 874 (1992).

128. KISS & SHELTON, *supra* note 106, at 349.

129. *Id.* at 215. “Responsibility” is an objective standard, in which “due diligence”, an obligation of conduct, is imposed. *Id.* at 215.

Principle 21 considers potential "victim states, affirming the duty of states 'to ensure' that activities within their jurisdiction or control do not cause damage to the environment of other states."¹³⁰ The principle holds that states are required to prevent or abate transboundary pollution that actually cause substantial harm. It also holds that states are required to prevent or abate activities that entail a *significant risk* of causing such harm.¹³¹ Finally, Principle 21 is based on the obligations which states assume toward the international community.¹³² Thus, the duty to not cause damage to the environment exists not only toward other states, but also toward the 'areas beyond the limits of national jurisdiction': the high seas and the airspace above them, the deep seabed, outer space, the Moon and other celestial bodies, and Antarctica."¹³³

However, Professor Bodansky points out that the second part of Principle 21 is not well-supported by regularities in state behavior (and is thus, not a rule of customary international law), and that "transboundary pollution seems much more the rule than the exception in interstate relations."¹³⁴ His argument carries much weight in the context of transboundary movement of hazardous wastes, since there are several documented incidents of illegal shipments of hazardous wastes across national borders to states clearly incapable of handling and safely disposing of toxic material. Despite the prevalence of principles stated in various declarations and treaties prohibiting transfrontier pollution, the practice of illegal movement of hazardous wastes, although not extremely well-documented, was enough to raise international awareness of the problem. I address the argument that transboundary movement of hazardous wastes is not a rule of customary international law below.

130. *Id.* at 129.

131. CENTRE FOR STUDIES AND RESEARCH IN INTERNATIONAL LAW AND INTERNATIONAL RELATIONS, TRANSFRONTIER POLLUTION AND INTERNATIONAL LAW 97 (1985) [hereinafter CENTRE].

132. *Id.* After the Stockholm Conference, Professor Kummer argues, nations seemed to work toward a more "holistic" approach to preserving the environment and the earth as a whole: "Pollution came to be seen as a form of harm to the environment as such, and the idea of a collective responsibility of the world community to protect the environment from such harm began to evolve." KUMMER, *supra* note 46, at 32-33.

133. KISS & SHELTON, *supra* note 106, at 130.

134. Daniel Bodansky, *Customary (and Not So Customary) International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 105, 111 (1995).

3. The "Trail Smelter" Arbitration

The principle of state responsibility was explicitly applied to transfrontier pollution in the *Trail Smelter* Arbitration decision. The tribunal stated in dicta that:

Under the principles of international law, . . . no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."¹³⁵

In addition to generally outlawing transboundary pollution (duty not to cause "substantial harm"¹³⁶), the *Trail Smelter* Tribunal asserted a general duty on the part of a state to protect other states from injurious acts by individuals within its jurisdiction, whether or not the harmful activity was caused by the state's activities. The arbitration panel also "elaborated a framework for the future . . . in recognizing the necessity of further cooperation between the interested states."¹³⁷

The customary international law prior to the Basel Convention was apparently fairly well-developed, however, very few activities were actually prohibited by it.¹³⁸ States have the obligation of due diligence under customary law, but this vague standard is only defined to a limited extent in treaties and non-binding guidelines.¹³⁹ Furthermore, these standards apply only to the

135. Trail Smelter Arbitral Tribunal (United States v. Canada), 3 R.I.A.A. 1911 (1941), cited in KUMMER, *supra* note 46, at 17. "In the Trail Smelter arbitration, a specially appointed arbitral tribunal held Canada responsible for damages caused to property in the United States by a privately owned smelting plant in British Columbia. . . . In its final decision, the tribunal required that the smelter refrain from causing any future pollution." Brian R. Popiel, Comment, *From Customary Law to Environmental Impact Assessment: A New Approach to Avoiding Transboundary Environmental Damage Between Canada and the United States*, 22 B. C. ENVTL. AFF. L. REV. 447, 451 (1995).

136. CENTRE, *supra* note 131, at 95.

137. KISS & SHELTON, *supra* note 106, at 125. "In requiring regulation, the judgment identifies what is now seen as a general requirement of environmental law: the rules adopted should be flexible and should be adapted according to the evolution of the situation and knowledge of it." *Id.*

138. KUMMER, *supra* note 46, at 18.

139. *Id.* at 19.

particular activity or situation described by the treaty.¹⁴⁰ Existing treaty law has not been forward-looking. On the other hand, the Basel Convention is the first treaty to offer the possibility of a comprehensive global regime to regulate movement of hazardous wastes.¹⁴¹

4. Treaty Law

Before the Basel Convention, several non-binding international rules established safety standards and uniform procedures for international transport of dangerous substances.¹⁴² However, they addressed substances other than hazardous waste and adherence was left to the discretion of states.¹⁴³ Transport of dangerous materials was addressed, but not the rights and obligations of nations with respect to waste shipments.¹⁴⁴ Furthermore, virtually no treaty law existed prior to the Basel Convention regarding the transboundary movement of hazardous waste but dealt instead with transfrontier pollution.¹⁴⁵ However, the evolution of international environmental law has led to the concern for the environment beyond national boundaries. One example is Principle 6 of the Stockholm Declaration, which established a general duty to protect the environment from the ill effects of dangerous substances. Principle 7 applies this to the marine environment in particular.¹⁴⁶ These duties were incorporated into Articles 192-94 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), which entered into force November 16, 1994.¹⁴⁷ Furthermore, these treaties represent a piecemeal, rather than comprehensive, approach to the hazardous waste cycle.¹⁴⁸

[Treaties] contribute to the regulation of the issue [of hazardous waste movement] insofar as they directly or

140. *Id.*

141. *Id.* at 29.

142. *Id.* at 26.

143. *Id.* at 28.

144. *Id.* at 26.

145. See Convention on Long-Range Transboundary Air Pollution (LRTAP), Nov. 13, 1979, T.I.A.S. 10541, 18 I.L.M. 1442; Agreement Concerning Frontier Watercourses, Apr. 24, 1964, Fin.-U.S.S.R., 537 U.N.T.S. 231.

146. KUMMER, *supra* note 46, at 18.

147. Kummer writes that the law of transboundary movement of hazardous wastes had some of its foundations in the concept of transfrontier pollution, and that UNCLOS specifically addressed itself to transfrontier marine pollution. *Id.* at 18-19.

