

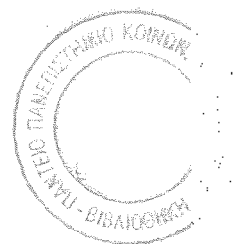
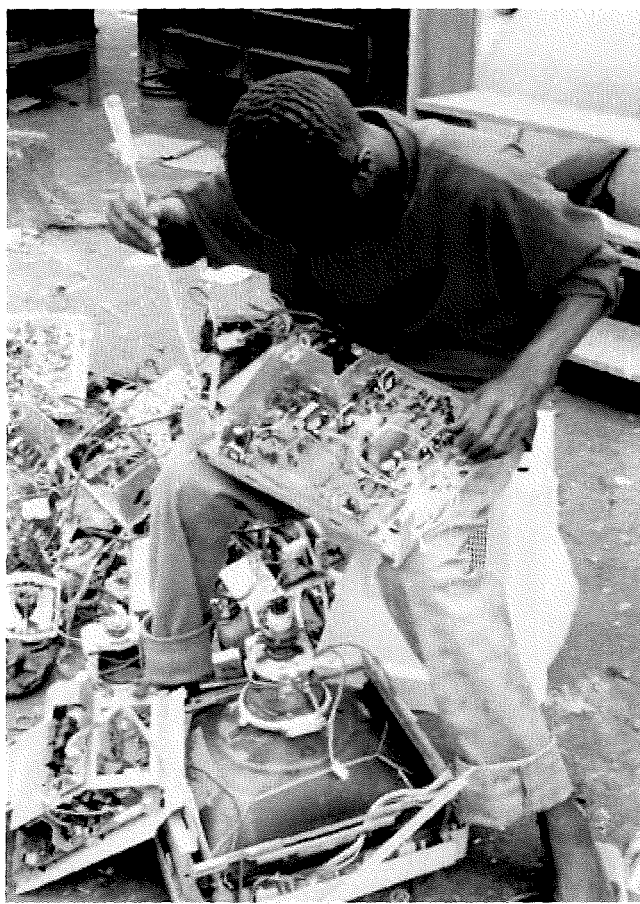
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E.MA THESIS

*'The "dirty" side of the European countries,
Illustrated by their growing E-waste export to Africa and its shameful
consequences regarding Human Rights over there.'*



European Master's Degree in Human Rights and Democratisation

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ABSTRACT

E-waste, understood as high-tech items discarded, is an emerging international issue that may affect both the environment and human health when it is mishandled. It requires high investments in order to be managed in an environmentally sound manner as it is required by a multitude of legislations. However, today, the majority of e-waste produced in rich countries is exported to developing countries where it is well-known that these poor countries have much lower environmental and social standards.

Admittedly, the European Union is the only economic organization today that has adopted binding regulations about e-waste. Nevertheless, the analysis of these latter reveals important shortcomings which still allow a large part of European e-waste to move to Africa. On the other side, this continent, being the poorest of the world, seems compelled to accept these toxic products, but in the detriment of the health of its peoples.

In this regard, this thesis aims at assessing the efficiency of the international environmental and Human Rights regimes to protect the health of African peoples. The ultimate objective will consist in determining whether or not the European countries may be held responsible for the adverse effects of their e-waste on African peoples' health.

Cover picture: Dismantling monitors, and attempting repairs from dismantled parts. Ikeja village, Nigeria. From the Basel Action Network Report, 'The Digital Dump, Exporting Re-use and Abuse to Africa', 2005, p.21. Available at <http://www.ban.org/Library/TheDigitalDump.pdf> (consulted 25 March 2010).

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Finally, I would like to dedicate the present thesis to my first nephew who will be born in three months, I really wish him to live in a better world than ours, respectful of Human Rights and caring about real sustainable development for everyone.

ABBREVIATIONS

Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice for Environmental Matters	Aarhus Convention
African Charter of Human and Peoples' Rights	ACHPR
African Commission of Human and Peoples' Rights	AComHPR
African Union	AU
African, Caribbean and Pacific (countries)	ACP (Group)
Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement of Hazardous Wastes within Africa	Bamako Convention
Basel Action Network	BAN
Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal	Basel Convention
Commission of Human Rights	CHR
Committee on Economic, Social and Cultural Rights	CESCR
Conference of the Parties	COP
Economic Community of West African State	ECOWAS
Electrical and Electronic Equipments	EEE
Environmental Sound Management	ESM
European Economic Community	EC/EEC
European Convention of Human Rights	ECHR
European Court of Human Rights	ECtHR
European Court of Justice	ECJ
European Topic Centre on Sustainable Consumption and Production	ETC/SCP
European Transnational Corporations	TNCs
European Union	EU
European Waste List	EWL
Foreign Direct Investment	FDI
General Agreement on Tariffs and Trade	GATT
General Comment n°14 on the right to the highest attainable standard of health	General Comment n°14
Human Rights Committee	HRCCom
Human Rights Council	HRC
Idem	Id.
Information and Communication Technology	ICT°
Inter-American Commission of Human Rights	I-ACHR
International Court of Environmental Arbitration and Conciliation	ICEAC
International Court of Justice	ICJ
International Covenant on Economic, Social and Cultural Rights	ICESCR

International Covenant on Civil and Political Rights	ICCPR
International financial institutions	IFIs
International Labour Organisation	ILO
International Tariff	IT
Non Governmental Organisations	NGOs
Optional Protocol to the African Charter on the Rights of Women in Africa	Optional Protocol to the ACHPR
Organisation for Economic Co-operation and Development	OECD
Organisation of African Unity	OAU
Paragraph	Para.
Polluteur Pays Principle	PPP
Prior Informed Consent	PIC
Producer Responsibility Principle	PRP
Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade	Rotterdam Convention
Special Rapporteur on Adverse effects of the movement and dumping Of toxic wastes and dangerous products and wastes on the enjoyment of human rights	SR on Toxic Wastes
Special Rapporteur on the right of everyone to the enjoyment to of the highest attainable standard of physical and mental health	SR on the Right Health
Special Representative of the General Secretary on the issue of Human Rights and Transnational Corporations and other business enterprises	Special Representative on Business and Human Rights
Stockholm Convention on Persistent Organic Pollutants	Stockholm Convention
Transnational Corporations	TNCs
United Nations	UN
United Nations General Assembly	UN GA
United Nations Environment Programme	UNEP
Waste Electronic and Electric Equipment	WEEE
World Bank	WB
World Health Organisation	WHO
World Trade Organisation	WTO

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INTRODUCTION

Do you know anyone who still does not own an I-phone, MP3, Mac Book, Internet modem, radio, Wii game console, flat screen, fridge or digital camera? If you do, this human being must belong to a rare sect that rejects technology by ideology because today, electronics are everywhere, at least in our rich societies. Actually, the Information and Communication Technology (ICT) boom in the 90s has been analyzed as one of the main features of the globalization process¹. In this respect, the European Union (EU) with its 450 million consumers constitutes the first users-market of ICTs². While people are interested in whether their particular model of an electronic device has gone out of date, they are less interested in the question of where the outdated models end up. Of course, this side of the story is much less glamorous because basically, we are talking about waste. This explains why the management of Waste Electronic and Electric Equipment (WEEE)³, also more commonly called e-waste, has always been neglected by the different actors involved in the high-tech industry chain⁴. As a result, the reality is very dirty and the prospects are even more alarming given the ongoing growth of electronic goods sold worldwide⁵.

If e-waste raises a complex issue for a Human Rights defender, it is because the trend regarding its management has been to export it to developing countries, where the

¹ Roy, 2005, pp.100-101.

² http://www.lookintoirreland.com/european_ict_market_ireland.htm.

³ According to the European Union definition which will be analysed in the core document since this regional economic organisation is the only one to have a specific legislation on e-waste.

⁴ <http://www.step-initiative.org/initiative/what-is-e-waste.php>.

⁵ Greenpeace Report, 'Switching on to Green Electronics', 2009, p.2. +12% of ICTs have been sold in 2008, the market should grow from \$294 billion in 2008 to \$485 billion in 2013, at <http://www.ems007.com/pages/zone.cgi?a=58843>.

environmental and social standards are much lower than in the WEEE producer states⁶. The point is that e-scrap is not a simple waste but a toxic waste that requires specific handling techniques in order to prevent any harm to the environment and to human health⁷. Therefore, when rich countries send their WEEE to the poorest ones, they are implementing the transfer of an unfair toxic burden rather than an insignificant trade act⁸. As the *raison d'être* of the international Human Rights regime is to protect human dignity, it is necessary to ask whether this regime is capable of protecting the fundamental rights of the peoples affected by the e-waste export of developed countries.

Traditionally, the issue of toxic waste movement such as WEEE has been dealt with by international environmental legislation, but the human stakes have become so important that it has been progressively linked to Human Rights. Indeed, since the right to remedy for the victims of Human Rights' violations constitutes the cornerstone of this system, it acts as an effective complementary framework to cope with the adverse effects of toxic wastes on human life by ensuring due reparation to the victims. However, our case of transboundary movement of e-waste adds the further difficulty of recognising the responsibility of the home countries of the e-waste exporters for the effects on human rights in the countries to which the waste is exported.

To fully illustrate the importance of this topic, this thesis will focus on two of the main actors in the international e-waste business, namely the EU and Africa. Discussion of the former is particularly illustrative because it is often presented as the economic organisation with the highest standards in relation to environmental and Human Rights issues⁹, caring expressly for Human Rights in its external relations with developing countries¹⁰. Yet, the WEEE issue shows another version of the European green fairy tale where European economic interests are often given priority over these important considerations. On the other hand, the extreme poverty of Africa has forced

⁶ Clapp, 2000, pp.106-108.

⁷ Supra 4.

⁸ Clapp, 2001, pp.1-20.

⁹ See the paper 'Globalizing EU environmental Regulation' of R. Daniel Kelemen presented at the 11th Biennial International Conference of the European Union Studies Association, 2009, pp.1-2.

¹⁰ See the Article 5 of the Lomé Convention IV European Union-African, Caribbean and Pacific on economic cooperation signed 15 December 1989, replaced in 2000 by the Cotonou Agreement.

its members to take part in this hazardous trade because, whether for dumping, recycling or re-use, the importation of e-waste in this continent represents an opportunity to boost economic development as will be explained below. Nevertheless, these mutual economic interests cannot justify the collateral toxic damage caused to African peoples living nearby or working for the local industries in charge of managing European WEEE.

With this in mind, and given the special dramatic situation of public health in Africa¹¹ and the fact that European countries contribute to the aggravation of this situation by blindly exporting their e-waste to Africa, this thesis will then concentrate on the evaluation of the efficiency of both the international environmental and Human Rights regimes as regards the protection of the health of Africans in this transnational toxic case. The final goal will consist in determining whether the EU countries may be held responsible for the harms they cause to African peoples' health by exporting their WEEE to Africa, and eventually to find out if the affected African peoples can expect any remedy from the European states. To this end, the following questions will have to be answered:

- What are the sources of the e-waste problem?
- To this respect, what are the specific environmental obligations of the states? How strictly are they enforced?
- To what extent does the initial environmental e-waste issue impact on the Human Rights of African peoples? Has the issue of toxic pollution been integrated into Human Rights case law?
- How do the environmental and Human Rights regimes deal with extraterritorial responsibility for transboundary damage?

¹¹ African Regional Health Report 'The Health of the Peoples' issued by the World Health Organisation regional office for Africa, 2008, p.3.

- What are the best means for African victims to get reparation for their health injuries from EU states? What are the major obstacles and what are the prospects?

This research focuses on an analysis of the interactions between both international and regional economic, environmental and Human Rights laws. Concerning the Human Rights stakes, the study of potential European extraterritorial responsibility for Human Rights abuses in Africa due to environmental transboundary harm is both an important and topical issue of international law. First, it confronts the Human Rights regime, traditionally based on a territorial jurisdiction, with an extraterritorial environmental problem stemming from globalisation. Thus, the effect of the European e-waste export on Africans' Human Rights challenges the classic territorial application of Human Rights and questions the efficiency of the Human Rights system in a globalised world.

Second, as this thesis will focus particularly on the protection of Africans' health, it will necessarily pinpoint the differences in treatment between civil and political rights on the one hand, and economic, social and cultural rights on the other hand, since the right to health will be discussed in detail. Admittedly, this theme is recurrent in Human Rights debates¹² but one cannot refrain from insisting on the interdependence of these two sets of rights, especially when Africa is concerned.

Finally, this thesis will have to consider a topic which is today more troubling for Human Rights – that is, the responsibility of European states for the interference of their Transnational Corporations (TNCs) with the Human Rights of Africans¹³. Indeed, the e-waste issue is primarily generated by private industrial activities, as is the case with a number of international environmental problems¹⁴. Illustrating *par excellence* actual globalisation, the involvement of European TNCs in the WEEE trade with Africa also represents a hot topic concerning the scope of states' obligations with regards Human Rights.

¹² Uchenna Gwan, 2001-2002, pp.443-448.

¹³ Letnes, 2004, pp.1-4.

¹⁴ <http://www.pollutionissues.com/Ho-Li/Industry.html>.

However, due to time and space constraints, this thesis will not cover the provision of the General Agreement on Trade and Tariffs (GATT)¹⁵ that provides a possibility for the states to adopt national protective measures to defend environmental or health interests because it would require an economic analysis that would definitely go beyond the objectives of this study. Furthermore, as the Panel Settlement Dispute of the World Trade Organisation (WTO) has still never been seized to rule over a commercial conflict that has ensued from a multilateral environmental agreement like the Basel Convention that exists for toxic waste¹⁶, the review of the WTO approach to human health protection in this case would not be instructive.

For the same reasons, the choice of emphasising the right to health instead of other fundamental Human Rights should not be interpreted as meaning that European e-waste export only affects this right. On the contrary, the Special Rapporteur on adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights (SR on Toxic Wastes) of the United Nations (UN)¹⁷ has indicated in its first report that these types of hazardous products may impact on civil and political rights as much as on economic, social and cultural, rights¹⁸. Furthermore, the UNSR has underlined that the Human Rights of vulnerable groups such as women, minorities or children in developing countries, Africa included, are particularly at stake¹⁹. Thus, the focus on the right to health has to be construed as representing the whole Human Rights regime.

Regarding the methodology that will be employed hereafter, it will be alternatively analytical to embrace all the different aspects of the topic, legal to pinpoint

¹⁵ Article XX of the GATT.

¹⁶ This Convention constitutes the major international instrument for dealing with toxic waste so it will be duly analysed later in the core of this thesis.

¹⁷ Ms. Fatma Zohra Ksentini was the first Special Rapporteur on Toxic Wastes appointed by the CHR, resolution 1995/81, 6 March 1990. Her mandate was renewed twice, in 1998 and 2001, CHR resolutions 1998/12 and 2001/35. She was replaced in 2004 by Mr. Okechukwu Obiama Ibeanu, appointed by the CHR resolution 2004/17, 16 April 2004. The UN Human Rights Council (HRC) replaced the CHR in March 2006 and decided to extend all the CHR mandates, including the one on Toxic Wastes, resolution 5/1, 18 June 2007.

¹⁸ Report E/CN.4/1996/17 adopted by the UN Commission of Human Rights on 22 February 1996, paragraph (para.)132.

¹⁹ *Idem* (Id.), para.139.

the gaps that allow the current e-waste trade, and finally, critical in light of a European ethical debate. Primary sources such as United Nations (UN) documents, EU and African legislation, as well as reports undertaken by legitimate Non Governmental Organisations (NGOs) will form the starting basis of the research. They will be complemented by comprehensive references to case law issued by diverse authoritative bodies either for environmental or Human Rights matters. Secondary sources consisting in extracts from books and articles of authors belonging to different schools of thought will be principally used to support the suggested criticisms and solutions to our e-waste problem.

As a result, the thesis will be divided into two parts. The first will assess the initial European and African environmental schemes to deal with the e-waste problem in order to protect human health. After presenting how WEEE has become an international issue (Chapter 1), this part will demonstrate the deficiency of the environmental frameworks to cope with the European e-waste export to Africa (Chapter 2). The second part will then make a comparative evaluation of the human health protection ensured by the international Human Rights regime, in the context of the European e-waste export to Africa. Before ultimately proving that the Human Rights framework does not allow a fair repartition of responsibility between European and African states, compared to the environmental framework (Chapter 4), a thorough analysis about the recent progressive recognition of the links between e-waste and Human Rights will be provided, insisting, as mentioned above, on the right to health of Africans (Chapter 3).

Part 1: The initial European and African environmental schemes to deal with the e-waste problem in order to protect human health.

Chapter 1: The international issue of e-waste.

I- E-waste definition.

As an introductory remark, one could say that the topic of waste has in general not attracted much attention from people living in rich countries. “Rich countries” must be understood as corresponding to the 31 members of the Organisation for Economic Co-operation and Development (OECD) which account for 51% of the world Gross Domestic Product²⁰. This situation is mainly due to the negative connotation usually attached to waste, perceived as unclean, ugly or useless and basically as a bad feature of our consumerist societies²¹. One could have expected that e-waste, coming from high-tech goods which generally enjoy a good reputation, being symbols of modernity²², would have received more attention but unfortunately this has so far not been the case. At the same time, e-waste is still a new and confusing concept.

Throughout this thesis, e-waste or e-scrap will have to be understood as having the same meaning given to WEEE by the European Directive precisely related to this subject²³. Indeed, as this Directive is the only regional legislation dealing specifically with this matter, and as the EU is one of the main study-objects of this thesis, it is logical to rely on this definition. According to the definition, WEEE covers goods

‘dependent on electric currents or electromagnetic fields in order to work properly and equipment for the generation, transfer and measurement of such currents and fields’²⁴

which are discarded by the consumer for whatever reason. This definition reveals the expanded notion of e-waste which embraces an enormous variety of products which are

²⁰ http://www.oecd.org/document/12/0,3343,en_2649_33959_45467980_1_1_1_1,00.html.

²¹ Sanne, 2005, p.316-317.

²² Burbach, 2005, Barons pp.70-73.

²³ Directive 2002/96/ on waste electrical and electronic equipment (WEEE) of 27 January 2003, amended by the Directive 2003/108/EC of 8 December 2003 and the Directive 2008/34/EC of 11 March 2008.

²⁴ Supra 23, Article 3 (a).

becoming increasingly used in industrialised countries: computers, printers, copiers, telephones, televisions, games and consoles, lamps, refrigerators, microwaves, ventilators etc²⁵. In addition, it is the fastest growing waste stream in the world, accounting for more than 5% of the municipal solid waste²⁶ and weighing between 20 and 50 million tons²⁷. The spreading generation of e-waste is directly connected to the last technological revolution principally characterised by the massive consumption of ICTs in rich countries²⁸. This is for instance seen by the 183 million computers sold worldwide in 2004 corresponding to a progression of 11.3% compared to the figures of 2003²⁹.

If WEEE includes many other products in addition to discarded ICTs, the latter appear to be more of a problem than other types of electronic items because they are more likely to be replaced for simple fashion update rather than for proper end of life³⁰. As a result, the lifespan of these high-tech goods has tended to dramatically decrease in rich countries, thus fuelling the actual increase in e-waste flow. In this respect, it is striking that the OECD has evaluated that, among its members, the lifespan of computers has dropped from 6 to only 2 years between 1997 and 2005³¹. This trend is characteristic of rich countries whose economies are based on a capitalist mode, encouraging peoples to consume goods as much as possible in order to produce economic growth³². If ICTs have followed this trend, their boom of production occurring since the 80s has also played a key role in the last mutation of the market economies presented as 'informational capitalism'. In fact, this concept underlines the crucial position of ICTs in economic globalisation, constituting a new wide market which can supplied itself as the other market at a faster rate³³.

²⁵ Towles and others, 2004-2005, pp.60-61.

²⁶ According to the OECD, e-waste grows three times faster than the total of waste stream <http://www.oecd.org/dataoecd/42/24/40833678.pdf>.

²⁷ <http://www.greenpeace.org/international/campaigns/toxics/electronics/the-e-waste-problem>.

²⁸ Pohjola, 2003, p.3.

²⁹ http://www.gartner.com/press_releases/asset_120419_11.html.

³⁰ BAN report, 'Exporting Harm, The High Tech Trashing in Asia', 2002, p.5.

³¹ Supra 26.

³² <http://www.earthportal.org/?p=1790>.

³³ Fuchs and Horak, 2007, pp.11-12.

The industrialized countries may be today the current principal e-users and therefore e-wasters, but developing countries' consumption of Electrical and Electronic Equipments (EEE) is also skyrocketing, and prospects are bad since their internal markets are yet to be saturated with electronic devices, such as mobile telephones or computers³⁴. As a result, the United Nations Environment Programme (UNEP) predicts astronomic amounts of e-scrap in countries such as South Africa or China, with rates of computers' waste at least doubling by 2020³⁵.

