

Are Belgium and the Netherlands in breach of their international obligations under the Basel Convention and customary international law due to their export of high sulfur fuels to certain developing countries in Africa that are Parties of the Bamako Convention?

CIEL legal opinion

23 January 2017

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Executive summary

While Belgium and the Netherlands have banned high sulfur fuels in their territories on account of their harmful effects on health and the environment, they nevertheless are allowing exports of such high sulfur fuels to West African States. As shown in this legal opinion, the exports by Belgium and the Netherlands of high sulfur fuels are in violation of the *Basel Convention on the Transboundary Movements of Hazardous Wastes and their Disposal*. The conduct by Belgium and the Netherlands is also in breach of their international human rights obligations and principles of customary international law.

Most States importing high sulfur fuels in West Africa are Parties to the *Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa*. High sulfur fuels satisfy all the constituent elements of the definition of hazardous wastes of the Bamako Convention, and therefore the import into Bamako Parties of high sulfur fuels is banned under the Bamako Convention.

High sulfur fuels further satisfy the definition of hazardous wastes under the Basel Convention where the Bamako definition of hazardous wastes is part of the domestic legislation of the importing States, such as in Benin, Cameroon, Ivory Coast, Mozambique, Republic of the Congo, Senegal and Togo. The Basel Convention clearly prohibits the export of hazardous wastes and other wastes to Parties that have prohibited the import of such wastes. The export from Belgium and the Netherlands of high sulfur fuels to these States is thus in violation of the Basel Convention.

Furthermore, according to well-established international customary law, Basel Parties should not act in a way that undermines the ability of other Basel Parties to fulfill their international obligations under the treaty. Basel Parties are officially on notice that the Bamako Convention prohibits the import of hazardous wastes to the territories of its Parties. Consequently the export from Belgium and the Netherlands of high sulfur fuels to any Bamako party is in violation of the Basel Convention.

Additionally, international human rights law includes the obligations incumbent upon all States to cooperate in regard to the realization of the right to health and to avoid causing harm extraterritorially through actions or omission. Given the ample knowledge that exists regarding the detrimental effects of high sulfur fuels to health and the environment, the Belgian and Dutch failure to ban their export to African Countries, including those not parties to the Bamako Convention, is a breach of their international human rights obligations.

Introduction

West Africa is a significant producer of crude oil. But due to its lack of refining capacity, the region must import roughly half of its diesel and gasoline. The majority of this fuel is imported from the Netherlands and Belgium. Trade statistics show 80 percent of the diesel exported from such location to Africa has sulfur content at least 100 times above the European standard. These fuels exported to Africa (referred to as African Quality Fuel by the exporters) also contain high level of other toxic substances such as benzene and aromatics, which are also released when the fuel is combusted, and therefore pose a threat to human health and the environment in Africa.

The countries receiving the highest quantities of high sulfur fuels are Ghana, Nigeria, Togo, and Senegal. Other countries importing high sulfur fuels include Benin, the Republic of the Congo, Gambia, Ivory Coast, Cameroon, and Mozambique. All of these countries, except for Ghana and Nigeria, are Parties to the Bamako Convention on the Ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (the Bamako Convention).

A question has been raised about the legality of such exports from Belgium and the Netherlands under the Basel Convention. Both exporting countries (Belgium and the Netherlands) and importing countries (...) are Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (the Basel Convention).¹

In order to address this question, the following issues must be addressed:

1. Whether high sulfur fuels are considered hazardous wastes under the Bamako Convention?
2. Whether high sulfur fuels are considered hazardous wastes under the Basel Convention?
3. What are the obligations of Belgium and the Netherlands in relation to the export of high sulfur fuels to African Countries that are Parties to both the Basel and Bamako Conventions?

¹ The Basel Convention entered into force for the Netherlands on 15 July 1993 and in Belgium on 30 January 1994. Basel Convention, Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, available at <http://www.basel.int/Countries/StatusofRatifications/PartiesSignatories/tabid/4499/Default.aspx> accessed on 21 November 2016.