148. *Id.* at 28.

indirectly address the disposal of hazardous wastes in a particular sphere of the environment. They generally establish more detailed standards than the customary norms, and thus contribute to the development of internationally accepted thresholds for the different forms of pollution.¹⁴⁹

While these treaties are useful in this regard, they do not establish the comprehensive approach to hazardous waste movement that is needed.¹⁵⁰

Whether or not the rule existed in customary international law, the principle that states have a responsibility to prevent the illegal shipment of hazardous wastes to other states ill-equipped to handle such shipments is now a part of the Basel and Bamako Conventions, as I discuss in the next section. The fact that the conventions have incorporated these norms into treaty language highlights the crucial importance of detailed regimes such as the Basel and Bamako Conventions. If it is more important to have a treaty or convention rather than just a reliance on rules of CIL because of state compliance problems, then it is even more impressive that developed and developing nations were able to work together to develop the Basel and Bamako Conventions.

Further, simply articulating the rules of customary international law may prove to be a useful tool.¹⁵¹ CIL may not be a good indicator of regular state behavior, but it is a good tool for analyzing what states say and how they talk about a particular issue. Thus, the articulation of certain norms forms the basis for negotiation and discussion of treaties.¹⁵² The Basel Convention's framework conforms to this argument. Rules of CIL seem to be incorporated into the treaties. Art. 4(2)(c) establishes the responsibility of generators, transporters and importers to prevent pollution due to hazardous waste, a direct incorporation of the CIL rule to prevent pollution. Art. 4(1)(c) requires exporter/generator states who have not already banned the particular waste to obtain the express written permission of importer states. This is a manifestation of the rule of prior informed consent. Another important example of the Basel Convention's attempt to codify custom is the requirement that the state of export take back hazardous waste that was illegally exported as a result of conduct on the part of the exporter/generator. This is another means of

149. *Id.* at 26.

150. *Id.* at 28.

151. Bodansky, *supra* note 134, at 105.

152. *Id.* at 119.

incorporating the duty to prevent pollution by the strict prohibition on certain movement of hazardous wastes.

B. International Law Has Allowed Transboundary Movement and Dumping of Hazardous Wastes in Developing Countries

Despite the rules of customary international law that existed before the Basel Convention, many shipments of hazardous waste still crossed international boundaries illegally, causing significant public health risks and environmental harms. The difficulty, as always, was with enforcement.¹⁵³ The rules of customary international law permitted the transboundary movement of hazardous waste to developing countries under limited circumstances, although the principles of preventing “substantial harm” and the more general concepts of cooperation, consultation, and prior information should have prevented the majority of catastrophes. However, there were no well-defined liability schemes in the existing treaties and only vague notions of fault in customary international law. Consequently, there was little to prevent developed nations from shipping out their hazardous waste. Thus, while international law made certain dumping formally illegal, in practice it did not actually prevent the transboundary movement of hazardous waste to developing countries.

The *Trail Smelter* Arbitration might seem to restrict the transboundary dumping of hazardous waste. However, it did not resolve the issue of the rights and obligations of the states as to movement of transboundary waste because it did not “extend to situations where the source of pollution is transferred to an area beyond the jurisdiction of the state of origin. That state cannot be required to observe the duty of due diligence if it does not have jurisdiction or control over the relevant activity.”¹⁵⁴ Therefore, not even the *Trail Smelter* Arbitration, one of the pieces of law most often-cited to support the notion that transboundary pollution is illegal, was helpful in punishing those responsible for export dumping scandals. The tool that did the most to increase public awareness of hazardous waste export dumping was the political embarrassment

153. The EPA is required to disclose information known to be hazardous. Under U.S. law, the U.S. cannot be responsible for exported containers that are falsely labeled. Resource Conservation and Recovery Act, 42 U.S.C. § 6938 (1994).

154. KUMMER, *supra* note 46, at 19.

of being discovered and the damage publicized.¹⁵⁵ This went far in deterring further careless illegal dumping.

1. The Basel Convention

In 1982, the Governing Council of a UN committee formed a working group of experts to develop guidelines with regard to hazardous wastes. The resulting document, the Cairo Guidelines, aimed to protect human health and the environment against harmful hazardous wastes¹⁵⁶ by affirming the existing rules of customary international law. The Cairo Guidelines mandated the start of a working group to convene a global convention on the control of the transboundary movement of hazardous waste with the authority to adopt and sign the convention in early 1989.¹⁵⁷ This convention was later called the Basel Convention on the Transboundary Movement of Hazardous Wastes.

The Basel Convention was considered in final draft and unanimously adopted on March 22, 1989. One-hundred five states and the EU signed the final act. On March 22, 1990, when the Basel Convention was closed for signature, 53 states and the EU signed it. It entered into force on May 5, 1992.¹⁵⁸

a. The Basel Negotiations

The Basel negotiations were “contentious” because of the controversy surrounding the export of waste to Third World countries.¹⁵⁹ This controversy heavily politicized the negotiations.¹⁶⁰ The increase in the number of states represented at the Working Group sessions for the Basel negotiations reflects this aspect of the negotiations:

The elaboration of the Basel Convention was seen by many primarily as an opportunity to put a stop to illegal international waste traffic from North to South. A substantial number of

155. Hurtado & McGregor, *supra* note 50, at 77.

156. KUMMER, *supra* note 46, at 19.

157. *Id.* at 40.

158. *Id.* at 41; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 28 I.L.M. 657.

159. KUMMER, *supra* note 46, at 42. Developing countries largely ignored the fact that the vast majority of waste transported internationally is traded among the developed nations. *Id.*

160. *Id.*

developing countries, led by member states of the OAU, regarded the deliberations as an opportunity to demonstrate their solidarity in refusing to tolerate the use of their territories as dumping grounds for toxic wastes from the rich states of the industrialized world.¹⁶¹

The developed countries along with UNEP, however, took the position that they did not want certain hazardous materials, especially recyclable wastes with economic value, to be banned from trade. UNEP did not support a complete ban because of the concern that a complete ban might discourage the waste movement from a nation that had inadequate disposal facilities to a nation that had adequate disposal facilities. Developing countries were concerned that a failure to ban recyclable hazardous waste would result in fake recycling schemes in which recycling is used as a mere label for exports that would otherwise be prohibited under the [Basel] Convention.¹⁶² Thus signatories desperate for capital might knowingly accept hazardous waste falsely labeled as "recyclable" even though the material inside the container was banned by the Basel Convention.

The negotiations did not lead to a satisfactory result for either side. At the end of the three-day conference, during the adoption ceremony of the Basel Convention, the President of Mali and OAU chair stated that the African states were not going to sign the convention because it was too weak and that the OAU would have to undertake further discussion.¹⁶³ The developed nations were not happy with the outcome of the conference, either. The Republic of Germany, the US, UK, and Japan also deferred a decision on signing for exactly the opposite reason.¹⁶⁴ As of Feb. 9, 1995, 81 states and the EU had ratified it.¹⁶⁵

161. *Id.* at 43.