II- High toxic problem.

Having said that, the major problem concerning e-waste is not so much its increasing volume but rather its management, because of the toxic or hazardous substances included therein, such as chemicals and heavy metals³⁶. Furthermore, some materials included in WEEE are not toxic as such but can become so through the process of incineration, recycling or recovery. Plastic, for instance, may constitute up to 40% of ICTs³⁷ and when it is burnt for any of these purposes, it releases deadly dioxins³⁸. The terrible effects of these materials on human health and the environment do not need further proof. Already a large number of reports drafted by scientific research centres³⁹, UN agencies⁴⁰ and international NGOs⁴¹ have presented sound evidence in this sense. Ironically, it is scientific progress supported by technological advances which has allowed such thorough studies about the consequences of toxic substances on health and the environment⁴².

The main problem is therefore that, when such dangerous substances are mishandled, the people who are in contact with them either by working in the hazardous

³⁴ http://www.industryweek.com/articles/asia_to_fuel_new_pc_market_boom_9223.aspx.

³⁵ UNEP report, 'From e-waste to resources', 2009, p.50.

³⁶ Supra 30, pp.9-10.

³⁷ United Nations University report, '2008 Review of Directive 2002/96 on Waste Electrical and Electronic Equipment (WEEE)', 2008, p.79.

³⁸ <http://www.who.int/mediacentre/factsheets/fs225/en/index.html>.

³⁹ See notably the United States (US) Environmental Protection Agency and the European Environment Agency.

⁴⁰ See particularly the WHO and the UNEP.

⁴¹ See the website of BAN that provides a list of NGOs working especially on the toxic issue, available at <http://www.ban.org/main/links.html>.

⁴² <http://www.unu.edu/unupress/unupbooks/uu08ie/uu08ie07.htm>.

industry or by just living nearby the area where the activity is practiced suffer from a double toxic burden. First, they may be directly affected by the hazardous product through its manipulation, inhalation or absorption⁴³. In these cases, the health damage can be immediate, most commonly resulting in poisoning and strong diarrheal. Furthermore, children are particularly vulnerable to toxins⁴⁴. Secondly, the harmful effects of toxic products to human health increase indirectly, as a long-term effect, due to the contamination that they cause to the environment⁴⁵. Indeed, by polluting the air, the water supplies, the soil and so the aliments which are produced on this land, the dumping of toxic substances creates an unhealthy environment for people⁴⁶. In addition, hazardous products may affect almost all the components of the global ecosystem when they are not well disposed of: the ozone layer, animal and vegetal life, oceans, forests etc. Yet, a lot of research remains to be done to assess the impact of such pollution on human health⁴⁷ and given the development of the concept of a right to environment, it would go far beyond the topic of this thesis to discuss the hypothetical legal consequences which could arise in case of mere environmental damage⁴⁸.

Greenpeace has been the precursor NGO to denounce, from an environmental point of view, the damaging effects brought about by the chaotic dumping of hazardous materials⁴⁹ in developing countries, but the Basel Action Network (BAN) has been the first NGO to draw international attention to the specific e-waste toxic problem through its report *Exporting Harm - The High-Tech Trashing in Asia* published in 2002⁵⁰. This paper documents investigations done by a BAN experts' team in China, India and Pakistan which cast a "dirty light" on the scandalous social and environmental standards applied in these countries concerning the management of imported WEEE. It reveals, for instance, that after the conversion of the poor agricultural Chinese community of Guiyu into an e-scrap managing centre, the water has become so polluted that fresh

⁴³ Supra, p.26.

⁴⁴ Nweke and Sanders, 2009, p.864-868.

⁴⁵ WHO Report, 'Preventing disease through healthy environment, towards an estimate of the environmental burden of disease', 2006, pp.9-100.

⁴⁶ Id., p.38.

⁴⁷ <http://apps.who.int/tdr/svc/topics/environment/priorities-environment>.

⁴⁸ Shelton, 1991-1992, pp.133-138.

⁴⁹ <http://archive.greenpeace.org/comms/vrml/rw/text/t11.html>.

⁵⁰ Supra 30.

water has to be imported from another city⁵¹. The workers -paid on average 1.50\$ per day- have been seen effectuating recycling operations such as printer toner recuperation or open burning of the final worthless components without any protection. The BAN report has concluded its field trip mission by publishing a highly critical assessment regarding the environmental and occupational impacts of the processing of e-waste in Asia⁵².

Greenpeace has also become very committed to solving the e-waste issue and has published several reports on the topic⁵³. In 2005, this well-known NGO put out a listing of the dangerous materials present in electronic products, insisting on the risks which they induce for the environment and the people living in the area or directly handling them when they are disposed of or manufactured⁵⁴. This briefing about the toxic composition of WEEE summarizes the scientific findings that are now well-established concerning the hazardous effects of the majority of chemicals and metals included in e-waste such as beryllium, chromium hexavalent, brominated flame retardant, polyvinyl chloride, cadmium, lead or mercury⁵⁵. The US Agency for Toxic Substances and Disease Registry provides comprehensive data about the variety of health problems generated by these toxic substances which range non-exhaustively through cancers, child mental and physical deficiencies, respiratory difficulties, infertility, poisoning, damage to nervous and blood systems, renal and kidney malfunctions and cardiac defects⁵⁶.

Admittedly less frequent but equally alarming, is that hazardous components may provoke brutal deaths when they are badly managed and result in industrial

⁵¹ Id., p.16.

⁵² Id., p.28.

⁵³ Supra 5 and see also Greenpeace reports on 'Toxic Tech Pulling the plug on dirty electronics', 2005; 'Not In Our Backyard ,Uncovering the Hidden Flows of e-Waste', 2008; 'Chemical contamination and e-waste recycling in Ghana', 2008.

⁵⁴ Published online 20 May 2005, at <http://www.greenpeace.org/raw/content/international/press/reports/toxic-tech-chemicals-in-ctec.pdf>.

⁵⁵ See the following carcinogenic analysis of these components published by WHO in 1997, at <http://monographs.iarc.fr/ENG/Monographs/vol58/volume58.pdf>.

⁵⁶ See the website of the US Agency for Toxic Substances and Disease Registry, at <http://www.atsdr.cdc.gov/>.

accidents as is shown by the dramatic Bhopal disaster that occurred in India in 1984⁵⁷. This tragedy, that killed at least 8 000 people after the leak of 40 tons of deadly chemicals used by the pesticide manufacture *Union Carbide* in the Indian city Bhopal, has been emblematic of the hugely harmful potential of toxic substances⁵⁸. In addition, certain severe diseases such as cancer, caused by these products, may result in death⁵⁹. More recently in 2006, the *Probo Koala* case, in Ivory Coast, has caused 17 deaths and thousands of injuries in Abidjan following the dumping of 500m³ of hazardous waste, shipped by the *Probo Koala* cargo chartered by the Dutch *Trafigura* company, at 11 different sites⁶⁰.

III- Stakes relative to the European WEEE export to Africa.

Having exposed the high health and environmental stakes involved in e-waste management, it must now be explained why WEEE is increasingly –at least in volume– exported to developing countries⁶¹. At this stage, it is necessary to point out that one of the main problems regarding international e-waste trade concerns the lack of reliable data. As there is currently no International Tariff (IT) dealing with these types of goods, they are currently classified into either the scrap category or the new technology category⁶². Both of these classifications present interests for exporters: in the first case, they will have to pay a lower tax but will be subject to more regulation whereas in the second option, the export tax will be higher while the shipment will be less controlled⁶³. In either case, the two ITs do not represent the real international WEEE flow which must therefore be more than scientifically asserted⁶⁴. Then, the actual method of assessing the e-waste trade worldwide consists in combining the selling figures of EEE

⁵⁷ <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1142333/>.

⁵⁸ <http://bhupal.org/index.php?id=155>.

⁵⁹ According to WHO, cancer killed 7,4 millions people in 2004, available at <http://www.who.int/mcdiacentre/factsheets/fs297/en/index.html>.

⁶⁰ <http://www.greenpeace.org/international/en/news/features/toxic-waste-in-abidjan-green/>.

⁶¹ <http://www.greenpeace.org/africa/en/Press-Centre-Hub/Press-releases/Vast-amounts-of-hazardous-electronic-waste-unaccounted-for/>.

⁶² Schmidt, 2006, p.234.

⁶³ Id.

⁶⁴ Supra 53, 'Not In Our Backyard', *Uncovering the Hidden Flows of e-Waste*, 2008, p.9.

with the lifespan of the products and ascertaining the amount collected at the end of this period. These estimations do show an exponential growth over the past 20 years⁶⁵.

In her preliminary report⁶⁶ the SR on Toxic Wastes has pinpointed different factors that have increased the movement of toxic waste from OECD countries to developing countries⁶⁷. Given the damaging effects induced by toxic substances which are included in e-waste, the SR notes that following numerous scandals in relation to hazardous dumping or chemical accidents within their territories⁶⁸, rich countries have passed strict environmental laws in order to precisely protect their citizens from environmental disease exposure arising from mainly outdoor disposal. If this latter phenomenon has declined, it has increased the amount of materials collected in order to be properly managed according to the new requirements. However, these materials require huge and costly investments, and since the generation of hazardous elements has continued to spread, export to developing countries where no such high environmental and social standards exist has constituted the best economic option for waste producers⁶⁹.

In this respect, the Special Rapporteur highlights that the liberalisation of international markets -symbolised by the signing of GATT in 1947- has facilitated the trade in toxic waste⁷⁰ because, even though states involved do not explicitly view strict environmental law as a trade barrier able to restrict international exchanges⁷¹, they have continually ignored environmental concerns during negotiations.⁷² She has particularly stressed the international financial institutions (IFIs) policies which have strongly called for more liberalisation and deregulation of poor economies in their structural adjustment programmes undertaken in order to produce economic growth⁷³. The polemic⁷⁴ which arose about the leak of an internal memo written by the World Bank (WB)'s chief

⁶⁵ Id., pp.15-18.

⁶⁶ Supra 18, para.103-115.

⁶⁷ Id..

⁶⁸ See notably the *Seveso* case in Italy, 1976 and the *Love canal* case in NY in the US, 1978.

⁶⁹ Supra 18, para.108-109.

⁷⁰ Id., para.112

⁷¹ Ederington and Minier, 2003, p.15-16.

⁷² WTO report, 'Trade and Environment', 1999, pp.9-10.

⁷³ Supra 70.

⁷⁴ Johnson and others, 2007, p.397-398.

economist in 1991⁷⁵ encouraging this dirty waste transfer between industrialised and developing countries considered to be '*under-polluted*'⁷⁶ tends to support the view that, in general, the IFIs have never taken into full consideration all the environmental and social stakes involved in the toxic waste trade.

What makes the e-waste export problem even more complicated than its own composition is that these products are not only toxic - they also comprise valuable elements such as precious metals and raw materials⁷⁷ which are tradable and so constitute a source of revenue⁷⁸. Furthermore, some of these products are particularly necessary for the manufacture of certain high-tech items and so bids for their recycling or recovery remain high. For instance 80% of the global demand of indium and ruthenium come from the electronic industry⁷⁹.

This dual nature of WEEE helps us to understand the boom of the recycling business which is seen in developing countries. Given the high environmental standards required in rich countries, the recycling process has generally been regarded to be too expensive in such countries for the waste producers, representing an excessive economic burden threatening the competitiveness of these companies⁸⁰. Greenpeace has calculated that recycling a computer in China is ten times cheaper than in the US⁸¹. Thus, e-waste has been also transferred for recycling to low-standards countries (that is, the poorest countries) where the economic incentives to recover metals and raw materials are very high. If recycling does present positive aspects, it is only when such operation is soundly conducted; otherwise the result is further environmental and social damage than is the case with mere uncontrolled dumping⁸². While it is economically attractive for developing countries, one could say that the import of WEEE for recycling

⁷⁵ Memo partly reproduced at http://www.ban.org/whistle/summers_2.jpg.

⁷⁶ Id.

⁷⁷ UNEP report, 2009, p.7-8.

⁷⁸ Widmer and others, 2005, pp.445-446.

⁷⁹ Supra 77.

⁸⁰ J.adou and Lovegrove, 2008, p.7.

⁸¹ <http://www.greenpeace.org/international/campaigns/toxics/electronics/where-does-e-waste-end-up>.

⁸² Supra 30, pp.7-8.

faces even bigger challenges regarding management than mere disposal of WEEE faces⁸³.

The last problem concerning WEEE exports is that sometimes WEEE is disguised under other appellations such as used EEE or second-hand products. This misnomer enables them to avoid the appropriate legislation regulating toxic waste trade. Unfortunately, this phenomenon has been increasingly observed alongside the strengthening of environmental law in rich countries⁸⁴. As a result, the trade of these used EEE has flourished as it is presented as a good way of helping the poorest countries to bridge the “digital divide”⁸⁵ and so to develop by facilitating them with access to cheap technology. However, in reality a majority of these second-hand products have been found to be WEEE necessitating adequate management⁸⁶. This new trade, hidden behind its altruist image, is essentially one further way of transferring the toxic burden generated in rich countries to lesser developed countries.

The issue concerning e-waste export to developing countries, whether for disposal, recycling or fake re-use, remains fundamentally the same: it threatens unfairly both the health and the environment of the people living in the toxic area. So, to answer the central research question of this thesis regarding whether European States could be held responsible for the damage they cause to the health of Africans when exporting their WEEE to the poorest continent, it is now necessary to present the legal framework regulating the European states with regards e-waste export.

⁸³ BAN Report, ‘The Digital Dump, Exporting Re-use and Abuse to Africa’, 2005, pp.32-36.

⁸⁴ *Id.*

⁸⁵ *Id.*, pp.5-7. This concept covers basically the discrepancies that exist between rich and poor countries to access to ICTs.

⁸⁶ 75% of “used EEE” coming to Nigeria is unfixable according to BAN, 2005, p.13.

Chapter 2: The deficient environmental framework to cope with the European e-waste export to Africa.

I- The basic weaknesses of the international regime.

A) The first environmental steps to deal with the international trade of toxic waste between rich and poor countries.

First, it is necessary to underscore that the dual nature of e-waste –toxic and valuable- coupled with its rocketing expansion worldwide explains the lack of any international norms dealing with this specific issue. However, given the multiplication of scandals concerning the management of this imported high-tech garbage in developing countries and its harmful effects to the local population's health and environment⁸⁷, the international community decided in 2006 to include⁸⁸ this modern type of waste in the general regime instituted in 1989 by the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (the Basel Convention hereafter). However, since its creation, this Convention has displayed many shortcomings which have made it quite ineffective in stopping the transfer of toxic waste produced by industrialised countries to poorer countries⁸⁹. The *Probo Koala* case⁹⁰ and even more the current international e-waste flow act illustrations of this unsatisfactory regime. Therefore, it is necessary to examine the history, content and latest developments of the Basel framework in order to fully understand the legal problems raised by e-waste.

The issue of toxic dumping was first dealtt with by voluntary non-binding rules and principles. Indeed, following the United Nations Conference on the Human Environment held in Stockholm in 1972, the dangerous risks attached to chaotic

⁸⁷ See notably BAN and Greenpeace Reports.

⁸⁸ On 1 December 2006, the 8th Conference of the Parties (COP) to the Basel Convention adopted the Nairobi Declaration on the Environmentally Sound Management of Electrical and Electronic Waste (UNEP/CHW.8/CRP.24) and decision VIII/2 that set up an Open-ended Group in charge of working particularly on the issue of e-waste management in developing countries. Article 1.(d) of the Nairobi Declaration states notably that '*the Basel Convention is the main global instrument for guiding the environmentally sound management of hazardous e-waste*'.

⁸⁹ Webster-Main, 2002-2003, pp.73-80.

⁹⁰ Supra 60.

discharge of hazardous substances came to the fore⁹¹ and in 1981, UNEP gathered an Ad Hoc Committee of Legal experts in charge of making a more in-depth assessment of the global toxic situation⁹². Having concluded that this issue needed improved international cooperation, the Committee launched the Montevideo Programme⁹³, notably convoking a Working Group (WG) especially assigned to propose guidelines and principles on the environmentally sound transport, management and disposal of hazardous wastes.

In 1982, during the WG's work time, the UN General Assembly (UN GA) adopted the symbolic World Charter for Nature⁹⁴ which recommends in Article 11 the control of all activities which impact on the environment and displays their general commitment to reduce environmental risks and adverse effects. It is noteworthy that Article 12 of the Charter precisely targets *'the discharge of pollutants into natural systems'* advising to this respect that such materials should *'be treated at the source'*. This suggests obviously that the movement of toxic waste should be prevented. Although it has important legal meaning, the Charter is not binding upon states.

Despite the global environmental awareness of the dangerous consequences of toxic dumping, manifested by the Stockholm Declaration and the adoptions of the Montevideo Programme and the World Charter for Nature, a number of shocking incidents involving hazardous disposal in developing countries were made public⁹⁵. This led UNEP in June 1987 to adopt the 'Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes', drafted in 1985 by the WG. These guidelines are largely inspired by the legislation adopted in OECD countries at this period regarding the obligation of toxic waste exporters to inform and receive a formal acceptance from the importers⁹⁶. At the same time, UNEP's Governing Council

⁹¹ Stockholm Declaration U.N. Doc. A/CONF.48/14/Rev.1 at 3 (1972), Principles 6 and 7.

⁹² http://www.unep.org/law/About_prog/montevideo_prog.asp.

⁹³ http://www.unep.org/law/PDF/Montevideo_Programme_1.pdf.

⁹⁴ World Charter for Nature, UN GA resolution A/RES/37/7 (1982).

⁹⁵ Hackett, 1990, pp.296-297. The author refers to dumping cases which happened in Africa, but also in Thailand, Lebanon or Venezuela.

⁹⁶ See notably Directive on General Principles of Waste Disposal 75/439/EEC (1975); US Resources Conservation and Recovery Act 1976; Directive on Toxic and Dangerous Wastes 78/176/EEC (1978);

agreed to mandate another group of legal experts to draft an international convention, which would be binding for states, regarding the movement of hazardous wastes.⁹⁷

The outrage created by the discharge by Italy of 18 000 drums of poisonous substances in a private yard in the Nigerian Koko bay for a 100\$ monthly rent in 1988 may have been decisive in convincing the international community of the urgent necessity of such international treaty⁹⁸. Nevertheless, given the huge economic and political interests at stake, the negotiations have been very tough (lasting almost two years)⁹⁹. Essentially, the difficulties have arisen from the differences between the exporter states and the recipient states, with the former inclined only to accept mere control of their hazardous waste movement, and the latter advocating a firm prohibition of the trade¹⁰⁰. In fact, the OECD countries, which were responsible for 95% of the global toxic waste generated at the end of the 80s (with the United States being the worst culprit¹⁰¹), were very reluctant to institute a general ban on hazardous scrap export which they perceived as necessitating costly investments to comply with their own strict environmental laws¹⁰². On the other hand, the developing countries, led by the African states and generally supported by environmental NGOs, were advocating for such a solution, pointing at the unfairness of the toxic burden transfer, made possible only because of their poor environmental and social conditions¹⁰³.

B) The Basel Convention and its shortcomings.

The Basel Convention was finally adopted on 22 March 1989 by 53 countries¹⁰⁴ and largely reflects the views of the OECD countries. Indeed, it institutes a regulatory

OECD Decision-Recommendation on Transfrontier Movements of Hazardous Waste (1984); OECD Decision-Recommendation on Exports of Hazardous Wastes from the OECD Area (1986).

⁹⁷ <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=100&ArticleID=1663>.

⁹⁸ Uchenna Gwam, 2000, p.187.

⁹⁹ Clapp, 1994, pp.510-511.

¹⁰⁰ Id.

¹⁰¹ Uchenna Gwam, 2001-2002, p.430.

¹⁰² Krueger, 2001-2002, p.45. The author particularly targets the US, Germany and the United Kingdom but also stresses the important lobby of the International Chamber of Commerce and the Bureau for International Recycling.

¹⁰³ Supra 99.

¹⁰⁴ Entered into force on 5 May 1992, UN Doc. n°28911, at <http://treaties.un.org/doc/publication/mtdsg/volume%20ii/chapter%20xxvii/xxvii-3.en.pdf>.

system concerning transboundary toxic waste movement instead of prohibiting such movement. Generally, it is seen as a compromise of diverging interests and a significant first attempt to regulate the transfer of dangerous waste from OECD countries to poorer countries¹⁰⁵. Nevertheless, the Basel Convention has been highly criticised since its adoption¹⁰⁶.

