Criminalization of Trafficking in Hazardous Waste in Africa

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1. 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.”
- Haidar el Ali, Senegalese Minister of Ecology

The African Union (AU) adopted the Malabo Protocol to create the first ever regional criminal tribunal in May of 2014. The regional criminal tribunal criminalizes trafficking in hazardous waste, and presents an opportunity for African states to alter the status quo in environmental protection. Trafficking in hazardous waste is something that none of the existing international criminal tribunals have jurisdiction over. African states may be particularly sensitive to concerns about toxic waste, given a history of negative external interventions. This chapter argues that regional cooperation 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, which presents a significant innovation for the field of international criminal justice.

The regional court will be situated in the African Court which will have three chambers - one with general jurisdiction to hear claims on all matters relating to treaty interpretation and questions of general international law, one with civil jurisdiction over human rights cases, and the third with international criminal law jurisdiction. The regional criminal chamber will have jurisdiction over crisis related-crimes like genocide, war crimes, and crime against humanity. It also expands international criminal law by punishing the following systemic quotidian crimes: unconstitutional change of government, piracy, terrorism, mercenarism, corruption, trafficking of humans and drugs, as well as money laundering amongst others. The Malabo Protocol requires fifteen States to ratify it, before it can enter into force. As of March 2016, no states have ratified the Protocol, and only four have signed it. Because internal procedures for treaty signature and ratification vary widely amongst states, it is impossible to know how long it will take to garner the fifteen ratifications necessary for the Protocol to come into force.

This chapter 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 chapter illuminates an under-researched area and provides a robust analysis of the criminalization of trafficking in hazardous waste in Africa. This chapter 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 is a contested term that has variously been defined by scholars as - signifying inequitable distribution, a lack of recognition, limited participation, a critical lack of

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7 Malabo Protocol, supra note 3, art. 46C. This chapter 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, arts. 2, Annex I, Annex II, Jan. 29, 1991, 30 I.L.M. 773 (entered into force April 22, 1998) [hereinafter Bamako Convention].

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


10 See Malabo Protocol, supra note 3 art. 16.

11 Id. art. 28B (genocide), art. 28C (crimes against humanity), art. 28D (war crimes), art. 28M (crime of aggression).

12 Id. art. 28E.

13 Id. art. 28F.

14 Id. art. 28G.

15 Id. art. 28H.

16 Id. art. 28I.

17 Id. art. 28Ibis; art. 28Libis (illicit exploitation of natural resources).

18 See Merger Protocol supra note 9 art. 11.

capabilities, inequitable application of environmental regulations, and systematic exclusion from environmental policies and decisions amongst others.\textsuperscript{20}

The dumping of toxic waste in the Global South, and particularly in African countries is by no means an exceptional, or recent phenomenon.\textsuperscript{21} This chapter will demonstrate the problematic trend of “toxic colonialism,” in which African states are used as “disposal sites for waste rejected” by more developed states.\textsuperscript{22} The term “toxic colonialism” is used to signify the relationship between countries in the Global North that export the risks of toxic waste to countries in the Global South, who do not “share in the benefits of the production process that generate those wastes”.\textsuperscript{23} This pattern resembles some of the characteristics of historical colonialism in that toxic colonialism is similarly driven by economic dependence, exploitation, and inequality.\textsuperscript{24}

This chapter also builds on findings from an earlier article, which argued that the regionalization of international criminal law is a useful addition to the field of international criminal justice, which has hitherto been hampered by the limitations of both domestic and international adjudication. In \textit{Regionalism, Regime Complexes and International Criminal Justice in Africa}, I argued that the emergence of the regional criminal court is due in part to the influence of regionalism\textsuperscript{25} in international relations.\textsuperscript{26} I postulated that regionalism allows for more innovation than may be possible in a domestic or global institution. The article identified an emerging regime complex in the field of international criminal law. Regime complexes consist of “several legal agreements that are created and maintained in distinct fora with participation of different sets of actors.”\textsuperscript{27} 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.

This chapter is organized as follows: Part II 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 III will explore how the inadequate international legal framework for regulating hazardous waste, led to the criminalization of trafficking in hazardous waste in the Malabo Protocol. Part IV analyzes how the regional prosecution of trafficking in hazardous waste contributes towards some of the newer theories of punishment, as

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\textsuperscript{22} Laura A. Pratt, \textit{Decreasing Dirty Dumping? A Reevaluation of Toxic Waste Colonialism and the Global Management of Transboundary Hazardous Waste}, 41 TX. ENVTL. L.J. 147, 151 (Winter 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.”)
\textsuperscript{24} See Pratt supra note 22 at 152.
\textsuperscript{25} Regionalism has spawned “new political, economic, security, and culturally driven projects, which sought in different ways to find a new space for regions in an increasingly interdependent global order.” Louise Fawcett and Mónica Serrano, \textit{Introduction, in REGIONALISM AND GOVERNANCE IN THE AMERICAS: CONTINENTAL DRIFT}, xxii, xxii (Louise Fawcett and Mónica Serrano eds., 2005).
\textsuperscript{27} Kal Raustiala and David Victor, \textit{The Regime Complex for Plant Genetic Resources}, 58 INT’L ORG. 277, 279 (2004).
well as some of the more traditional goals of punishment. This Part also discusses how any potential challenges might be resolved through creative interpretation of the Protocol. Lastly, this chapter concludes that the regional criminal court’s prosecution of trafficking in hazardous waste presents another option for African states whose domestic judiciaries and related institutions may not be able to prosecute trafficking in hazardous waste, and the international system, which has failed to prosecute trafficking in hazardous waste or corporations involved in toxic dumping.