1. Whether high sulfur fuels are considered hazardous wastes under the Bamako Convention

Article 2 of the Bamako Convention defines hazardous wastes. Under Article 2.1.d., the definition includes “*hazardous substances which have been banned, cancelled or refused registration by government regulatory action, or voluntarily withdrawn from registration in the country of manufacture, for human health or environmental reasons.*”² In the context of the situation examined by this legal opinion, this definition calls for analysis of four elements: (i) substances; (ii) which have been banned; (iii) in the country of manufacture; (iv) for human health or environmental reasons. These elements are analyzed next.

In respect of element (i) of the definition and specifically whether high sulfur fuels qualifies as “*substances*”, it is noteworthy that in contrast to the other elements of Article 2, Bamako's definition of hazardous wastes refers to “*substances*” rather than wastes.³ This particularity of Article 2.1.d. of the Bamako Convention allows the possibility that high sulfur fuels satisfy the definition of hazardous wastes under the Bamako Convention. Indeed, according to a former Executive Secretary of the Basel Convention, the reference to “*substances*” was intentionally included so as to cover products (not just wastes) banned in the domestic market. The Executive Secretary explains, “*Unlike the Basel Convention, however, the Bamako Convention extends the definition of hazardous wastes ... to all hazardous substances (whether or not defined as wastes) that have been banned in the country of manufacture. The inclusion of [this] was inspired by the GATT draft Decision on Products Banned or Severely Restricted in the Domestic Market, the elaboration of which was initiated by African states.*”⁴

In respect of element (ii) of the definition and specifically whether substances have been banned, high sulfur fuel is effectively “*banned*” in the Netherlands and Belgium because fuel quality standards do not permit its use. European Directive 2003/17/EC requires Member States to ensure that unleaded petrol and diesel fuels are marketed in their territory only if it has a sulfur content that does not exceed 10 mg/kg, by no later than 1 January 2009.⁵ Thus, since 2009, 10 mg/kg constitutes the maximum quantity of sulfur allowed for fuel in use in the European Union (EU). Exceeding this amount is prohibited within the EU. The EU also restricts the benzene, polyaromatics, and manganese content of diesel.⁶

Because the use of these fuels is not permitted in European countries, it is therefore “*banned*” within the meaning of the Bamako Convention. Although none of the individual components

² Bamako Convention, Art 2(1)(d).

³ The Bamako Convention defines “waste” as “*substances or materials, which are disposed of, or are intended to be disposed of, or are required to be disposed of by the provisions of national law.*”

⁴ Katharina Kummer, *International Management of Hazardous Wastes: The Basel Convention and Related Rules*, p. 101 (Oxford University Press, 1995).

⁵ Council Directive 2003/17/EC amending Directive 98/70/EC relating to the quality of petrol and diesel fuels [2003] OJ L 76/10, amending Art 3(2)(e) and adding Art 4(1)(e), available at <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003L0017&from=EN>> accessed on 14 November 2016.

⁶ Council Directive 2009/30/EC amending Directive 98/70/EC and Directive 1999/32/EC and repealing Directive 93/12/EEC [2009] OJ L 140/88, Art 8(a), Annex I and Annex II, available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:140:0088:0113:EN:PDF>> accessed on 12 December 2016.

of high sulfur fuels are banned, the mixture of these components results in a unique substance, which is harmful for human health and environmental protection due to its high sulfur, benzene, polyaromatics and manganese content.

In respect of element (iii) of the definition and specifically whether the substances are banned in the country of manufacture, the relevant question is what is the country of manufacture. In this regard, arguably the location where fuels are mixed prior to export or the location where fuels are mixed to include high sulfur content is arguably the place where they are “*manufactured*.” When this mixing takes place within the EU, which we understand to be the case for the vast majority of the fuels exported to African countries examined by this legal opinion, high sulfur fuels are considered a hazardous waste under the Bamako Convention.