One of the main reproaches concerns the fact that the regulatory regime still allows the movement of toxic waste from the producers' countries to developing countries. The only clear interdiction of toxic waste movement concerns exports to Antarctica¹⁰⁷ and to non-parties to the Convention but this latter prohibition can be overcome by a bilateral agreement which confers an equal level of protection to the Basel provisions¹⁰⁸. Otherwise, the Basel system enforces the "Cairo Guidelines' spirit" by setting up a general regulatory procedure based on two main principles. Firstly, the parties are required to implement Environmental Sound Management (ESM) of their hazardous waste under which they have to ensure that these products are managed in a safe manner in relation to both human health and the environment during their whole life-cycle. In this respect, they are especially encouraged to dispose of this dangerous waste as close as possible to its source of production in order to avoid its transboundary movement¹⁰⁹.

Secondly, transboundary movement is still permitted under Article 4-9 of the Basel Convention which states the following three hypotheses:

(a) The State of export does not have the technical capacity and the necessary facilities, capacity or suitable disposal sites in order to dispose of the wastes in question in an environmentally sound and efficient manner; or

(b) The wastes in question are required as a raw material for recycling or recovery industries in the State of import; or

¹⁰⁵ Supra 99.

¹⁰⁶ Id.

¹⁰⁷ Supra 104, Article 4-6.

¹⁰⁸ Id., Article 4-9 c).

¹⁰⁹ Id., Preamble, and Articles 4.2 b) and d).

(c) The transboundary movement in question is in accordance with other criteria to be decided by the Parties, provided those criteria do not differ from the objectives of this Convention.'

The Basel Convention subjects hazardous transfer to a double condition: the product concerned has to be notified to the import country which in return has to give prior written consent¹¹⁰. Under this regulation, a potential importing country is entitled to refuse any foreign delivery of hazardous waste if it estimates that no proper ESM could be handled within its territory.

Having identified the most important features of the Basel regime, one cannot avoid noticing that in addition to failing to ban the export of toxic waste, the fact that this kind of movement for recycling or recovery is still permitted considerably undermines the scope of the international regulation. This is particularly relevant as regards e-waste since, despite its toxic components, it is principally exported for these purposes¹¹¹.

In addition, most of the Basel Convention's provisions lack precision¹¹². Already the definition of 'waste' in itself is difficult to understand. It refers to two different Annexes of the Convention enumerating a long list of 47 types of waste¹¹³ (commonly called the Basel codes) considered to be toxic, unless they do not present one of the 14 specific dangerous characteristics stated in Annexe III of the Basel Convention¹¹⁴. While they are supposed to cover the full range of hazardous waste, these codes have been revealed to omit at least one third of such waste¹¹⁵, including WEEE. Moreover, the acceptance of the national definition of dangerous waste stated in Article 2-1 of the Convention weakens the original objective of this treaty of establishing an international standard regarding toxic waste because thus, the wide discrepancies which exist

¹¹⁰ Article 6 of the Basel Convention.

¹¹¹ Supra 83.

¹¹² Kummer, 1995, p.80. Katharina Kummer is since 1997 the Head of the Secretariat of the Basel Convention.

¹¹³ Supra 104, Annexes 1 and 2.

¹¹⁴ The Annex 3 notably points out that waste has to be for example explosive, flammable, poisonous, infectious or corrosive.

¹¹⁵ European Topic Center on Sustainable Consumption and Production (ETC/SCP) report, 'Data availability on transboundary shipments of waste based on the European Waste List', 2009, p.7.

between member states' environmental law can still prevail¹¹⁶. By the same token, the ESM concept has been criticized for being too vague and not implying clear obligations for states¹¹⁷.

Another important shortcoming of the Basel Convention which is perhaps the best proof of the Basel regime's weakness is the absence of provision regarding liability in case of illegal transfer of toxic waste. Thus, the people suffering from environmental damage or health problems due to unsound management of imported hazardous waste are completely forgotten in this system which is not effective in inducing a feeling of responsibility in toxic waste producers or in making them commit to the reduction of such toxic production and export to poor countries¹¹⁸.

Finally, the refusal of the United States to sign the Basel Convention demonstrates that the international regulation of the toxic waste trade constitutes a sensitive issue. This also explains why states generally lack political will to enforce the Basel Convention¹¹⁹. As the Basel Convention does not set up an effective body to monitor the compliance of states with the Basel obligations, it is very difficult to assess the efficiency of the Convention¹²⁰. However, Kummer has pointed out that the implementation of the Basel Convention requires important domestic techniques and infrastructures to control the exported products, especially at borders, and such techniques and infrastructures are deficient in poorer and more vulnerable countries¹²¹. As a result, although all European states signed the Basel Convention in 1989, Nigeria was the only African country to do so because other African states were so disappointed by the final version of the Convention¹²².

C) Post-Basel developments to improve the situation.

¹¹⁶ Andrews, 2009, p.177.

¹¹⁷ Supra 112, pp.56-59.

¹¹⁸ <http://www.ban.org/subsidiary/liability10.html>.

¹¹⁹ Supra 116, p.183.

¹²⁰ Supra 112, p.77.

¹²¹ Id., p.81.

¹²² Supra 89, p.70.

After the adoption of the Basel Convention, the international community showed its determination to address the toxic waste issue at the Earth Summit held in Rio de Janeiro, in 1992. Both Agenda 21 and the Rio Declaration on Environment and Development adopted at this occasion¹²³ contain special provisions concerning the movement of toxic waste¹²⁴, but again these two texts remain non binding upon states. However, they have influenced the third Conference of the Parties (COP-3) of the Basel Convention to adopt the BAN Amendment in 1995¹²⁵ prohibiting all waste exports to non-OECD countries¹²⁶. While the BAN Amendment has been welcomed by both developing countries and environmental NGOs¹²⁷, it still has not received sufficient ratification to enter into force. The same is also true for the Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal (the Protocol to the Basel Convention), adopted by the COP-5 at the 10th anniversary of the Basel Convention's adoption in December 1999¹²⁸.

To complete this global legal presentation regarding e-waste, three other conventions should be mentioned. These Conventions do not deal specifically with toxic waste such as WEEE but they do present important links with this topic. First, the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice for Environmental Matters (Aarhus Convention) adopted on 25 June 1998¹²⁹ constitutes an important headway for the victims of toxic waste dumping even if only 44 states are parties to this Convention¹³⁰. Article 3-9 of the Aarhus Convention notably established a very progressive principle of non-discrimination regarding the access to justice that the parties should provide to victims¹³¹.

¹²³ As referred in the Report of the United Nations Conference on Environment and Development, adopted by the UN GA on 12 August 1992, A/CONF.151/26, vol.I-IV.

¹²⁴ See Chapter 19, 20 and 21 of the Agenda 21 and Principles 10, 13, 14, 16 and 17 of the Rio Declaration.

¹²⁵ Decision III/1 of the COP-3 of 22 September 1995, at http://www.ban.org/about_basel_ban/copsIII_1.html.

¹²⁶ In fact, the BAN Amendment forbids the export between the countries mentioned in the Annex VII of the Basel Convention which are members of the OECD, EC plus Luxembourg to the other countries.

¹²⁷ See article the Basel convention and the international trade in hazardous wastes p.45

¹²⁸ UNEP/CHW/OEWG/S/2/Add.7. See Krueger, 2001-2002, p.45.

¹²⁹ Entered into force in 2001, UN Doc. n°37770, at <http://www.unece.org/env/pp/documents/cep43e.pdf>.

¹³⁰ <http://www.unece.org/env/pp/ratification.htm>.

¹³¹ *Supra* 129, Article 3.9: 'Within the scope of the relevant provisions of this Convention, the public shall have access to information, have the possibility to participate in decision-making and have access to

Nevertheless, although the Aarhus Convention has the potential for universality¹³², the scope of the Convention still remains primarily European as it has been adopted by the UN Commission for Europe. Adopted by the EU on 17 February 2005¹³³, 12 South-East European and Central Asian countries have nevertheless become parties¹³⁴, but the adoption of the Aarhus Convention by African countries is still a long way off.

Secondly, the Rotterdam Convention on the Prior Informed Consent Procedure (PIC) for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention) adopted on 10 September 1998¹³⁵ targets in its Annex III 11 industrial chemicals which should only be traded according to the Rotterdam Convention's obligations regarding PIC. As some of these chemicals are used in high tech goods, the Rotterdam Convention constitutes a step towards better implementation of the PIC procedure for both European and African countries – this is seen by the fact that the EU and 39 African states have adopted it¹³⁶.

Thirdly, by calling for an elimination or reduction of the production of certain toxic substances which are also used in high-tech products' manufacture, the Stockholm Convention on Persistent Organic Pollutants (Stockholm Convention on POPs) adopted on 22 May 2001¹³⁷, binding both the EU and 48 African states¹³⁸, tackles the hazardous waste problem at its roots – that is, at the production stage. Although the scope of Stockholm is limited to a number of POPs, it does address the cause of the issue.

The interrelations between the Basel, Stockholm and Rotterdam Conventions are so important that UNEP decided in 2001 to amalgamate the three secretariats in charge

justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.'

¹³² The former UN Secretary General, Kofi Annan, has estimated that the Aarhus Convention was 'the most ambitious venture in the area of environmental democracy so far undertaken under the auspices of the United Nations', para. 2 of its foreword to the 'Implementation Guide to the Aarhus Convention', 2000.

¹³³ Supra 130, Council Decision 2005/370/EC (2005).

¹³⁴ Albania, Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, the Former Yugoslav Republic of Macedonia, Turkmenistan, Ukraine.

¹³⁵ Entered into force in 2004, UNEP/FAO/PIC/CONF/5.

¹³⁶ <http://www.pic.int/home.php?type=t&id=63&sid=17#NI>.

¹³⁷ Entered into force in 2004, UN Doc n°40214.

¹³⁸ <http://chm.pops.int/Countries/StatusofRatification/tabid/252/language/en-US/Default.aspx>.

of monitoring the implementation of these three Conventions in order to have a more comprehensive overview of the toxic matter and to facilitate 'an integrated life-cycle approach' to the hazardous substances dealt with by these treaties¹³⁹.

These last positive developments regarding the international management of toxic waste from 'cradle to grave' should not make us underestimate the real difficulties faced daily in enforcing these multinational agreements and in actually reducing their transboundary movement from OECD countries to developing countries. To palliate the Basel regime's shortcomings, some regional organisations, such as the EU and the Organisation of African Unity (OAU), have used Article 11 of the Basel Convention¹⁴⁰ to enforce stricter regulation. While the latter organisation, despite its numerous economic problems, seems to be very supportive of the BAN's approach regarding toxic waste imports, the EU has adopted an ambiguous attitude on this issue that ultimately shows that its principle concern is its internal interests.

II-The "dirty" interplay between the dubious progressive EU legislation and the ambiguous protective African stance regarding WEEE.

A) The contradictory European environmental position within and outside its borders.

1) The EU and the environment: the toxic waste law example.

As stated in the introduction, Europe is an interesting case-study as regards the complex topic of e-waste. This is because this "high-tech" issue mixes economic, environmental and Human Rights considerations, and Europe enjoys a unique regional configuration to cope with these matters. Indeed, two Courts have been established to deal with two separate sets of problems: the European Court of Human Rights (ECtHR)

¹³⁹ See the website of the Ad Hoc Group Joint Working Group composed of 15 representatives of each of these three Conventions, available at <http://ahjwg.chem.unep.ch/>.

¹⁴⁰ The Article 11 of the Basel Convention allows the parties to enter into bilateral, multilateral or regional agreements provided that 'they are not less environmentally sound' than the Basel Convention.

to protect Human Rights and the European Court of Justice (ECJ) to monitor EU law. When first established, neither of these Courts were concerned with environmental protection, but the long democratic tradition that exists in the old continent has, through time, forced these two judicial institutions to pay more attention to European civil society's worries about the environment, and to integrate this problematic issue into their modern case-law¹⁴¹. Since Europe is a land of liberty where freedom of speech and association are guaranteed, and given the deep respect in Europe for such fundamental civil rights, the formation of powerful environmental NGOs has been possible. Such NGOs have been able, especially with the development of ICTs, to communicate more easily with European citizens about the different environmental issues which threaten them directly or the planet in general¹⁴².

Regarding the approach of the EU to the environmental problems that an issue such as e-waste raises, it should be emphasised that despite the complete absence of any environmental competence in the founding treaties, the European institutions quickly began to legislate in this area when it became apparent that discrepancies between national environmental laws could prevent the realization of the single market goal of the organization¹⁴³. Thus, it can be said that, motivated by its original economic mandate, the EU has become committed to environmental protection, even if this was not its primary intention. This is clear from the more than 200 directives adopted in this field which cover a broad range of green issues¹⁴⁴. In this respect, it is striking to observe the special attention paid at an early stage by the European Community (EC) to hazardous substances, especially because of their harmful potential both for environment and for human health. Again, the EC's concern for human health appeared as a result of the spiral effect: to have an efficient single market, European workers have to be in good health¹⁴⁵.

¹⁴¹ Pederson, 2008, pp.36.

¹⁴² Breitmeier and Rittberger, 2000, pp.145-146.

¹⁴³ Folmer and Howe, 1991, p.18-19.

¹⁴⁴ Axelrod and others, 2005, p.208.

¹⁴⁵ Petersmann, 2002, p.624.

More specifically, the EU has slowly integrated the environmental question into its treaties through its innovative 'precautionary approach'¹⁴⁶. As a clear sign of will to become more than a simple economic organization, the development of the precautionary principle and its utilisation by the EU regarding its risk management shows real intention to take into account both environmental and health impacts in its economic policies. The Lisbon Treaty has finally recognised the new aspirations of the EU concerning its evolving mandate, comprising additional fields of competence which globally aim at implementing policies 'for better life'¹⁴⁷. According to this Treaty, both environmental protection and health may now compete with economic interests.

EC regulation of toxic products began in 1967 with the adoption of the Directive on Dangerous Substances¹⁴⁸ aimed at establishing European standards regarding the classification, packaging and labelling of certain chemicals known for their hazardous impact on health. At the same time, as a result of its original economic mandate the EC has also had to develop an innovative policy regarding waste¹⁴⁹. Alongside its early awareness of the risks raised by toxic substances, the EC began to legislate in 1991 about hazardous waste¹⁵⁰.

The European global policy on dangerous garbage can be summarised as relying on two complementary priorities: diminishing the production of this type of waste and when they are ultimately released, absorbing the harmful effects¹⁵¹. Relevant to our topic, the Toxic Waste Directive of 1991 establishes a European Waste List (EWL)¹⁵² into which the member states should report this type of waste to enable the EU to evaluate the environmental and economic toxic waste situation in order to manage it more efficiently. Much more developed than the list set up by the Basel regime, the EWL is

¹⁴⁶ As embodied in the Title XIX of the EC Treaty relative to Environment. The Article 176 notably allows the members states to adopt 'more stringent protective measures' to pursue the objectives of the EC enounced at the Article 174 consisting in 'preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilisation of natural resources, promoting measures at international level to deal with regional or worldwide environmental problems.'

¹⁴⁷ http://europa.eu/lisbon_treaty/glance/better_life/index_en.htm.

¹⁴⁸ Directive 67/548/EEC of 27 June 1967.

¹⁴⁹ See Directive 75/442/EEC of 15 July 1975 as amended by the Directive 2006/12/EC of 5 April 2006.

¹⁵⁰ Directive 91/689/EEC on Hazardous Wastes (1992).

¹⁵¹ EEA report, 'Europe's Environment, The 4th Assessment', 2007, pp. 281-282.

¹⁵² Supra 250, Article 4-1.

estimated to cover between 80% and 90% of the types of toxic waste with 325 specific codes¹⁵³. Paradoxically, while the EU uses a more stringent framework concerning hazardous waste, member states are only obliged to report according to the flawed Basel requirements¹⁵⁴. This comprehensive legislation has translated into a positive diversion of waste from landfills which are acknowledged to be the worst method of disposal for the environment¹⁵⁵. However, landfill is still the most practiced method worldwide, including in the EU¹⁵⁶. However, the deficiency of the EWL system which is aimed at tracking toxic waste, has in fact contributed to the “hidden flow” of toxic waste worldwide including e-waste¹⁵⁷.

2) European actions to mitigate the adverse effect of EU green law in developing countries.

However, the adverse effect of this positive diminution of dumping practices has been a boom of collected toxic waste waiting to be correctly managed. The problem is that the huge costs¹⁵⁸ required for proper waste management have deterred European toxic actors from investing in clean disposal or the recycling industry and as a result, the legal responsibility of such actors for non-compliance with the new European environmental legislation has widened¹⁵⁹. Furthermore, in accord with European liberal philosophy which has always promoted free competition among its economic agents in order to have the lowest prices for its consumers¹⁶⁰, the export of toxic waste outside the EU appears to be the most profitable option for those involved in the disposal of hazardous scrap. Once again it is possible to see the dilemma between the EU’s principal economic mandate and its growing environmental engagement because the correct handling of toxic waste does in fact represent an economic burden for European

¹⁵³ Supra 115, pp.11-12.

¹⁵⁴ Id..

¹⁵⁵ Supra 151, p.283.

¹⁵⁶ Id.

¹⁵⁷ In reference to the Greenpeace report of 2008, supra 53.

¹⁵⁸ Supra 69.

¹⁵⁹ See Article Global standards hazardous substances and e-waste management in the EU

¹⁶⁰ Supra 70.

companies which is capable of affecting their competitiveness either on the domestic or international stage¹⁶¹.

Yet, the EEC was alerted of the dramatic consequences of spreading European toxic waste exports to developing countries, both by the European Parliament and by powerful NGOs¹⁶², which are able to lobby the European Commission about this increasingly shocking issue. As a result, the EEC notably agreed, in the same year as the adoption of the Basel Convention, to a special clause completely banning the export of hazardous waste to the African, Caribbean and Pacific countries (ACP Group) included in the Lomé Convention IV of December 1989¹⁶³. This Convention updates the broad cooperation partnership started in 1975 between the EC and the ACP Group regarding their exchanges in the field of aid, trade and political issues, and has since been replaced by the Cotonou Agreement in 2000. This special provision has defined the EU as the leading regional economic organisation with regards issues relating to the problematic consequences of transboundary toxic waste movement to developing countries¹⁶⁴.

In line with this, the EU ratified the Basel Convention in 1993 and incorporated its provisions into the European Waste Shipment Regulation¹⁶⁵, thus confirming European concern about the international transfer of hazardous waste. At this point, one should make clear that the EU is already working on its future enlargement towards the East and realizes that its current toxic waste flow to future members¹⁶⁶ will no longer be compatible with the harmonization of environmental standards, which will automatically occur upon accession of the former communist countries to the EU¹⁶⁷. This point helps us to understand why the EU has also ratified the Basel BAN

¹⁶¹ http://wasteage.com/mag/waste_cu_government_enforce/.

¹⁶² Wynne, 1989, p.122.

¹⁶³ Supra 10, the Article 39-1 states that '*the Community shall prohibit all direct or indirect export of such waste to the ACP States*'.

¹⁶⁴ Supra 99, p.513.

¹⁶⁵ Council Decision 93/98/EEC of 1 February 1993 on the conclusion, on behalf of the EC, of the Basel Convention, entered into force in the EC on 7 February 1994.

¹⁶⁶ EC Regulation n°259/93 of 1 February 1993, replaced in 2007 by the EU Regulation n°2006/1013 of 12 July 2006. The latest regulation also incorporates the provisions of the OECD Decision 2001/107 of 4 February 2001, updating the OECD views about toxic waste trade.

¹⁶⁷ Dawson, 2006, p.118-120.

Amendment in 1997¹⁶⁸ which thus forbids its members to transfer any kind of toxic substance to the ex-soviet republics who are on course to join the EU¹⁶⁹. The result of this comprehensive legislative package is a strict prohibition on any hazardous waste export for any purpose from the EU territory to non-OECD countries. This means that all the actual transboundary movements of toxic wastes from the EU to African countries are illegal¹⁷⁰.

3) The EU e-waste law remains inadequate.

Conscious of the toxic waste issue, it is natural that the EU has tried to cope with its exponential e-waste generation problem, being the fastest being the fastest growing stream of waste in the Union expected to double in 12 years¹⁷¹. Here we are talking about 8,7 million tonnes of WEEE for 2005¹⁷² accounting for a 4% average of municipal solid waste¹⁷³. The principal concern is in relation to its annual growth rate of between 3% and 5% which is due to two main reasons specific to the EU. First, with the recent enlargement, the European EEE market has seen a renewal of its potential as the Eastern countries are still lagging behind the Western members in electronic equipments such as ICTs¹⁷⁴. Secondly, since the EU is an organization of rich countries, it can afford to follow all progressions in technology, which are realised faster and faster in the field of EEE and have shortened the lifespan of these products¹⁷⁵, thus feeding the WEEE flow.

