

NOT YOUR DUMPING GROUND: CRIMINALIZATION OF TRAFFICKING IN HAZARDOUS WASTE IN AFRICA

MATIANGAI V.S. SIRLEAF*

ABSTRACT

This Article examines how the African Union's adoption of the Malabo Protocol seeks to improve upon the limitations of the international legal framework for regulating hazardous waste. The Malabo Protocol criminalizes trafficking in hazardous waste and envisions a regional forum for such prosecutions, which presents an opportunity for African states to alter the status quo in environmental protection. This Article examines how the troubling history of toxic colonialism in Africa helped to inform the attempt to criminalize the trafficking of hazardous waste and create a forum under the Malabo Protocol for combating dirty dumping.

This Article explores how the inadequate international legal framework for regulating hazardous waste, led to the attempt to create a more robust regional regime under the Bamako Convention, with the Malabo Protocol serving as the vehicle for regional enforcement. It evaluates whether the Protocol furthers the punitive objectives of the Bamako regime to punish and deter trafficking in hazardous waste. It does this by analyzing whether the regional prosecution of dirty dumping is consistent with the newer theories of punishment, as well as some of the more traditional goals of punishment.

This Article also analyzes the implications of the regional prosecution of dirty dumping under the Malabo Protocol. It assesses the potential challenges that might arise in the attempt to regionally prosecute trafficking in hazardous waste and suggests ways these issues can be resolved through creative interpretation of the Malabo Protocol. Lastly, this Article concludes that the Malabo Protocol's provision for a regional forum for the prosecutions of traffickers of hazardous waste

* Assistant Professor of Law, University of Pittsburgh School of Law. I would like to thank Ifeoma Ajunwa, Rabia Belt, Kamari Clarke and the participants in the University of Pittsburgh School of Law's Junior Faculty Emerging Ideas workshop for their helpful comments on earlier drafts. I would also like to thank Jacqueline Jones for her research assistance. I take full responsibility for any errors.

presents another venue for African states whose domestic judiciaries and related institutions may have limited resources. If implemented, the Protocol could facilitate closing the global impunity gap for dirty dumping in Africa.

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INTRODUCTION

“We talk of globalization, of the global village, but here in Africa we are under the impression of being that village’s septic tank.”
- Haïdar el Ali, Senegalese Minister of Ecology¹

The African Union (AU) adopted the Malabo Protocol, which would create the first-ever regional criminal tribunal, if it attains sufficient ratifications.² The Protocol requires 15 ratifications before it can come into force; at the time of writing eleven states have signed it.³ The Protocol criminalizes trafficking in hazardous waste⁴ and presents an opportunity for African states to alter the *status quo* in environmental protection. No existing international criminal tribunals have jurisdiction over trafficking in hazardous waste.⁵ African states may be particularly sensitive to concerns about toxic waste, given a history of negative external interventions.⁶ This article argues that regional cooperation

¹ Christopher Parayre, *Africa: The world’s ‘septic tank’*, MAIL & GUARDIAN (Sept. 25, 2006), <https://mg.co.za/article/2006-09-25-africa-the-worlds-septic-tank>.

² Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, art. 16, May 15-16, 2014, A.U. Doc. No. STC/Legal/Min/7(I) Rev.1 [hereinafter Malabo Protocol]. The Assembly of the AU adopted the Malabo Protocol on June 30, 2014 at its Twenty-Third Ordinary Session. See Decision on the Draft Legal Instruments, A.U. Doc. No. Assembly/AU/Dec.529 (XXIII) (entered into force June 30, 2014). The regional criminal court would be composed of a Pre-Trial Chamber, a Trial Chamber, and an Appellate Chamber. Malabo Protocol, *supra* note 2, art. 16(1); see also DINAH L. SHELTON & PAOLO G. CARROZA, REGIONAL PROTECTION OF HUMAN RIGHTS 1019 (ed. 2013) (characterizing this as “revolutionary”).

³ See Parties to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, AFR. UNION, <http://www.au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights> (last visited Mar. 22, 2018) [hereinafter Parties to the Malabo Protocol].

⁴ Malabo Protocol, *supra* note 2, art. 28L.

⁵ See generally Agreement for and Statute of the Special Court for Sierra Leone, U.N.-Sierra Leone, Jan. 16, 2002, <http://www.scs-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3d&tabid=176> [hereinafter SCSL Statute]; Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; S.C. Res. 1315, U.N. SCOR, 55th Sess., U.N. Doc S/RES/1315 (Aug. 14, 2000) (on the establishment of the SCSL); Statute International Criminal Tribunal for Rwanda, S.C. Res. 955 (Nov. 8, 1994), <http://www.unict.org/Portals/0/English/Legal/Statute/2010.pdf> [hereinafter ICTR Statute]; Statute International Criminal Tribunal for the former Yugoslavia, S.C. Res. 827 (May 25, 1993), http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf [hereinafter ICTY Statute].

⁶ For further discussion, see Henry J. Richardson, *African Grievances and the International Criminal Court: Issues of African Equity Under International Criminal Law*, in AFRICA AND THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 81, 88–89 (Vincent O. Nmeihelle ed., 2012) (discussing the continent’s history with slavery, colonialism, and neo-colonialism).

through the criminal tribunal might assist with more effective prosecution of toxic dumping incidents. This is especially so because the Protocol provides for corporate criminal liability,⁷ which presents a significant innovation for the field of international criminal justice.⁸

This article examines how the AU's adoption of the Malabo Protocol seeks to improve upon the limitations of the international legal framework for regulating hazardous waste. Little to no scholarship exists on the Malabo Protocol's provision criminalizing trafficking in hazardous waste. This article illuminates an under-researched area and provides a robust analysis of the criminalization of trafficking in hazardous waste in Africa. This article situates the Malabo Protocol's provision criminalizing the trafficking in hazardous waste as part of the larger environmental justice movement and the struggle against corporate, government, and individual polluters.

Environmental justice as a field is primarily concerned with inequitable distribution, the lack of recognition, limited participation, the critical lack of capabilities, the inequitable application of environmental regulations, and the systematic exclusion from environmental policies and decisions amongst others.⁹ Robert Nixon coined the term "slow violence" to describe a violence of delayed destruction that is "dispersed throughout time and space" to disposable bodies.¹⁰ His work draws attention to categories of violence that unfolds over years and decades, is often exponential, and operates as a major threat multiplier, in the same way that toxic dumping can.¹¹ Such work complicates our understanding of violence because it does not conceive of violence as spectacular, immediately sensational, or hyper-visible.¹² The concept of slow violence

⁷ Malabo Protocol, *supra* note 2, art. 46C. This article relies on the broad definition of "hazardous waste" in the Bamako Convention, including wastes from particular streams in manufacturing processes, or hazardous constituent materials, wastes considered hazardous under the domestic laws of the country of export, import, or transit, as well as wastes outlawed in the exporting country due to human health or environmental reasons, and radioactive wastes. See Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, art. 2, Annex I, Annex II, Jan. 29, 1991, (entered into force Apr. 22, 1998) [hereinafter Bamako Convention].

⁸ None of the existing international criminal tribunals provide for corporate criminal liability. See SCSL Statute, *supra* note 5; Rome Statute, *supra* note 5; ICTR Statute, *supra* note 5; ICTY Statute, *supra* note 5.

⁹ See Workineh Kelbessa, *Environmental Injustice in Africa*, 9 CONTEMP. PRAGMATISM 99, 105 (2012).

¹⁰ ROB NIXON, SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR 2 (Harvard Univ. Press rev. ed. 2011) (discussing the analogous concept of slow violence).

¹¹ *Id.* at 3.

¹² *Id.* at 13.

allows us to consider more forcefully the violence caused by environmental harms like toxic dumping.

The dumping of toxic waste in the Global South, and particularly in African countries is by no means an exceptional or recent phenomenon.¹³ This article will demonstrate the problematic trend of “toxic colonialism,” in which African states are used as “disposal sites for waste rejected” by more developed states.¹⁴ The term “colonialism” is used to signify the relationship between countries in the Global North (more industrial developed countries in the Northern Hemisphere) that export the risks of toxic waste to countries in the Global South (less developed countries that generally make up the Southern Hemisphere) who do not “share in the benefits of the production process that generates those wastes.”¹⁵ This pattern resembles some of the characteristics of historical colonialism in that toxic colonialism is similarly driven by economic dependence, exploitation, and inequality.¹⁶

As I argued elsewhere, the regional criminal court proposed in the Malabo Protocol can be understood as part of an emerging regime complex in the field of international criminal law.¹⁷ Regime complexes consist of “several legal agreements that are created and maintained in distinct fora with participation of different sets of actors.”¹⁸ They allow for greater creativity and flexibility. This adaptability is evident in the types of crimes covered by the regional criminal court, especially the attempt to regulate the trafficking in hazardous waste.

Part I of this article provides a brief background on how the history of toxic colonialism in Africa helped to inform the attempt to criminalize the trafficking of hazardous waste in the Malabo Protocol. Part II explores how the inadequate international legal framework for regulating hazardous waste led to the criminalization of trafficking in

¹³ See Rob White, *Toxic Cities: Globalizing the Problem of Waste*, 35 SOCIAL JUST. 107 (2008).

¹⁴ Laura A. W. Pratt, *Decreasing Dirty Dumping? A Reevaluation of Toxic Waste Colonialism and the Global Management of Transboundary Hazardous Waste*, 41 TEX. ENVTL. L.J. 147, 151 (2011) (discussing how the term “toxic colonialism” was coined by Greenpeace to describe the dumping of “industrial wastes of the West on territories of the Third World”).

¹⁵ See, e.g., Samuel O. Atteh, *Political Economy of Environmental Degradation: The Dumping of Toxic Waste in Africa*, 30 INT’L STUD. 277, 278 (1993) (discussing the unfairness of this relationship).

¹⁶ See Pratt, *supra* note 14, at 151–52.

¹⁷ Matiangai V.S. Sirleaf, *Regionalism, Regime Complexes and the Crisis in International Criminal Justice*, 54 COLUM. J. TRANSNAT’L L. 699, 699 (2016).

¹⁸ Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT’L ORG. 277, 279 (2004).

hazardous waste in Africa and the provision for a regional forum for prosecution through the Malabo Protocol. Part III analyzes how the regional prosecution of trafficking in hazardous waste contributes towards some of the newer theories of punishment, as well as some of the more traditional goals of punishment. Part III also discusses how any potential implementation challenges might be resolved through creative interpretation of the Protocol. Lastly, this article concludes that the regional criminal court's prosecution of trafficking in hazardous waste presents another possibility for African states whose domestic judiciaries and related institutions may not be able to prosecute this offense, especially given that the international system has failed to prosecute trafficking in hazardous waste or corporations involved in toxic dumping.

I. OVERVIEW OF TOXIC COLONIALISM IN AFRICA

The toxic dumping discussed in this part illustrates the disturbing pattern of colonialism, marked by economic dependence, exploitation, and inequality.

A. THE GLOBAL INCREASE & CAUSES OF TRAFFICKING IN HAZARDOUS WASTE

In 2000, worldwide generation of hazardous waste was 400 million metric tons, with almost all of this amount originating in developed nations.¹⁹ It is estimated that by 2020, the total production of hazardous waste in the Global North will have increased by 60% annually.²⁰ Most of the estimates of the transboundary movement of hazardous waste from the Global North to the Global South are quite small.²¹ However, all of the estimates are based on the legal transfer of hazardous waste since “illegal transboundary exchanges of hazardous waste [are] much more difficult” to quantify.²²

¹⁹ See DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 947 (3d ed. 2007).