In respect of element (iv) of the definition and specifically whether the ban in the country of manufacture is for health or environmental reasons, both European Directive 2003/17/EC limiting the sulfur content of fuels, and Council Directive 2009/30/EC limiting the benzene, polyaromatics and manganese content in fuels, clearly establish their health and environmental rationale. The former indicating in its preambular paragraphs 2 and 4 that the reduction of the sulfur content of petrol and diesel has been identified as means of contributing to the objective of high level of protection of health and the environment⁷, while the latter identifies Article 95 of the treaty establishing the European Community (calling for a high level of protection of health and the environment) as its first basis for the adoption of the directive⁸.

Conclusion on the first issue: High sulfur fuel satisfies all the constituent elements of the definition of hazardous waste of the Bamako Convention, and it is therefore a “*hazardous waste*” within the meaning of the Bamako Convention. Because high sulfur fuel is a hazardous waste under Bamako, its import is banned on the territory of the Bamako Parties.

⁷ See note 5 above

⁸ See note 6 above

2. Whether high sulfur fuels exported from Belgium and the Netherlands to certain Bamako Parties are considered hazardous wastes under the Basel Convention

Article 1 of Basel Convention defines hazardous wastes as:

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

(b) Wastes that are not covered under paragraph (a) but are defined as, or are considered to be, hazardous wastes by the domestic legislation of the Party of export, import or transit.”

“Wastes” are defined as “substances or objects, which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law,”⁹ and “disposal” is “any operation specified in Annex IV to this Convention.”¹⁰

The Annexes thus effectively create a baseline list of wastes that are subject to the Convention, which can be expanded by Parties, in particular through domestic legislation, pursuant to Article 1.1.b.

High sulfur fuels do not meet criteria of Article 1(1)(a) of the Basel Convention because they are not “wastes” destined for disposal by an Annex IV operation.

Article 1.1.b of the Basel Convention however explicitly refers to the definition of hazardous wastes in domestic legislation. It is therefore necessary to assess the legal status of high sulfur fuel in the domestic legislation of importing countries.

As is noted above, the Bamako Convention's definition of hazardous wastes includes high sulfur fuels. There are at least two pathways for the incorporation of the Bamako Convention's definition into the domestic legislation of Bamako Parties: first, parliament may adopt internal laws implementing the international treaty; second, the constitutional legal order may directly incorporate international treaties into the domestic legal order. This latter pathway is referred to as a monist constitutional system, by contrast to a dualist system.¹¹ In other words, the degree to which an international treaty is “directly applied” or “self executing” in a national legal system (*i.e.*: the international treaty is part of the domestic legal system) depends largely on whether a country operates under a monist or dualist system.

In regard to the situation examined under this legal opinion, it appears that no African Country has adopted laws explicitly incorporating Article 2.1.d of the Bamako Convention.

⁹ Basel Convention, Art 2(1).

¹⁰ Ibid Art. 2(4).

¹¹ In monist states, international law does not need to be translated into national law. The act of ratifying an international treaty immediately incorporates the law into national law. Conversely, dualist systems emphasize the difference between national and international law, and require the transposition of the latter into the former. Without this transposition, international law does not exist as domestic law. In the case of countries under a dualist system, it is important to distinguish between the obligations of the state, which arise solely from the ratification process, and the opposability of these obligations in the domestic order, which require an act of transposition.

However, we next explore whether African countries receiving high sulfur fuels operate under a monist system or dualist system.

2.1 Are the African countries importing the high sulfur fuels under a monist or dualist constitutional system?

The monist or dualist nature of a state depends on its internal constitutional order. Because Ghana and Nigeria are not parties to the Bamako Convention, their situation is irrelevant to the present analysis and will therefore not be examined.

2.1.1 Benin

Article 147 of the Benin constitution provides that “[t]reaties or agreements lawfully ratified shall have, upon their publication, an authority superior to that of laws, without prejudice for each agreement or treaty in its application by the other Party”.¹² This constitutional provision establishes a monist system.

Benin has validly ratified the Bamako Convention on 1st December 1997 and deposited the instrument of ratification to the African Union on 21 January 1998.¹³ The Convention’s provisions, in particular Article 2.1.d., are therefore considered an integral part of Benin’s domestic legislation.