To combat this issue, the European Commission adopted the WEEE and RoHS Directives¹⁷⁶ in 2003 which set up a specific ambitious framework to deal with e-waste. The WEEE Directive provides a comprehensive management scheme which should

¹⁶⁸ Council Decision 97/640/EC of the 22 September 1997 on the conclusion, on behalf of the EC, of the Basel BAN.

¹⁶⁹ The European Eastern countries are not members of the OECD.

¹⁷⁰ Supra 83, p.37.

¹⁷¹ See data provided by the ETC/SCP at <http://scp.eionet.europa.eu/themes/waste/#6>

¹⁷² Greenpeace Report 2008 Not in our Backyard p.17

¹⁷³ <http://scp.eionet.europa.eu/themes/waste/#6>

¹⁷⁴ Supra 255.

¹⁷⁵ Supra 23, WEEE Directive and RoHS Directive 2002/95/EC of 27 January 2003, entered into force on 1 July 2006, on the restriction of the use of certain substances in electrical and electronic equipments, amended by the Directive 2008/35/EC of 11 March 2008.

¹⁷⁶ Supra 23, Articles 8 and 9.

ensure the safe collection, recycling and disposal of e-waste with the ‘*Producer Responsibility Principle*’ (PRP) acting as the cornerstone of the regime to cover the whole EEE life-cycle. Even if the PRP remains controversial among high-tech manufacturers, it solves the problem of identifying the party who should bear responsibility for financing such costly operations¹⁷⁷. To complement this, the RoHS Directive echoes the Rotterdam Convention and tackles the roots of the toxic e-waste issue by directly prohibiting EEE manufacturers from including in their products any of the 6 hazardous substances banned by this directive because of their well-known harmful effects to health and environment¹⁷⁸.

This brief presentation of the EU’s environmental approach concerning e-waste management may suggest that the approach is satisfactory, since it goes further than the international Basel regime, but in reality, it may cause more harm to developing countries than expected through the obscure trail of illegal transboundary movement. Indeed, neither the WEEE nor the RoHS Directives contain any provision regarding export as the Commission seems to consider that it is clear that such transfer outside Europe is effectively forbidden according to the European Waste Shipment Regulation. Therefore, these two Directives have only focused on European welfare which was internally endangered by the lack of European legislation on WEEE management, given the harmful risks to environment and to health raised by these products.

With the WEEE Directive, firm objectives regarding the collection and treatment of these discarded high-tech items are stated in Articles 5 and 6. The main fear concerning the WEEE Directive’s implementation is that it is likely to produce the same effects observed with the classic toxic waste stream which, after having been legally collected internally, has increasingly been exported illegally to developing countries, despite the EU regulation. In this regard, the BAN NGO dreads a European “tsunami of e-waste”¹⁷⁹ to non-OECD countries as a result of the WEEE Directive’s implementation, which will probably increase the volumes of electronic items collected

¹⁷⁷ Towles and others, 2004-2005, p. 84-90.

¹⁷⁸ Namely: lead, mercury, cadmium, hexavalent chromium, polybrominated biphenyls (PBB) and polybrominated diphenyl ethers. Supra 55 for the effects of these materials on human health.

¹⁷⁹ See BAN Highlight released in August 2005, at <http://www.ban.org/highlights/highlights05.html>.

inside the EU and the deficient enforcement of the European Waste Shipment Regulation that will still allow large amounts of toxic substances that are included in e-waste to be exported to non-OECD countries.

This alarming prediction discloses a deep contradiction as regards the internal and external EU green position, despite its good intentions, depicted for example by the Lomé IV Convention. Indeed, while the EU uses express legislation in relation to WEEE management, the Commission still estimates that two thirds of the Union's e-waste is not dealt with according to the legislation¹⁸⁰, and so ultimately is managed in a way which is damaging to the environment, whether inside or outside the EU. The point is that with the ever stricter European environmental law such as the WEEE Directive's provisions, the outcome is an increasing risk of illegal export of e-waste to developing countries (which are far from implementing such green norms) in total violation of both the Basel Convention/BAN and EU law. This essentially brings us to the nexus of the problem concerning European e-waste management, namely the general lack of political will to implement the full set of regulations governing the e-waste regime when it comes to transboundary transfer to non-OECD countries or to recognise that such regulation is the best environmental and economic alternative for the EU. This situation highlights that the EU is applying double environmental standards: it imposes restrictive regulation within its territory while being too lenient at its borders. This casts a poor light on the global environmentally-friendly discourse of the EU and damages the image of the EU as a defender of Human Rights, given the impact of e-waste on human health.

Having examined the hypocrite attitude of the EU concerning transboundary e-waste management, it is now important to analyse how imported WEEE is received in Africa and to understand that only poverty motivates the African actors involved in this toxic business.

B) The African 'path of least resistance'.

1) Significance of the concept.

¹⁸⁰ http://ec.europa.eu/environment/waste/weee/index_en.htm.

The 'path of least resistance' expression was first employed by the US Congressman James Florio in 1984 to explain why toxic waste movement from industrialised countries to poorer countries has been continually increasing at such a rate and it has since been adopted as a reference to the different reasons underlying this hazardous flow¹⁸¹. Essentially, this image illustrates the different factors that make the non-OECD countries unable, due to their poverty, to firmly refuse to take part to the international toxic trade. The 'path of least resistance' implies the idea that while toxic waste management has become a very sensitive issue in industrialised countries, this question has obviously not been dealt with the same precautionary manner in developing countries suffering from serious poverty.

On the contrary, such countries tend to view handling of Western toxic waste as a commonly accepted means of economic development, which is the priority of these poor countries, whatever the nature of the activity¹⁸². In other words, while hazardous waste management is increasingly regulated and so more expensive in OECD countries, the lower environmental and social standards present in developing countries as a result of their poverty have made such countries, economically speaking, very attractive for both the rich countries exporting toxic waste, and the poor African importers¹⁸³. This is so, despite the dangerous risks attached to the hazardous products concerned. Thus, allowing the industrialised states to externalise their toxic burden, the international toxic trade has also permitted developing countries at the other side of the chain to receive hard foreign currency fast, to create some dubious waste management jobs and to encourage Foreign Direct Investment (FDI)¹⁸⁴.

Nevertheless, the African countries, where 70% of the poorest population live¹⁸⁵, denounce this scandalous toxic burden transfer and have been the strongest proponent of an international ban on such movement. However, being the poorest and so the most

¹⁸¹ See Kummer, 1995, pp.6-8 and Uchenna Gwam, 2001-2002, pp.434-436.

¹⁸² *Id.*

¹⁸³ According to Krueger, 2001-2002, p.44, at the end of the 80s, it costs between \$US 2.50 and \$US 50 to dispose of one ton of toxic waste in Africa while the same process costs between \$US 100 and \$US 2000 in the OECD countries.

¹⁸⁴ *Supra* 18, para.113.

¹⁸⁵ Collier, 2007, p.6.

vulnerable continent in the world, in the 80s Africa was least able to resist acceptance of OECD hazardous waste¹⁸⁶. Following several scandals¹⁸⁷ in Africa in relation to the management of toxic waste at this period and especially the *Koko* case in Nigeria¹⁸⁸, African leaders took different initiatives to protest against the growing danger arising from the flow of Western waste that many observers denounced as equivalent to '*toxic colonialism*'¹⁸⁹ or '*toxic terrorism*'¹⁹⁰.

In May 1988, the Organisation of African Union (OAU) adopted a strong and promising resolution calling for a regional ban of both radioactive and toxic waste from outside the continent, considering that

*'the dumping of nuclear and industrial waste in Africa is a crime against Africa and the African people.'*¹⁹¹

This resolution officially marks the point at which the African leadership became an international advocate for prohibiting toxic waste exports to poor countries¹⁹². At this time, the African nations obliged the OAU to set up a group of experts to follow up the developments of the Basel Convention's negotiations in order to secure African interests. In June 1988, the Economic Community of West African States (ECOWAS) also adopted a resolution condemning hazardous wastes exports and notably establishing a special Committee named *Dumpwatch* responsible for monitoring the toxic waste trade and dumping in Africa¹⁹³.

¹⁸⁶ Greenpeace inventory 'POPs in Africa, Hazardous waste trade 19880-2000, Obsolete pesticide stockpiles', 2000, pp.4-5.

¹⁸⁷ According to Vir, 1989, pp.24-25, cases of US and European toxic dumping notably occurred in Benin, Ethiopia, Gabon, Guinea, Guinea Bissau, Niger, Nigeria, Peoples' Republic of Congo, Senegal, Sierra Leone, South Africa and Zimbabwe.

¹⁸⁸ Supra 98.

¹⁸⁹ O'Neill, 1998, p.140.

¹⁹⁰ Supra 99, p.512.

¹⁹¹ Resolution CM/Res. 1153 (XLVIII) of the council of Ministers of the Organization of African Unity, on Dumping of Nuclear and Industrial Wastes in Africa, May 25, 1988.

¹⁹² Supra 186.

¹⁹³ ECOWAS resolution of the Authority of Heads of State and Government Relating to the Dumping of Nuclear and Industrial Waste, A/Res.1/6/88 (1988).

2) The Bamako Convention in this difficult African context.

As mentioned above, only Nigeria signed the Basel Convention in 1989¹⁹⁴. In contrast, the other African states preferred to work on a more protective regional convention under the auspices of the OAU. After two years of discussion, 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 on 30 January 1991¹⁹⁵. Inspired by the Basel Convention regarding the ESM of African toxic waste¹⁹⁶, the Bamako Convention marks a great improvement in the matter of transboundary transfer as it bans imports of non-African hazardous substances for any purpose¹⁹⁷.

Furthermore, the Bamako Convention has opted for a broader scope of the definition of waste, and does not require the cumulative condition of being listed in Annexe 1 and presenting one of the specific hazardous characteristics enounced in Annexe 2, which the Basel Convention requires. Instead, the African treaty defines anything which comes within either Annexe as waste¹⁹⁸. Interestingly, the Bamako Convention extends the notion of toxic waste to any hazardous substance whose production has been banned in the exporter countries¹⁹⁹. This latter provision illustrates the main concern of the African countries to protect themselves against any kind of imported toxicity, whether under the form of waste or not²⁰⁰.

¹⁹⁴ Supra 122.

¹⁹⁵ The Bamako Convention was adopted by the Conference of Environment Ministers of the OAU in Bamako, Mali, entered into force 22 April 1998.

¹⁹⁶ Kummer, 1995, p.99.

¹⁹⁷ Supra 195, the Article 4-1 clearly states that '*All Parties shall take appropriate legal, administrative and other measures within the area under their jurisdiction to prohibit the import of all hazardous wastes, for any reason, into Africa from non-Contracting Parties.*'

¹⁹⁸ Id., Articles 2-1 a) and c).

¹⁹⁹ Id., Article 2-1 d).

²⁰⁰ Jones, 1993, pp.338-339.

If the Bamako Convention has greatly influenced other regions of the world to adopt the same type of ban²⁰¹ which has ultimately convinced the Basel COP-5 to pass the BAN Amendment in 1995, its implementation has not produced the expected results. Indeed, ratified by only 24 countries of the 53 African Union members²⁰², the main African toxic waste importers' countries such as Ghana, Nigeria or South Africa have not yet ratified the Bamako Convention. This greatly weakens the principal goal of this Convention to combat the invasion of occidental hazardous substances, when one considers the porous nature of African borders as underlined by the UNSR on Toxic Waste in her preliminary report²⁰³. The reason that these countries have not ratified the Convention is mainly due to the boom of the recycling industry in these countries, representing a high source of revenue, especially when it comes to e-waste, and the fact that the Bamako Convention does not make any distinction between the waste imported for recycling or for direct final disposal means that ratification is unattractive to their economies²⁰⁴.

Further, the conflicts of interests among the African countries themselves have led to the same problem faced by the Basel Convention regarding the general lack of political will for enforcement. In addition, the implementation of such high standards through the ban in the Bamako Convention requires - especially in poorer countries - huge financial, legal and technical resources for realisation, and such countries do not have sufficient funds to invest in the toxic waste sector to either combat illegal imports of hazardous substances or to develop an ESM of their own dangerous products²⁰⁵.

3) Economic development versus Human health protection, illustrated by the e-waste European import in Africa.

²⁰¹ Supra 186, p.7. See the Central America Agreement on Hazardous Waste signed in 1992 by six Central American countries, the Waigani Convention adopted on 16 September 1995 by the South Pacific Forum States and the Izmir Protocol to the Barcelona Convention regarding the Mediterranean Sea's region.

²⁰² <http://www.africa-union.org/root/au/Documents/Treaties/List/Bamako%20Convention.pdf>

²⁰³ Supra 18, para.115.

²⁰⁴ Supra 110, 101.

²⁰⁵ Supra 200, pp.122-13

Having exposed the ambiguous position of the African states regarding toxic waste, which are torn between environmental and social concerns on one hand and economic development on the other, the particular nature of e-waste has exacerbated the situation by producing high economic benefits that have tended to overcome the environmental and social concerns attached to their management. It has to be underlined that Africa is not the main destination for WEEE exports which are still primarily to Asia where the labour force is very cheap and more skilled at handling such waste²⁰⁶.

Yet, the BAN report issued in 2005 assessing the African approach to managing imported e-scrap insists on the noticeable switch of direction of this high-tech flow which is increasingly going to Africa instead of China or India²⁰⁷. Indeed, while these two giant countries have, since the problem first started, been the main importers of WEEE, their recent economic boom has slowly modified their attitude towards the e-scrap business and has made them much less dependent on this business as a way to enable them to participate in international economic relations. Furthermore, as their middle-classes have developed, there is less demand for second-hand e-devices, which are generally mixed up with WEEE. This has led high-tech exporters to deal with less resistant countries such as countries in Africa.

In Africa, the economic situation is sadly very different from the Asian situation inasmuch as it has deteriorated since the 70s with a doubling of people living in extreme poverty²⁰⁸. In this respect, it is possible to pinpoint the 'digital divide' that separates the African continent from the developed countries as being one of the reasons for African misery by excluding Africa from economic globalization²⁰⁹. The point is that since African people often already struggle to afford basic food and water, they will not be able to afford high-tech products, especially when such products often cost the equivalent of more than 3 years salary²¹⁰. In addition, there is great interest in buying

²⁰⁶ Supra 30, pp.11-12. According to BAN, Approximately 80% of e-waste collected in industrialized countries end up in Asia.

²⁰⁷ Fuchs and Horak, 2007, pp.13-17.

²⁰⁸ <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/EXTPA/0,,contentMDK:20153855-menuPK:435040-pagePK:148956-piPK:216618-theSitePK:430367,00.html>.

²⁰⁹ Fuchs and Horak, 2007, pp.27-29.

²¹⁰ One computer costs \$1 000 in average, while a poor African has to live with 2\$ a day.

low price second-hand products from industrialized nations²¹¹. However, the distinction between WEEE and reusable WEEE is often very narrow, and given the potential for economic development in the imported e-waste business, African countries have generally cast a blind eye on the increasing amounts of e-waste shipments coming from OECD countries. This lax attitude has been reinforced by the fact that even when used WEEE turns out to be scrap, these products can still be economically advantageous for African importers given their high potential for recycling²¹².

This study has already outlined the dual nature of e-waste which, in addition to including toxic substances, also comprises valuable components such as raw materials and precious metals. However, in contrast to other developing regions like Asia or Latin America, that could have penetrated the international market through their rising of manufactured goods' exports since the 70s, the African nations' economies still rely heavily on the export of these types of primary commodities²¹³. One may easily understand why the African countries have not strongly resisted Western WEEE exports, because they have seen in these products possible profits that could be made by trading the recycled materials.

In theory it may be hard to discern where there is a problem if African countries can benefit from the OECD countries' e-waste recycling. However, as mentioned above, the recycling of WEEE is a major problem precisely when it is practised in developing countries such as those in Africa, as they lack the appropriate infrastructures and techniques required to do it properly, that is, in a harmless way to both environment and health²¹⁴. In any case, as regards the e-waste recycling in developing countries, only a part of the product can be recycled, and the remainder usually finishes being disposed of

²¹¹ Widmer and others, 2005, p.438.

²¹² As BAN could notice during its field trip in Nigeria, supra 83, pp.12-14.

²¹³ UN Conference on Trade and Development report, 'Economic Development in Africa, Trade Performance and Commodity Dependence', 2003, pp.2-13, at http://www.unctad.org/en/docs/gdsafrika20031_en.pdf.

²¹⁴ After his recent mission to India in January 2010, where he visited an e-waste recycling facility, the SR on Toxic Wastes has particularly insisted on this point, stressing the toxic risks of such activity for human health, at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=9880&LangID=E>.

in a hazardous manner whether by being burnt in the open-air or discarded in the natural environment²¹⁵.

To summarise the African position concerning e-waste import, this practice is supposedly banned according to the Bamako Convention. Nevertheless, given the important economic interests linked to WEEE recycling, the African quest for economic development has led the continent to be less stringent about e-waste import than for common toxic waste. Despite this, even if the management of these end-of-life high-tech products may present some economic interests for African people, the environmental and social bill is scandalous inasmuch as it shows how the OECD countries escape their toxic responsibility through this dirty business based only on African misery.

As both the international and regional environmental legislation regarding e-waste management have not been well adapted or implemented, one should have a look to another protective system that the international community has used to deal with the toxic dumping in developing countries: the human rights regime.

²¹⁵ Supra 83, pp.21-23.

Part 2: An evaluation of the human health protection ensured by the international Human Rights regime, in the context of the European e-waste export to Africa.

Chapter 3: The progressive links between e-waste and HR.

I- A connection marked primarily by soft law.

We have so-far exposed the important shortcomings of the international and regional environmental regimes which have as yet been unable to stop, reduce or at least control the e-waste movement from European to African countries. As this illegal toxic burden transfer may prove to be very harmful to the health and environment of African peoples, this chapter seeks to examine whether the international Human Rights regime offers better protection in this regard to Africans.

According to Dinah Shelton, it is largely the dramatic global concerns about human health that have motivated the connection between Human Rights and environmental protection²¹⁶ as is apparent in Principle 1 of the Stockholm Declaration, which proclaims a fundamental right to environment allowing people to enjoy '*a life of dignity and well being*'. Principle 1 of the Rio Declaration in 1992 reiterates this idea by affirming that '*human beings are entitled to a healthy and productive life in harmony with nature*'. This principle is important since the rights to environment and to development have been often seen as protecting conflicting interests.

Indeed, poor countries, whose priority has always been their economic development, have argued that the right to environment could seriously hamper the realisation of the right to development²¹⁷. To that end, it is interesting to see that the Rio Declaration succeeds in resolving the "*Environment versus Development*" dilemma, by linking them both to human health matters. In other words, as health protection is as important to the right to environment as it is to the right to development, it has alleviated what seems to be contradictory between these two rights in order to

²¹⁶ Shelton, 2002, p.3.

²¹⁷ Willis, 1996-1997, pp.215-217.

eventually ensure a better protection of the human dignity²¹⁸. These high objectives of protecting health and environment while ensuring economic development are notably reflected into the Chapters 19 and 20 of the Agenda 21 adopted during the same Conference, relative to the ESM of toxic wastes²¹⁹.

What is important here is to understand that it is the cardinal notion of human dignity that has led the international Human Rights regime to progressively include in its scope of application some elements of environmental protection seen to be essential to secure human dignity. As will be discussed below, this is particularly evidenced by the development of the right to health which has incorporated more and more environmental standards like the ESM of toxic waste as conditions of its realization.

The direct links between toxic waste and Human Rights were first recognized by the Vienna Declaration adopted during the World Conference on Human Rights held in Austria in 1993 which states that

*'illicit dumping of toxic and dangerous substances and waste potentially constitutes a serious threat to the human rights to life and health of everyone.'*²²⁰

Thus, the Vienna Declaration symbolizes the starting point of international preoccupation about the adverse effects of hazardous waste on Human Rights.

Following this, the Special Rapporteur on Human Rights and the Environment²²¹ indicated in her final report issued in 1994 that *'the transfer of toxic and dangerous products and wastes across frontiers and their dumping also lead to violations of human rights'*²²². Compared to the Vienna Declaration, this provision specifies that the transboundary movement of toxic waste in itself affects human rights. In this way, the Special Rapporteur gives an extraterritorial dimension to the Human Rights link with

²¹⁸ Id., p.214.

²¹⁹ Supra 124.