²⁰ See, e.g., DAVID NAGUIB PELLOW, RESISTING GLOBAL TOXICS: TRANSNATIONAL MOVEMENTS FOR ENVIRONMENTAL JUSTICE 33 (Robert Gottlieb ed., 2007).

²¹ See, e.g., HUNTER ET AL., *supra* note 19, at 947 (estimating that only 4% of the generated hazardous waste actually travels across borders).

²² Pratt, *supra* note 14, at 153.

Irrespective of the exact amount of hazardous waste, toxic dumping in Africa is a significant problem for several reasons. People that are exposed to toxic waste can experience dire health consequences including respiratory problems, birth defects, burns, miscarriages, nausea, severe headaches, paralysis, frequent illness, irritation of the eyes and skin, various types of cancer, brain damage, intestinal disease, stunted growth, harm to the immune system, pathological conditions, and death.²³ If not properly treated, toxic waste can not only threaten human life, but can also lead to ecological, geological, and environmental disasters. For example, contaminated soil, groundwater, and streams can endanger public health and the environment.²⁴ A significant percentage of Africans live in rural areas that are dependent on groundwater and streams for domestic and agricultural uses.²⁵ The disposal of hazardous waste in landfills can easily result in water and food contamination.²⁶ The lack of the necessary infrastructure, facilities, environmental technology, and economic resources means that toxic dumping on the continent has much more devastating consequences than it does elsewhere.²⁷

Given these negative consequences, why does toxic colonialism persist? The key driver is profit.²⁸ Toxic colonialism is also furthered by certain structural changes of and in the global system, including the “restructuring of the nation-state and the growth of interdependence.”²⁹ The age of globalization³⁰ is marked by the increased mobility of capital and competition amongst states to attract foreign direct investment. For example, the amount of money offered for permission to import hazardous waste into African countries is sometimes more than the individual country’s gross national product or its total foreign debt.³¹ Accordingly, individual developing countries are dissuaded from taking

²³ See Kelbessa, *supra* note 9, at 109.

²⁴ Atteh, *supra* note 15, at 279.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ See Pratt, *supra* note 14, at 154.

²⁹ Anél Ferreira-Snyman, *Regionalism and the Restructuring of the United Nations with Specific Reference to the African Union*, 44 COMP. & INT’L L.J. S. AFR. 360, 362 (2011).

³⁰ See Adam Lupel, *Regionalism and Globalization: Post-Nation or Extended Nation?* 36 POLITY 153, 155 (2004). Globalization is a term that “summarizes a variety of processes that together increase the scale, speed, and effectiveness of social interactions across political, economic, cultural, and geographical borders.” *Id.*

³¹ See David M. Dzidzornu, *Marine Pollution Control in the West and Central African Region*, 20 QUEENS L.J. 439, 451 n.31 (1995).

additional regulatory measures that would force multinational corporations (MNCs)³² to comply with environmental and human rights obligations.³³ For instance, in some African countries, there are “no real treatment process[es] and no proper storage”³⁴ options for hazardous waste. Indeed, the United Nations Environment Program (UNEP) noted that “it costs as little as \$2.50 per ton to [legally] dump hazardous waste in Africa as opposed to \$250 per ton in Europe.”³⁵ Consequently, since the late 1970s, toxic waste has been exported increasingly to Africa.³⁶

B. HISTORICAL DEVELOPMENT OF TOXIC COLONIALISM IN AFRICA

Toxic colonialism manifests in many ways: from Western MNCs rarely having track records of safe waste disposal, to the receiving countries not being accurately informed about the dangers of the hazardous waste,³⁷ to the lack of capacity of countries in the Global South to deal with the aftermath of dumping. In the mid-1980s, a number of African countries had private local companies, individuals, and governments openly or secretly sign waste disposal contracts with waste brokers.³⁸ These contracts authorized waste brokers “to use certain designated areas” for dumping hazardous waste.³⁹ For example, the governments of Benin and Guinea-Bissau signed lucrative contracts with companies in the Global North to dump hazardous waste in their

³² Multinational corporations (MNCs) or transnational corporations (TNCs) “are economic entities operating in more than one country or a cluster of economic entities operating in two or more countries.” See Economic and Social Council Res., U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003).

³³ See Lupel, *supra* note 30, at 157 (discussing how globalization challenges states in their: administrative effectiveness, territorial sovereignty, collective identity, and democratic legitimacy).

³⁴ Fred Bridgland, *Europe’s New Dumping Ground: Fred Bridgland reports on how the West’s toxic waste is poisoning Africa*, SUNDAY HERALD (Oct. 1, 2006), http://archive.ban.org/ban_news/2006/061001_dumping_ground.html (quoting the French environmental group “Robin Hood of the Forest”).

³⁵ UNITED NATIONS ENVIRONMENTAL PROGRAM, AFTER THE TSUNAMI: RAPID ENVIRONMENTAL ASSESSMENT 135 (2005), <http://allafrica.com/download/resource/main/main/idates/00010390:6cf8736d0bf3cee68015608214d00f53.pdf> [hereinafter UNEP Report].

³⁶ See Atteh, *supra* note 15, at 281 (discussing how France and the U.S. export “enormous amounts of hazardous waste to Africa”).

³⁷ See James Brooke, *Waste Dumpers Turning to West Africa*, N.Y. TIMES (July 17, 1988) at A1, <http://www.nytimes.com/1988/07/17/world/waste-dumpers-turning-to-west-africa.html?pagewanted=all>.

³⁸ See Kelbessa, *supra* note 9, at 109.

³⁹ Atteh, *supra* note 15, at 281.

territories for a specified period of time.⁴⁰ In Benin, the company falsely described the hazardous waste material in the ten-year contract as “complex organic matter” and “ordinary industrial wastes.”⁴¹ In Guinea, a Norwegian shipping company brokered a deal in 1988 to dump on Kassa, a resort island not too far from the capital.⁴² The company unloaded 15,000 tons of a substance listed as “raw material for bricks” in an abandoned quarry.⁴³ Subsequently, visitors from the mainland noticed that the island’s vegetation began to shrivel.⁴⁴ A government investigation later discovered that in fact the material was incinerator ash from Philadelphia.⁴⁵ Following the incident, the government of Guinea arrested at least thirteen people,⁴⁶ including the Norwegian Consul-General who was accused of forging an import license to enable the company to import the hazardous waste.⁴⁷ International furor ensued, and a Norwegian freighter completed removal of the hazardous waste in July of 1988.⁴⁸

This pattern of toxic colonialism is replicated in Somalia’s experience with hazardous waste dumping. In 1992, Italian and Swiss MNCs purportedly negotiated an \$80 million, twenty-year contract with the “Minister of Health” to dump toxic waste.⁴⁹ This is despite the reality that Somalia was embroiled in a devastating civil war with none of the warring factions able to claim any sense of legitimacy or hold on power. The dumping began in the early 1980s and continued throughout the civil war.⁵⁰ The financial arrangements undoubtedly helped to fuel the conflict and gave powerful incentives to the various warlords to ignore

⁴⁰ For further discussion see *id.* at 285–86.

⁴¹ Brooke, *supra* note 37.

⁴² *See id.*

⁴³ *See id.*

⁴⁴ *See id.*

⁴⁵ *See id.*; see also Mark Jaffe, *Tracking the Khian Sea: Port to Port, Deal to Deal*, PHILA. INQUIRER (July 15, 1988), http://articles.philly.com/1988-07-15/news/26236354_1_khian-sea-coastal-carriers-incinerator-ash (discussing how efforts to dispose of the Philadelphia ash failed in Chile, Honduras, Haiti, the Bahamas, the Dominican Republic, and Costa Rica before it reached the West Coast of Africa).

⁴⁶ See Barbara Huntoon, *Emerging Controls on Transfers of Hazardous Waste to Developing Countries*, 21 LAW & POL’Y INT’L BUS. 247, 250 (1989).

⁴⁷ *See* Atteh, *supra* note 15, at 285.

⁴⁸ *See* Brooke, *supra* note 41.

⁴⁹ Hao-Nhien Q. Vu, *The Law of Treaties and the Export of Hazardous Waste*, 12 UCLA J. ENV’T L. & POL’Y 389, 390 (1994).

⁵⁰ *See* UNEP Report, *supra* note 35, at 134.

environmental and public health repercussions.⁵¹ Italian authorities initiated an investigation into the company's hazardous waste trade in 1997.⁵² Due to the continued violence and political instability in Somalia, the prospects for a successful clean-up are limited.

The dumping of toxic waste in Somalia gained renewed international attention following the 2004 tsunami.⁵³ The waves from the tsunami exposed containers, which held "radioactive waste, lead, cadmium, mercury, flame retardants, hospital waste, and cocktails of other deadly residues," on Somalia's shores.⁵⁴ "Subsequent cancer clusters have also been linked to Europe's special gift to the country, delivered by that tsunami."⁵⁵ A report by UNEP found the release of the deadly substances caused health and environmental problems to the surrounding communities including contamination of groundwater.⁵⁶ Moreover, many people subsequently complained of unusual health problems caused by the tsunami winds blowing the hazardous waste, including: acute respiratory infections, dry heavy coughing and mouth bleeding, abdominal hemorrhages, unusual skin chemical reactions, and sudden death after inhaling toxic materials.⁵⁷

Nigeria's experience also exhibits the problematic pattern of countries in the Global North exporting the risks of toxic waste to countries in the Global South, who do not share in the benefits of the production process of the waste.⁵⁸ In Nigeria, a businessman permitted two Italian MNCs to use his residential property to store 18,000 drums of hazardous waste in 1987.⁵⁹ His property was located in Koko, Nigeria, a small rural community located on the Niger River.⁶⁰ The line ship, which was registered in Germany, was refused entry in Europe because the ship had been found to be carrying "highly poisonous chemical waste" before

⁵¹ See Bridgland, *supra* note 34.

⁵² See Kelbessa, *supra* note 9, at 110.

⁵³ *Id.* at 109.

⁵⁴ Bridgland, *supra* note 34.

⁵⁵ *Id.*

⁵⁶ UNEP Report, *supra* note 35, at 134.

⁵⁷ *Id.*

⁵⁸ See, e.g., Sylvia F. Liu, *The Koko Incident: Developing International Norms for the Transboundary Movement of Hazardous Waste*, 8 J. NAT. RESOURCES & ENV'T'L. L. 121 (1992); *Toxic Terrorism*, WEST AFRICA, June 20, 1988, at 1108; Special correspondent, *Nigeria: Koko's Radioactive Waste*, WEST AFRICA, Aug. 1, 1988, at 1388.

⁵⁹ See Kelbessa, *supra* note 9, at 109.