162. *Id.* at 56.

163. *Id.* at 45.

164. *Id.* The U.S. eventually signed the Basel Convention by March 22, 1990. *Id.*

165. *Id.* at 41. As of the Third Conference of the Parties in Geneva in Sept. 1995, the U.S. was still not a party to the Convention. Since industry did not approve of the text of the Basel Convention, the U.S. Chamber of Commerce withdrew its support and the Clinton administration has slowed ratification efforts. Marbury, *supra* note 8, at 266.

b. General Analysis of the Basel Convention

The Convention considered the obligations of the various actors in the transboundary movement of hazardous waste: generator (usually the same as the exporter), carrier, and importer/disposer.

c. Obligations of the Exporter/Generator

Under the Basel Convention, the generator/exporter is required to develop waste minimization policies. All states should consequently develop technologies and policies that decrease the amount of waste generated.¹⁶⁶ The generator must also take necessary steps to prevent pollution due to hazardous waste.¹⁶⁷ The exporter is required to prohibit the export of hazardous waste to states parties that have prohibited the importation of such wastes.¹⁶⁸ If the importer has not prohibited the particular hazardous waste, the exporter must obtain the importer's express written consent.¹⁶⁹ The exporter must reduce transboundary movement of hazardous waste to a minimum and must do so in an environmentally sound way.¹⁷⁰ Exports to a state party are not allowed if the exporter has reason to believe that the hazardous waste will not be managed in an environmentally sound manner.¹⁷¹ States parties are not allowed to export to a non-party,¹⁷² nor to Antarctica.¹⁷³ The exporter is required to notify the state of import and the state of transit about any proposed transboundary movement of hazardous wastes.¹⁷⁴ In addition, the exporter must not export until the states of import and transit have consented in writing.¹⁷⁵ Finally, the state of export must take back or adequately dispose of hazardous waste that was illegally exported as a result of conduct on the part of the exporter or

166. Basel Convention, *supra* note 158, art. 4 para. (2)(a). States may take into account social, technological, and economic aspects of these measures. *Id.*

167. *Id.* at art. 4, para. (2)(c).

168. *Id.* at art. 4, para. (1)(b).

169. *Id.* at art. 4 para. (1)(c).

170. *Id.* at art. 4, para. (2)(c).

171. *Id.* at art. 4, para. (2)(e).

172. *Id.* at art. 4, para. (5).

173. *Id.* at art. 4, para. (6).

174. *Id.* at art. 6, para. (1).

175. *Id.* at art. 6, para. (3).

generator.¹⁷⁶ States must also introduce appropriate legislation to punish illegal traffic.¹⁷⁷

C. Rights and Obligations of the State of Transit

The state of transit has the right to refuse an exporter any movement of hazardous waste through its territories.¹⁷⁸ The state of transit also has the same obligations to reduce hazardous waste production¹⁷⁹ and to prevent pollution as the exporter does,¹⁸⁰ as well as to prevent unauthorized persons from transporting hazardous waste.¹⁸¹ Hazardous waste must be labeled, packaged and transported in conformity with generally accepted and recognized international standards¹⁸² and must be accompanied by movement documents.¹⁸³

D. Rights and Obligations of the State of Transport

States of import have the right to prohibit the importation of hazardous waste, but they must notify all other parties (through the Secretariat) that they are doing so.¹⁸⁴ Importing states must give their written consent for each importation of hazardous waste.¹⁸⁵ Adequate disposal facilities are required of the state of import.¹⁸⁶ Personnel involved in managing the hazardous waste must ensure both pollution prevention¹⁸⁷ and the minimization of transboundary movement of hazardous wastes.¹⁸⁸ The importing state must prevent the importation of hazardous waste if it has reason to believe that the wastes in

176. *Id.* at art 9, para. (2).

177. *Id.* at art. 9, para. (5).

178. *Id.* at art. 6, para. (4).

179. *Id.* at art. 4, para. (2)(a).

180. *Id.* at art. 4, para. (2)(c).

181. *Id.* at art. 4, para. 7(a).

182. *Id.* at art. 4, para. 7(b).

183. *Id.* at art. 4, para. 7(c).

184. *Id.* at art. 4, para. (1)(a).

185. *Id.* at art. 4, para. (1)(c); *Id.* at art. 6, para. (2).

186. *Id.* at art. 4, para. (2)(b). The Basel Convention does not provide guidance to the manner or extent to which the exporting state must verify safety. Sometimes the only information on which the exporting country can rely is that provided by the importing state. KUMMER, *supra* note 46, at 57.

187. Basel Convention, *supra* note 158, at art. 4, para. (2)(c).

188. *Id.* at art. 4, para. (2)(d).

question will not be managed in an environmentally sound manner.¹⁸⁹ Non-parties are prohibited from importing hazardous waste.¹⁹⁰ Only authorized persons are permitted to dispose of waste.¹⁹¹ The waste must be accompanied by the proper paperwork and must be properly labeled, packaged and transported.¹⁹² Importation is only allowed if the state of export does not have the proper facilities to properly dispose of the waste, or if the importing state needs the hazardous waste for recycling or recovery industries.¹⁹³ Finally, the state of import must ensure proper disposal of hazardous waste if it was illegally imported as a result of conduct by the importer or disposer.¹⁹⁴

As I argued earlier, the Basel Convention is valuable because it represents the codification of the rules of CIL that had already been articulated. The Basel Convention is “to date the most advanced attempt at comprehensive global regulation” of hazardous waste control and is potentially the framework upon which a comprehensive regime for transboundary movement of hazardous waste can be realized.¹⁹⁵ The other treaties that regulated and prohibited transboundary pollution (UNCLOS and the various treaties that regulated transboundary pollution) were inadequate as comprehensive regulatory frameworks but play complementary roles to the Basel Convention.¹⁹⁶ Thus, the Basel Convention is an evolving regime that will hopefully improve as the Conferences to the Parties have more time to work together.

b. Position of African States

Traditionally, the developing nations have been more concerned about development issues than conservation issues. The governments argued that they were too poor to worry about the environment,¹⁹⁷ yet they did not want groups

189. *Id.* at art. 4, para. (2)(g).

190. *Id.* at art. 4, para. (5).

191. *Id.* at art. 4, para. (7)(a).

192. *Id.* at art. 4, para. (7)(b)-(c).

193. *Id.* at art. 4, para. (9)(a)-(b).

194. *Id.* at art. 9, para. (3).