2.1.2 Cameroon

Article 45 of the Cameroon Constitution provides that “[d]uly approved or ratified treaties and international agreements shall, following their publication, override national laws, provided the other Party implements the said treaty or agreement”.¹⁴ This constitutional provision establishes a monist system.

Cameroon has validly ratified the Bamako Convention on 11 July 1994 and deposited the instrument of ratification to the African Union on 21 December 1995.¹⁵ The Convention’s provisions, in particular Article 2.1.d., are therefore considered an integral part of Cameroon’s domestic legislation.

2.1.3 Ivory Coast

¹² Loi N° 90-32 du 11 décembre 1990 portant Constitution de la République du Bénin, Art 147, available at <<http://www.cour-constitutionnelle-benin.org/lacourpresent/decrets/Constitution.pdf>> accessed on 11 January 2017 [Translation from https://www.constituteproject.org/constitution/Benin_1990.pdf?lang=en].

¹³ As the Parties representatives have given the information to the African Union, available at <https://www.au.int/en/sites/default/files/treaties/7774-sl-bamako_convention.pdf> accessed on 12 January 2017.

¹⁴ Loi N° 96/06 du 18 janvier 1996 portant Révision de la Constitution du 2 juin 1972, Art 45, available at <<http://www.spm.gov.cm/documentation/textes-legislatifs-et-reglementaires/article/loi-n-9606-du-18-janvier-1996-portant-revision-de-la-constitution-du-02-juin-1972.html>> accessed on 11 January 2017 [Translation from <http://confinder.richmond.edu/admin/docs/Cameroon.pdf>].

¹⁵ As the Parties representatives have given the information to the African Union, available at <https://www.au.int/en/sites/default/files/treaties/7774-sl-bamako_convention.pdf> accessed on 12 January 2017

Pursuant to Article 123 of the new Ivorian Constitution, “[r]atified treaties or agreements shall have, upon their publication, an authority superior to that of laws, provided the other Party implements the said treaty or agreement”.¹⁶

Article 87 of the former 2000 Constitution used exactly the same words and had the same scope as Article 123 of the new Constitution.¹⁷ These constitutional provisions establish a monist system.

Ivory Coast has validly ratified the Bamako Convention on 13 July 1994 and deposited the instrument of ratification to the African Union on 16 September 1994.¹⁸ The Convention’s provisions, in particular Article 2.1.d., are therefore considered an integral part of Ivorian domestic legislation.

2.1.4 Mozambique

Article 18(1) of the Constitution of Mozambique stipulates that “[v]alidly approved and ratified international treaties and agreements shall enter into force in the Mozambican legal order once they have been officially published and while they are internationally binding on the Mozambican State”.¹⁹ This constitutional provision establishes a monist system.

Mozambique has validly ratified the Bamako Convention on 5 February 1999 and deposited the instrument of ratification to the African Union on 29 March 1999.²⁰ The Convention’s provisions, in particular Article 2.1.d., are therefore considered an integral part of Mozambique’s domestic legislation.

2.1.5 Republic of the Congo

Pursuant Article 223 of the Constitution of the Republic of the Congo, “[r]atified or approved treaties or agreements shall have, upon their publication, an authority superior to that of laws, provided the other Party implements the said treaty or agreement”.²¹ This constitutional provision establishes a monist system.

¹⁶ Nouvelle Constitution Ivoirienne du 8 novembre 2016, Art 123, available at <<http://abidjanais.mondoblog.org/files/2016/10/Constitution-ivoirienne.pdf>> accessed on 11 January 2017 [Translation by the author].

¹⁷ Loi N° 2000-513 du 1er août 2000 portant Constitution de la Côte d’Ivoire, Art 87, available at <<http://www.unesco.org/education/edurights/media/docs/ea778cb20fbd7a77fe62ae0c85bbd87c0757abd.pdf>> accessed on 11 January 2017 [Translation by the author].

¹⁸ As the Parties representatives have given the information to the African Union, available at <https://www.au.int/en/sites/default/files/treaties/7774-sl-bamako_convention.pdf> accessed on 12 January 2017.