⁶⁰ See Atteh, *supra* note 15, at 283.

it made its way to Nigeria.⁶¹ The businessman charged \$100 a month for the storage of the toxic waste.⁶² The ship delivered four shipments of the waste before media exposure of the crime alerted the Nigerian authorities.⁶³ A Nigerian construction company falsified documents to the government, which allowed the company to import the toxic waste under the pretense that it was importing “building materials.”⁶⁴ Nineteen individuals in the area died, including the businessman who stored the waste in his backyard, and others suffered adverse effects including chemical burns.⁶⁵ Moreover, due to exposure a member of the crew who reloaded the waste was paralyzed, while the dockworkers that repackaged the waste on board the ship reportedly vomited blood.⁶⁶ Nigeria’s government responded forcefully—it recalled its ambassador to Italy, demanded that Italy remove the waste at once, and seized an Italian ship docked in its harbor.⁶⁷ The government also enacted a decree making the trafficking in hazardous waste a capital crime, but later reduced the punishment to life imprisonment.⁶⁸ It also passed a decree in 1988, which barred citizens from negotiating toxic waste contracts with foreign companies.⁶⁹

The patterns of economic dependence, exploitation, and inequality that characterized the Nigerian and Somalian toxic dumping incidents resurfaced more than twenty years later in Côte d’Ivoire. Outrage about toxic dumping in Nigeria in 1988, led Côte d’Ivoire to adopt a law that provides for prison terms of up to twenty years and fines of up to \$1.6 million for individuals who import hazardous waste.⁷⁰ In August of 2006, a ship named the Probo Koala, which was chartered by the Dutch-based oil and service shipping company Trafigura Beheer BV, offloaded toxic waste.⁷¹ The Probo Koala left the waste at the port of

⁶¹ *Id.*

⁶² See Kelbessa, *supra* note 9, at 109.

⁶³ See Atteh, *supra* note 15, at 282–83.

⁶⁴ *Id.* at 284.

⁶⁵ See *id.*

⁶⁶ *Id.*; see also Kelbessa, *supra* note 9, at 109.

⁶⁷ See Atteh, *supra* note 15, at 283.

⁶⁸ See Joel Millman, *Exporting Hazardous Waste: From Developed to Third World Nations*, *TECH. REV.*, Apr. 1989, at 7; see also Kingsley Moghalu, *Nigeria Gets Tough on Toxic Dumping*, *CHRISTIAN SCI. MONITOR*, Mar. 30, 1989, <https://www.csmonitor.com/layout/set/print/1989/0330/odump.html>.

⁶⁹ See Atteh, *supra* note 15, at 287.

⁷⁰ See Brooke, *supra* note 41, at 2.

⁷¹ See Amnesty International and Greenpeace, *The Toxic Truth*, *AMNESTY INT’L* 8, (Sept. 25, 2012),

Abidjan, the capital city of Côte d'Ivoire.⁷² A local contractor of Trafigura disposed of the waste at approximately eighteen open-air sites in and around the city of Abidjan.⁷³ Similar to the hazardous dumping incident in Nigeria, the ship had attempted to discharge its waste in Europe, but was unable to due to the toxicity of the waste.⁷⁴ People living near the discharge sites began to suffer from a range of illnesses: nausea, diarrhea, vomiting, breathlessness, headaches, skin damage, and swollen stomachs.⁷⁵ The exposure to this waste caused the death of sixteen people, and more than 100,000 people sought medical attention.⁷⁶ Trafigura denied any wrongdoing.⁷⁷ In early 2007, the company paid approximately \$195 million to the Ivorian government for cleanup.⁷⁸ The government waived its right to prosecute the company.⁷⁹ Today, more than ten years after the dumping of large quantities of toxic waste in Côte d'Ivoire, despite the huge numbers of people affected, international coverage of the issue, and several legal proceedings, there remains no effective national, regional, or international mechanism to prevent and address a similar disaster.⁸⁰

According to a three-year investigative report by Amnesty International and Greenpeace, "too little has been done to strengthen national and international regulations, even after the scale of the toxic

<http://www.greenpeace.org/international/Global/international/publications/toxics/ProboKoala/The-Toxic-Truth.pdf> [hereinafter *The Toxic Truth*].

⁷² See *id.* at 9.

⁷³ See *Toxic waste dumping in Abidjan, Ivory Coast*, ENVTL. JUSTICE ATLAS, <http://ejatlas.org/conflict/toxic-waste-dumping-in-abidjan-ivory-coast> (last visited Mar. 22, 2018).

⁷⁴ See *Trafigura Lawsuits* (re Côte d'Ivoire), BUS. & HUMAN RIGHTS RES. CTR., <http://business-humanrights.org/en/trafigura-lawsuits-re-c%C3%B4te-d%E2%80%99ivoire> (last visited Mar. 22, 2018); see also *Amnesty International and Greenpeace Call for Criminal Investigation*, AMNESTY INT'L (Sept. 25, 2012), <https://www.amnesty.org/en/latest/news/2012/09/report-slams-failure-prevent-toxic-waste-dumping-west-africa/> (last visited Mar. 22, 2018) [hereinafter *Call for Criminal Investigation*].

⁷⁵ See *The Toxic Truth*, *supra* note 71, at 57.

⁷⁶ See *id.* at 2.

⁷⁷ See *id.* at 60; see also Bianca Lazzari, *The International Movement of Hazardous Waste: The Ivory Coast*, PREZI (May 28, 2014), <https://prezi.com/nd1b96exyf1j/the-international-movement-of-hazardous-waste-the-ivory-coa/> (last visited Mar. 22, 2018).

⁷⁸ See *The Toxic Truth*, *supra* note 71, at 9.

⁷⁹ See *id.*

⁸⁰ For further discussion, see *infra* Part II.

dumping became clear.”⁸¹ Greenpeace International Executive Director Kumi Naidoo said that

[Trafigura is] a story of corporate crime, human rights abuse and governments’ failure to protect people and the environment. It is a story that exposes how systems for enforcing international law have failed to keep up with companies that operate transnationally, and how one company has been able to take full advantage of legal uncertainties and jurisdictional loopholes, with devastating consequences.⁸²

The victims of Trafigura’s toxic dumping in Côte d’Ivoire were not able to seek redress in their domestic judiciary. They also tried to seek justice in Europe, which ultimately proved unsatisfactory.⁸³

The incidents of toxic colonialism discussed above indicate that several countries attempted to take steps to limit toxic dumping in their territories by resorting to criminal sanctions.⁸⁴ These countries also utilized tort law, but both areas of their domestic law proved to be inadequate deterrents. The spate of toxic dumping that took place in the 1980s led the Organization of African Unity (OAU)⁸⁵ to pass a resolution urging all member states to ban all imports of waste chemicals, metals, and radioactive materials, calling the trafficking in hazardous waste a “crime against Africa and the African people.”⁸⁶ The OAU passed the resolution in 1988, shortly after the toxic dumping scandal in Nigeria came to light. The resolution condemned the dumping of hazardous waste by MNCs⁸⁷ and urged its members to stop arranging for waste dumping.⁸⁸ It also sought to require that dumpers “clean up the areas that

⁸¹ See Fiona Harvey, *Trafigura Lessons Have Not Been Learned, Report Warns*, GUARDIAN (Sept. 25, 2012), <http://www.theguardian.com/environment/2012/sep/25/trafigura-lessons-toxic-waste-dumping>.

⁸² See *Call for Criminal Investigation*, *supra* note 74.

⁸³ For further discussion of the case against Trafigura, see Cyril Gwam, *Symposium Powering the Future: A 21st Century Guide for Energy Practitioners: Human Rights Implications of Illicit Toxic Waste Dumping from Developing Countries Including the U.S.A., Especially Texas to Africa, in particular Nigeria*, 38 T. MARSHALL L. REV. 241, 261 (2013); Holy Hall, *Super-Injunction, What’s Your Function*, 18 COMM. L. & POL’Y 309, 320 (2013).

⁸⁴ See Chris Okeke, *Africa and the Environment*, 3 ANN. SURV. INT’L & COMP. L. 37, 62 (1996).

⁸⁵ The OAU “steered Africa’s political and ideological matters since its inception” in 1963. ABOU JENG, *PEACEBUILDING IN THE AFRICAN UNION: LAW PHILOSOPHY AND PRACTICE*, 136 (2012).

⁸⁶ Organization of African Unity: Council of Ministers Resolution on Dumping of Nuclear and Industrial Waste in Africa, art. 1 May 23, 1988, *reprinted in* 28 I.L.M. 567 (1989) [hereinafter OAU Resolution].

⁸⁷ *Id.* art. 2.

⁸⁸ *Id.* art. 3.

have already been contaminated by them.”⁸⁹ Although this resolution was a non-binding political statement, it would go on to lay the foundation for the position that African states would adopt regarding the importing of hazardous waste from outside Africa. African countries’ individual experiences with toxic colonialism are emblematic of why greater cooperation was needed in regulating hazardous waste. The experience with toxic colonialism on the continent also influenced the attempt to regionally criminalize the trafficking of hazardous waste on the continent and the subsequent attempt through the Malabo Protocol to create a regional venue for such prosecutions.

II. INTERNATIONAL LEGAL FRAMEWORK FOR REGULATING HAZARDOUS WASTE & AFRICAN REGIONAL INNOVATION

This part will explore how the inadequate international legal framework for regulating hazardous waste led to the attempt to criminalize the trafficking in hazardous waste regionally in Africa. The intention here is not to provide a comprehensive analysis of the main shortcomings of this area of international law.⁹⁰ Instead, this part briefly highlights the existing state of international law governing the import of hazardous waste and the control of transboundary movements of such wastes and analyzes African attempts to innovate regionally. This part demonstrates how African states have been at the forefront of efforts to penalize trafficking in hazardous waste—leading the way through a ban in a regional treaty, which would subsequently influence the direction of international law more generally. African states once again are at the forefront of shaping international law in this area by moving to prosecute trafficking in hazardous waste through a common forum under the Malabo Protocol.

A. THE INADEQUATE LEGAL FRAMEWORK FOR REGULATING HAZARDOUS WASTE

This sub-section gives much-needed context on the international regulation of hazardous waste. The treaty governing this area—the Basel

⁸⁹ *Id.* art. 2.

⁹⁰ For more on the limitations of the current legal framework, see generally Frederic Megret, *The Problem of an International Criminal Law of the Environment*, 36 COLUM. J. ENV'T'L. L. 195, 201 (2011); Robert Percival, *Global Law and the Environment*, 86 WASH. L. REV. 579 (2011); Pratt, *supra* note 14, at 167–71.

Convention of 1989—did not provide for a complete prohibition on the trafficking of hazardous waste. Consequently, African states insisted on such a ban in a regional treaty—the Bamako Convention of 1991. To date, the international regime governing this area of law has not adopted the abolitionist position seen in the Bamako Convention. Efforts to change the international regime through an amendment to the Basel Convention (Basel Ban Amendment), which would adopt the African prohibition on hazardous waste rule globally, have stalled due to the resistance of countries in the Global North. This stalemate at the international level helps to explain in part why African states, through the Malabo Protocol, are attempting to create a regional forum for prosecuting the crime of trafficking in hazardous waste. Article 28L in the Malabo Protocol can only be understood against this background as it incorporates provisions articulated in the regional Bamako Convention of 1991.

1. *International Regulation Through the Basel Convention of 1989*

The Basel Convention of 1989, which entered into force in 1992, is the primary international agreement for the regulation of hazardous waste.⁹¹ Prior to this treaty, the international regulation in this area consisted of non-binding soft law. For example, in 1987 UNEP gathered a group of experts to develop an agreement for the “environmentally sound management of hazardous waste,” which came to be known as the Cairo Guidelines.⁹² Global concerns about hazardous waste “sparked a desire to create a more binding agreement” and led to the Basel Convention.⁹³ As of March 2018, 186 states are party to the Basel Convention.⁹⁴

The Basel Convention works more like a trade regime—it seeks to control the movement of hazardous waste “through a system of prior

⁹¹ Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal, Mar. 22, 1989, 28 I.L.M. 649 (entered into force May 5, 1992), at 119, <http://www.basel.int/Portals/4/Basel%20Convention/docs/text/BaselConventionText-e.pdf> [hereinafter Basel Convention].

⁹² United Nations Environment Programme, Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Waste, June 17, 1987.

⁹³ Pratt, *supra* note 14, at 158.