²²⁰ The Vienna World Conference on Human Rights took place 14-25 June 1993 and adopted the on 25 June 1993 the Vienna Declaration and Plan of Action as the UN GA on 12 July 1993, resolution A/CONF.157/23. See para. 11.

²²¹ Appointed by the UN Commission on Human Rights (CHR) 6 March 1990, resolution 1990/41.

²²² Final Report adopted by the CHR resolution E/CN.4/Sub.2/1994/9, on 6 July (1994), para. 125.

toxic waste. According to her, *'these intolerable practices...are particularly outrageous'*²²³.

As a result of this recognition of a threat to Human Rights and in view of the difficulties in implementing the Basel Convention and the corresponding augmentation of such toxic movement, the CHR appointed a Special Rapporteur in 1995 to deal with this dangerous issue²²⁴. The Rapporteur's initial mandate notably obliges her to pay special attention to the adverse effects of the transboundary transfer and dumping of hazardous wastes on the Human Rights to life and to health, in African countries in particular²²⁵, and to produce a list of TNCs involved in the toxic business²²⁶. These three provisions are obviously highly relevant to our e-waste topic. However, the general lack of power of the UN Special Procedures undermines the real scope of the SR's mandate. At least, it can be said that it highlights the correlation between health and environmental degradation due to industrial contamination as may cause toxic scrap.

Therefore, keeping in mind that the hazardous composition of e-waste may harm human health when it is mishandled, and can result in air, soil, food or water pollution, one can easily understand why in 2004 – give the mushrooming of WEEE generation was seen worldwide - the CHR included in the SR's mandate the specific task of documenting this new trend of toxic waste²²⁷. The HRC resolution 9/1 of 2008 that extends the Special Rapporteur's mandate for three more years endorses this particular assignment, exhorting the UNSR to report about the effects of e-waste on Human Rights²²⁸.

²²³ Id.

²²⁴ Supra 17.

²²⁵ See Article of the SR mandate

²²⁶ Article 7 (a), (b) and (d) of the UNSR on Toxic Wastes' mandate, CHR resolution 1995/81.

²²⁷ Supra 17, para.16 e) of the resolution 2004/17.

²²⁸ HRC resolution 9/1, (2008), para.5 (e).

II- Focus on the right to health of African peoples.

A) Crucial significance of the right to health in Africa.

It is a fact that given the lagging economic and social condition of Africa, economic, social and cultural rights take on greater significance in this continent²²⁹. These rights have always received less consideration from the international community but this has not stopped African states from strongly advocating for these rights. There argument is summarised by the familiar African expression, '*Human Rights do not bake bread*', stressing the fact that without the basic realisation of economic, social and cultural rights, civil and political rights do not make much sense²³⁰. It questions, for instance, the fundamental importance of the Freedom of Association of a woman when she is too sick to be able to get food.

Since e-waste can seriously affect human health, this thesis has chosen to focus on the right to health of African peoples in order to appreciate the relevance of the international Human Rights regime to their protection when they are suffering from environmental diseases due to European e-waste export to Africa. The study of this right is interesting inasmuch as its realisation in Africa currently faces enormous challenges as is shown by the undeniably dramatic situation of African health²³¹.

On this point, the African regional health report issued by the WHO in 2006 insists that the ongoing '*vicious circle*' that holds the African peoples in the poverty trap is mostly caused by the African countries' very weak records regarding public health²³². The study sadly concludes that Africa cannot expect to develop without manifest improvement of its health system²³³. Therefore, the e-waste problem constitutes another hazardous circle -- if not a deadlock - for Africa since while the management of imported WEEE represents a short-term means of economic development for this poor

²²⁹ Agbakwa, 2002, p.191-192.

²³⁰ Unchenna Gwam, 2000, p.190.

²³¹ Supra 11. The WHO report notably details major problems concerning maternal, newborn and child health, the spreading of HIV/AIDS which killed 3.2 million Africans in 2005, the persistence of other infectious diseases like malaria -whose Africa bears 90% of the global burden- and tuberculosis, and the common sicknesses such as cancers or diabetes.

²³² Id., p.3.

²³³ Id., p.11.

continent, it damages the health of the African peoples, and so has adverse long term effects in an area which it is vital to improve.

The WHO report devotes a whole chapter to the environmental health risks in Africa²³⁴. It notably pinpoints the air pollution, unsafe water and food, poor sanitation and hygiene levels as the mere causes of these diseases and calls attention particularly to the growing chemical contamination stemming from industrial waste²³⁵ that could apply, by analogy, to e-waste.

B) Standards relative to the right to health of African peoples.

Before delving further into the substance of the right to health as interpreted by different authoritative bodies, the precise roots of this right must be recalled, in order to identify the exact legal basis on which the African peoples may claim a violation of their right to health. In fact, the African peoples are entitled to their right to health according to both international and regional instruments. Firstly, by ratifying the International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted in 1966²³⁶, 48 of the 54 African states have undertaken to realize the right to health of the people living under their jurisdiction, according to the elementary principle of national application of Human Rights.

Echoing the exhaustive Article 25-1 of the Universal Declaration of Human Rights²³⁷, Article 12-1 of the ICESCR grants each individual the fundamental '*right to the enjoyment of the highest attainable standard of physical and mental health*'. The second paragraph of Article 12, indicating the areas in which the states should take measures, remarkably targets

²³⁴ Id., Chapter 5, pp.85-101.

²³⁵ Id., pp.87-90.

²³⁶ The ICESCR was adopted by the UN GA, resolution 2200A (XXI), 16 December 1966, entered into force 3 January 1976 and is ratified by 160 states.

²³⁷ Adopted by the UN GA, resolution 217 (III), 10 December 1948. Its Article 25-1 proclaims that '*Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.*'

'The improvement of all aspects of environmental and industrial hygiene'.

This provision highlights that environmental questions were already perceived in 1966 as conditioning the realization of the right to health.

Some African nations have also committed to other Human Rights treaties which expressly recognize the conferral of the right to health on certain categories of vulnerable peoples such as the women, children or migrant workers. Generally, these instruments emphasize the equality of treatment that should be ensured to the members of these groups regarding the fulfilment of the right to health²³⁸. In line with this, the International Labour Organisation (ILO) has adopted different conventions about workers' rights to occupational health which deal with hazardous environments²³⁹.

Secondly, the African peoples enjoy the right to health according to Article 16 of the African Charter of Human and Peoples Rights (ACHPR) adopted in 1981²⁴⁰ and since then, ratified by all 53 African states of the AU²⁴¹. In addition, the ACHPR which is the most progressive regional Human Rights treaty inasmuch as it includes in the same document civil, political, economic, social and cultural rights, also provides innovative rights like the right to development and the right to a healthy environment²⁴². These two rights are still being debated on the international stage²⁴³, but they illustrate the sincere African commitment to the right to health of their peoples. Thus, the ACHPR has been the first regional Human Rights instrument to clearly link health to environment and development.

²³⁸ See Article 11 of the Convention on the Elimination of All Forms of Discrimination Against Women adopted by the UN GA, resolution 34/180, 18 December 1979, entered into force 3 September 1981, ratified by 48 African states; Article 24 of the Convention on the Rights of the Child adopted by the UN GA, resolution 44/25, 20 November 1989, entered into force 2 September 1990, ratified by 49 African countries, Article 25 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families adopted by the UN GA, resolution 45/158, 18 December 1990, entered into force 1 July 2003, ratified by only 14 African states.

²³⁹ ILO Convention n°148 Working Environment (1977); ILO Convention n°155 Occupational health and Safety (1981); ILO Convention n°182 The Worst Forms of Child Labour (1999).

²⁴⁰ The ACHPR was adopted at the 18th Assembly of Heads of State and Government of the OAU, (OAU Assembly) 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

²⁴¹ Morocco is the only African country that is not party to the ACHPR since it has quitted the OAU in 1984.

²⁴² Supra 240, respectively Articles 22 and 24.

²⁴³ See Marks, 2004, p.137 and Lee, 2000, pp.284-285.

The special African concern about health has been confirmed in the African Charter on the Rights and Welfare of the Child adopted in 1990²⁴⁴ Article 14 of which specifies not less than ten obligations placed on states in order to ensure the right to health is conferred on every child covered by this article. Article 15 of the same Charter, relating to child labour, also protects the child

'from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development.'

This disposition shows again the African intention to protect the entire health-environment-development triptych.

While the Constitutive Act of the African Union (AU) which abrogated and replaced the OAU Charter in July 2000²⁴⁵ has reaffirmed the OAU's spirit regarding the betterment of public health in Africa by providing as an AU objective *'the promotion of good health on the continent'*²⁴⁶, the Optional Protocol to the African Charter on the Rights of Women in Africa of 2003 (Optional Protocol to the ACHPR)²⁴⁷ may be considered as the more promising African instrument concerning the protection of women's right to health. Indeed, in addition to Article 14 of the Optional Protocol relating to health and reproductive rights, this instrument also confers on women a clear *'right to a healthy and sustainable environment'* as enounced in its Article 18. This article is very interesting for our topic inasmuch as it especially deals with the issue of domestic waste by ordering the states to

²⁴⁴ Adopted by the OAU Assembly, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force on 29 November 1999, ratified by 45 African states.

²⁴⁵ The Constitutive Act of the AU was adopted by the OAU Assembly, 11 July 2000, entered into force on 26 May 2001. The AU counts 53 African countries, Morocco being the only one not party. Available at http://www.africa-union.org/root/au/AboutAU/Constitutive_Act_en.htm.

²⁴⁶ Id., Article 3 n).

²⁴⁷ The Optional Protocol to the ACHPR was adopted in by the Assembly of the AU, 11 July 2003, entered into force on 25 November 2005, ratified by 27 African states. Available at <http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol%20on%20the%20Rights%20of%20Women.pdf>.

*'regulate the management, processing, storage and disposal of domestic waste'*²⁴⁸

as a way to ensuring this right to a healthy and sustainable environment. Thus, for the first time in a Human Rights convention, the link between waste and health via the contamination of the environment is formulated.

To summarise the African position regarding the right to health, one may think that the continent is equipped with the most protective Human Rights framework. Now it is necessary to examine the content of this right in order to evaluate its effects when the health of Africans is affected by European e-waste.

C) Content of the right to health:

1) Necessary clarifications of the concept.

As with any legal term that has to balance the objective of precision with one of generality in order to be relevant, the concept of the right to health cannot be fully understood and so protected without looking at the different authoritative comments, interpretations and case-law developed internationally, regionally or nationally on this topic. As the subject of this thesis specifically concerns European e-waste export's impact on the African peoples' right to health, this legal review will focus more precisely on the pertinent passages relevant to the right to health in the context of environmental harm that may produce mishandled WEEE.

Two preliminary remarks are needed here. First, it has to be indicated that the '*right to health*' expression is usually employed instead of the official disposition providing '*the right to the enjoyment of the highest attainable standard of physical and mental health*' as proclaimed in the ICESCR. Being shorter and so more practical to use, one should not forget the exact formulation of the right to health which better underlines the basic idea that the right to health does not mean a right to be healthy as is recalled by the General Comment n°14 on the right to the highest attainable standard of

²⁴⁸ Id., Article 18-2 d).

health (General Comment n°14), issued by the Committee on Economic, Social and Cultural Rights (CESCR)²⁴⁹. Indeed, the Human Rights regime that relies on the obligations, whether negative or positive, imposed on the state to guarantee these special rights can certainly not prevent people falling sick in absolute terms given the immense range of diseases and factors which cause them²⁵⁰. Secondly, despite the numerous statements and pieces of legislation adopted on the right to health, its legal content is ‘*not yet well established*’ according to the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (SR on the Right to health)²⁵¹.

Nevertheless, what can be said is that its scope has tended to be more and more extensive as is confirmed by General Comment n°14 which considers the right to health to be a component of other fundamental Human Rights²⁵² and to comprise

*‘the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.’*²⁵³

This broad vision of the right to health proposed by the CESCR is intended to reflect the progressive case law developed in this respect by the different institutions in charge of implementing or monitoring international and regional Human Rights treaties. Yet, it is striking to notice that the content of the right to health has been principally protected indirectly through the dynamic interpretation of civil and political rights which, since their creation, have always enjoyed better enforcement than economic, social and cultural rights²⁵⁴.

²⁴⁹ General Comment n°14 adopted by the CESCR, E/C.12/2000/4., 11 August 2000, para.8.

²⁵⁰ *Id.*, para.9.

²⁵¹ Report E/CN.4/2003/58, (2003), para.39.

²⁵² *Supra* 249, para.3 referring to ‘*the rights to food, housing, work, education, life, non-discrimination, equality, prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement.*’

²⁵³ *Id.*, para.4.

²⁵⁴ *Supra* 230, p.192.

2) Indirect protection of human health under civil and political rights instruments:

a) General approach.

In the context of environmental damage, the right to health has been often linked to the primordial right to life²⁵⁵. Indeed this latter right has been interpreted from an early stage as equivalent to a right to a 'decent life' thus embodying the founding Human Rights regime's value of human dignity. So, the right to life is meant to extend to the elements required to allow each individual to enjoy this decent life. Here we are talking about the minimums of health, adequate housing, food, water or environment which condition the realisation of the right to a decent life and so have in turn necessitated special protection from the state to effectively ensure the fundamental right to life²⁵⁶.

Thus, the right to life is considered as also implying positive obligations on states to guarantee the right to life of their peoples. General Comment n°6 on the right to life issued by the ICCPR in 1982 insists that states should take positive measures regarding the reduction of infant mortality, malnutrition and epidemics²⁵⁷. These objectives highlight the intrinsic interactions between the right to health and the right to life. In the same year, the HRCCom in the *EHP v. Canada* case notably underscored that the storage of radioactive waste near private households was seriously questioning the obligation of states to protect human life inasmuch as this waste has been proved to cause deadly diseases such as cancer²⁵⁸.

By the same token, in the *Bordes and Temeharo v. France* case settled in 1996, also relating to the risks to the fundamental right to life raised by nuclear radiation, the HRC has insisted on the fact that the right to life does require positive measures from the state such as ensuring environmental protection and public health²⁵⁹. The case was

²⁵⁵ Brown Weiss and others, 1992, Section III of Chapter 9, at <http://www.unu.edu/unupress/unupbooks/uu25ee/uu25ee0p.htm#iii>.

²⁵⁶ Id..

²⁵⁷ General Comment n°6 on the right to life, adopted by the HRCCom (1982), para.5.

²⁵⁸ Communication n° 67/1980 *EHP v. Canada*, decision of 1982.

²⁵⁹ Communication n°645/1995, decision of 1996, para.4-7.

about the impact of the six underground nuclear tests carried out by French President Chirac just after his election in May 1995 on the right to life of the French complainants residing near the nuclear test zone, in the South Pacific. However, the HRCOM found the case to be inadmissible because the applicants did not prove sufficient violation of their right to life, given that this debate is '*highly controversial even in concerned scientific circles*', especially in relation to whether these tests 'increase the likelihood of an accident of catastrophic proportions' for human life²⁶⁰.

Another good illustration of the close ties between the right to life and the right to health in the case of environmental damage was given in 1985 by the Inter-American Commission of Human Rights (I-ACHR) in the *Yanomami Indians* case²⁶¹. Indeed, while the I-ACHR was called to pass judgment on the effects of a Brazilian authorisation, in relation to the construction of a highway which crossed the ancestral Yanomami peoples' territory, on the right to life and to the preservation of health and to well-being of these peoples, it did not make a distinction between the violations of these two rights. In fact, the construction work led to many fatal diseases being contracted within the Yanomami population which resulted in the loss of 1,500 inhabitants out of 12,000²⁶². This unclear decision implies that the I-ACHR considers in this case that the Brazilian state was under the same obligations in relation to these two different rights. More specifically, it means that for the I-ACHR both respect for the right to life and to health of the Yanomami peoples required the Brazilian state to adopt '*timely and effective measures to protect*' these people²⁶³. Nevertheless, this non differentiation of obligations regarding the right to life and to health has to be put back into the context of the case which refers to an indigenous community.

Indeed, the cultural rights conferred by Article 27 of the International Covenant on Civil and Political Rights (ICCPR)²⁶⁴ on minorities such as the Yanomami peoples have also been extensively interpreted by the different Human Rights bodies which

²⁶⁰ Id., para. 5-6 and 5-7.

²⁶¹ I-ACHR resolution n° 12/85 adopted on 5 March 1985, para.2 a) and 3 e).

²⁶² <http://www1.american.edu/ted/ice/yanomami.htm>.

²⁶³ Supra 261, para.11.

²⁶⁴ The ICCPR was adopted by the UN GA, resolution 2200A (XXI), 16 December 1966, entered into force 23 March 1976 and is ratified by 166 states.

have unanimously recognised the protection of the indigenous environment as stemming from these cultural rights. The HRC has notably taken this view in different cases relating to the Sami peoples²⁶⁵ living off unregulated fishing and hunting in remote areas of Finland when it had to examine the effects on Sami cultural rights of Finnish regulations adopted in view of favouring economic development of the Sami territory. As these official measures had generally led to the penetration of the traditional Sami territory by exterior actors, the regulation of the Sami activities practiced in the territory and a certain deterioration of the Sami peoples' environment, the HRCCom concluded that they may impact on the Sami peoples' cultural rights by directly affecting the Sami way of life based on their natural environment.

Yet, in these cases the HRCCom held that the Finish authorities did not violate the Sami peoples' cultural rights inasmuch as these peoples had been duly consulted in the political process and the Finish state had paid careful attention to minimising the environmental damage²⁶⁶. The HRCCom has confirmed this restrictive approach to cultural rights in relation to mere protection of the minorities' environment in the *Apirana Mahuika et al v. New Zealand* case relating to the alleged violation of the Maoris' cultural rights following the government's decision to regulate the fishing industry around the Maori's settlement. The complainants have argued that these legal measures were harmful to the Maoris cultural economic activity of fishing. Nevertheless, while acknowledging the environmental component of the Maoris culture, the HRCCom has simply relied on the consultation conducted by of the New Zealand authorities with the Maoris about their projects to conclude that the interests at stake regarding economic development meant that the infringement of the Maoris' cultural rights by the state could be justified. These later developments with regards cultural rights help to show that when a state interferes with the environment, this is not sufficient on its own to protect cultural rights of minorities, but when the environment is

²⁶⁵ See, for instance, Communication n° 511/1992 Ilmari Lansman et al. v. Finland of 1996, decision of 8 November 1994; Communication n°431/1990, O.S et al. v. Finland, decision of 23 March 1994; Communication n°671/1995, Jouni E. Lansmann et al. v. Finland, decision of 30 October 1996.

²⁶⁶ See Communication n° 511/1992 Ilmari Lansman et al. v. Finland of 1996, Communication n°431/1990, O.S et al. v. Finland, decision of 23 March 1994; Communication n°671/1995, Jouni E. Lansmann et al. v. Finland, decision of 30 October 1996.

affected by a breach of the right to life or health, then the limitations are much more restrictive, as is shown by the Yanomami decision.

In this respect, the country report on Ecuador issued by the I-ACHR in 1997 especially focuses on the threats brought about by environmental contamination to the rights to life and to health and does indicate that the states should adopt the necessary measures to prevent excessive pollution endangering human life and health²⁶⁷. This report is relevant to our topic as it was drafted after an *in situ* visit realised by the I-ACHR in Ecuador, during which it observed that oil exploitation activities had resulted in pollution of the air, water and soil of the population living near to toxic enterprises, who, in turn, were suffering from diseases which it was suspected were related to such pollution.

Finally, in August 2004, the I-ACHR required precautionary measures from the Peruvian government consisting notably in removing toxic waste dumped in three local communities²⁶⁸. It later found the petition submitted on behalf of the inhabitants of the affected localities admissible, and reissued precautionary measures²⁶⁹. In fact, the plaintiffs were arguing that the dumping of dangerous wastes coming from mining operations in their neighbourhood was violating 14 of their rights as recognised in the American Convention of Human Rights, including the right to life and to human treatment²⁷⁰. The applicants presented a brief to support their petition, exposing in detail the serious health problems at stake, especially regarding children²⁷¹. Although the merits of the case have still not been judged, the I-ACHR decisions in relation to the *San Mateo* case do indicate that civil and political rights may ensure adequate health protection in cases of industrial pollution as could produce e-waste.

²⁶⁷ I-ACHR Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, doc. 10 rev. 1 (1997), para. 89.

²⁶⁸ http://www.ciel.org/Publications/SanMateo/IACHR_MC_17Aug04.pdf (in Spanish).

²⁶⁹ Report n°69/04, petition 504/03 Community of San Mateo de Huanchor and its members v. Peru of 15 October 2004 and Precautionary Measures 608-03-Peru of 4 November 2005.