¹⁹ Constitution of the Republic of Mozambique, entered into force in November 1990, Art 18(1), available at <http://www.presidencia.gov.mz/files/republica/constituicao_republica_moc.pdf> accessed on 11 January 2017 [Translation from <http://faolex.fao.org/docs/pdf/moz117331ENG.pdf>]

²⁰ As the Parties representatives have given the information to the African Union, available at <https://www.au.int/en/sites/default/files/treaties/7774-sl-bamako_convention.pdf> accessed on 12 January 2017.

²¹ Constitution de la République du Congo adoptée par référendum le 25 octobre 2015 et publiée dans le Journal Officiel le 6 novembre 2015, Art 223, available at <http://cour-constitutionnelle.cg/docs/constitution_25_10_2015.pdf> accessed on 11 January 2017 [Translation by the author].

The Republic of the Congo has validly ratified the Bamako Convention on 19 March 1997 and deposited the instrument of ratification to the African Union on 25 June 1997.²² The Convention's provisions, in particular Article 2.1.d., are therefore considered an integral part of the domestic legislation of the Republic of the Congo.

2.1.6 Senegal

Article 98 of the Senegalese Constitution stipulates that “[t]he treaties or agreements regularly ratified or approved have, on their publication, an authority superior to that of the laws, under reserve, for each treaty or agreement, of its application by the other Party”.²³ This constitutional provision establishes a monist system.

Senegal has validly ratified the Bamako Convention on 16 February 1994 and deposited the instrument of ratification to the African Union on 29 March 1994.²⁴ The Convention's provisions, in particular Article 2.1.d., are therefore considered an integral part of the Senegalese domestic legislation.

2.1.7 Togo

Article 140 of the Togolese Constitution provides that “[r]atified or approved treaties or agreements shall have, upon their publication, an authority superior to that of laws, provided the other Party implements the said treaty or agreement”.²⁵ This constitutional provision establishes a monist system.

Togo has validly ratified the Bamako Convention on 6 May 1996 and deposited the instrument of ratification to the African Union on 23 August 1996.²⁶ The Convention's provisions, in particular Article 2.1.d., are therefore considered an integral part of the Togolese domestic legislation.

2.1.8 Gambia

Under Article 7 of the Gambian Constitution, “[i]n addition to this Constitution, the laws of The Gambia consists of –

²² As the Parties representatives have given the information to the African Union, available at <https://www.au.int/en/sites/default/files/treaties/7774-sl-bamako_convention.pdf> accessed on 12 January 2017.

²³ Constitution de la République du Sénégal du 22 janvier 2001, mise à jour le 2 juin 2009, Art 98, available at <<http://www.au-senegal.com/IMG/pdf/Constitution-senegal-juin2009.pdf>> accessed on 11 January 2017 [Translation from https://www.constituteproject.org/constitution/Senegal_2009.pdf?lang=en].

²⁴ As the Parties representatives have given the information to the African Union, available at <https://www.au.int/en/sites/default/files/treaties/7774-sl-bamako_convention.pdf> accessed on 12 January 2017.

²⁵ Constitution de la IV^e République Togolaise adoptée par référendum le 27 septembre 1992, promulguée le 14 octobre 1992 et révisée par la loi n°2002-029 du 31 décembre 2002, Art 140, available at <<http://www.antogo.tg.refer.org/IMG/pdf/CONSTITUTION.pdf>> accessed on 11 January 2017 [Translation by the author].

²⁶ As the Parties representatives have given the information to the African Union, available at <https://www.au.int/en/sites/default/files/treaties/7774-sl-bamako_convention.pdf> accessed on 12 January 2017.

- (a) *Acts of the National Assembly made under this Constitution and subsidiary legislation made under such acts;*
- (b) *Any Orders, Rules, Regulations or other subsidiary legislation made by a person or authority under a power conferred by this Constitution or any other law;*
- (c) *The existing laws including all decrees passed by the Armed Forces Provisional Ruling Council;*
- (d) *The common law and principles of equity;*
- (e) *Customary law so far as it concerns members of the communities to which it applies;*
- (f) *The Shari'a as regards matters of marriage, divorces and inheritance among members of the communities to which it applies".*²⁷

The Constitution does not refer to the international instruments as being part of the internal legal order, which indicates a dualist system requiring that international treaties and agreements shall be translated into orders, rules or regulations to become applicable within the Gambian legal system.