⁹⁴ See *Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, BASEL CONVENTION, <http://www.basel.int/Countries/StatusofRatifications/PartiesSignatories/tabid/4499/Default.aspx> (last visited Mar. 22, 2018).

informed consent, strict notification, and tracking requirements.”⁹⁵ Under the Convention, the movement of hazardous waste is only permitted where the exporting country does not have the capacity to dispose of the material “in an environmentally sound and efficient manner,” or the waste is required in the importing country as a raw material for recycling or recovery.⁹⁶ If prior informed consent is not received by the exporting country from each state involved, or if consent is obtained through “falsification, misrepresentation, or fraud” the movement of hazardous waste is considered illegal trafficking under the Convention.⁹⁷

The Basel Convention imposes certain general obligations on state parties. These include ensuring that the generation of hazardous wastes within the state is “reduced to a minimum, considering social, technological, and economic aspects.”⁹⁸ The Basel Convention also requires certain notifications between state parties when hazardous wastes will be moved between or amongst them. To start, the exporting state must notify the importing state of any proposed transport of hazardous wastes.⁹⁹ Additionally, the importing state must then respond in writing, expressing its consent to the movement, denying permission for the movement, or requesting additional information.¹⁰⁰ The Basel Convention also regulates the transnational movement from a state party to non-state parties. Furthermore, Article 9 of the Convention provides that any transboundary movement of hazardous wastes or other wastes shall be deemed “illegal” if the movement occurs:

- (a) without notification pursuant to the provisions of this Convention to all states concerned; or
- (b) without the consent pursuant to the provisions of this Convention of a State concerned; or
- (c) with consent obtained from States concerned through falsification, misrepresentation or fraud; or
- (d) [in a manner] that does not conform in a material way with the documents; or

⁹⁵ Pratt, *supra* note 14, at 160.

⁹⁶ Basel Convention, *supra* note 91, at 17; *see also* Pratt, *supra* note 14, at 160.

⁹⁷ Basel Convention, *supra* note 91, at 23.

⁹⁸ *Id.* art. 4(2)(a).

⁹⁹ *Id.* art. 6(1).

¹⁰⁰ *Id.* art. 6(2).

(e) [in a manner] that results in deliberate disposal (e.g. dumping) of hazardous wastes or other wastes in contravention of this Convention and of general principles of international law.¹⁰¹

In the event of illegal trafficking in hazardous waste, the Basel Convention provides (depending on fault) that the exporter or generating state take back the waste if practicable or otherwise dispose of it.¹⁰² Where the importer or the disposing state is found to be at fault, then that state is responsible for disposal in an environmentally safe manner, and where it is unclear who is at fault amongst the parties, the Convention provides that the parties are to cooperate to make sure that the waste is disposed of in an environmentally sound manner.¹⁰³ Moreover, Article 9 of the Basel Convention provides that each party shall introduce appropriate national/domestic legislation to prevent and punish illegal trafficking.¹⁰⁴ Instead of dictating how this is to be done, the Convention leaves it up to state parties whether to use tort law, criminal law, administrative law or other relevant areas of law to remedy this illegality.¹⁰⁵ The parties to the Basel Convention more than likely envisioned that enforcement would take place through a tort law-regime.¹⁰⁶ They subsequently enacted a Protocol setting out appropriate rules and procedures for liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes and other wastes.¹⁰⁷ The Basel Convention certainly did not provide for enforcement of trafficking in hazardous waste through an international or regional court like the Malabo Protocol envisions.

2. *Other Attempts at International Regulation of Hazardous Waste*

The Basel Convention has been followed by subsequent agreements and amendments, which continue to shape the international regulation of hazardous waste. For example, African, Caribbean and Pacific (ACP) states signed the Lomé IV Convention in 1990 with the

¹⁰¹ *Id.* art. 9(1).

¹⁰² *Id.* art. 9(2).

¹⁰³ *Id.* art. 9(3), (4).

¹⁰⁴ *Id.* art. 9(5).

¹⁰⁵ *Id.* art. 4(4).

¹⁰⁶ *Id.* art. 12.

¹⁰⁷ See Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Waste and their Disposal, Dec. 10, 1999, UNEP, <http://archive.basel.int/meetings/cop/cop5/docs/prot-e.pdf> [hereinafter Basel Protocol].

European Economic Community.¹⁰⁸ The Lomé IV Convention prohibited the export of hazardous waste from the European Community to ACP States, and in return the ACP states agreed not to accept waste from any country outside of the European Community.¹⁰⁹ The agreement between the ACP states noted that, in interpreting the provisions of the ban, states would be guided by the principles and provisions in the 1988 OAU Resolution,¹¹⁰ which considered the trafficking in hazardous waste to be a “crime against Africa and the African people.”¹¹¹ The Lomé IV Convention expired in 2000.¹¹²

Overlapping regimes like the Basel and Lomé IV Conventions can result in a “race to the bottom”¹¹³ with countries seeking lower barriers to entry. The Cotonou Agreement, which replaced the Lomé IV Convention between the European Community and ACP states in 2000, illustrates this point.¹¹⁴ The Cotonou Agreement backtracks from the hazardous waste ban contained in the Lomé IV Agreement. Instead, the Agreement takes “into account issues relating to the transport and disposal of hazardous wastes.”¹¹⁵ This essentially rendered the ban meaningless, and without the total ban, the Cotonou Agreement is significantly weaker than the Lomé IV Agreement.¹¹⁶ The limitations of the Cotonou regime reinforces the necessity for African states to act regionally to first criminalize dirty dumping through the Bamako Convention, and subsequently attempt to create a venue for penalizing and punishing traffickers of hazardous waste under the Malabo Protocol.

¹⁰⁸ See Fourth African, Caribbean, and Pacific States-European Economic Community Convention of Lomé, Dec. 15, 1989, 29 I.L.M. 783 [hereinafter Lomé IV Convention], <http://aei.pitt.edu/4220/1/4220.pdf>.

¹⁰⁹ *Id.* art. 39.

¹¹⁰ *Id.* Annex VIII Joint Declaration on Article 39 on Movements of Hazardous Waste or Radioactive Waste.

¹¹¹ OAU Resolution, *supra* notes 86–89 and accompanying text.

¹¹² See Pratt, *supra* note 14, at 166.

¹¹³ Kenneth W. Abbott, *The Transnational Regime Complex for Climate Change*, 30 ENV'T & PLANNING C: GOV'T & POL'Y 571, 582 (2012) (discussing how this can lead to “pathological effects of unnecessary fragmentation”).

¹¹⁴ See generally Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and its Member States, of the Other Part, June 23, 2000 O.J. (L 317) 3 (entered into force Jan. 4, 2003) [hereinafter Cotonou Agreement], https://ec.europa.eu/europeaid/sites/devco/files/cotonou-agreement-2000_en.pdf.

¹¹⁵ *Id.* art. 32(1)(d).

¹¹⁶ See Pratt, *supra* note 14, at 166.

3. *Regional Innovation & Regulation of Hazardous Waste Through the Bamako Convention of 1991*

The OAU adopted the Bamako Convention in 1991, which built on its earlier resolution in 1988. The Bamako Convention entered into force in 1998 and imposes a duty on states to take legal, administrative, and other measures to prohibit the import of any hazardous wastes into their territories.¹¹⁷ Like the Basel Convention, it imposes certain general obligations on state parties, but the Bamako Convention imposes significantly more aggressive obligations. For example, the Bamako Convention imposes, “strict, unlimited liability as well as joint and several liability on hazardous waste generators.”¹¹⁸ This was an important improvement over the Basel Convention, which did not stipulate the rules for liability within the Convention.¹¹⁹ As of March 2018, the Bamako Convention had thirty-five signatories and twenty-seven parties.¹²⁰

One of the key motivations for the Bamako Convention was the failure of the Basel Convention to ban imports of hazardous waste from more developed countries into less developed ones. Thus, the first general obligation imposed by the Bamako Convention is a hazardous waste import ban, which created a regional ban on the importation of all hazardous waste into Africa and limits the transfer of hazardous waste within Africa.¹²¹ With respect to hazardous waste generated within Africa, the Convention mimics the Basel Convention provisions.¹²² OAU member states were dissatisfied with the Basel Convention, which does not explicitly ban the export of hazardous waste.¹²³ Instead, the Basel

¹¹⁷ See generally Bamako Convention, *supra* note 8.

¹¹⁸ *Id.* art. 4(3)(b). The Bamako Convention defines a waste generator as “any person whose activity produces hazardous wastes, or, if that person is not known, the person who is in possession and/or control of those wastes.” *Id.* art. 1(20).

¹¹⁹ Basel Convention, *supra* note 91, art. 12.

¹²⁰ See Parties to the Bamako Convention, AFR. UNION, https://au.int/sites/default/files/treaties/7774-sl-bamako_convention_on_the_ban_of_the_import_into_africa_and_the_control_o.pdf (last visited Mar. 22, 2018).

¹²¹ See generally Bamako Convention, *supra* note 8.

¹²² See *id.* art. 11. For intra-African waste trade, parties must minimize the transboundary movement of wastes and only conduct it with consent of the importing and transit states among other controls. Parties are to minimize the production of hazardous wastes and cooperate to ensure that wastes are treated and disposed of in an environmentally sound manner. See *id.*

¹²³ See Jennifer R. Kitt, *Waste Exports to the Developing World: A Global Response*, 7 GEO. INT’L ENVTL. L. REV. 485, 500–01 (1995).

Convention has a limited ban on exports and imports of hazardous waste to and from non-parties to the Convention.¹²⁴ Accordingly, almost all OAU countries, refused to ratify the initial Basel Convention.¹²⁵ The two conventions in many ways reflect the split between the Global North and South in the regulation of hazardous waste—with the Global North favoring a free-trade model for hazardous waste, and African countries demanding a total ban on toxic waste.¹²⁶ Both views emanate from concerns over enforcement, with the Global North viewing a total ban as impossible to enforce, and African countries viewing the free-trade model as impossible to monitor or control effectively due to disparities in technological and environmental infrastructure.¹²⁷ This view was reinforced by the series of toxic dumping scandals that took place in Africa, even after the Basel Convention came into force.¹²⁸ This may also help to explain why the scope of what constitutes hazardous waste is much wider in the Bamako Convention than in the Basel Convention.¹²⁹

Additionally, the Convention stipulates that any importation of hazardous waste into Africa “shall be deemed illegal and a criminal act.”¹³⁰ This was a significant development from the Basel Convention, which considered trafficking “illegal,” but not criminal.¹³¹ The same five conditions of illegality, quoted above in the Basel Convention, can be found in the Bamako Convention.¹³² Crucially, the Bamako Convention goes further providing that “[e]ach Party shall introduce appropriate national legislation for imposing criminal penalties on all persons who have planned, committed, or assisted in such illegal imports. Such penalties shall be sufficiently high to both punish and deter such conduct.”¹³³ As such, the Bamako Convention envisions that trafficking in hazardous waste will be regulated not simply through a tort-law regime like the Basel Convention, but crucially through each state’s domestic penal law. Thus, the Bamako Convention provides a clear rationale to understand the later move to create a regional forum to

¹²⁴ See Basel Convention, *supra* note 91, art. 4(5).

¹²⁵ See Vu, *supra* note 49, at 410.

¹²⁶ See Atteh, *supra* note 15, at 283.

¹²⁷ See *id.*

¹²⁸ See *infra* Section II.C.

¹²⁹ Compare Basel Convention, *supra* note 91, art. 1, Annex I, Annex II, with Bamako Convention, *supra* note 8, art. 2, Annex I, Annex II.