195. KUMMER, *supra* note 46, at 29.

196. *Id.*

197. See Mpanya, *supra* note 9, at 209.

in their countries to protest, lest controversy discourage foreign investors.¹⁹⁸ Developing countries said that they were more concerned with feeding and housing their people than they were with environmental regulations.¹⁹⁹

Alexandre Kiss and Dinah Shelton argue that there is an increased acceptance by Third World countries for world cooperation in the enactment of environmental regulations:

First, the frequent link between deterioration of the environment and poverty and its consequences has become obvious. . . . Second, the natural resources of poor countries risk bearing the cost of unregulated development. Third, health and nutrition of Third World people depend on the integrity and productivity of the environment and the compatibility of the development process with the imperatives of conservation Fourth, Third World countries increasingly have realized the dangers of the "exportation of pollution" by companies or individuals seeking to profit from weakness of protective legislation or enforcement mechanisms in developing countries.²⁰⁰

Developed nations have usually been more concerned with conservation than with development. Because they have more clout and more power, developed nations naturally have more ability to influence agendas and negotiations for treaties at international conventions. Thus, treaties have been negotiated with only the developed nations' problems in mind, thereby reflecting "a myopic world view in which part of humanity has impunity to consider remedying certain future problems of mankind (on their own terms) while rejecting the realities of the present in which a substantial part of humanity has no future prospects."²⁰¹

198. *Id.*

199. Shearer, *International Law Colloquium*, *supra* note 95, at 397-98.

200. KISS & SHELTON, *supra* note 106, at 50.

201. Shearer, *International Law Colloquium*, *supra* note 95, at 425-26. Because treaties are often heavily influenced by developed nations, the developing nations are sometimes forced into a defensive position which requires them to oppose an agreement which could ultimately be beneficial to themselves and the global community. The First World is often responsible for these environmental hazards in the first place. Developed nations have achieved their superiority in part through the exploitation of developing nations. Shearer argues that these countries never received benefits equal to those extracted. *Id.* at 412. Thus, it is unfair for the Third World to pay for externalities that the First World forces on them at the expense of their own development.

The Organization of African Unity consolidated its position and demanded the incorporation of strong safeguards against hazardous waste traffic from developed to developing countries. The OAU nations refused to sign the Basel Convention and three months later, in June 1989, the OAU Ministerial meeting in Kampala assessed environmental problems affecting the African region in which the OAU developed a common strategy for environmental management and sustainable development.²⁰² The resulting document was the Kampala Declaration which identified several priority areas for achieving environmentally sound sustainable development.²⁰³ Shortly thereafter, the African, Caribbean and Pacific states (ACP) signed the Lomé IV Convention²⁰⁴ with the European Economic Community. The treaty banned exports from developed nations to ACP nations.²⁰⁵ It also contained a chapter specifically on protection of the environment and conservation of natural resources.²⁰⁶ In addition, the Lomé IV Convention contains language that dumping nuclear and industrial wastes in Africa is a crime against Africa and its people; it condemns all transnational corporations involved in such activities; and it demands that they clean up areas that have already been contaminated.²⁰⁷

Thus, negotiations for the Bamako Convention were held concurrently with negotiations for the Basel Convention. Mpanya argues that the lack of knowledge of how to deal with hazardous waste was responsible for reducing levels of confidence of African governments, and that African countries started to doubt their own abilities to dispose of hazardous waste. The OAU asked for a complete ban on toxic waste trading to eliminate even the mere risk of dealing

202. *Id.* at 52. A new reading of international environmental law is that each nation has the potential to be a trustee, executor, or guardian of the global commons. *Id.* at 19(emphasis added). The Brundtland Commission, established by the U.N. in 1983, concluded that without the equitable sharing of costs and benefits of environmental protection within and between countries, neither social justice nor sustainable development (development that meets the needs of present and future objectives for the environment and development) can be achieved. *Id.* at 51-52.

203. *Id.* at 52.

204. African, Caribbean and Pacific States-European Economic community: Final Act, Minutes, and Fourth ACP-EEC Convention of Lomé, Dec. 15, 1989, 29 I.L.M. 783 (1990). The Lomé IV Convention interacts with the Basel Convention and is considered a supplement to it. KUMMER, *supra* note 46, at 111-12.

205. Marbury, *supra* note 8, at 267. The rest of the treaty would take effect only after it was ratified by the parliaments of all 12 EEC states and 2/3 of the ACP states. KUMMER, *supra* note 46 at 107-08.

206. KUMMER, *supra* note 46, at 108.

207. KISS & SHELTON, *supra* note 106, at 325-26.

with hazardous waste.²⁰⁸ In his Comment, Marbury argues that the OAU interpreted the lack of a complete ban as an indication that the Basel Convention failed to adequately protect Africa, since there was no effective system for the administration of the Basel Convention.²⁰⁹ Thus, the OAU drafted the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movements of Hazardous Wastes within Africa (Bamako Convention) in protest against the Basel Convention.²¹⁰ This, in itself, illustrates the ability of the OAU to use the power of its constituency to make its voice heard, especially given that it is a voice of a variety of developed nations with a variety of interests. With the Lomé IV and the Bamako Conventions, the international community saw the Third World countries band together in protest against “garbage imperialism” by the developed nations.

3. *Analysis of the Bamako Convention and Comparison with the Basel Convention*

The Bamako Convention completely bans the importation of all hazardous waste into Africa from non-OAU nations.²¹¹ The definition of “hazardous waste” in the Bamako Convention is much broader than that of the Basel Convention. Unlike the Basel Convention, the Bamako Convention prohibits hazardous waste imports “for any reason.”²¹² Bamako includes waste for recycling in its definition of hazardous waste. Katharina Kummer argues that this language emphasizes the lack of distinction between recyclable and non-recyclable wastes.²¹³ Recycling was an issue because much of the material destined for recycling was also hazardous or toxic. Household wastes are also included in hazardous waste²¹⁴, which eliminates the need for a special category of waste.²¹⁵ Bamako also creates a limited ban on the transfer of hazardous waste among African nations by allowing each state to designate other wastes

208. Mpanya, *supra* note 9, at 209.

209. Marbury, *supra* note 8, at 269.

210. See KUMMER, *supra* note 46, at 99.

211. Bamako Convention, *supra* note 98, at art. 4, para. (1).

212. *Id.*

213. KUMMER, *supra* note 46, at 101.

214. Bamako Convention, *supra* note 100, at art. 2, para. (1)(a).

215. C. Russell H. Shearer, *Comparative Analysis of the Basel and Bamako Conventions on Hazardous Waste*, 23 ENVTL. L. 141, 155 (1993).

as hazardous through the operation of its own domestic regulatory procedures.²¹⁶

The disagreement over the Basel Convention's definition of "hazardous waste" was one of the controversies that prevented the OAU nations from signing the original draft. The definition in the Basel Convention was criticized chiefly because it was too broad and contained no minimum concentration values for any particular hazardous substances.²¹⁷ A working group is currently mandated to formulate a definition. The Basel Convention definition excludes "household wastes", "[w]astes collected from households" and "[r]esidues arising from incineration of household wastes."²¹⁸ The Bamako Convention includes household wastes, defined as "wastes collected from households,"²¹⁹ including sewage and sewage sludges, as well as "residues arising from incineration of household wastes."²²⁰ The definition of "hazardous wastes" is still a source of contention for the Parties to the Basel Convention.