Although Gambia has not transposed the provisions of the Bamako Convention in its internal legal order, it remains a party to the Convention. Gambia has ratified the Bamako Convention on 26 June 2000 and deposited the instrument of ratification to the African Union on 8 September 2000.²⁸ As such, it is under an international obligation to ban the import of hazardous waste as defined by the Convention.

Conclusion on the second issue: As indicated above, high sulfur fuels are considered hazardous wastes by the domestic legislation in Benin, Cameroon, Ivory Coast, Mozambique, Republic of the Congo, Senegal and Togo. Therefore, in respect of exports from Belgium and the Netherlands to these Basel Parties (which are also Parties to the Bamako Convention), high sulfur fuels fall under the definition of hazardous wastes in Article 1.1.b. of the Basel Convention.

Furthermore, Ivory Coast has specifically reported to the Basel Convention Secretariat that under Article 1(1)(b), hazardous wastes include hazardous wastes as defined by the Bamako Convention.²⁹

²⁷ Constitution of the Second Republic of the Gambia (adopted on 8 August 1996, entered into force in January 1997, last amended in 2001), Art 7, available at <<http://www.wipo.int/edocs/lexdocs/laws/en/gm/gm001en.pdf>> accessed on 11 January 2017.

²⁸ As the Parties representatives have given the information to the African Union, available at <https://www.au.int/en/sites/default/files/treaties/7774-sl-bamako_convention.pdf> accessed on 12 January 2017.

²⁹ Basel Convention, Electronic Reporting System of the Basel Convention, Ivory Coast (2014). available at <<http://ers.basel.int/ERS-Extended/FeedbackServer/fsadmin.aspx?fscontrol=respondentReport&surveyid=65&voterid=47194&readonly=1&nomenu=1>> accessed on 16 January 2017.

3. What are the obligations of Belgium and the Netherlands in relation to their export of high sulfur fuels to African Countries, Parties to the Bamako Convention?

In respect of export of high sulfur fuels from their territories, Belgium and the Netherlands are bound by international obligations arising out of the Basel Convention, international customary law and international human rights law, as detailed next.

3.1 Obligations of Belgium and the Netherlands under the Basel Convention

Basel Parties have officially been notified of the relevance of the Bamako Convention to the implementation of the Basel Convention in general and to the definition of hazardous wastes in particular:

Article 4(1)(a) of the Basel Convention provides that *“Parties exercising their right to prohibit the import of hazardous wastes or other wastes for disposal shall inform the other Parties of their decision pursuant to Article 13.”*

Article 4(1)(b) of the Basel Convention specifies that Parties *“shall not permit the export of hazardous wastes and other wastes to the Parties which have prohibited the import of such wastes, when notified pursuant to subparagraph (a) above.”*

Basel Parties thus have a clear obligation to prohibit the export of those wastes to the Parties that have provided notification, pursuant to Article 4(1)(b).³⁰

According to the Basel Convention Secretariat, the prohibition of importation *“can be a unilateral act by a Party, which must be noticed to all Parties through the Secretariat, or it can be embedded in an international agreement, for instance the 1991 Bamako Convention on the Ban of the Import Into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa which prohibits the import of hazardous wastes into Africa from non-contracting Parties.”*³¹

The Basel and Bamako Conventions share the same Secretariat,³² and the Basel Secretariat has formally identified the Bamako Convention as a regional agreement related to the Basel Convention.³³

³⁰ Article 4(1)(b) of the Basel Convention specifies that Parties *“shall not permit the export of hazardous wastes and other wastes to the Parties which have prohibited the import of such wastes, when notified”* in accordance with the process prescribed by the Convention.