¹³⁰ Bamako Convention, *supra* note 8, art. 4(1).

¹³¹ Basel Convention, *supra* note 91, art. 9.

¹³² Bamako Convention, *supra* note 8, art. 9(1).

¹³³ *Id.*, art. 9(2).

prosecute the trafficking of hazardous waste in the Malabo Protocol. It is likely that parties found that only relying on domestic enforcement to prosecute trafficking in hazardous waste was leading to insufficient punishment and deterrence and anticipated that the creation of a regional court through the Malabo Protocol would lead to better results.

4. *From Regional Innovation Through Bamako to Attempts to Strengthen the International Regulatory Framework Through Basel*

The overlapping Bamako and Basel regimes for regulating trafficking in hazardous waste led to generative outcomes for the progressive development of international law. Some scholars have postulated that competing regimes can also “generate positive feedback:” providing incentives for a “race to the top.”¹³⁴ This occurs where countries take stronger action on a given issue in one regime, which generates imitation by others.¹³⁵ An excellent example of this is how the Bamako Convention’s imposition of strict liability on “hazardous waste generators”¹³⁶ influenced the Basel Convention’s Protocol on Liability and Compensation.¹³⁷ Recall, the Bamako Convention entered into force in 1998,¹³⁸ while the Basel Convention required parties to create and adopt a protocol on liability in 1989.¹³⁹ The Basel Protocol was only adopted after heated negotiations in December of 1999.¹⁴⁰ The Basel Protocol provides for strict liability for damages where parties to the Convention maintain control of the hazardous waste, but any person can also be subject to fault-based liability under the general principles of tort law.¹⁴¹ The Protocol needs twenty ratifications to enter into force—as of March 2018, it only had eleven.¹⁴² The stalled efforts at ratification

¹³⁴ Robert O. Keohane & David G. Victor, *The Regime Complex for Climate Change*, 9 PERSP. ON POL. 7, 19 (2011).

¹³⁵ *See id.*

¹³⁶ Bamako Convention, *supra* note 8, art. 4(3)(b), 1(20).

¹³⁷ *See* Basel Protocol, *supra* note 107.

¹³⁸ *See* Bamako Convention, *supra* note 8.

¹³⁹ *See* Basel Convention, *supra* note 91, art. 12.

¹⁴⁰ *See* Pratt, *supra* note 14, at 163, 164.

¹⁴¹ *See* Basel Protocol, *supra* note 107, art. 4.

¹⁴² *See* Parties to the Basel Protocol of the Basel Convention, BASEL CONVENTION, <http://www.basel.int/Countries/StatusofRatifications/TheProtocol/tabid/1345/Default.aspx> (last visited Mar. 22, 2018).

reflects the continued split between the Global North and South on the regulation of hazardous waste.

Another instance of how the Bamako Convention is influencing international law regulating hazardous waste is the Basel Ban Amendment.¹⁴³ In 1995, state parties to the Basel Convention decided by consensus that a total ban of hazardous waste should be developed.¹⁴⁴ The Ban Amendment would go further than the Bamako Convention by prohibiting all exports of hazardous wastes between developed and developing countries, not just exports and imports within Africa like the Bamako Convention.¹⁴⁵ The Ban Amendment technically needs sixty-two ratifications to come into effect.¹⁴⁶ As of March 2018, ninety-three parties have ratified the Ban, yet it has not entered into force,¹⁴⁷ because for many years parties disagreed on the interpretation of the provision on amendments to the Convention.¹⁴⁸ In 2011, state parties agreed that the Ban Amendment will enter into force when three-fourths of those parties that were parties at the time of the adoption of the amendment ratify it.¹⁴⁹

The controversy on the Ban Amendment also reflects the continued split between the Global North and South on the regulation of hazardous waste. Countries have continued to disagree on the need and utility of a total ban on hazardous waste. Because the Basel Convention is a compromise document, the basic obligations under the treaty regime

¹⁴³ See Decision III/1 Amendment to the Basel Convention, Third Meeting of the Conference of the Parties to the Basel Convention on the Control of Transboundary Shipments of Hazardous Waste and Their Disposal, U.N. Doc. UNEP/CHW.3/35 (Sept. 18–22, 1995).

¹⁴⁴ *Id.* (explaining how the eighty-two parties present at the Third Meeting of the Conference of the Parties of the Basel Convention adopted the decision by consensus on Sept. 22, 1995); see also Basel Convention, *supra* note 91, art. 4A, Annex VII [hereinafter Ban Amendment].

¹⁴⁵ *Id.*

¹⁴⁶ See *id.* art. 17(5) (providing that amendments enter into force between the parties when “at least three-fourths of the Parties who accepted them” ratify the amendment); see also Pratt, *supra* note 14, at 163 (noting that sixty-two ratifications represents three-fourths of the parties present at the Third Meeting of the Conference of the Parties).

¹⁴⁷ See *Amendment to the Basel Convention on the control of transboundary movement of hazardous waste and their disposal*, BASEL CONVENTION, <http://www.basel.int/Countries/StatusofRatifications/BanAmendment/tabid/1344/Default.aspx> (last visited Mar. 22, 2018).

¹⁴⁸ See *The Basel Convention Ban Amendment*, BASEL CONVENTION, <http://www.basel.int/Implementation/LegalMatters/BanAmendment/Overview/tabid/1484/Default.aspx> (last visited Jan. 19, 2018).

¹⁴⁹ For further discussion, see *Amendments*, BASEL CONVENTION, <http://www.basel.int/TheConvention/Overview/Amendments/Overview/tabid/2759/Default.aspx>, (last visited Jan. 19, 2018).

had to be lower to get more state parties to join the regime.¹⁵⁰ This also helps to explain the stalled efforts to try to extend the reach of the original Basel Convention with the Basel Protocol and the Ban Amendment. Currently, the only agreement that bans the import of hazardous waste is the Bamako Convention with African state parties. The rest of the international agreements in this area seek to put varying levels of control on the transboundary movements of such wastes. The delayed efforts at getting a harder enforcement regime in place, provides additional normative justification for the Malabo Protocol's move to create a regional court to prosecute traffickers of hazardous waste.

The African innovation in the field of environmental and criminal law is akin to how regional systems have demonstrated creativity and flexibility in other areas of the law. For example, regional systems adopted regional human rights treaties to fill the gaps in international law.¹⁵¹ Regional systems also innovated to cover rights and duties not recognized in the main international human rights treaties.¹⁵² The regional human rights system has functioned to strengthen the enforcement of human rights across the globe and fill in gaps that the international system alone cannot accommodate.¹⁵³ Given the experience of regionalization in the international human rights regime, a similar outcome may pertain in the fields of international environmental and criminal law.

The regional criminalization of hazardous waste in the Bamako Convention allows for more regulation than was possible at the global level. Yet, the international regime created by the Basel Convention does not provide for any enforcement mechanisms for illegal trafficking in

¹⁵⁰ See Pratt, *supra* note 14, at 163 (discussing how the option of a total ban was tabled until future conferences of the parties).

¹⁵¹ See, e.g., Chaloka Beyani, *Reconstituting the Universal: Human Rights as a Regional Idea*, in CAMBRIDGE COMPANION TO HUMAN RIGHTS LAW 173, 176 (Conor Gearty & Costas Douzinas eds., 2012).

¹⁵² Compare African Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 217 (entered into force Oct. 21, 1986) (explaining concept of peoples' rights), and the American Declaration of the Rights and Duties of Man, OEA/Ser.L./V.II.23, doc. 21, rev. 6 (May 2, 1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82, doc. 6, rev. 1 at 1 (explaining concept of duties), with G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Rep. 102-23, 999 U.N.T.S. 171, and the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

¹⁵³ See Beyani, *supra* note 151, at 190; George William Mugwanya, *Realizing Universal Human Rights Norms Through Regional Human Rights Mechanisms: Reinvigorating the African System*, 10 IND. INT'L & COMP. L. REV. 35, 40 (1999).

hazardous waste. Instead, it provides that parties should adopt domestic legislation for the prevention and punishment of trafficking in hazardous waste.¹⁵⁴ However, since the OAU resolution in 1988, African states have considered the trafficking in hazardous waste to be a “criminal act.”¹⁵⁵ This view was reiterated and turned into hard obligation under the Bamako Convention.¹⁵⁶ Under Bamako, criminal penalties were to be “sufficiently high to both punish and deter such conduct.”¹⁵⁷ Yet, despite the strong provisions of the Bamako Convention,¹⁵⁸ the African state parties to Bamako simply lacked the capacity to effectively enforce the provisions domestically and prevent toxic colonialism within their borders.¹⁵⁹ Indeed, none of the international legal agreements discussed above have adequately addressed the illegal trade in hazardous waste, which is often transported under false pretenses.¹⁶⁰ Additionally, no state has the ability to check and inspect each shipment that enters its ports to see if it contains hazardous waste.¹⁶¹ Notwithstanding the widespread capacity limitations on an individual state level, the Malabo Protocol provides a potentially more robust venue for the regional prosecutions of trafficking in hazardous waste through Article 28L.

Article 28L of the Malabo Protocol is derived from longstanding efforts by African states to criminalize and punish trafficking in hazardous waste. Certainly, the Bamako Convention envisioned future regional agreements regarding the transboundary movement and management of hazardous wastes generated in Africa and allowed for such arrangements so long as they “do not derogate from the environmentally sound management of hazardous wastes as required” by Bamako and are “no less environmentally sound than those provided for” under the Convention.¹⁶² Article 28L of the Malabo Protocol is consistent with the Bamako Convention and promotes “South-South co-operation in the implementation of the Convention”¹⁶³ through the creation of a

¹⁵⁴ See Basel Convention, *supra* note 91, art. 9(5).

¹⁵⁵ See OAU Resolution, *supra* note 86.

¹⁵⁶ Bamako Convention, *supra* note 8, art. 9(2).

¹⁵⁷ *Id.*

¹⁵⁸ See *id.* art. 4.

¹⁵⁹ See *infra* Section II.B.

¹⁶⁰ See Pratt, *supra* note 14, at 167.

¹⁶¹ *Id.* at 167 n.173.

¹⁶² Bamako Convention, *supra* note 8, art. 11(1).

¹⁶³ *Id.* art. 11(4).

regional forum for prosecutions of traffickers of hazardous waste amongst others.

B. AFRICAN REGIONAL INNOVATION & ENFORCEMENT THROUGH MALABO

This sub-section discusses some of the challenges that might arise with the enforcement of Article 28L. Under the Bamako Convention, state parties were urged to cooperate and consider other “enforcement mechanisms” to ensure that no imports of hazardous waste enter Africa.¹⁶⁴ The Malabo Protocol is potentially such an enforcement mechanism—it creates a regional venue for prosecuting trafficking in hazardous waste, amongst other crimes. The Protocol improves upon the international framework for regulating the trafficking of hazardous waste. Article 28L of the Malabo Protocol provides that “any import, or failure to re-import transboundary movement or export hazardous waste proscribed by the Bamako Convention . . . shall constitute the offence of trafficking in hazardous waste” and fall under the criminal jurisdiction of the regional court.¹⁶⁵

1. Interpretative Challenges

Article 28L potentially invites confusion as it requires reference to a separate legal text to determine the relevant criminal prohibitions. When one turns to the Bamako Convention, Article 1(22) informs the reader that illegal traffic “means any transboundary movement of hazardous wastes as specified in Article 9 of this Convention.”¹⁶⁶ Article 9(2) provides for the criminal penalties to be imposed on “all persons who have planned, committed, or assisted” in illegal trafficking in hazardous waste.¹⁶⁷ This occurs according to Article 9(1), when transboundary movement of waste occurs without notification or without consent of the relevant state, when consent is obtained through falsification, misrepresentation, or fraud, and when the waste does not conform materially with the documents.¹⁶⁸ While it might have been

¹⁶⁴ Bamako Convention, *supra* note 8, art. 4(1)(b).