The Bamako Convention contains a liability scheme that imposes unlimited joint and several liability on generators of improperly disposed hazardous wastes.²²¹ Unlimited liability does not restrict the reward to damaged parties.²²² It also allows for the trier of fact to impose appropriate compensatory and punitive damages.²²³ This liability scheme is not found in the Basel Convention because of the conflicting interests between the developed and developing nations.²²⁴ The Basel Convention contains no liability scheme at this point;

216. Bamako Convention, *supra* note 98, at art. 2, para. 1(b).

217. KUMMER, *supra* note 46, at 50.

218. Basel Convention, *supra* note 158, at Annex II (Y46-Y47).

219. Bamako Convention, *supra* note 98, at Annex I (Y46).

220. *Id.* at Annex I (Y47).

221. *Id.* at art. 4, para. (3)(b); "Joint and several liability allows the trier of fact to either impose liability upon all those responsible on a pro rata basis reflecting responsibility, or impose total liability upon one of the responsible parties, leaving that party to obtain compensation from the other responsible parties." Shearer, *Comparative Analysis*, *supra* note 215, at 158.

222. Shearer, *Comparative Analysis*, *supra* note 215, at 158.

223. *Id.*

224. The developed nations were reluctant to sign on to treaty provisions that may bind them to uncertain and expensive assistance programs. The developing countries, on the other hand, saw such inaction as a sign that developed countries had no real commitment to curbing waste exports. See William N. Doyle, Comment, *United States Implementation of the Basel Convention: Time Keeps Ticking, Ticking Away...*, 9 TEMP. INT'L & COMP. L.J. 141, 146 (1995).

providing only that a working group meet to draft a liability scheme.²²⁵ In addition, both Conventions provide that national legislation should be passed to punish illegal traffic and to make the facilitation of illegal traffic a criminal offense.²²⁶

Critics of both conventions predict compliance problems because no organizations currently exist to monitor compliance, to enforce the provisions, or to prosecute violators.²²⁷ Any disputes may be settled through arbitration, or they may be brought to the International Court of Justice, but only if both parties consent to the jurisdiction of the ICJ.²²⁸

The Bamako Convention differs from the Basel Convention in other ways. Article 4 of the Bamako Convention prohibited dumping at sea or internal waters.²²⁹ The Basel Convention did not include this prohibition because it recognizes that certain sectors are already regulated by other legal instruments.²³⁰

Article 5 of the Bamako Convention creates a "Dumpwatch."²³¹ Article 5 also created a "focal point" to centralize each member states' administration of the treaty.²³² Basel lacks any additional monitoring system such as a "Dumpwatch." Although both conventions mandate a secretariat for monitoring and compliance purposes, the Basel Convention is criticized for not granting more supervisory functions to the Secretariat.²³³ In Bamako, the Secretariat is required to carry out hazardous waste audits based on information submitted to it by the parties.²³⁴ The Bamako Secretariat also has the competence to actively verify alleged breaches of the Convention reported to it by a party.²³⁵

225. Basel Convention, *supra* note 158, at art. 12.

226. Basel Convention, *supra* note 158, at art. 9, para. (5); *Id.* at art. 4, para. (3); Bamako Convention, *supra* note 98, at art. 9, para. (2).

227. See Jaffe, *supra* note 41, at 137.

228. *Id.* at 135.

229. Bamako Convention, *supra* note 98, at art. 4, para. (2).

230. KUMMER, *supra* note 46, at 84.

231. Bamako Convention, *supra* note 98, at art. 5, para. (4).

232. Marbury, *supra* note 8, at 271.

233. KUMMER, *supra* note 46, at 82.

234. *Id.* at 103.

235. Bamako Convention, *supra* note 98, at art. 19.

The standard regarding an environmental policy approach in Bamako is higher than that in Basel. Bamako requires a “preventative, precautionary approach to pollution problems,”²³⁶ and rejects Basel’s less stringent “permissible emissions.” The Basel Convention requires hazardous waste generation levels to be reduced in light of sociological, technological and economic factors.²³⁷ In effect, this greatly lowers the standard for States-Parties.

Bamako’s Art. 9 provision is stronger than that of Basel. Art. 9 provides that wastes deemed to be illegal should be returned to the state of origin in every case.²³⁸ It also places a stronger emphasis on states’ duties to adopt relevant criminal legislation.²³⁹

The scope of the Bamako Convention and its high standards would have the effect of chilling foreign business interests in Africa. Thus, it is hard to believe that African countries, so direly in need of foreign investment and business, would be willing to regulate hazardous waste at the expense of development. Yet it seems that this was the choice that the OAU nations made. The memory of horrible events in their past convinced African governments to give the environment higher priority vis-à-vis development issues. They also felt the impact of poor environmental health of a nation feeds directly into the expense of having to take care of the population and the quality of work performed by the citizenry.

The Bamako Convention is in line with the Basel Convention’s fundamental principles.²⁴⁰ The Basel Convention allows for regional agreements,²⁴¹ and the Bamako Convention fulfills the requirements for a regional agreement, although it has never been formally designated as such.²⁴²

236. *Id.* at art. 4, para. 3(f).

237. Marbury, *supra* note 8, at 272.

238. Bamako Convention, *supra* note 98, at art. 9, para. (3).

239. *Id.* at art. 9, para. (2); KUMMER, *supra* note 46, at 103.

240. Art. 11 of the Basel Convention allows for other agreements more tailored to the specific needs of a particular region. UNEP takes this position and even provided assistance to the OAU in drafting the Bamako Convention. KUMMER, *supra* note 46, at 104-05.

241. See Basel Convention, *supra* note 158, at art. 2, para. 20 (“‘Political and/or economic integration organization’ means an organization constituted by sovereign States to which its member States have transferred competence in respect of matters governed by this Convention.”).