³¹ Basel Convention: *Controlling transboundary movements of hazardous wastes*, Section 1, available at <<http://www.basel.int/Portals/4/Basel%20Convention/docs/pub/leaflets/leaflet-control-procedures-en.pdf>> accessed on 16 January 2017.

³² Resolutions and decisions adopted by the United Nations Environment Assembly of the United Nations Environment Programme at its first session on 27 June 2014, Decision 1/16 (authorizing the Executive Director to carry out the secretariat functions specified in decision 1/6 of the first Conference of Parties to the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa on such mutually agreed terms as the Executive Director and the parties see fit and in accordance with decision 1/6 of the First Conference of the Parties to the Bamako Convention).

³³ Basel Convention, Text of the Multilateral / Regional Agreements or Arrangements in Force as Transmitted to the Secretariat, available at <<http://www.basel.int/Countries/Agreements/MultilateralAgreements/tabid/1518/Default.aspx>> accessed on 16 January 2017.

Furthermore, as indicated above, Ivory Coast has specifically reported to the Basel Convention Secretariat that under Article 1(1)(b), hazardous wastes include hazardous wastes as defined by the Bamako Convention.³⁴

Belgium and the Netherlands have a legal obligation to ban the export of high sulfur fuels to countries where the Bamako definition of hazardous wastes is part of the domestic legislation (e.g.: in Benin, Cameroon, Ivory Coast, Mozambique, Republic of the Congo, Senegal and Togo). The export from Belgium and the Netherlands of high sulfur fuels to these States is in violation of the Basel Convention.

3.2 Obligations of Belgium and the Netherlands under international customary law: the duty not to frustrate the object and purpose of the Basel Convention

According to well-established international customary law, Basel Parties should not act in a way that makes it more difficult for other Basel Parties to fulfill their international obligations under the treaty. The Basel Convention clearly prohibits the export of hazardous wastes and other wastes to the Parties that have prohibited the import of such wastes. Basel Parties are officially on notice that the Bamako Convention prohibits the import of hazardous wastes to the territories of its Parties. Consequently Basel Parties are required to prohibit the export of high diesel fuels to all Bamako Parties.

3.3 Obligations of Belgium and the Netherlands under international human rights law: the extraterritorial dimension of the right to health

Fuels containing high levels of sulfur, benzene, polyaromatics, and manganese are banned in the territories of the Member States of the European Union, in order to protect the health of EU citizens and the environment. Belgium and the Netherlands are nevertheless authorizing the export of high sulfur fuels to a number of developing States in West Africa, despite the knowledge that the combustion of high sulfur fuels harms the health and environment in West African States.

International human rights law establishes the international responsibility of Belgium and the Netherlands for nullifying and impairing the right to health in States importing high sulfur fuels from Belgium and The Netherlands.

Both Belgium and the Netherlands are Parties to the Covenant on Economic, Social and Cultural Rights. This international treaty recognizes and protects the right to health, establishes international obligations that contain no jurisdictional or territorial limitation, and calls upon Parties to cooperate in the progressive realization of human rights.

The extraterritorial reach of human rights obligations has been distilled and restated by international law publicists in the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (the Maastricht Principles).³⁵ The

³⁴ Basel Convention, Electronic Reporting System of the Basel Convention, Ivory Coast (2014) (n 27).

³⁵ The Maastricht Principles are a restatement of applicable international law adopted by 40 international experts in international law and human rights, including current and former UN Special Procedures and human rights treaty body members. The ETO Consortium, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* (January 2013), available at http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23 [hereinafter *Maastricht Principles*]; *see also* De Schutter

Maastricht Principles explain that all States have obligations to respect, protect and fulfill human rights, including civil, cultural, economic, political and social rights, both within their territories and extraterritorially.³⁶ These extraterritorial obligations find concrete expression in the duty to take action through international cooperation to fulfill the right to health.³⁷ Under principles of human rights law, the Netherlands and Belgium therefore have a duty to cooperate with all other States to advance the realization of the right to health, including the Bamako Parties.