¹⁶⁵ Malabo Protocol, *supra* note 2, art. 28L.

¹⁶⁶ Bamako Convention, *supra* note 8, art. 1(22).

¹⁶⁷ *Id.* art. 9(2).

¹⁶⁸ *Id.* art. 9(1)(a)–(d).

possible to interpret Article 28L of Malabo such that it could cover only those offenses that the Bamako Convention itself says are criminal acts under Article 9, this interpretative methodology is unavailable because of the broad scope of the language in the last provision. Article 9(1)(e) stipulates criminal penalties “when hazardous waste is deliberately disposed of in contravention of the Convention and of the general principles of international law.”¹⁶⁹

Article 9(1)(e) of the Bamako Convention is the most ambiguous in terms of figuring out the scope of criminal liability under Article 28L of the Malabo Protocol. For one, it is not exactly clear what general principles Article 9(1)(e) refers to. And, as discussed above, the general international law framework for regulating hazardous waste does not attach criminal penalties to trafficking in hazardous waste. Moreover, there are numerous ways to dispose of hazardous waste in “contravention” of Bamako. While Article 4(1) of the Bamako Convention clearly makes importing hazardous waste into Africa an illegal and criminal act, it is not evident that all of the obligations that states undertook in Bamako were to also have that effect.¹⁷⁰ For example, Article 4(2) of the Bamako Convention, which bans the dumping of hazardous waste at sea and in internal waters, specifies that all such actions shall be illegal, but does not contain the same “and a criminal act” of Article 4(1)’s prohibition.¹⁷¹ Thus, it is unclear whether the Malabo Protocol wishes to expand Bamako to criminalize trafficking in hazardous waste at sea and in internal waters.

In addition, the Bamako Convention contains a host of very detailed obligations that state parties undertook for the transportation of hazardous waste within Africa.¹⁷² With some of these provisions—such as Bamako’s expansive definition of what constitutes “hazardous waste”—it is apparent that the Malabo Protocol sought to include them within the criminal jurisdiction of the court.¹⁷³ However, for other

¹⁶⁹ *Id.* art. 9(1)(e).

¹⁷⁰ *Id.* art. 4(1)–(2).

¹⁷¹ *Id.*

¹⁷² *Id.* art. 4(3)(i)–(u).

¹⁷³ Compare Malabo Protocol, *supra* note 2, art. 28L(2), with Bamako Convention, *supra* note 8, art. 2, 4(3)(i). The Bamako Convention not only includes radioactive wastes, but also considers any waste with a listed hazardous characteristic or a listed constituent as a hazardous waste. The Convention also covers national definitions of hazardous waste. Finally, products that are banned, severely restricted, or have been the subject of prohibitions, are also covered under the Convention as wastes to be criminally prohibited from importation into Africa. See Bamako Convention, *supra* note 8.

obligations, like parties agreeing “not to allow the export of hazardous wastes for disposal within the area South of 60 degrees South Latitude,”¹⁷⁴ it is not as straightforward. Additionally, the Bamako Convention contains detailed rules about the specific form and timing of notifications to be exchanged prior to the transportation of hazardous wastes across borders.¹⁷⁵ It would seem nonsensical to impose criminal liability for transportation of wastes that do not conform to every single provision in the Convention. Moreover, this is likely not what the drafters of Malabo intended. Yet it is certainly possible to interpret Article 28L quite broadly—to criminalize any violation of any rule or regulation contained in the Bamako Convention governing the transportation of hazardous waste across state boundaries. Accordingly, it would be helpful if state parties further clarified what exactly was being criminalized so that actors can be aware of the permissible and impermissible bounds of conduct. Moreover, this would help ensure that the court’s resources are used judiciously, and that valuable time is not spent prosecuting minor violations of the Bamako Convention that the Malabo Protocol drafters did not intend to criminalize regionally nor dedicate resources to prosecuting.

The analysis above indicates that the Protocol needs to be much clearer about what specifically is being made illegal and criminalized. The Bamako Convention sets out many detailed rules relating to the transport of waste. It seems unreasonable to impose criminal liability for transport of wastes that do not conform with every single provision in the Convention. Accordingly, much more clarification is needed. This is important because it potentially violates one of the bedrock principles of criminal justice—legality. Individuals need to be given fair warning and notice about the criminal laws such that they can conform their conduct with the dictates of the law. In short, the Protocol would benefit from a clear statement of which “proscribed” practices it is making illegal.

2. *Implementation Challenges*

If the Malabo Protocol enters into force, the regional court’s potentially expansive jurisdiction might assist with more effective prosecutions of toxic dumping incidents. Under Malabo, the court can exercise jurisdiction over trafficking in hazardous waste and other crimes

¹⁷⁴ Bamako Convention, *supra* note 8, art. 4(3)(l).

¹⁷⁵ *Id.* art. 6.

committed after that date.¹⁷⁶ The Assembly of the Heads of State and Government, the Peace and Security Council¹⁷⁷ of the AU, state parties, and the independent prosecutor¹⁷⁸ will be able to submit cases to the court.¹⁷⁹ Under the Protocol, the court would only exercise its jurisdiction where a State accepts its jurisdiction, where the crime was committed on the territory of the State, where the accused or victim is a national of the state, and/or when the vital interests of a state are threatened by the extraterritorial acts of non-nationals.¹⁸⁰ The Protocol does not give the court jurisdiction over persons under the age of eighteen during the alleged commission of the crime.¹⁸¹ The Protocol's provision on corporate criminal liability¹⁸² will be important in prosecutions of traffickers. Controversially, the Protocol does not give the court jurisdiction over any "serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office."¹⁸³ This immunities provision is in stark contrast with the statutes of other international criminal tribunals.¹⁸⁴ It has caused significant backlash towards the Malabo Protocol from scholars and practitioners.¹⁸⁵ This subsection discusses some of the implementation issues raised by the corporate criminal liability and immunity provisions for prosecuting traffickers of hazardous waste below.¹⁸⁶

Additionally, there are many political, financial, and other obstacles that may impede the regional criminal court's ability to offer a

¹⁷⁶ See Malabo Protocol, *supra* note 2, art. 46E.

¹⁷⁷ See Protocol Relating to the Establishment of the Peace and Security Council of the African Union, art. 2 (July 9, 2002) [hereinafter PSC Protocol], <http://www.peaceau.org/uploads/psc-protocol-en.pdf> (establishing the PSC as the permanent mechanism for conflict prevention and resolution on the Continent).

¹⁷⁸ See Malabo Protocol, *supra* note 2, art. 46G.

¹⁷⁹ See *id.* art. 15.

¹⁸⁰ See *id.* art. 46E.

¹⁸¹ See *id.* art. 46D.

¹⁸² See *id.* art. 46C.

¹⁸³ *Id.* art. 46A *bis*.

¹⁸⁴ See SCSL Statute, *supra* note 5, art. 6; Rome Statute, *supra* note 5, art. 27 (detailing the irrelevance of official capacity for exempting someone from criminal responsibility); ICTR Statute, *supra* note 5, art. 6; ICTY Statute, *supra* note 5, art. 7.

¹⁸⁵ See, e.g., Mark Kerster, *What Gives? African Union Head of State Immunity*, JUSTICE IN CONFLICT (July 7, 2014), <http://justiceinconflict.org/2014/07/07/what-gives-african-union-head-of-state-immunity/>; Mireille Affa'a-Mindzie, *Leaders Agree on Immunity for themselves During Expansion of African Court*, IPI GLOBAL OBSERVATORY (July 23, 2014), <http://theglobalobservatory.org/2014/07/leaders-agree-immunity-expansion-african-court/>.

¹⁸⁶ See *infra* Part III. For further discussion, see generally Sirleaf, *supra* note 17.

robust prosecution mechanism for trafficking in hazardous waste. First, the regional criminal court that Malabo envisions may never be established due to insufficient political will. Secondly, if it is established, it is likely that the court will still face challenges regarding political will to enforce decisions. It is also likely that the regional criminal court would face credibility issues because of the issue of official immunity. Moreover, the court would likely have difficulty guarding against accusations of bias, particularly when the accused individuals or entities are from outside of the African region. Additionally, the regional court would probably encounter challenges ensuring adequate funding, meeting international fair trial standards, and conducting its proceedings with sufficient transparency. Furthermore, the regional criminal court may suffer from having less judicial and lawyering experience than exists at the international level. Notwithstanding these theoretical and policy concerns, the Malabo Protocol's criminalization and provision of a common forum for prosecutions of the trafficking of hazardous waste¹⁸⁷ pushes the boundaries of international environmental and criminal law in a much-needed direction. The failure of both domestic and international institutions to effectively deal with trafficking in hazardous waste has created a space for African states to innovate regionally and to attempt to progressively develop international law by providing for a regional institution to penalize and prosecute this offense.

III. IMPLICATIONS OF CRIMINALIZING AND PROSECUTING HAZARDOUS WASTE REGIONALLY

This part analyzes the potential implications of criminalizing and prosecuting trafficking in hazardous waste regionally. Recollecting that the Bamako Convention called for the imposition of criminal penalties domestically, and that said penalties “shall be sufficiently high to both punish and deter” trafficking in hazardous waste.¹⁸⁸ Further, the Bamako Convention requires that parties to the Convention “co-operate with one another and with relevant African organisations, to improve and achieve the environmentally sound management of hazardous wastes.”¹⁸⁹ Because the Bamako Convention laid the groundwork for Article 28L of the Malabo Protocol, this part analyzes whether Article 28L furthers the

¹⁸⁷ See Malabo Protocol, *supra* note 2, art. 28L.

¹⁸⁸ Bamako Convention, *supra* note 8, art. 9(2).

¹⁸⁹ *Id.* art. 10(1).

criminal prosecution objectives of the Bamako Convention. It does so by considering whether the regional prosecution of trafficking in hazardous waste through the Malabo Protocol contributes towards some of the more traditional goals of punishment like retribution and deterrence as well as newer theories of punishment like restorative justice and expressive condemnation. Lastly, this part examines how some of the more pressing challenges might be resolved through creative interpretation of Article 28L of the Protocol to assist with furthering the sound regulation of hazardous wastes.

A. REGIONAL CRIMINALIZATION OF TRAFFICKING IN HAZARDOUS WASTE & RETRIBUTIVE JUSTICE

How should the traditional notions of criminal law, based as they are on the idea of a natural person with free will to choose to engage in culpable actions, be applied to corporations deemed guilty of illegal dumping? And in relation to this, how can we think of the regional prosecution of trafficking in hazardous waste in relation to its ability to further retribution? Retributive justice theories of punishment emanated from the desire for vengeance and “just deserts” for offenders.¹⁹⁰ Most modern retributivists, however, reject the notion of an “eye for [an] eye,” and instead seek to determine the degree of punishment in relation to the magnitude of the alleged crimes.¹⁹¹ The Malabo Protocol allows for the imposition of prison sentences, pecuniary fines, and forfeiture of property acquired unlawfully.¹⁹² The Protocol also stipulates that the regional court should be guided by the “gravity of the offence and the individual circumstances of the convicted person.”¹⁹³ The analysis above indicates that states have provided for criminal sentences ranging from twenty years to life imprisonment and fines of up to \$1.6 million for trafficking in hazardous waste.¹⁹⁴ It is not clear how “grave” the regional court would determine the crime of trafficking in hazardous waste is, and

¹⁹⁰ See, e.g., IMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL PROPOSAL (Helen O’Brien trans., 1927); SUSAN JACOBY, WILD JUSTICE: THE EVOLUTION OF REVENGE (1983).