²⁷⁰ http://www.ciel.org/Hre/HRE_SanMateo.html.

²⁷¹ http://www.ciel.org/Publications/SanMateo/MC_San%20Mateo_21Jul04.pdf.pdf.

b) The original protection of the ECtHR.

It is a fact that the ECHR merely contains civil and political rights and so does not guarantee either a right to health or to environment to European peoples. Yet, the ECtHR has turned out to be the regional Human Rights body that has dealt the most with issues relating to Human Rights violations in cases of environmental pollution²⁷², thus leading the ECtHR to guarantee a minimum level of protection to human health. Indeed, through its dynamic interpretation of the European Convention of Human Rights (ECHR), the ECtHR have developed a rich case-law regarding the impact of environmental harm on the individual rights guaranteed by the ECHR. Due to time and space limitations, we will primarily focus on their rulings recognizing Human Rights violations in cases particularly involving toxic contamination as these cases are the most able to be applied by analogy to the effects of hazardous e-waste on the right to health of African peoples.

The analysis of the European case law coping with toxic contamination shows that the ECtHR has strived to protect human health primarily through the use of Article 8 of the ECHR relating to the right to respect for private and family life, demonstrating the great power of interpretation of the ECtHR. A clarification of vocabulary regarding Article 8's extensive scope given by the European Court of Human Rights is important here: the Court usually refers to the broader concept of '*well-being*' rather than one of human health to appreciate the content and respect of the right to private and family life²⁷³.

However the ECtHR has made clear that this notion of '*well-being*' does include health concerns²⁷⁴ as it confirmed in 1994 in the *Lopez Ostra* case²⁷⁵ which symbolizes the starting point of the ECtHR case law developments as regards the effects of toxic

²⁷² Boyle, 2010, p.13. Available at <http://www.unep.org/environmentalgovernance/LinkClick.aspx?fileticket=GccCLN-brmg%3d&tabid=2046&language=en-US>.

²⁷³ Hippler Bello and Desgagne, 1995, pp.789-790.

²⁷⁴ Id..

²⁷⁵ *Lopez-Ostra v. Spain*, n°16798/90 (1994), ECHR 46.

pollution on European Human Rights. The facts were that the applicant was living near a waste treatment plant which was processing waste without a licence required by the Spanish legislation concerning dangerous activities. Along with numerous locals, Ms Lopez Ostra had suffered since the beginning of the station's operations from health problems which, she argued, were due to the high environmental contamination caused by the factory.

While the EComHR did not find a violation of Article 3 of the ECHR²⁷⁶, it did recall that

*'severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely'*²⁷⁷.

What is new in *Lopez Ostra* is that the ECtHR links this statement, previously established in cases relating to noise pollution²⁷⁸, to its other finding regarding Article 8 for which it deduced positive obligations on the state to ensure this right²⁷⁹. As a consequence the European Court examined whether the Spanish authorities had taken the appropriate measures required to protect the right to private and family life from the serious environmental pollution emitted by the waste treatment plant. The Court applied its principle of proportionality to balance the individual's right and the public interests at stake in order to evaluate the compliance of Spain with its state obligations²⁸⁰.

It concluded that the Spanish administration had exceeded the margin of appreciation to legally interfere with the enjoyment of the applicant's right. Concretely, the ECtHR found that the failure of the Spanish officials to take the necessary measures

²⁷⁶ Relative to the prohibition of torture or to inhuman or degrading treatments or punishment.

²⁷⁷ Supra 275, para.51.

²⁷⁸ See notably *Arrondelle v. United Kingdom*, 19 DR 186 (1980); 26 DR 5 (1982) and *Powell and Rayner v. United Kingdom*, ECHR (1990) Series A, n°172.

²⁷⁹ *X. and Y. v. the Netherlands*, ECHR (1985), Series A, n°91.

²⁸⁰ Shelton, 2002 (a), p.20.

to protect Mrs Lopez Ostra's right to private and family life from the plant's toxic contamination was amounting to a violation by the state of Article 8²⁸¹.

This important case law illustrates the protective attitude of the ECtHR regarding this individual right to private and family life when it comes to toxic pollution and shows how the European Court has indirectly developed a certain level of protection of human health. The ECtHR has confirmed this position in different cases, insisting every time on the obligation of the state to regulate private business²⁸². In this respect, *Öneryildiz v. Turkey*²⁸³ is very relevant to our e-waste topic because the European Court found a violation of the complainant's right to life by the state. The case related to a methane explosion that happened in a toxic waste dumping site located near the slum where the applicant was living and which killed around 39 people. The ECtHR deemed that there was '*real and immediate risk for life and physical integrity*' caused by the positioning of the dump, and this was proved by the damage caused by the explosion, and as a result the right to life of Mr. Öneryildiz was affected. Therefore the Court held Turkey responsible for its violation of this right, as they had failed to take the necessary measures to protect life. As the Turkish authorities knew about the high toxic risks either for the life or health of the inhabitants of the slum, the European Court considered that they did not take all the measures possible required by Article 2 of the ECHR to prevent the deadly accident.

It appears, therefore, that regarding the harmful effects of severe pollution to human health, the ECtHR will limit its extensive protection of the right to life to cases involving brutal deaths which are a direct result of toxic contamination, such as deaths caused by chemical accidents. Thus, it can be suggested that the progressive European case-law with regards the right to private and family life, which ensures a minimum level of protection for human health against toxic environmental damage, can more

²⁸¹ Supra 273, p.791.

²⁸² See notably *Guerra and others v. Italy*, n°14967/89 (1998), ECHR 7; *Taşkin v. Turkey*, n°46117/99 (2004), ECHR 7; *Öneryildiz v. Turkey*, n°48939/99 (2004), ECHR 657; *Fadeyeva v. Russia*, n°55723/00 (2005), ECHR 376; *Tatar v. Romania*, n°67021/01 (2009).

²⁸³ Id..

easily be applied to our e-waste problem than the restrictive principles in the case law on the right to life.

To resume the examination of the general civil and political rights approach towards human health, it cannot be denied that the way in which environmental damage has increasingly been taken into account when discussing these rights²⁸⁴ has helped to protect human health. In fact, given the enormous differences of treatment between civil and political rights on one side and economic, social and cultural rights on the other, shown by their distinct enforcement mechanisms, it seems that civil and political rights have been more able to secure human health than the actual right to health. Indeed, the right to health has received little attention in international or regional Human Rights bodies. However, all the soft law and case law regarding the right to health indicates great similarities in the method of development of civil and political rights' in this field, as the following discussion will demonstrate.

3) The unjustified weakness of the right to health in cases of toxic pollution.

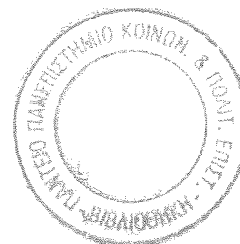
a) The traditional difficulty of realising economic, social and cultural rights: the right to health

Due to well-known ideological reasons, economic, social and cultural rights - among which the right to health could be the best example of the tensions within these rights - have always raised important issues regarding the specific obligations that they imply for states²⁸⁵. Furthermore, this debate has led to general criticisms relating to their justiciability before Human Rights bodies²⁸⁶. Unfortunately, the small amount of international and regional case law concerning the right to health tends to support this idea which according to the author of this thesis is no longer justified in the case of toxic pollution which may be caused by e-waste.

²⁸⁴ Supra 272, p.30.

²⁸⁵ Hamm, 2001, p.1006-1008.

²⁸⁶ Id..



Whether or not this is the case, when one looks at the right to health, one cannot fail to notice that the governing regime is mostly made up of soft law²⁸⁷. The first attempt to define the legal content of this crucial right was made 1978 in the Declaration of Alma-Ata²⁸⁸ but its scope was limited to the access of primary health care. What must be underlined is the focus put by the Declaration on the ‘political will’ required by governments to manage their national resources in a way favouring the setting up of primary health care, principally through the adoption of adequate national measures²⁸⁹. Essentially, the Alma-Ata Declaration remains important for stating that public health is fundamental for the international agenda as otherwise its legal provisions are no more than approximate and do not create binding obligations for states²⁹⁰.

Otherwise, as for all the other economic, social and cultural rights, the obligatory provision regulating the achievement of the right to health is Article 2-1 of the ICESCR which provides that

‘Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.’

As highlighted by numerous actors, the terminology of this article has brought about numerous uncertainties concerning its legal meaning²⁹¹. The Limburg Principles on the implementation of the ICESCR of 1987²⁹² have helped to clarify the meaning of this article, indicating for instance that the word ‘progressively’ required immediate - even if

²⁸⁷ See the different Declarations on Health Promotion adopted during each Global Conference on Health Promotion since 1986, at <http://www.who.int/healthpromotion/conferences/en/>.

²⁸⁸ The Declaration of Alma-Ata was adopted at the International Conference on primary health, held in 6-12 September 1978 in USSR, (Kazakhstan), available at http://www.who.int/hpr/NPH/docs/declaration_almaata.pdf.

²⁸⁹ *Id.*, Article VIII.

²⁹⁰ Hall and Taylor, 2003, p.18.

²⁹¹ Arambulo, 2003, p.122.

²⁹² Drafted by a group of 29 distinguished legal experts, met in Maastricht on 2-6 June 1986 and adopted by the HRC, resolution E/CN.4/1987/17, 8 January 1987.

limited - actions from the states, showing for instance that there is a basic obligation on states to abstain from discrimination when realising these rights²⁹³. The CESCR also adopted a specific General Comment in 1990 on the nature of State parties' obligations, in order to help the states to fulfil their obligations²⁹⁴. It notably declares that states should provide judicial remedies in many cases²⁹⁵ and that they have core obligations to ensure the satisfaction of, at the very least, minimum essential levels²⁹⁶.

In addition, the Maastricht Guidelines²⁹⁷, adopted ten years after the Limburg Principles, concentrate particularly on violations of economic, social and cultural rights. In this respect, they indicate that a failure of the state to respect its core obligations or '*to exercise due diligence in controlling... non state actors*' amounts to a violation of the ICESCR²⁹⁸. They also insist on the general right to a remedy for victims of economic, social and cultural rights' violations²⁹⁹. This point is important because it has been one of the most controversial issues as regards the implementation and justiciability of these rights³⁰⁰.

The analysis of General Comment n°14 adopted by the CESCR in 2000 certainly constitutes it as the most comprehensive instrument regarding the content of the right to health. Indeed, it adequately summarises the most recent developments concerning the implementation of this right by states and contains important references to the special issue of toxic environmental pollution, reflecting much of the case law concerning civil and political rights in this field. In fact, in addition to commenting that states have a '*continuing obligation*' to take measures necessary for realisation of the right to health, regardless of their economic constraints³⁰¹, General Comment n°14 details the core obligations that states are to respect in order to comply with Article 12 of the ICESCR. The minimum State obligations that concern us are the following:

²⁹³ Id., para.21 and 22.

²⁹⁴ General Comment n°3 adopted by the CESCR on 14 December 1990.

²⁹⁵ Id., para.5.

²⁹⁶ Id., para.10.

²⁹⁷ Drafted also by distinguished legal experts, met in Maastricht on 22-26 January 1997, adopted by the CESCR, resolution E/C.12/2000/13, (2000).

²⁹⁸ Id., para. 9.

²⁹⁹ Id., para. 22.

³⁰⁰ Dennis and Stewart, 2004, pp.476-478.

³⁰¹ Supra, para.31.

'... (b) To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;

*(c) To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water ...'*³⁰²

§44 of General Comment n°14 also considers as core obligations the state's duty

'(a) To ensure ... child health care; ...

(d) To provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them'.

The major problem that then arises is that these essential obligations seem to be directly dependent on the realisation of other economic, social and cultural rights, such as the right to adequate shelter, to food or to water.

In addition, General Comment n°14 provides clarifications in relation to the general obligations to respect, protect and fulfil the right to health. Significantly for our topic, it states that regarding the obligation to respect, the state should particularly refrain *'from censoring, withholding or misrepresenting health-related information'* as well as *'from unlawfully polluting air, water, and soil, e.g. through industrial waste from State-owned facilities'*³⁰³. This provision is very pertinent when it comes to e-waste given its potential for toxic contamination because it seems to imply a state obligation of ESM as included in the Basel Convention.

With regard to the obligation to protect, General Comment n°14 takes on great force as essentially this obligation requires states to prevent third party infringement of the enjoyment of the right to health of its peoples³⁰⁴. It stipulates that states should take appropriate measures to ensure that third parties such as TNCs or individuals do not

³⁰² *Id.*, para.43

³⁰³ *Supra* 249, para.34.

³⁰⁴ *Id.*, para.35.

infringe its peoples' right to health. As the African import of European WEEE usually involves such private intermediaries, we see how this provision is important.

Finally, General Comment n°14 gives some indications to states about the policies that they should implement at national level in order to comply with their obligation to ensure the right to health. These should especially deal with the promotion of health education and information campaigns about substances harmful to human health. They should also include '*measures against environmental and occupational health hazards*'. To this end, the states are invited to adopt specific '*policies aimed at reducing and eliminating pollution of air, water and soil, including pollution by heavy metals such as lead from gasoline*'³⁰⁵. Again, this provision appears to be crucial for the African states' obligation to realise the right to health of their peoples when they are facing the growing toxic flow of European e-waste.

b) Analysis of the African Commission of Human and Peoples' Rights case law.

We must now examine the only regional case law that has properly dealt with the right to health, heard by the African Commission of Human and Peoples' Rights with regards Article 16 of the ACHPR. Although the African Commission's workload has been quite low³⁰⁶, one case still deserves particular attention. Indeed, in 2001, the African Commission issued its final decision regarding the complaints filed in the name of the Ogoni peoples by the Social and Economic Action Centre and the Centre for Economic and Social Rights against Nigeria³⁰⁷, finding Nigeria to be responsible for various violations of Human Rights, including the right to health of the Ogoni peoples.

With regards the facts, the case concerned actions undertaken by Nigerian agents against the Ogoni peoples living in the Niger delta where a consortium of oil companies

³⁰⁵ Id., para.36.

³⁰⁶ Udombana, 2000, pp.66-73.

³⁰⁷ Communication 155/96, case n°ACHPR/COMM/A044/1, 27 May 2002.

was operating³⁰⁸. As regards the right to health, the applicants first argued that Nigerian officials were responsible for directly polluting the Ogoni people's environment resulting in serious health problems for these people. Secondly, they claimed that Nigerian authorities positively facilitated the toxic activities of the oil enterprises, which also harmed the Ogoni people's health. Thirdly, they alleged that the Nigerian administration had failed to give full information to the Ogoni peoples regarding the toxic health risks they were facing by living near such hazardous plants³⁰⁹.

The African Commission eventually ruled in favour of the plaintiffs and held that Nigeria did violate its obligations to respect, protect and provide information necessary under Article 16 of the ACHPR³¹⁰. It notably held Nigeria responsible for having illegally interfered with the basic respect of the Ogoni's right to health by actively participating in the destruction of the Ogoni's environment which directly injured their health. Furthermore, it held that by providing the oil consortium with the legal and military powers to continue its highly toxic activities, Nigerian authorities infringed their obligation to protect the Ogoni people's right to health. Finally, the African Commission considered the failure of the Nigerian administration to furnish '*information to those communities exposed to hazardous materials and activities*' as constituting a violation of the state's obligation to provide information regarding the right to health of the Ogoni peoples.

One may underline that the African Commission did not make any distinction between the requirements stemming from the right to health included in Article 16 of the ACHPR and those derived from Article 24 of the ACHPR relating to '*the right to a general satisfactory environment favourable to their development*' which could suggest that the African Commission is greatly concerned with protecting the African peoples' right to health when it is particularly threatened by environmental harms, as may be the case with the mismanagement of e-waste. It also explains why the AComHPR interprets

³⁰⁸ Comprising the Nigerian National Petroleum Development Company and the multinational Shell Petroleum Development Corporation..

³⁰⁹ Supra 307, para.50.

³¹⁰ Id., para 54.

Article 26 as signifying basically a ‘*right to a healthy environment*’³¹¹ and so requiring the same obligations that are demanded for the right to health³¹².

Previously, in a case not directly related to environmental damage, the African Commission had already recognised Zaire responsible for the violation of the Zairian Jehovah Witnesses’ right to health because the state had failed to furnish to these latter the minimum of adequate water required in order to comply with the Article 16 of the ACHPR³¹³. Thus, the African Commission did embrace a broad vision of the right to health, including ‘*underlying determinants*’ like water, which was, since then, confirmed by the General Comment n°14.

This inclusive approach of the right to health in Africa is also mirrored by the progressive South African Constitution. Indeed, after the end of the Apartheid in 1994, this country has adopted one of the most modern constitutions of the world regarding Human Rights and especially economic, social and cultural rights, which, some of them, have been made expressly justiciable before national courts³¹⁴. Hence, Article 27 of the South African Constitution is often quoted in relation to the protection that it ensures to the right to health of South Africans, notably specifying that it comprises ‘*the right to have access to ... sufficient food and water*’.

However, until now the only case relative to this provision has been disappointing³¹⁵ inasmuch as the South African Constitutional Court recently interpreted it in 2009 as implying from the state an obligation of means rather than an obligation of result³¹⁶. In other words, the Constitutional Court has deemed that the South African state is only obliged to take the appropriate measures to reach the objective of securing ‘*sufficient water*’ to its peoples and so - contrary to the applicants’ argument - not to provide immediate access. The South African Constitution also

³¹¹ Id., para.52 and 53.

³¹² Shelton, 2002 (b), p.939.

³¹³ Communications 25/89, 47/90, 56/91, 100/93 World Organisation Against Torture, Lawyers’ Committee for Human Rights, Jehovah Witnesses, Inter-African Union for Human Rights v. Zaire, AComHPR decision of March 1996.

³¹⁴ Kende, 2003, p.138.

³¹⁵ <http://www.hhropenforum.org/2009/11/access-to-water-case/>.

³¹⁶ *Mazibuko and Others v. City of Johannesburg and Others*, CCT 39/09, ZACC 28 (2009), para.50.

contains a significant right to a healthy environment in Article 24 which orders the state to take '*reasonable legislative and other measures that ... prevent pollution and ecological degradation*' but so far no case has been heard, and so it is impossible to evaluate its true scope. Nevertheless, the Ogoni case law gives a remarkable example of how this environmental right protecting human health should be interpreted.

c) Application to the European e-waste problem in Africa.

In light of the last three chapters, it seems understandable that e-waste's effects on Human Rights have not yet been dealt with by any regional Human Rights institutions. Indeed, we have explained how the integration of environmental protection within the Bill of Rights' scope has been progressive, replying generally to specific demands (indigenous cultural rights in America, respect for private life in Europe, economic and social rights' emphasis in Africa). Given the even more recent recognition of the e-waste toxic composition, these two factors explain why, so far, no case law exists regarding e-waste's impacts on Human Rights.

However, the ongoing catastrophic situation in Africa concerning the management of European e-waste whether for dumping, recycling or re-use does not prevent us from making a number of hypotheses as regards its consequence on African peoples' Human Rights and especially their right to health. The question of European origin of potentially harmful e-waste is especially relevant for the purpose of apportioning responsibility and therefore will be discussed in more detail in the last chapter of this thesis.

So, we will proceed by analogy with the *Ogoni* case reasoning in order to analyse whether European e-waste affects the Africans' right to health when it is improperly and results in toxic pollution. Concerning the obligation of African states to respect the right to health of their peoples, the African Court has clarified that they should refrain

*'from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual.'*³¹⁷

Keeping in mind that all African states are bound by the Basel Convention and 24 are bound by the more restricting Bamako Convention, we see how the lack of national enforcement of these two fundamental instruments regarding e-waste may lead to a conflict with their international obligations to respect the right to health of their peoples. Indeed, if an African state permits - contrary to its Basel and Bamako obligations - unsound environmental management of European e-waste that proves harmful to the health of its peoples, the African Commission could view this type of permissive comportment as 'tolerating [a] practice violating the integrity of the individual'.

Regarding the obligation of African states to protect the right to health of its people particularly against third party infringement, the Ogoni case law may fall short of covering European e-waste management in Africa. This is because that case dealt with a consortium of companies, one of which was entirely public, whereas WEEE business usually involves only private intermediaries. If this is so, the African Commission should copy the ECtHR case law concerning toxic pollution as in the *Ostra Lopez case*³¹⁸, in which the European Court ruled that the Spanish state was required to protect the private life of the applicant from the harmful activity of the private company. This approach is fully supported by General Comment n°14. However, the likelihood of this approach being taken is reduced by the major difficulty faced by poor African countries of having to balance respect for Human Rights and economic development³¹⁹.