The Maastricht Principles also articulate the obligation to avoid causing harm, as follows:

“States must desist from acts and omissions that create a real risk of nullifying or impairing the enjoyment of economic, social and cultural rights extraterritorially. The responsibility of States is engaged where such nullification or impairment is a foreseeable result of their conduct.”³⁸

It is well understood that high sulfur fuels carry grave impacts on health and the environment. In fact, EU regulations have banned the use of high sulfur fuels in the European Union on account of their impact on health and the environment. Accordingly, both Belgium and the Netherlands have actual knowledge of the serious harm on health and the environment resulting from the use of high sulfur fuels. It is therefore foreseeable that the failure to ban export of high sulfur fuels to other States will impair the realization of the right to health.

Conclusion on the third issue: Since high sulfur fuels fall under the definition of hazardous wastes under the Basel Convention in respect of Bamako Parties that have incorporated the Bamako definition of hazardous waste into their domestic legislation, their export from Belgium and the Netherlands to these States is in violation of the Basel Convention.

In regard to international customary law, Basel Parties should not act in a way that makes it more difficult for other Basel Parties to fulfill their international obligations under the treaty. The export of high sulfur fuels that harm health and the environment frustrates the object and purpose of the Basel Convention and is thus in breach of customary law.

In regard to the extraterritorial human rights obligations incumbent upon Belgium and the Netherlands, there is ample knowledge that high sulfur fuels are detrimental to health and the environment. The failure by Belgium and the Netherlands to ban export of high sulfur fuels to African States impairs the right to health in those States, and it therefore constitutes a breach by Belgium and The Netherlands of their international human rights obligations.

et al., *Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, HUMAN RIGHTS QUARTERLY, Vol. 34, p. 1084 (2012) also available at http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=63 (accessed 05 January 2017).

³⁶ Maastricht Principles, at 3.

³⁷ Id., at 28.

³⁸ Article 1 and 13 of Maastricht Principles on the Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights. Cf. note 35.

Conclusion

While Belgium and the Netherlands have banned high sulfur fuels in their territories on account of their harmful effects on health and the environment, they nevertheless are allowing exports of such high sulfur fuels to West African States. Both exporting countries (Belgium and the Netherlands) and importing countries are Parties to the Basel Convention and most States importing high sulfur fuels in West Africa are Parties to the Bamako Convention.

A question has been raised about the legality of such exports from Belgium and the Netherlands under the Basel Convention.

In order to answer this question, this legal opinion analyzed: 1/ whether the high sulfur fuels exported are considered hazardous wastes under the Bamako Convention; 2/ whether they are considered hazardous wastes under the Basel Convention; and 3/ what are the international legal obligations of Belgium and The Netherlands in relation to these exports.

The legal opinion concluded that:

High sulfur fuels satisfies all the constituent elements of the definition of hazardous wastes of the Bamako Convention, and it is therefore a “*hazardous wastes*” within the meaning of the Bamako Convention. Because high sulfur fuels are hazardous wastes under Bamako, its import is banned on the territory of the Bamako Parties.

High sulfur fuels further satisfy the definition of hazardous wastes under the Basel Convention where the Bamako definition of hazardous wastes is part of the domestic legislation of the importing States, such as in Benin, Cameroon, Ivory Coast, Mozambique, Republic of the Congo, Senegal and Togo.

The Basel Convention clearly prohibits the export of hazardous wastes and other wastes to Parties that have prohibited the import of such wastes. The export from Belgium and the Netherlands of high sulfur fuels to these States is thus in violation of the Basel Convention.

Furthermore, according to well-established international customary law, Basel Parties should not act in a way that undermines the ability of other Basel Parties to fulfill their international obligations under the treaty. Consequently the export from Belgium and the Netherlands of high sulfur fuels to any Bamako party is in violation of international customary law.

Moreover, given the ample knowledge that exists regarding the detrimental effects of high sulfur fuels to health and the environment, the Belgian and Dutch failure to ban their export to African Countries, including those not parties to the Bamako Convention, is a breach of their international human rights obligations.

In conclusion, the export of high sulfur fuels from Belgium and The Netherlands therefore constitutes a violation of these countries international obligations under the Basel Convention, international customary law, and international human rights law.