¹⁹¹ Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 67 CAMBRIDGE L.J. 145, 147 (2008); see also Allison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415, 444 (2001); Andrew von Hirsch & Nils Jareborg, *Gauging Criminal Harm: A Living-Standard Analysis*, 11 OXFORD J. LEGAL STUD. 1, 2–3 (1991).

¹⁹² Malabo Protocol, *supra* note 2, art. 43A.

¹⁹³ *Id.* art. 43A(4).

¹⁹⁴ See *supra* Section II.B.

whether this will comport with the sentences or fines available domestically. If the regional court's sentencing or penalties for those found guilty of trafficking in hazardous waste vary significantly from domestic norms, this could frustrate the ability of the regional court to further retributive justice goals. The regional court might need to develop something akin to the "margin of appreciation" doctrine used by the European Court of Human Rights¹⁹⁵ for sentencing and ensuring its judgments comport with most states' practices in the region.

Furthermore, because the Malabo Protocol bars the prosecution of not only Heads of States, but also of "senior state officials" based on their functions,¹⁹⁶ leaders who are accused of trafficking in hazardous waste cannot be investigated and prosecuted before the regional court. This is a serious challenge to the court's ability to fulfill retributive justice goals given the role that some African leaders have played in facilitating the dumping of hazardous waste in their territories.¹⁹⁷ Failure to prosecute all equally culpable individuals violates the retributive principle of just deserts, as well as the principle of proportionality that all like crimes should be treated the same.

The ability of the regional court to contribute towards retributive justice goals may also be limited because the Protocol makes it dependent on member states for the enforcement of its sentences and fines.¹⁹⁸ Complications could arise where an individual is sentenced, or an entity is fined by the regional court for trafficking in hazardous waste, but no state indicates their willingness to accept and imprison the sentenced person or give effect to the fine ordered by the regional court. Moreover, the Malabo Protocol also provides for the pardon or commutation of sentences where a person convicted by the regional court would be eligible for a pardon or commutation in the jurisdiction where the convicted person is imprisoned.¹⁹⁹ In these circumstances, the regional court could issue a pardon or commutation of a sentence based on the "interests of justice and the general principles of law."²⁰⁰

¹⁹⁵ See, e.g., Paul L. McKaskle, *The European Court of Human Rights: What It Is, How It Works, and Its Future*, 40 UNIV. SAN. FRAN. L. REV. 1, 49 (2005) (explaining that the concept of margin appreciation allows for "countries to differ in what is acceptable under the terms of the Convention based on cultural differences").

¹⁹⁶ Malabo Protocol, *supra* note 2, art. 46A*bis*.

¹⁹⁷ See *supra* Section II.B.

¹⁹⁸ See Malabo Protocol, *supra* note 2, art. 46J, 46J*bis*.

¹⁹⁹ *Id.* art. 46K.

²⁰⁰ *Id.*

Depending on how the regional court interprets these provisions, this could potentially allow for states to work around the attempt to criminalize and punish the trafficking in hazardous waste regionally. However, because the Malabo Protocol situates the regional criminal court within a larger judicial architecture in the AU, this can potentially be counteracted. Other relevant regional bodies that may assist with issues of compliance include the Panel of the Wise, the Peace and Security Council and the African Standby Force.²⁰¹ Of course, the existence of a connection with regional institutions does not completely solve issues of non-compliance.²⁰² For the reasons discussed above, the regional prosecution of trafficking in hazardous waste may have limited ability to further retribution, which is a traditional goal of punishment. Accordingly, the regional court may face significant limitations in furthering one of the Bamako Convention's objectives of punishing trafficking in hazardous waste via retribution.

Another concern is the court's ability to effectively exercise its control over offenders, especially offenders outside of the territory of any state party. Generally, hazardous waste moves from the Global North to South. Thus, although this will not necessarily always be the case, there is a high likelihood that violators importing waste will be coming from states that are not parties to the Protocol. The court may, thus, have a challenging time bringing offenders from the Global North before the regional court for trial. For this reason, the Protocol's effectiveness and legitimacy could be enhanced by expanding the scope of its cooperation regime.

²⁰¹ See PSC Protocol, *supra* note 177, art. 7, 11, 13(1) (providing the authority for the Peace and Security Council, establishing the Panel of the Wise, and providing for the African Standby Force).

²⁰² George William Mugwanya, *International Criminal Tribunals in Africa*, in THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM: 30 YEARS AFTER THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS 301, 307–10 (Mainsuli Ssenyonjo ed., 2012) (discussing the difficulties securing state cooperation with the criminal tribunals in Rwanda and Sierra Leone); *see also* Beyani, *supra* note 151, at 187.

B. REGIONAL CRIMINALIZATION OF TRAFFICKING IN HAZARDOUS WASTE, RESTORATIVE JUSTICE & EXPRESSIVE CONDEMNATION

1. Restorative Justice

The prosecution of trafficking in hazardous waste through the regional court may help to further restorative justice goals. Restorative justice can be conceptualized as “a process in which offenders, victims, their representatives and representatives of the community come together to agree on a response to a crime.”²⁰³ The overwhelming focus is to assist with “re-establishing social equilibrium”²⁰⁴ and facilitating “corrective changes in the record, in relationships, and in future behavior.”²⁰⁵ The Malabo Protocol empowers the court to provide compensation and reparation to victims.²⁰⁶ The Malabo Protocol also provides for the establishment of a trust fund for victims to provide legal aid and assistance.²⁰⁷ The ability of the court to contribute towards restorative justice goals may be limited if the court interprets these provisions narrowly. The court’s effectiveness may also be limited if the fund for victims is under-funded or if reparations are administered in a problematic way. However, if the regional criminal court follows the lead of the Inter-American Court for Human Rights in fashioning remedies, it might order communal reparations²⁰⁸ or formulate broad

²⁰³ Linda Gröning & Jørn Jacobsen, *Introduction: Restorative Justice and the Criminal Justice System*, in RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: EXPLORING THE RELATIONSHIP 9, 12 (Linda Gröning & Jørn Jacobsen eds., 2012). For further discussion, see generally John Braithwaite, *Narrative and “Compulsory Compassion,”* 31 LAW & SOC. INQUIRY 425 (2006). See also Elizabeth Kiss, *Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice*, in TRUTH v. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 68, 79–83 (Robert I. Rotberg & Dennis Thompson eds., 2000).

²⁰⁴ Jennie E. Burnet, *(In)Justice: Truth, Reconciliation, and Revenge in Rwanda’s Gacaca*, in TRANSITIONAL JUSTICE: GLOBAL MECHANISMS AND LOCAL REALITIES AFTER GENOCIDE AND MASS VIOLENCE 95, 100 (Alexander L. Hinton ed., 2010).

²⁰⁵ MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 91 (1998).

²⁰⁶ See Malabo Protocol, *supra* note 2, art. 20.

²⁰⁷ See *id.* art. 46M.

²⁰⁸ See, e.g., *Sawhoyamaya Indigenous Cmty. v. Paraguay*, Merits, Reparations and Costs Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶¶ 224, 226 (Mar. 29, 2006). The Court fashioned an order, which provided that the state was to allocate \$1 million to a community development fund for educational, housing agricultural, and health projects. See *id.* In addition, the state was to provide compensation of \$20,000 each to the 17 members of the community who died as a result of events. See *id.*

reparative and restorative measures,²⁰⁹ which require the state to formulate specific policies and programs that provide redress for the violation(s).²¹⁰ There may also be insufficient compliance with restorative justice orders because of the court's dependence on member states for enforcement.²¹¹

The court could potentially be a vehicle for regional innovation in providing fuller redress to victims. The court might even require a convicted defendant to participate in local reconciliatory procedures as a means of securing reparations to victims. It is premature to determine how broadly the court would construe these provision, but this would be an improvement on the "imagined victims" of international justice advocates. These "imagined victims" always demand retributive justice, when in reality, victims have diverse desires for redress, which also emphasize reparative and restorative justice.²¹² Restorative justice approaches may be especially important for the crime of trafficking in hazardous waste, given the dire consequences that toxic dumping has on public health and the environment.²¹³ The detrimental impact of trafficking in hazardous waste for individuals and communities may mean that imprisonment of traffickers or other retributive measures have less import in achieving justice as conceived by the affected community. This is particularly important in some communities within African countries where justice is conceptualized in "reference to communal restoration, interpersonal forgiveness, reconciliation, and redistributive, rather than retributive process."²¹⁴ Consequently, the regional criminalization and prosecution of trafficking in hazardous waste under

²⁰⁹ For further discussion, see Thomas M. Antkowiak, *An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice*, 47 STAN. J. INT'L L. 279 (2011).

²¹⁰ See, e.g., *Miguel Castro Prison v. Peru Merits, Reparations and Costs Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 160, ¶¶ 445, 451–54 (Nov. 25, 2006). The Court's order provided amongst others that the state needed to carry out a public act of acknowledgement of its international responsibility in relation to the violations declared and for satisfaction of the next of kin. The state also had to conduct a public ceremony covered by the media, carry out human rights education and programs for the security sector, as well as create a monument for those who died as a form of reparations. See *id.*

²¹¹ See *supra* Section III.A.

²¹² See Laurel E. Fletcher, *Refracted Justice: The Imagined Victim and the International Criminal Court*, in CONTESTED JUSTICE: THE POLITICS AND PRACTICE OF INTERNATIONAL CRIMINAL COURT INTERVENTIONS 302, 306 (Christian De Vos, Sara Kendall & Carsten Stahn eds., 2015), <http://www.law.berkeley.edu/php-programs/faculty/facultyPubsPDF.php?facID=517&pubID=41>.

²¹³ See *supra* Section I.A.

²¹⁴ Sergey Vasiliev, *Between International Criminal Justice and Injustice: On the Methodology of Legitimacy*, 29 (draft paper on file with author).

Malabo may further restorative justice goals. As such, Article 28L would assist with furthering the Bamako Convention's objectives of punishment for traffickers of hazardous waste.

2. Expressive Condemnation

The prosecution of trafficking in hazardous waste through the regional court may also help to further expressive condemnation goals. Some theorists emphasize the expressive value of punishment,²¹⁵ which is required to reverse the false message—sent by the offender's actions about the value of the victim—relative to the criminal.²¹⁶ These theorists view punishment as a form of moral communication used to express condemnation, revalidate a victim's worth, and strengthen social solidarity. Yet, the ability of the regional court to further expressive condemnation goals of punishment may be limited for many reasons. First, regional powers may tend to distort or even abuse regional processes²¹⁷ by using the court to further political aims or protecting allies from the court's reach. In the same way that powerful actors may shield their allies from potential prosecutions at the domestic or international level, the regional court may exhibit the same tendencies. For example, the AU has been notoriously silent on human rights violations taking place in Zimbabwe and other countries with influential or revered leaders.²¹⁸ The regional criminal court could then be subject to the criticism that it lacks sufficient political independence, which may limit the ability of the Court to be a robust mechanism for expressing condemnation of trafficking in hazardous waste. Yet, because there are multiple regional hegemonies on the continent, this may counteract the ability of one state to exercise undue influence over the regional criminal

²¹⁵ See, e.g., EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (George Simpson trans., The Free Press 1964) (1933); David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 569, 575 (Samantha Besson & John Tasioulas eds., 2010); Dan M. Kahan, *What Do Alternative Sanctions Mean?* 63 U. CHI. L. REV. 591, 597 (1996); Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39, 42–45 (2007).