242. KUMMER, *supra* note 46, at 105.

4. *Decision II/12*

The Conference of the Parties to the Basel Convention continued to meet after the adoption of the Convention in 1989. One of the most important decisions to be made was whether to change from a "limited ban" on hazardous waste shipments to the "complete ban" that the African countries wanted. At the Second Meeting in Geneva in March 1992, the Parties adopted an amendment (Decision II/12) that would completely prohibit the transboundary movement of hazardous waste from OECD to non-OECD nations. Decision II/12 would also change the definition of "hazardous wastes" to include recyclable materials previously not included in the scope of the Convention. Both these issues had been in great controversy during the Basel negotiations.

At the Third Meeting of the Parties in Geneva in September 1995, the Nordic States made a motion to fully adopt the Basel Convention to reflect the provisions of Decision II/12.²⁴³ The Parties did so, and amended the Convention to include the text of the decision. Seventy-six Member States agreed to a total ban on hazardous waste exports from OECD to non-OECD nations.

Decision II/12 also prohibited the movement of recyclable materials starting on December 31, 1997.²⁴⁴ Although this decision was not a formal amendment to the Basel Convention and thus, not legally binding, the Nordic States made a formal proposal in March 1995 meeting to make Decision II/12 binding to the States Parties. The G-77 countries and OAU members had lobbied in favor of a complete ban from the time of the First Conference of the Parties in Uruguay, and finally succeeded in getting it.²⁴⁵ By the time of the Third Conference of the Parties held in Geneva in September 1995, Decision II/12 was adopted. The negotiations for the amendment were difficult, but the overarching goal was the protection of the environment, according to President of the Third Conference of the Parties, Bakary Kante.²⁴⁶ This amendment is viewed as protecting of the developing countries since they do not have the technical, financial, legal, and institutional capacity for preventing illegal imports.

243. *Id.* at 47.

244. *Id.*

245. *See Id.* at 63.

246. *Basel Convention Adopts Amendment Banning Hazardous Waste Exports From Developed to Developing Countries*, (Sept. 22, 1995) < <http://www.unep.ch/sbc/pr9-95a.html> >. Bakary Kante is Director of Environment in Senegal's Ministry of Environment.

B. Implications of the Conventions for International Environmental Racism

The existence of the Basel and the Bamako Conventions weaken charges of environmental racism on the international level. Two of the four characteristics transferred from the domestic context seem to have counterparts on the international level regarding the transboundary movement of hazardous waste: cheap land and poverty. The other two characteristics concerning the inability of domestic minority communities to mobilize (lack of political power and lack of mobility) do not apply to the international situation. The OAU nations were able to unite to present a unified position on hazardous waste movement to the Meeting of the Parties to the Basel Convention, and to draft and enact their own conventions to completely ban the import of hazardous wastes into Africa. International environmental racism is a phrase that does not apply to the transboundary movement of hazardous waste. Even if the lack of liability schemes makes enforcement of the Conventions difficult, at least the instruments that currently exist are a strong start in the control of international shipments of hazardous waste.²⁴⁷

Another tool of international law that weakens claims of international environmental racism is national sovereignty. Sovereignty protects a nation's right to undertake environmental protections or risks. The theoretical right of nations to refuse shipments of hazardous wastes and other rules of customary international law, as well as the existence of the Basel and Bamako Conventions attest to the ability of even the least powerful nations to control the amount of pollution by hazardous waste.

247. A few incidents of the movement of hazardous waste in African countries have been reported. An example of the movement of hazardous waste is a ship carrying toxic chemicals which left Mombasa Harbor looking for a home for its cargo. Robert Bisset, *Mombasa Toxic Chemicals Incident* (April 1996) <<http://www.ce/lists/infoterra/1996/04/0014.html>. Some argue that "the [Basel] Convention's formation has not prevented an increase in dumping, . . . and [t]he organization cited what it called a 'new epidemic of industrialized nations dumping toxic waste on the economically struggling nations of the Third World and Eastern and Central Europe.'" *Environment: Fears Expressed About Third World Becoming Waste Dump*, INTER PRESS SERVICE, Nov. 30, 1992, available in LEXIS, News Library, ARCNWS File. Several incidents were also reported after 1992. See LOUKA, *supra* note 91, at 106-08.

Ironically, there is no equivalent right in the United States. There is a long tradition of freedom of movement of hazardous waste across state lines that has been strongly protected by dormant Commerce Clause jurisprudence.²⁴⁸ The lack of sovereignty has prevented communities of color in the U.S. from banning the import of hazardous waste into their communities. Nations have more and better protection through the concept of sovereignty than do communities of color in the United States. Perhaps if these communities of color could identify some right, such as the notion of a right to a clean environment, they would have more control over what kinds of pollutants enter their communities. They could choose to accept these wastes, but would have to give their express permission. Instead, communities of color must rely on awkward and slow-moving Congressional action (or inaction) and often unpredictable Supreme Court jurisprudence.²⁴⁹

Finally, the Basel Convention highlights the issue of compliance despite a lack of enforcement schemes. The existence of the Basel and Bamako Conventions make it difficult to assert international environmental racism. Even if CIL previous to the drafting of the Basel Convention was extremely weak or non-existent, thus making claims of international environmental racism more legitimate, the advent of the Basel Convention eclipsed the claim of racism. Once a treaty is in place and states become parties and ratify the convention, there is strong incentive to comply with the treaty, as I argue below. Compliance with the treaty means, to a large degree, a prohibition on hazardous waste movement into developing countries. If there is no movement of waste into these countries, there can be no claims of environmental racism.

The Bamako Convention's liability scheme, which imposes strict liability, is even more effective against further illegal dumping. The existence of the Bamako Convention shows that developing nations are not being forced to remain ignorant, nor are they burying their heads in the sand about issues of environmental concern.

248. Kate Sinding, Comment, *The Transboundary Movement of Waste: A Critical Comparison of U.S. Interstate Policy and the Emerging International Regime*, 5 N.Y.U. ENVTL. L.J. 796, 823 (1996).

249. Sinding suggests that "Congress should enact comprehensive national legislation governing the interstate transportation of hazardous waste rather than depending on the Supreme Court to rethink its jurisprudence in the area, or relying on legislative proposals which grant states the individual ability to regulate." *Id.* at 828.

The existence or non-existence of enforcement schemes are a constant concern in international agreements. Legal regimes contained the Bamako Convention and in the Basel Convention (whenever they are finally drafted) impose compliance in certain ways that are not concrete. Thus, the fact that a liability scheme and enforcement body have not yet been drafted in the Basel Convention does not mean that states will not comply with the Convention.