Finally, the Ogoni decision contains a detailed paragraph about the content of the African states' obligation to provide the right to health to their peoples in case of toxic pollution. This requires

'ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact

³¹⁷ Supra 307, para.52.

³¹⁸ As also the I-ACHR case law *San Mateo*.

³¹⁹ See Part I of the thesis.

*studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.*³²⁰

Then, if an African state refuses to conduct or allow such scientific enquiry about the hazardous effects of the European e-waste management practiced by African peoples or to communicate its results to the peoples concerned by the toxic risks, the African Commission could again hold the African country responsible for violating its obligation to provide the right to health to its peoples.

In consequence, the traditional scheme of national jurisdiction regarding Human Rights' violations appears to be inadequate to solve the problem of European e-waste's impact on the African right to health, inasmuch as it seems to completely remove the burden from European WEEE export states of Human Rights responsibility. This situation raises a serious ethical problem for the EU states given their general environmental and Human Rights-friendly discourse.

CHAPTER 4: The legal difficulty, despite the “toxic reality”, to hold responsible the European states for affecting Africans peoples' health with their illegal e-waste export to Africa.

- I- **The sharing of environmental responsibility between European and African countries but which fails to furnish adequate remedy to Africans.**
 - A) **The inexistent EU territorial environmental responsibility for illegally exporting e-waste to Africa.**

³²⁰ Id., para.53.

We have seen that the EU does have a comprehensive environmental legal framework to deal with toxic wastes' issues. It has notably integrated the Basel BAN regarding the movement of toxic wastes, including e-waste, to non-OECD countries within its internal legislation. Then, it seems that the actual European e-waste export to African countries violates the European environmental law³²¹. Then, one could expect that the European Court of Justice (ECJ), the judicial organ in charge of ensuring the respect of this legislation, has already ruled over this kind of transboundary case. It has not happened yet.

On the contrary, if the ECJ has not known a single case relative to the export of toxic wastes to developing countries, it is striking to observe that it has developed an important case law regarding the transfer of hazardous goods but between EU members³²². This constitutes an additional proof as concerns the EU hypocrite approach to this toxic issue, caring internally and ignoring internationally.

Besides, what comes out of the ECJ case law is that the EC Court always copes with the transboundary dangerous waste movement problem by presuming that its limitation constitutes a disguised protectionist measure prohibited by the fundamental EC law³²³. It ensues from this attitude that environmental and health concerns have been often seen as threats to the European free trade. This general trend is very counterproductive regarding the ultimate objectives of environmental and human health protection to which the EU has fully subscribed, by translating in internal regulations the international engagements of its members to the Basel regime.

Anyhow, from the African victims' point of view, the ECJ is not able to offer any remedy to their alarming situation, given the particular role of this Court, not supposed to be the direct judicial interlocutor of individuals. However, as the European e-waste export to Africa's problem depends first of all on the implementation by the European states of the strict EU law in this field and so eventually, on the control of its

³²¹ Supra 170.

³²² ECJ Cases *Walloon Waste* C-2/90 (1992); *Beside* C-192/96 (1998); *ASA Abfall Service* C-6/00 (2002); *EU Wood Trading* C-277/02 (2004); *Marius Pedersen* C-215/04 (2006).

³²³ Tromans, 2001, pp.145-146.

respect by the ECJ, this is appalling to see that since more than ten years, neither the European Commission nor any EU state has taken action before the ECJ concerning this matter.

As concerned the Cotonou Agreement that also bans EU e-waste export to Africa, its mechanism for the settlement of disputes is largely inspired by the traditional approach of the states in case of international trade conflicts: the arbitration after having failed in negotiating a solution³²⁴. In any case, it does not provide any individual complaint procedure as it exists in Human Rights law. As a result, the African victims are again excluded of the process and denied reparation. Besides, as until today, no arbitral case has ever risen about this toxic issue, the pertinence of this provision may be questioned as regards the real commitment of the EU to enforce it³²⁵. The imbalance of power between the EU and the ACP countries in this mechanism of settlement of disputes has been pointed out as undermining the aim of this agreement to provide aid to the ACP states, these latter being too dependent of the EU favourable trade partnership –because too poor-, to claim their rights³²⁶.

If at this point I did not mention the Basel provisions regarding the liability of the states for their failure to respect their obligations, it is because the ECJ appears to be an institution much more constraining for the European states than what the Basel Convention establishes to recognise the responsibilities of the parties for not complying with their conventional obligations, and to finally grant due remedy to the victims. However, the African countries have to rely primarily on this deficient regime.

B) The weaknesses of the Basel and Bamako regimes regarding the responsibility of African and European states.

³²⁴ Supra 10, Article 98.

³²⁵ Slocum-Bradley and Bradley, 2010, pp.35-36.

³²⁶ Id..

As we have also examined, the environmental responsibility of African states for illegally importing European e-waste comes from two different sources, namely the Bamako and Basel Conventions. Regarding the former Convention, as it expressly prohibits the parties from importing toxic waste from non-African countries, the importing countries are responsible for violating their Bamako obligations when European e-waste arrives in their territory.

The problem is that only 24 African states are party to the Bamako Convention and the main e-waste importers are not. Nevertheless, for these countries which are party to the Bamako Convention, their regimes of responsibility are governed by the provisions of this Convention, Article 12 of which provides that a protocol relating to liabilities and compensation for the victims should be used to set up this mechanism. However, it has so far not been adopted. Furthermore, the resolution of conflicts, regarding the compliance of the parties with the Bamako ban, is managed by Article 20 of the Convention that opts for an inter-state mechanism, leaving the victims completely outside of the process.

Concerning the 29 other African nations that did not ratify the Bamako Convention, they remain bound by the Basel regime. Five of them - including Nigeria - have interestingly ratified the Basel BAN Amendment instead of the Bamako Convention that has a broader scope of application. As 5 African states are parties to both the Bamako Convention and the BAN Amendment, 10 African countries are bound by the BAN Amendment while 24 African states are covered only by the Basel Convention which does not prohibit the importation of European e-waste. The result is that the 10 African parties to the BAN Amendment are responsible for violating their international obligations when they import European e-waste whereas the other 24 African countries are not, if they have duly notified the exporter countries of their national ban of e-waste imports or given their prior written consent to the movement (see Annex for a summary table). As the BAN Amendment is still not internationally in force, we will focus on the case where the African states have failed to implement these two basic obligations stemming from the initial Basel Convention.

To this respect, both the Basel³²⁷ and Bamako Conventions set up inter-states mechanisms to resolve the conflicts able to rise up regarding the compliance of the parties with their obligations. Thus, we see that this option falls short to provide adequate reparation to the African victims. Nevertheless, reflecting the general tendency of international environmental law³²⁸, the Protocol on Liability to the Basel Convention adopted in 1999³²⁹ will allow the victims of such damages to claim before their national courts civil reparation from the individuals recognised as being also responsible of the harm produced. Thus, this Protocol enhances the 'Polluteur Pays Principle'(PPP) that has been enounced several times in environmental instruments³³⁰ as representing a good way to ensure effective remedy to victims.

Since the international law is still principally based on an inter-states approach, the PPP has appeared to be a good complement to the basic state responsibility, taking duly account of victims. In fact, it has been determinant to convince the reluctant states to develop international environmental law inasmuch as environmental degradation has always been more due to private industrial activities than public ones³³¹. Yet, regarding the Basel Protocol, it has still not come into force but even though, one should underline that up on the ten states that does have ratified it, six are African. This clearly shows the deep concerns of these latter concerning the impacts of OECD imported toxic wastes on their peoples.

Concerning the settlement of disputes, one should look more closely to the international case law issued about environmental inter-state disputes, and especially to the International Court of Justice (ICJ)'s judgements, the competent international organ to settle such disputes as it is expressly referred to in the Basel and Bamako Conventions. The objective consists in determining if the European states could finally be held responsible for their illegal export to African countries.

³²⁷ Supra 104, Article 20.

³²⁸ Brunnée, 2004, pp.356-358.

³²⁹ Supra 128.

³³⁰ Supra 91 and 123, Principle 22 of the Stockholm Declaration and Principles 13 and 16 of the Rio Declaration.

³³¹ Sachs, 2008, pp.843-845.

C) Towards an extraterritorial environmental responsibility of EU countries for exporting e-waste to Africa?

Admittedly, the voluntary procedure to follow, in order to have a case admissible before the ICJ, has prevented this later to elaborate a furnished jurisprudence³³². However, due to its supreme authoritative posture in international law, the ICJ's judgements have always given serious indications, as regards the evolution of the international law, to the other regional or national Courts in a similar case. Thus, the ICJ has influenced both international environmental and Human Rights law. It has notably started with transboundary harm.

Before analysing the ICJ approach to this topic, the well-known *Trail Smelter* arbitration³³³ deserves our particular attention because until today it constitutes the only decision recognising the international responsibility of a state –Canada- for transboundary environmental harm. By stating in 1941 that

*'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 established by clear and convincing evidence'*³³⁴

the *Trail Smelter arbitration* is often seen as marking the beginning of international environmental law³³⁵. Concretely, the case was relative to the harmful effects of the toxic fumes released by a Canadian smelting company to the US environment. Even if the facts in question may appear different from our European e-waste issue, the two general principles found by the international arbitral Court at this occasion remain

³³² Anand, 2001, p.1 and pp.6-7.

³³³ *Trail Smelter Arbitration*, US v. Canada, 3 R.I.A.A. 1905 (1938-1941). Reproduced at http://untreaty.un.org/cod/riaa/cases/vol_III/1905-1982.pdf.

³³⁴ Id.

³³⁵ Bodanski, 1995-1996, p.114.

relevant to our topic inasmuch as this later also constitutes a case of transboundary environmental harm³³⁶.

Basically, the arbitral tribunal hold Canada responsible for not having prevented the transboundary environmental harm by not controlling enough the activities of the polluting firm within its territory. Secondly, it considered Canada liable to pay compensation for the damage caused to the US. Applied to e-waste, African countries could invoke this fundamental case law to support that European countries have also a duty to impede its illegal export to them, by soundly proving its resulting environmental harm within their territories. Thus, it would provide a re-lecture of the *Trail Smelter* decision under the light of the actual economic globalisation that makes today the transfer of pollution at the other corner of the planet much easier than in 1941.

As regards the ICJ, it has to deal soon after its establishment with a case of transboundary damage. Although the *Corfu channel* case does not relate to an international environmental matter³³⁷, the ICJ has established in 1949 an interesting principle for our subject, estimating that a state should not permit its territory to be utilised to injury another country³³⁸. Thus, the ICJ has enforced the transboundary *Trail Smelter* jurisprudence in more general terms as it has considered that this obligation was not stemming from conventional law but rather from 'certain general and well-recognised principles'³³⁹ of international law.

Since then, we know that international environmental law has quickly developed through principally the adoption of diverse conventions coping respectively with specific environmental concerns -as the Basel Convention does with toxic wastes. Yct, if the spirit of the *Trail Smelter* and *Corfu Channel* case law regarding the principle of state's responsibility for causing environmental transboundary harm is often implied in these instruments, it has been expressly proclaimed in both the Stockholm and Rio

³³⁶ Viñuales, 2008-2009, p.235.

³³⁷ *Corfu Channel* case, Judgment of 9 April 1949, ICJ Reports 1949, p. 4 (United Kingdom v. Albania). The case was relative to the explosion of two British destroyers in Albanian territorial waters, where they struck mines.

³³⁸ *Id.*, p.22.

³³⁹ *Id.*.

Declarations³⁴⁰. All of this explains why the ICJ has admitted in its Advisory Opinion on Nuclear Weapons issued in 1996 that this principle was 'now part of the corpus of international law relating to the environment'³⁴¹. It did so by notably stressing that environment does represent 'the quality of life and the very health of human beings'³⁴², thus, recognising the undeniable links between environment and human health.

In the *Gabčíkovo-Nagymaros* case ruled in 1997³⁴³, the ICJ has to deal for the first time with a predominant environmental dispute and it gave an innovative interpretation of the environmental protection's scope. In fact, the international Court was called to examine whether the unilateral suspension by Hungary of the Danube dam's construction was legal. At this occasion, the ICJ has proceeded to a remarkable balance between environmental and economic interests, to finally internationally enforce the concept of sustainable development³⁴⁴. Thus, one may assume that European countries should take into consideration environmental impacts when they are developing economic activities such as the high-tech industry.

Another wave of environmental cases has come recently to the ICJ where it has also to arbitrate between environmental and economic stakes. Indeed, the ICJ has just issued in April 2010 its judgment about the *Pulp Mills* case³⁴⁵, estimating Uruguay responsible for having failed to conduct an environmental impact assessment before authorizing the a huge pulp mills on the Uruguay River constituting its international frontier with Argentina. This later was complaining about waster pollution resulting from the pulp's activity. The case is very important inasmuch as the ICJ has recognised that this environmental assessment has become a international customary rule³⁴⁶ and confirmed its environmental approach to economic development³⁴⁷. The *Aerial*

³⁴⁰ Supra 91 and 123, Principles 21 and 22 of the Stockholm Declaration, and Principles 2, 13 and 19 of the Rio Declaration.

³⁴¹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226, paragraph para. 29.

³⁴² *Id.*

³⁴³ *Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgment, ICJ Reports 1997, p. 7.

³⁴⁴ Supra 336, pp.250-252.

³⁴⁵ *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment of 20 April 2010, available at <http://www.icj-cij.org/docket/files/135/15877.pdf>.

³⁴⁶ *Id.*, para.121.

³⁴⁷ Paye, 2010, at <http://www.asil.org/insights100422.cfm>.

Herbicides case submitted in 2008 to the ICJ³⁴⁸ –but still pending- about the harmful effects produced by the Colombian spraying of toxic herbicides in Ecuador will certainly give a better overview about how the international Court intends to protect human health through its progressive interpretation of international environmental law.

Finally, we cannot avoid mentioning the *Sonora* case³⁴⁹, the only consultative opinion about transboundary toxic wastes issue, delivered by the International Court of Environmental Arbitration and Conciliation (ICEAC) in 1999. In fact, the ICEAC was requested to consider if the toxic wastes, first imported from the US to Tijuana, Mexico, and then transferred to another Mexican city, Sanora, where they were dumped in a hazardous manner, had to be sent back to the US. After having found that the Basel Convention was not applicable to the case³⁵⁰, the ICEAC has developed a very instructive reasoning as indicates the following.

*'It would seem logical that the United States, whose territory serves as base for activities that cause environmental damage elsewhere, or under whose control such activities are performed, should be liable for the resulting damage. The control carried out by the exporting state was not restricted merely to administrative activity, but it was under the obligation to ensure that the waste generated by the activities of a company located in its territory was handled in an ecological and rational manner. Its failure to fulfill this obligation renders it liable for the damage resulting from cross-border conveyance.'*³⁵¹

Although not binding, the *Sonora* Consultative Opinion offers an authoritative modern construction of extraterritorial environmental responsibility concerning the transboundary movement of toxic waste. Then, by analogy, one could apply this approach to our issue of European e-waste export to Africa. Indeed, if the African states can prove that the illegal European WEEE import causes serious environmental harms

³⁴⁸ *Aerial Herbicide Spraying* (Ecuador v. Colombia), Order of 30 May 2008, ICJ Reports 2008, p. 174.

³⁴⁹ Petition EAS 7/98, *Sonora* Consultative Opinion 1/99 of 7 April 1999, at http://iceac.sarenet.es/Ingles/cases/caso_sonora.html.

³⁵⁰ *Id.*, II-1.

³⁵¹ *Id.*, II-4.

like the ones able to affect human health, the ICEAC could recognise the European countries responsible for these damages.

Eventually, it results that all this diverse jurisprudence seems to support an international environmental European states' responsibility for exporting their e-waste to African inasmuch as they are proved to be very harmful to the local environment and thus, affecting human health. However, the existing inter-state mechanisms to solve the conflicts in this field and to recognise such responsibility are so long and difficult to enforce, that they considerably undermine the scope of this responsibility. Besides, this system occults completely the African victims who are fundamentally denied their essential right to remedy for their health damages resulting of the European e-waste export. This latter being one of the elementary pieces of the international Human Rights regime, this is then necessary to analyse if the responsibility for Human Rights' violations provides at the end a better remedy for the African victims.

II- The shocking unbalanced repartition of responsibilities regarding the Africans' Human Rights violations stemming from the European e-waste export to Africa.

A) The primary responsibility of African states.

When it comes to analysing the repartition of responsibility for the violation of African Human Rights, the primary responsibility of African states does not raise any contesting. Indeed, it corresponds to the traditional conception of the territorial application of the Human Rights regime that makes the national states responsible for respecting the Human Rights of the peoples living under their jurisdiction, understood as territorial³⁵².

The main interest to determine the African states responsible for the violation of the African peoples' Human Rights is that it automatically provides to these victims the fundamental right to remedy. Indeed, according to the adage that *Ubi jus ibi remedium*,

³⁵² King, 2009, p.522.

meaning that where there is a right, there must be a remedy, the right to remedy constitutes the cornerstone of the Human Rights regime. By establishing an embracing set of rights to protect human dignity, the relevance of the Human Rights regime precisely lies in its capacity to grant reparation to the victims for the violation of these fundamental rights³⁵³, otherwise these later would remain only humanist values. Regarding the protection of human health, we have seen that it was ensured through both civil and political rights and economic, social and cultural rights. It ensues from this observation that different mechanisms will be available to the African victims to look for adequate remedies.

At the international level, the individual complaint is the only procedure allowing a victim to seek for remedy³⁵⁴. Whereas for the civil and political rights, this type of mechanism has been established at the same time as the ICCPR's entry into force in 1976³⁵⁵, for the economic, social and cultural rights, it is not yet functioning. Actually, the Optional Protocol to the ICESCR setting up an individual complaint procedure is since 24 September 2009 open to signature. So for the moment, the African victims of Human Rights violations due to the European e-waste export are just internationally entitled to complain before the HRCCom. Therefore, it means that the African victims may invoke only civil and political rights violations before this instance, according to its recent green jurisprudence that does protect a minimum human health. This is not satisfactory as regards the right to health, our main study-case.

As a result, the African victims can only complain before the AComHPR which can receive individual communication³⁵⁶ alleging violations of the ACHPR's dispositions such as the right to health. Therefore, after having exhausted the local remedies, African peoples may initiate a procedure before the AComHPR to seek remedy. Even if the African individual request has been criticised for remaining too

³⁵³ Nowak, 2007, p.254.

³⁵⁴ Tomuschat, 2003, pp.160-185.

³⁵⁵ Supra 264, the individual complaint procedure before the HRCCom was established by the first Optional Protocol to the ICCPR, adopted and entered into force according to the same resolution.

³⁵⁶ Supra 240, Article 55.

political as regards its enforcement³⁵⁷, it represents the best way for African victims to get reparation.

Then, although the African solution is significant, it also raises huge questions as regards its legitimacy since we are talking about the impacts of the European e-waste export in Africa. Admittedly, it does respect the sovereignty of the African states concerning their primary territorial responsibility to implement Human Rights. However, given the general huge problems faced by African countries to realise economic, social and cultural rights as reflected by the recurrent alarming health situation in Africa³⁵⁸, one cannot avoid noticing the blatant injustice resulting from the European toxic burden transfer to Africa. Indeed, already struggling every day to ensure these basic rights, we have seen that the European WEEE export to Africa contributes to infringe the African peoples' right to health, while the responsibility of European countries seems unfairly inexistent.

B) The unjustified limited responsibility of European states

1) The interests at stake.

This final part is certainly the most challenging for a Human Rights defender who, after having demonstrated that the European e-waste export to Africa may affect Human Rights over there, is finally confronted to a legal deadlock that basically seems to absolve European states of responsibility affecting African peoples' Human Rights. Here in fact, we have to discuss about the actual approach of the European states regarding their extraterritorial responsibility for Human Rights violations. As we have explained, this concept has been recognised for environmental damage since a while so, given their crucial importance for humanity, one could have expected the same application to Human Rights³⁵⁹. Yet, the extraterritorial responsibility for Human Rights

³⁵⁷ Supra 306.

³⁵⁸ Supra 11.

³⁵⁹ Howland, 2007, p.389-390.

constitutes one of the most sensitive questions in contemporary international law. Whereas the actual globalisation seems to command such liability, the states are still demonstrating huge reluctance to comply with it, especially as regards economic and social rights.³⁶⁰

If we are talking about the potential European extraterritorial responsibility for African peoples' Human Rights violations, this is because we have already pointed to the hypocrite implementation of the European environmental law regarding e-waste that does impact extraterritorially on Africans' Human Rights. Then, the issue consists in determining whether the principal Human Rights instruments³⁶¹ to which the European states are bound -and so responsible for- may apply to African victims. In short words, do these treaties include a European extraterritorial responsibility for Human Rights violations? Can the Africans invoke the European violations of their Human Rights obligations to get a remedy from them? If yes, before which instances? What are the conditions? All will depend about how the notion of state's '*jurisdiction*' is interpreted.