²¹⁶ See, e.g., R.A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, 20 CRIME & JUST. 1, 8 (1996); Jean Hampton, *An Expressive Theory of Retribution*, in *RETRIBUTIVISM AND ITS CRITICS* 1, 32–33 (Wesley Cragg ed., 1992); Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1621, 1641 (1998).

²¹⁷ See Christoph Schreuer, *Regionalism v. Universalism*, 6 EUR. J. INT'L L. 477, 477 (1995).

²¹⁸ See generally Laurence Helfer & Karen J. Alter, *Legitimacy & Lawmaking: A Tale of Three International Courts*, 14 THEORETICAL INQ. L. 479 (2013).

chamber. Additionally, there is no reason to think of African states as a monolith—regional hegemony may have drastically different views on expressing condemnation on the trafficking of hazardous waste.

The criminalization of trafficking in hazardous waste may assist in rendering international criminal trials more credible in expressing condemnation. International criminal trials generally focus on individual cases, and not the complex relationships that exist between individuals, groups, institutions, and other entities that make massive violations possible.²¹⁹ “And in the effort to move away from collectivizing guilt (which may lead to further violence or recriminations), and instead attempt to individualize guilt, trials often tend to absolve other states, [corporations,] groups, [institutions,] bystanders, and the rest of society of any responsibility as if individuals committed massive violations in a vacuum.”²²⁰ The focus on establishing individual accountability for a small number of crimes may present the opportunity for many criminal participants, including corporations, “to rationalize or deny their own responsibility for crimes,”²²¹ which limits the ability of such trials to express social solidarity and condemnation. The regional criminal courts’ ability to prosecute trafficking in hazardous waste and the provision for corporate criminal liability may advance the already limited ability of such trials to express social solidarity and condemnation, and thereby increase the credibility of such trials, even if minimally. This improvement, while not eliminating some of the problematic tendencies of such trials, would be a welcome development. The regional criminal court could, given the prevalence of these issues in Africa, develop a regional jurisprudence²²² on trafficking in hazardous waste,²²³ which may influence other jurisdictions to express condemnation of this crime. In sum, the regional prosecution of trafficking in hazardous waste may further expressive condemnation goals. Accordingly, Article 28L of the

²¹⁹ See Matiangai V.S. Sirleaf, *Beyond Truth & Punishment in Transitional Justice*, 54 VA. J. INT’L L. 249 (2014).

²²⁰ *See id.*

²²¹ Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573, 601 (2002).

²²² For example, the Inter-American Court of Human Rights has developed a rich jurisprudence on the right to truth and forced disappearances due to the prevalence of authoritarian regimes in the region. *See* Inter-American Convention on Forced Disappearances of Persons, Preamble, Inter-Am. Comm’n H.R. (June 8, 1994), <http://www.oas.org/en/iachr/mandate/Basics/disappearance.asp>.

²²³ *See supra* Section I.B.

Malabo Protocol would assist with advancing the Bamako Convention's objectives of punishment for traffickers of hazardous waste.

C. REGIONAL CRIMINALIZATION OF TRAFFICKING IN HAZARDOUS WASTE & DETERRENCE

The prosecution of trafficking in hazardous waste through the regional court could also help to further deterrence. Utilitarian theories focus on punishment to achieve some desired end, usually the prevention of future crimes.²²⁴ Deterrence theories of punishment are based on the rationale that potential perpetrators are dissuaded from committing atrocities due to the risk and fear of punishment.²²⁵ Individual or specific deterrence seeks to prevent future crime by setting sentences that are strict enough to ensure that an offender will not recidivate, while general deterrence attempts to prevent crime by inducing others who might be tempted to commit crime to desist out of fear of the penalty.

The ability of the court to contribute towards deterrence goals may similarly be limited because it is dependent on member states for cooperation.²²⁶ In order for deterrence theory to work, the risk of getting caught and being punished cannot be so low as to be discounted. Yet, to effectively carry out any investigation and prosecution of trafficking in hazardous waste, the regional court is dependent on state parties for everything from the identification and location of persons, to the arrest, detention, and transfer of persons to the court, as well as the freezing and seizure of assets for forfeiture.²²⁷ The regional criminal court may face significant challenges with trying to increase the likelihood of getting caught for trafficking in hazardous waste.

As noted above, the illegal trafficking in hazardous waste depends on an underground economy,²²⁸ which may be exceedingly difficult to investigate and prosecute. The regional criminal court's inability to effectively prosecute the trafficking in hazardous waste could

²²⁴ See generally JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Oxford Univ. Press, 1823); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 159–60 (2d ed. 2008).

²²⁵ See, e.g., Deirdre Golash, *The Justification of Punishment in the International Context*, in INTERNATIONAL CRIMINAL LAW AND PHILOSOPHY 201, 211 (Larry May & Zachary Hoskins eds., 2010); Immi Tallgren, *The Sensibility and Sense of International Criminal Law*, 13 EUR. J. INT'L L. 561, 575 (2002).

²²⁶ See Malabo Protocol, *supra* note 2, art. 46L.

²²⁷ See *id.*

²²⁸ See Part II.

be even more pronounced because many of the individuals or entities sought will likely be located outside of the continent, and those located within Africa may not be parties to the Malabo regime. The problem of under-detection was illustrated in the toxic waste scandal in Nigeria discussed above. It highlights how detection of this crime is likely to prove difficult. As a result, there is a significant risk that hazardous, even radioactive materials, could be transported and left in Africa undetected until residents begin to suffer severe negative health consequences. For example, the domestic prosecution of the “war on drugs” in the United States indicates that unless changes are made on the demand side, cracking down on the suppliers will only lead to more individuals and entities stepping in to fill the roles of those imprisoned. Furthermore, at the international level, where crimes of mass atrocity are committed more openly, prosecutions have been anything but swift or certain, and this is with more states participating in the Rome Statute regime than Malabo.²²⁹ Accordingly, it may be worthwhile to consider supplementary monitoring mechanisms that will help ensure that, if the Protocol is violated, the prosecutor for the regional court will come to learn of these violations.

Yet, the court might be able to contribute to deterrence in other ways. For example, in accordance with the Malabo Protocol, the penalties should be adequately publicized regionally to further deterrence.²³⁰ The regional court should make every effort to publicize its sanctions not just before the accused or by word of mouth, but in print, online, and on social media. Moreover, the court may further deterrence through the severity of its penalties and sentences for trafficking in hazardous waste. It remains to be seen how the regional court will determine its sentences or penalties and whether it will have any impact on marginal deterrence. Because the court has a lot of latitude under the Protocol to impose penalties and sentences (short of the death penalty),²³¹ significant penalties and sentences should be imposed to further the goals of specific and general deterrence.

²²⁹ There are 123 countries that are State parties to the Rome Statute. African States form the biggest regional block, with thirty-three state parties. Compare The State Parties to the Rome Statute, INT'L CRIMINAL CT., https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Mar. 22, 2018) with Parties to the Malabo Protocol, *supra* note 2 (noting zero parties and eleven signatories).

²³⁰ See Malabo Protocol, *supra* note 2, art. 43A(3).

²³¹ See *id.* art. 43A(1)–(2).

Additionally, some commentators have found that deterrence due to the fear of trials may be more influential for higher-level perpetrators, while deterrence due to the fear of penalties might be more impactful for lower-level perpetrators.²³² It is not evident whether the unlikely, but more severe punishment of imprisonment or the more likely, but less severe sanction of a fine will deter would-be traffickers in hazardous waste. The Malabo Protocol gives the Court the flexibility of taking individual circumstances into account when imposing sentences or penalties and calibrating sentences accordingly.²³³ This adaptability will be incredibly important for dealing with hazardous waste brokers, as the penalties or sentences imposed on these intermediaries may need to differ from those imposed on those lower or higher-up the “food-chain.” Unlike retributive justice, deterrence theory does not require the punishment of all equally culpable individuals. Accordingly, the Court’s inability to prosecute political leaders that are alleged to have engaged in trafficking of hazardous waste due to the immunity provision is not fatal from a deterrence perspective. If exemplary punishments adequately deter future crime, that is sufficient. As such, the selective prosecution of “intermediaries” or lower level perpetrators may suffice to further general deterrence goals. The regional court could focus its prosecutions on private local companies, individuals, lower-level government officials and waste brokers regionally. This prosecution strategy may be the more feasible route in the short term because it will be difficult for the court to obtain jurisdiction over higher-level perpetrators or individuals and entities outside the continent. Yet, as the regional court grows and begins to increase its credibility, prosecutions of those higher up the food chain could be done more fruitfully.

The court may also further deterrence because this theory of punishment depends on the perpetrator being a “rational actor.” The individual(s) contemplating engaging in trafficking must be deterrable, and trafficking in hazardous waste is a crime that requires careful planning as opposed to being a crime of hate or passion. Consequently, deterrence theory is expected to work as applied to trafficking in hazardous waste because actors engaging in it are more likely to do a cost-benefit analysis. Indeed, the combination of cheap land and labor for landfill operations, concomitant with looser regulations and enforcement

²³² See Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39, 69–70 (2002).

²³³ See Malabo Protocol, *supra* note 2, art. 43A(4).

mechanisms in developing countries, means that exporting hazardous waste is a cost-effective option for producers in the Global North, and offers short-term benefits to importers in the Global South.²³⁴ The Malabo Protocol seeks to disrupt this cost-benefit calculus from the reported “\$2.50 per ton to [legally] dump hazardous waste in Africa as opposed to \$250 per ton in Europe.”²³⁵

In addition, actors maybe deterred from toxic dumping for non-legal reasons. For example, lower-level perpetrators might simply believe that trafficking in hazardous waste is wrong, or higher-level perpetrators may be more concerned about political isolation regionally or internationally. For these individuals, the regional court’s intervention would be expected to have no impact on deterrence. Yet, the net result of these non-legal deterrents would be to reduce the amount of trafficking in hazardous waste. Even if it does so minimally, the regional court will further deterrence goals by raising the cost of trafficking in hazardous waste in Africa—by increasing the regulation and prosecution of this crime, or at least increasing the stigma associated with the crime. Thus, Article 28L of the Malabo Protocol could assist with fulfilling the Bamako Convention’s requirement that criminal penalties “be sufficiently high to both punish and deter” trafficking in hazardous waste.²³⁶

IV. CONCLUSION

Given the analysis above, there are many reasons to be cautiously optimistic about Article 28L’s criminalization of trafficking in hazardous waste and the provision of a regional forum for the prosecution of trafficking in hazardous waste through Malabo. While it may be unlikely that regional criminalization and prosecution of toxic dumping will contribute to retribution, there are many theories of punishment that support the Malabo Protocol’s innovation in this area. These include restorative justice, expressive condemnation, and deterrence. It is also important to bear in mind that the proposed regional criminal court is one tool amongst many for combating the trafficking in hazardous waste. While by no means perfect, the Malabo Protocol potentially presents another avenue for African states whose domestic

²³⁴ See Pratt, *supra* note 14, at 154.

²³⁵ UNEP Report, *supra* note 35, at 135.

²³⁶ Bamako Convention, *supra* note 8, art. 9(2).

judiciaries and related institutions may not be able to prosecute trafficking in hazardous waste at all. Additionally, Article 28L of the Protocol, if implemented properly, certainly helps to fulfill the Bamako Convention's objectives of progressively closing the global impunity gap for dirty dumping in Africa.