Andrew Hurrell and Benedict Kingsbury comment that despite a lack of concreteness, there are three ways in which legal regimes provide incentives to comply. First, "states generally comply with international obligations . . . because of their broader concern with their reputation as reliable partners and their long-term interest in a rule-governed . . . international system."²⁵⁰ They further argue that regimes "stabilize expectations and institutionalize the fact that states are involved in long-term co-operation and in negotiating over an increasingly wide range of issues"²⁵¹ Thus, they have more of an interest in "predictability provided by rules and the salience of reputation"²⁵² because of this interdependence of issues. A third way in which environmental regimes encourage compliance is that they "contribute to a greater degree of transparency"²⁵³ which: (1) "undercuts the 'realist' position that anarchy inevitably generates mistrust and forces states to base policy on worst-case assumptions";²⁵⁴ and (2) "leads to . . . states coming to be more aware of the dangers of environmental degradation and the costs of non-agreement."²⁵⁵ Even though enforcement is a constant concern in international law, commentators have long recognized that expectations and predictability of actions of nations are often very strong incentives as much as legal, and more concrete, notions of enforcement in the form of a lawsuit holding individuals accountable or a supranational court or body to whom disputes can be taken.

250. Andrew Hurrell & Benedict Kingsbury, *The International Politics of the Environment: An Introduction*, in *THE INTERNATIONAL POLITICS OF THE ENVIRONMENT* 1, 24 (Andrew Hurrell & Benedict Kingsbury eds., 1992).

251. *Id.*

252. *Id.*

253. *Id.* at 25.

254. *Id.*

255. *Id.*

IV. CONCLUSION

A. Implications of the Conventions

Undeniably, before a liability scheme and enforcement mechanisms are added, the direct and immediate result of the Bamako and Basel Conventions is that businesses in developed countries are now targeting Latin America and the Caribbean for dumping.²⁵⁶ Asia and the Middle East will also be future targets for the hazardous waste trade. The Asian countries have not yet drafted an agreement similar to that of Bamako although many of the newly industrialized Asian countries have signed on to the Basel Convention.

The development mind-set of the Asian countries, especially the "Four Tigers," is so strong that it seems unlikely that they will ever go beyond the provisions of the Basel Convention in order to regulate hazardous waste trade. Perhaps they see the Basel Convention as strong enough to prevent major environmental disasters. Asian nations seem to be less concerned with the environment than the OAU nations. They seem willing to sacrifice more than the African countries in order to catch the interest of First World corporations. In fact, we can already see this happening. Trade liberalization in Asia leads to massive industrial development, which leads to a corresponding increase in pollution and the generation of large amounts of wastes.²⁵⁷ One estimate is that 1.9 million tons of hazardous waste was generated in 1990 in Thailand, and that the amount will be four times greater by 2001.²⁵⁸

B. Sovereignty in Light of the Conventions

Hurrell and Kingsbury argue that "the development of international environmental law has reduced the autonomy (although, apart from the EC, not the legal capacity or 'sovereignty') of states and provided for the international

256. Corporations present their waste to countries like Colombia as development plans that promise employment, electricity, and social and technological progress. See Alston & Brown, *supra* note 72, at 185.

257. KUMMER, *supra* note 46, at 11.

258. *Id.*

regulation of an increasing range of domestic environmental activities.”²⁵⁹ Due to the activity of OAU nations, developed nations are no longer free to export hazardous waste to developing nations at a drastically lower cost. The OAU nations seemed to find unity and strength in their identity as African nations. Thus, they willingly subordinated sovereignty concerns when they successfully lobbied for the two conventions, and were able to unite under the umbrella of “Africa.” Through this vehicle of regional and, perhaps ironically, racial identity, these desperately financially and politically-poor countries were able to completely ban the import of hazardous waste and recyclables from developed nations.

Sovereignty is usually seen as a barrier to unity and a hindrance to solidarity. In this case, however, sovereignty seemed not to be an issue. Both conventions state in the first part of their preambles that the Parties are aware of the potential for damage to human health and the environment.²⁶⁰ It is this belief in the importance of the environment that provided African countries with the strength and solidarity to ban hazardous wastes.

The very existence of the Basel Convention makes a belief in racist attitudes seem cynical, even though the Bamako Convention did serve as an effective “protest” tool. The practice of environmental racism, even if it did once exist, is much more difficult to practice now, in the arena of the transboundary movement of hazardous waste. The environment is simply too important and its damages too far-reaching for countries to continue to think about the environment in terms of racism.

However, sovereignty issues continue to concern all nations and remain a factor in environmental politics. For example, the United States’ failure to ratify the Basel Convention might be explained by the sovereignty argument. International industry, including the American Chemical Manufacturer’s Association, strongly disapproved of the total ban on hazardous wastes. The U.S. Chamber of Commerce repealed its support of the Basel Convention. Thus, the Clinton Administration drastically slowed efforts to become a party to the Convention, despite promises to do so. If large industry in the U.S. disapproved of the Basel Convention, and industry and the government are closely allied, then the government could justifiably invoke sovereignty to resist becoming a party to a treaty in order to protect its business interests.

259. Hurrell & Kingsbury, *supra* note 250, at 44- 45.

260. Basel Convention, *supra* note 158, at pmb1., para. 1; Bamako Convention, *supra* note 98, at pmb1., para. 1.

Sovereignty issues are a concern in other aspects of the Basel Convention as well. Kummer argues that Principle 21 is not easy to apply vis-à-vis transboundary movement of hazardous wastes because it does not apply to situations where the source of pollution is mobile and can be transferred to areas beyond the jurisdiction of the state of origin. "[A] state cannot be required to exercise due diligence if it does not have jurisdiction or control over the relevant activity."²⁶¹ And certainly, a state no longer has control over an activity once it is inside another country's borders. This raises sovereignty issues. How can a nation be responsible for hazardous waste and its harmful effects once it is received by the state of destination?²⁶²

Sovereignty arguments are eclipsed by the OAU's effort to reduce hazardous waste movement into Africa and its emphasis on shipping waste to countries that know how to properly dispose of it. On the international level, the actions of the Third World really exemplify increased emphasis of safeguarding the environment.

C. Implications for International Relations and International Law

I first demonstrated how the four characteristics of environmental racism: cheap land, lack of mobility, lack of political clout, and poverty are found in domestic claims of environmental racism. Then, turning to the international level, I applied the domestic characteristics of environmental racism to the international situation. I found that, due to the existence of the Basel and Bamako Conventions, two of the characteristics (lack of political clout and lack of mobility) did not apply on the international level. Looking at the pre-Basel customary international law, I argued that rules of customary international law, although seemingly well-developed, did not necessarily accurately characterize international norms of behavior. The rules of custom may not have reflected actual behavior, but did reflect the articulation of certain norms, and perhaps what states ideally thought about hazardous waste movement. This discussion or articulation formed the framework for the Basel negotiations. Although some might argue that even with the Basel and Bamako Conventions in place, illegal movement of hazardous waste continues to occur, I argue that this criticism downplays the importance of a more comprehensive regulatory regime than has been seen before Basel.