At this point, it is also necessary to stress the ultimate complexity of this thesis relative to the predominant role of the TNCs in the transboundary e-waste business and its consequences regarding Human Rights. Indeed, TNCs are the primary actors involved in the international waste trade³⁶² like the one concerning WEEE. Consequently, this manifold situation, that largely mingles private sector, calls for some remarks. First, the fact that TNCs are the principle producers of e-waste does not preclude the implications of other smaller intermediaries in the WEEE chain, which makes the repartition of responsibility for Human Rights even more difficult³⁶³. This is notably due to the illegal nature of the transboundary e-waste movement according to both European and African laws. Thus, by dealing with numerous and more obscure

³⁶⁰ Gondek, 2005, p.351.

³⁶¹ Namely, the ECHR, the ICCPR and the ICESCR.

³⁶² Supra 18, para. 127.

³⁶³ Schmidt, 2006, p.234.

interlocutors, the European TNCs have looked to escape from their environmental responsibility clearly established by the European legislation³⁶⁴.

Yet, it would go far out of this thesis's scope to examine the responsibility of all the brokers involved in the e-waste traffic. Having the producer responsibility expressly enacted, this chapter will rather analyse the links that may exist between this one and the extraterritorial responsibility of European states for Human Rights violations in Africa. To this regard, the '*Protect, Respect and Remedy*' framework proposed in 2008 by the Special Representative of the UN General Secretary on the issue of Human Rights and TNCs and other business enterprises and adopted by the Human Rights Council³⁶⁵ (Special Representative on Business and Human Rights), will give precious highlights about the European states' responsibility to protect peoples within their jurisdiction against TNCs' Human Rights abuses and to provide them with due remedy.

2) Interpretation of the 'jurisdiction' concept by the ECtHR.

a) The problematic regional vision of the ECHR application.

Beginning by the review of the ECHR's provisions, the Article 1 of European Convention clearly states that

"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention".

Thus, the exclusive use of the word '*jurisdiction*' without being limited by a territorial condition indicates that the ECHR could apply outside the territory of the European parties to the Convention. Nevertheless, if the ECtHR has found some cases where the members' states were held to respect extraterritorially their obligations, it has rather adopted a restrictive approach to this respect. Concretely, to recognise an extraterritorial

³⁶⁴ Id.

³⁶⁵ Mr. John Ruggie was appointed by the CHR, resolution 2005/69, 20 April 2005. The HRC has adopted the his proposition of framework regarding Business and Human Rights, resolution 8/7, 18 June 2008.

application of the ECHR, the European Court has required very strict conditions such as the effective control of another territory³⁶⁶ or the direct authority of a state agent over an individual³⁶⁷. It has also adopted the '*non-refoulement*' customary principle regarding situations of extradition or expulsion which prevent European states to transfer a person to a country where his life or physical integrity would be at risks³⁶⁸. It seems that this *a minima* extraterritorial application of the ECHR has always been justified to fill the gaps that could affect the basic '*purpose of the Convention*' consisting in protecting Human Rights in the European territory.³⁶⁹

However, the ECtHR has marked a strong setback to this regard in the *Bankovic and others v. Belgium and 16 other NATO states* case³⁷⁰ when it has denied in 2001 the extraterritorial application of the ECHR to the Yugoslavian victims of NATO members' bombings during the war in 1999. At this occasion, the European Court has estimated that the aerial strikes practiced by the High Parties were not sufficient to establish their direct control over the victims and that since Bosnia was not party to the ECHR, the claimants could not be considered to be within the jurisdiction of the European states. The ECtHR has justified its decision by developing the argument that the European Convention was basically a regional instrument '*not designed to be applied throughout the world*' but to the '*legal space of the Contracting States*'³⁷¹.

This narrow territorial vision of the ECHR's scope has been largely criticised by commentators, as mainly failing to adapt to the new threats caused by globalisation to Human Rights³⁷². Besides, the reasoning of the ECtHR in *Bankovic* has appeared to contradict its general evolutive interpretation of the European '*living instrument*'³⁷³. It also contrasts with the more open-minded approach of the I-ACHR concerning the extraterritorial application of the American Convention. Indeed for the I-ACoMHR,

³⁶⁶ See notably *Loizidou v. Turkey*, ECtHR (1995), Series A, Vol. 310 and *Cyprus v. Turkey*, n°25781/94, ECtHR (2001).

³⁶⁷ See *Stocké v. Germany*, n°28/1989/188/248, ECtHR (1989), Series A, Vol. 199, 24 and *W.M. v. Denmark*, Application No. 17392/90, EComHR (1992).

³⁶⁸ *Soering v. The United Kingdom*, n°1/1989/161/217, ECtHR (1989), Series A, Vol. 161.

³⁶⁹ Supra 366, para.62.

³⁷⁰ Application n°52207/99, Admissibility Decision (2001), 41 *ILM* (2002) p. 517.

³⁷¹ Id., para. 80.

³⁷² Supra 328, p.375-377.

³⁷³ Id., p.387.

*'the term 'jurisdiction' in the sense of Article 1(1) is [not] limited to or merely coextensive with national territory.'*³⁷⁴

It has justified this interpretation by notably emphasising the peculiar nature of Human Rights that *'inhere simply by virtue of a person's humanity'*³⁷⁵, rather than by a territorial attachment. As for the ACHPR, it does not contain any territorial or jurisdiction clause. If until today the AComHPR has not found the opportunity to hold an African state responsible for an extraterritorial violation of its Human Rights obligations, the possibility remains open. It really deserves to be underscored inasmuch as the African Charter does protect especially the right to health of Africans.

b) Noticeable evolution of the ECtHR.

Anyway, since the *Bankovic* case, the European Court has clarified some points of its case law regarding the extraterritorial application of the ECHR. First, in *Öcalan v. Turkey*³⁷⁶, the European Court has found Turkey responsible for violating the Article 5 of the ECHR, following the unlawful arrest and detention of a Kurdish militant in Kenya by Turkish agents. The African country being clearly located outside the European space, the *Öcalan* judgment is significant for correcting the *Bankovic* case law and supporting a more progressive interpretation of the 'jurisdiction' notion, notably based on the concept of effective control³⁷⁷.

Finally, the more promising jurisprudence is certainly the *Issa v. Turkey* case³⁷⁸ where the ECtHR has faced a situation very similar to the *Bankovic* case. In fact, the affair was relative to allegations of murders and killings of Kurdish shepherds in North Iraq, during a Turkish military operation against PKK in this region. The case was dismissed eventually, but for lacking of clear evidences against the Turkish agents,

³⁷⁴ *Victor Saldaño v. Argentina*, Report n°28/99 (1999), para. 17.

³⁷⁵ *Coard and others v. the US*, Report n°109/99, (1999), para.37.

³⁷⁶ *Öcalan v. Turkey*, ECHR n°46221/99 (2003).

³⁷⁷ *Supra* 392, p.358.

³⁷⁸ *Issa and Others v. Turkey*, ECHR n°31821/96 (2004).

proving their responsibility for the commission of the reported acts. However, contrary to the *Bankovic* case, the ECtHR has indicated that

*"The Court does not exclude the possibility that, as a consequence of this military action, the respondent State could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory of northern Iraq."*³⁷⁹.

One can see the neat change of thinking from the ECtHR between the *Bankovic* and the *Issi* cases, towards a much more satisfying approach to the notion of European 'jurisdiction'. Indeed in the *Issa* case, the European Court seems ready to overcome the traditional territorial vision of the 'European space', by preferring to rely on the efficiency of the control of the High Parties to the ECHR over an individual. Then, this swift of reasoning grants a better flexibility to the European Convention to protect the values of the old continent in time of globalization³⁸⁰.

3) The TNCs involvement in e-waste trade as the main obstacle to European extraterritorial responsibility.

Only, what is striking, after this brief presentation of the ECtHR jurisprudence regarding the extraterritorial responsibility of the European states for the violations of their Human Rights obligations, is to notice that it just deals with pure civil and political rights³⁸¹. All the exemplary case law concerning the greening of these rights, by which the ECtHR has ensured a certain protection of human health to European peoples, seems to be let completely out of reach from African victims. Concerning our European e-waste export case, one cannot contest that the condition of direct control by the state required by the ECtHR to apply the European Convention extraterritorially is

³⁷⁹ Id., para. 74.

³⁸⁰ Supra 360, p.359.

³⁸¹ Howland, 2007, p.407

impossible to establish, given the primary role of the private actor in the transboundary e-waste transfer to Africa. Basically, it means that according to the European Court position, African peoples are not entitled to claim any violation of Human Rights from the European states, as not being able to prove that they do depend of their jurisdiction.

After all these thorough researches, this is quite disappointing to conclude that the most progressive Human Rights Court in the world, the ECtHR, is not able to hold the EU states responsible for affecting the Africans' Human Rights, by illegally exporting their e-waste to this poor continent. It casts a shadow on the European consideration for the whole international Human Rights regime since the ECtHR gives the impression to utilize double standards: unanimously protective inside the European space whereas remaining completely silent when the same 'dirty' comportment of the High Parties produces identical effects on Human Rights, but extraterritorially.

This leads us to the hard core of the topic regarding the responsibility of the European states for the Human Rights abuses of their TNCs. Indeed, we have seen that the ECtHR was requiring the European states to territorially control and regulate private sector in order to protect Human Rights of their peoples³⁸². In this case, these entities are considered to pertain to the jurisdiction of the European states and so, to be bound by their national law, including the Human Rights provisions³⁸³. Then, one may legitimately wonder what legally happens when the activities of these European companies affect Human Rights of third countries' peoples. Could the European states be responsible for these acts?

Representing also a clear question of ECHR extraterritorial application, the answer unfortunately remains the same for our European e-waste problem, namely negative, since it supposes again the state's effective control over the company, basically inconceivable when we talk about independent private enterprises³⁸⁴. To this respect, the last report of the Special Representative on Business and Human Rights

³⁸² Supra 275 and 282.

³⁸³ McCorquodale and Simons, 2007, p.599

³⁸⁴ Id., p.606.

issued in April 2010 gives a good –even if disconcerting- overview of the states’ attitude concerning their extraterritorial jurisdiction over TNCs, by stating that

‘46. ... this is typically not the case in business and human rights.

*47. Legitimate issues are at stake and they are unlikely to be resolved fully anytime soon.*³⁸⁵

Due to time and space constraints, this thesis will not enter into the debate relative to the need of a separate responsibility of TNCs for their Human Rights abuses as the Special Representative report still insists on the primary state’s responsibility to protect from private interference with peoples’ Human Rights³⁸⁶. If this later is well integrated within the European jurisprudence, its extraterritorial component is still cruelly missing. As a result, the African victims of the European e-waste export cannot expect any remedy from European states according to the actual ECtHR position.

However, one should not omit that the European countries are also bound by the two international Human Rights covenants. Their international enforcement mechanisms may be less efficient than the ECtHR, but they have nevertheless given some encouraging signs towards a broader extraterritorial application of these two fundamental instruments.

C) The international encouraging factors towards an extraterritorial responsibility of European states for Human Rights violations.

1) With the ICCPR.

This Covenant has a specific clause indicating the scope of its application for the parties, which resembles very closely to the ECHR and I-ACHR dispositions, by providing that

³⁸⁵ Report adopted by the HRC, resolution A/HRC/14/27, 9 April 2010.

³⁸⁶ Id., para. 16.

*'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant ...'*³⁸⁷

Although the preposition “and” could indicate a cumulative condition of territorial jurisdiction for a state to be responsible for guarantying the rights protected in the ICCPR, the HRCOM has soon interpreted this sentence as implying two independent grounds³⁸⁸. Then, it has considered that the concept of ‘jurisdiction’ could request a state to extraterritorially comply with its ICCPR obligations³⁸⁹. These later having the vocation to be universal, a contrary opinion from its monitoring body about their extraterritorial aspects would have been so at odds. Actually, that is through the individual complaint procedure, the periodic state reports or its general comments, the HRCOM has constantly affirmed that the ICCPR could apply extraterritorially, but under specific circumstances³⁹⁰.

However, the same critics formulated against the ECtHR cannot be avoided concerning the HRCOM and its absence of consideration for the economic, social, cultural and environmental components previously integrated in its analysis when it has dealt with extraterritorial issues. From there on, the ICESCR constitutes obviously the most important instrument to which the European states are bound as regards the right to health. Therefore, the examination of the ICESCR provision relative to its scope of application is crucial to determine if finally the EU countries could bear any responsibility for affecting extraterritorially this essential right.

2) With the ICESCR.

³⁸⁷ Supra 264, Article 2-1.

³⁸⁸ Supra 360, p.378.

³⁸⁹ See notably *López Burgos v. Uruguay*, n°52/79 HRCOM (1981) and *Lilian Celiberti de Casariego v. Uruguay*, n°56/79, HRCOM (1984).

³⁹⁰ Supra, see also the HRCOM US Report Review, resolution CCPR/C/USA/CO/3/Rev.1/Add.1, 12 February 2008 and the General Comment n°31, para.10, adopted by the HRC, resolution CCPR/C/21/Rev.1/Add.13., 26 May 2004.

Like the ACHPR, the ICESCR does not especially limit the enjoyment of its rights to the territory of the parties. Instead, the Article 2-1 provides that

'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'

We have already mentioned the difficulties of interpretation raised by this article as regards the content of the states' obligations but it has also caused other problems concerning their territorial extent. Indeed, the reference to '*international assistance and co-operation*' is not further detailed in the ICESCR and clearly involved an extraterritorial dimension³⁹¹. Then, if it may be literally assumed that the Article 2-1 creates some extraterritorial obligations for the European states, as for instance the obligation to respect the Africans peoples' right to health, the practice of the states has completely differed in reality.

This is notably due to the traditional despise of the rich countries, Europe included, towards the economic, social and cultural rights³⁹². As a result, the monitoring body of the ICESCR, the CESCR has always been given weaker powers than the HRC³⁹³. Yet, the CESCR has continuously affirmed and specified in its general comments the extraterritorial obligations of the states. Concerning the right to health, the paragraph 39 General Comment n°14 indicates that

'To comply with their international obligations in relation to article 12, States parties have to respect the enjoyment of the right to health in other countries,

³⁹¹ Skogly, and Gibney, 2002, p.783-784.

³⁹² Supra 285.

³⁹³ It still does not have an individual complaint procedure.

*and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means*³⁹⁴.

Further, the General Comment n°14 notably points out that

*'the failure of the State to take into account its legal obligations regarding the right to health when entering into bilateral or multilateral agreements with other States, international organizations and other entities, such as multinational corporations*³⁹⁵

would constitute a violation of the right to health by the state.

According to these two provisions, the European countries could be held responsible for implementing the European e-waste law that affects the right to health of African peoples. The Special Rapporteur on the Right to Health has insisted on the responsibility of developed countries, as the European ones, for contributing to the realisation of the right to health in the world³⁹⁶. In 2004, he has especially referred to their obligation to take into account the right to health when negotiating international trade agreement or policy³⁹⁷. The Special Rapporteur on Toxic Wastes had also endorsed this view, by regularly calling the attention of the states on the adverse effects of the transboundary movement of hazardous wastes, and recently of e-waste, on the right to health of Africans, even if he does not properly speak about responsibility³⁹⁸.

Despite these diverse statements which tend to support an extraterritorial responsibility of the European states for the violation of their international obligation regarding the right to health, the African victims are not entitled to claim any remedy from the EU states, as the CESCR does not have an individual complaint procedure.

³⁹⁴ Supra 249, para.39.

³⁹⁵ Id., para. 50.

³⁹⁶ Report adopted by the HRC, resolution A/HRC/11/12, 31 March 2009, para. 11.

³⁹⁷ Id., para. 28

³⁹⁸ Report adopted by the CHR, resolution E/CN.4/2004/46, 15 December 2003, para.31.

The Optional Protocol to the ICESCR adopted in 2008³⁹⁹ that redresses this situation certainly constitutes the most encouraging sign towards the development of a real jurisprudence on the extraterritorial responsibility of states for the right to health. Thus, when it will enter into force; it will allow the African victims to ask for a remedy before the HSCR Committee. Eventually, the right to health will receive the same international protection that exists for the right to life, what is indispensable to the whole international Human Rights regime.

3) The ICJ support for an extraterritorial application of Human Rights instruments.

Admittedly, the ICJ cannot provide any remedy for African victims. Nevertheless, in its recent case law, it has been called to consider the extraterritorial application of the two covenants and basically, it has generally endorsed the views of the two monitoring bodies. First, in its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory* issued in 2004⁴⁰⁰, the ICJ has recognised that Israel was bound to respect both the ICCPR and the ICESCR in the Palestinian territory. To this regard, the Court has considered that the construction of the security wall has led Israel to breach various obligations of the two covenants⁴⁰¹. However, the very special circumstances of the case relative to an occupation internationally recognised are to be duly taken into account. Concerning the extraterritorial application of the ICESCR, the ICJ has stressed on the fact that the economic, social and cultural rights were ‘essentially territorial’⁴⁰². The situation of occupation with effective control of Israel over the Palestinian territory has been the key factor for the Court to hold responsible Israel for its ICESCR obligations over there. Therefore, it is hard to suppose that this opinion could apply to our “greenish health”

³⁹⁹ Adopted by the UN GA, resolution A/RES/63/117, 10 December 2008.

⁴⁰⁰ Advisory Opinion, ICJ 43 ILM1009, (2004).

⁴⁰¹ Id., para. 143.

⁴⁰² Id., para. 112.

Human Rights issue, even though it does constitute a positive step towards an effective extraterritorial responsibility of European states for economic, social and cultural right.

In 2005, the ICJ has dealt for the first time with the same extraterritorial question in a contentious case⁴⁰³. The Court had to decide whether the ICCPR, the Convention on the Right of Child and the ACHPR were applying or not to the Ugandan forces when they committed exactions in Congo. Referring to its Advisory Opinion on the Wall, the ICJ has concluded that these instruments were still bounding Uganda *'in respect of acts done ... in the exercise of its jurisdiction'*⁴⁰⁴. Since both the CRC and the ACHPR contain economic, social and cultural rights such as the right to health, this founding is of utmost importance for our topic. Indeed, it gives another encouraging signal towards a better protection of economic, social and cultural rights. However, the Africans victims are still completely forgotten in this inter-state process.

⁴⁰³ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, ICJ 45 ILM271, (2006).

⁴⁰⁴ *Id.*, para.217.

CONCLUSION

The choice of focusing on the impact of the European e-waste export on the African health has resulted to be very instructive as regards the current development of international law, which appears finally to be more fragmented in the reality than on the paper.

Indeed, the e-waste problem casts a light on the appalling compartmentalisation of the international environmental law on one side, and the international Human Rights regime, on the other one. While, according to Shelton, both of them share a lot of common⁴⁰⁵, their enforcement differs significantly. The problem then, in our 'toxic' case, is that neither of these two branches of law, supposed to primarily care about human beings, succeeds in protecting efficiently the African peoples affected by the illegal European WEEE export.

E-crap being the waste of the 21st century, its transboundary movement the consequence of the liberal 20th, it is troubling to observe that international law has remained stuck in the 19th, a time where international relations were, admittedly, inter-state-based. For the EU that seems to be fully entered in globalisation when it has adopted the Lisbon Agenda in 2000, aiming at establishing '*the most competitive and dynamic knowledge-driven economy by 2010*'⁴⁰⁶, its actual records regarding e-waste management is more than disappointing, when one have look at the other side of the Mediterranean Sea.

To this respect, the EU countries may do better than other OECD countries, but certainly not enough given its huge international economic and political powers. In addition, the majority of European states enjoy a long democratic tradition, respectful of Human Rights, that has in turn helped them to economically develop in the past. The ECtHR is notably internationally recognised to be the most progressive Human Rights institutions.

⁴⁰⁵ Shelton, 1991-1992, pp.109-111.

⁴⁰⁶ <http://www.euractiv.com/en/future-eu/lisbon-agenda/article-117510>.

Therefore, for all these reasons, this thesis will conclude by first, urging the EU to take the leadership on the global stage in the green electronics' revolution and secondly, calling the European countries to accept binding international Human Rights regulations concerning the extraterritorial activities of their TNCs. Only like this, one may expect to see the flow of European WEEE decreasing and a concrete dissuasive legal framework to cope with the European 'high-toxic' actors.

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