261. KUMMER, *supra* note 46, at 19.

262. *See id.* at 15-16.

Once a treaty codifies customary international law, it becomes enforceable against states. The rather detailed nature of the Basel and Bamako Conventions allows states to better articulate their rights in international law, and allows them to keep each other in check, for the threat of international embarrassment regarding an illegal shipment of hazardous waste is given more bite with a treaty in place. I mentioned some of the other ways in which the existence of a legal regime keeps states in compliance despite the lack of international tribunals and courts to enforce treaties.

A brief summary of the Basel and Bamako Conventions and their more notable features helped emphasize that both were more comprehensive regimes than anything that has existed before Basel. It also recognized that the Basel Convention was more than just a symbolic attempt to regulate hazardous waste, despite criticisms that it only reiterated already established policies of the U.S. and the EC. The discussion of the Basel Convention was meant to highlight the obligations and rights of generators/states of export, transporters, and states of import. Furthermore, the fact that the Bamako Convention was heavily influenced and modeled on the Basel Convention points out that the Basel Convention covered certain areas very thoroughly. Because the Basel Convention was drafted first (and with the help of UNEP), the OAU nations were able to confidently draft an even tighter scheme for the regulation of hazardous waste movement.

Claims of international environmental racism are difficult to explain, given the existence of some rather comprehensive conventions. Although international environmental racism may have led to the illegal dumping of toxic wastes in developing nations, it became much more difficult to continue to dump, and more difficult to assert that international environmental racism exists, once the Basel, Bamako, and Lomé IV Conventions were ratified. The ability of the developing nations to put their concerns on the international agenda, in addition to the realization by developed nations that hazardous waste movement was a global issue that affected more than just importer states, led to the drafting of more comprehensive regulatory regimes than had previously existed. These arguments pull at least one leg out from under the critics of transboundary movement of hazardous waste.

One final issue that is beyond the scope of this paper is that of a more detailed analysis of relations between developed and developing nations, especially colonists and former colonies. The examination of this relationship might reveal some deeper issues about racism and the exploitation of poorer nations, as well as the issue of fairness and justice in dealings between developed and developing states.²⁶³

Finally, the arguments I have made throughout this paper give more credence to the argument that in recent times, state sovereignty has a different role to play in the transboundary movement of hazardous wastes. All nations are concerned enough to ban hazardous wastes into Africa which indicates a shift in international environmental notions of protecting only that which is inside one's own national boundaries. That is, the African countries of the OAU acted together and subordinated state sovereignty in order to speak with one voice to the developed nations. This is unusual because:

the nation state remains extremely resilient as a focus for human loyalties and as a structure for the exercise of political power. There is little or no consensus amongst the leaders of states or amongst populations that a move towards supranationalism is desirable. This is particularly true of the developing world. For many peoples of the post-colonial world, the achievement of statehood was the condition of political emancipation.²⁶⁴

Furthermore, the power that developing nations have is usually described as "negative." This means that they only have the power to undermine

263. Shue's notions of various kinds of injustices would help in this analysis. Henry Shue, *The Unavoidability of Justice*, in *THE INTERNATIONAL POLITICS OF THE ENVIRONMENT: ACTORS, INTERESTS, AND INSTITUTIONS*, *supra* note 250, at 373. The first type of injustice assumes that the amount of resources that any country has is the amount that it *should or ought to have*. *See id.* at 385-86. Shue would argue instead that "the existing intentional distributions of wealth and resources are morally arbitrary at best and the result of systematic exploitation at worst." *Id.* at 386. "Background injustice" recognizes that poor nations might agree to something not knowing enough to know that the agreement actually disadvantages them. *Id.* at 386-87. Another type of injustice is that developed nations are primarily responsible for the production of hazardous wastes, so they should acknowledge that they have a greater responsibility to control the wastes. Developed countries continue to benefit far more than the developing countries from the production of hazardous wastes. The third type of injustice takes account of the cost of ignoring the costs of coping — small problems in poor nations are big problems because these nations lack the technology and know-how to deal with problems that wealthier nations would consider small. *See id.* at 393.

264. Hurrell & Kingsbury, *supra* note 250, at 7.

international environmental agreements. The ban, however, is an example of a “positive” power. Although the inability of developing nations to properly dispose of waste can potentially be a serious issue for developed nations, generally, the damage of the transboundary movement of hazardous wastes is isolatable within national boundaries. The unity of African countries, however, in their push for a change in the Basel Convention, was not just an attempt to undermine the control of hazardous waste shipments. It was a further restriction on the movement of dangerous chemicals that was arguably a move toward self-preservation.

It is easier to ban hazardous wastes because the issue is fundamentally different from those contemplated by Principle 21. In this case, it is not difficult to bar smelly, dangerous hazardous chemicals created by developed nations. This hazardous waste is shipped into a country, much in the same way as bacteria is introduced into the body. Once it is brought in, proper methods have to be used in order to properly control the waste, or else it can quite literally lead to infection and pain. This is not to say that the nations do not sometimes voluntarily take in the waste, but they often are unaware of the potential harm of the waste, given that they do not have the proper technology and infrastructure.

Some commentators have seen the increasing concern for the environment as necessitating a change in conceptions of sovereignty, even if states are unwilling to “abandon theoretical notions of sovereignty . . . in favor of the amorphous demands of future generations or allegedly vested environmental rights of an indeterminate and limitless character.”²⁶⁵ One commentator remarked “. . . the sovereignty doctrine is still alive but . . . it no longer manifests itself in the shape of an albatross; its wings have been clipped by a growing number of widely accepted regulations . . . based on adaptation of old and new principles that are now widely regarded as being indispensable to preservation of life on our planet. . . . A creature of a new shape is emerging perhaps best renamed, in the context of these wider environmental developments, as ‘responsible’ . . . sovereignty.”²⁶⁶

If we accept that this new “responsible sovereignty” is a reality, then the assertion that international environmental racism exists is becoming outmoded in favor of a globalized conception of the transboundary movement of

265. Patricia Birnie, *International Environmental Law: Its Adequacy for Present and Future Needs*, in *THE INTERNATIONAL POLITICS OF THE ENVIRONMENT*, *supra* note 250, at 84.

266. *Id.*

hazardous waste. This new conceptualization and the treaties will hopefully encourage technology-sharing with developing states, in addition to the cessation of all hazardous waste shipments into countries who are signatories.