2. Overview of Toxic Colonialism in Africa

This Part 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. This Part briefly discusses the increase and causes of toxic dumping. This Part also highlights some of the most egregious cases of toxic dumping in Africa. All of the toxic dumping incidents discussed in this Part share the disturbing pattern of toxic colonialism, marked by economic dependence, exploitation, and inequality.

A. The Global Increase & Causes of Trafficking in Hazardous Waste

In 2000, the worldwide generation of hazardous waste was four hundred million metric tons, with almost all of this amount originating from developed nations.\(^\text{28}\) It is estimated that by 2020, the total production of hazardous waste in the Global North will have increased by 60% annually.\(^\text{29}\) Most of the estimates of the transboundary movement of hazardous waste from the Global North to the Global South are quite small.\(^\text{30}\) However, all of the estimates are based on the legal transfer of hazardous waste as the quantification of “illegal transboundary exchanges of hazardous waste is much more difficult.”\(^\text{31}\)

Irrespective of the exact amount of hazardous waste; toxic dumping in Africa is a significant problem for a number of reasons. People that are exposed to toxic waste can experience dire health consequences ranging from 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.\(^\text{32}\) If not properly treated, toxic waste can not only threaten human life, but also lead “to ecological, geological, and environmental disasters” as contaminated “soil, groundwater, and streams can endanger public health and the environment.”\(^\text{33}\) A significant percentage of Africans live in rural areas that are dependent on groundwater and streams for domestic and agricultural uses.\(^\text{34}\) In addition, the disposal of hazardous waste in landfills can easily


\(^{29}\) See e.g. David Naguib Pellow, Resisting Global Toxics: Transnational Movements for Environmental Justice 33 (Robert Gottleib, ed., 2007).

\(^{30}\) See e.g. Hunter et. al. supra note 28 at 947 (estimating that only 4% of the generated hazardous waste actually travels across borders).

\(^{31}\) Pratt supra note 22 at 153.

\(^{32}\) Id. see also Kelbessa, supra note 20 at 109.

\(^{33}\) Atteh, supra note 23 at 279.

\(^{34}\) Id.
result in water and food contamination.\textsuperscript{35} The lack of the necessary infrastructure including facilities, environmental technology, and economic resources means that toxic dumping on the Continent has much more devastating consequences, than it does elsewhere.\textsuperscript{36}

Given all of these negative consequences, why does toxic colonialism persist? The key driver is profit.\textsuperscript{37} 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.\textsuperscript{38} The age of globalization\textsuperscript{39} 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 reportedly sometimes more than the individual country’s gross national product, or its total foreign debt.\textsuperscript{40} Accordingly, individual developing countries are dissuaded from taking measures that would place additional regulations on multinational corporations (MNCs)\textsuperscript{41} such as compliance with environmental and human rights obligations.\textsuperscript{42} For instance, in some African countries, there are “no real treatment process[es] and no proper storage”\textsuperscript{43} options for hazardous waste. Indeed, the United Nations Environment Program (UNEP) noted that “it costs as little as $2.50 per ton to dump hazardous waste in Africa as opposed to $250 per ton in Europe.”\textsuperscript{44} Consequently, since the late 1970s and early 1980s, toxic waste has been exported increasingly to Africa.\textsuperscript{45}

**B. Historical Development of Toxic Colonialism in Africa**

Toxic colonialism is manifested in many different 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,\textsuperscript{46} to the lack of capacity of countries in the Global South to deal with the aftermath. In the mid-1980s a number African countries had private

\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} See Pratt supra note 22 at 154.
\textsuperscript{39} See Adam Lupel, *Regionalism and Globalization: Post-Nation or Extended Nation?* 36 POLITY 153, 159 (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.”
\textsuperscript{41} 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 Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).
\textsuperscript{42} See Lupel, supra note 39, at 157 (discussing how globalization challenges states in their: administrative effectiveness, territorial sovereignty, collective identity, and democratic legitimacy).
\textsuperscript{45} See Atteh, supra note 23 at 281 (discussing French and the U.S. exporting "enormous amounts of hazardous waste to Africa").
\textsuperscript{46} See Brooke, supra note 50.
local companies, individuals, and governments “openly or secretly” sign waste disposal contracts with waste brokers. These contracts authorized waste brokers “to use certain designated areas” for dumping hazardous waste. For example, the governments of Benin and Guinea-Bissau signed lucrative contracts with companies in the Global North to dump hazardous waste in their territories for a specified period of time. In Benin, the company falsely described the hazardous waste material in the ten-year contract as “complex organic matter” and “ordinary industrial wastes”. In Guinea, a Norwegian shipping company brokered a deal in 1988, to dump on Kassa, a resort island not too far from the capital. The company unloaded 15,000 tons of a substance listed as “raw material for bricks” in an abandoned quarry. Subsequently, visitors from the mainland noticed that the island’s vegetation began to shrivel. A government investigation later discovered that in fact the material was incinerator ash from Philadelphia. The contract originally provided for the disposal of 85,000 tons of hazardous waste in Guinea. Following the incident, the government of Guinea arrested at least thirteen people, including the Norwegian Consul-General who was accused of forging an import license to enable the company to import the hazardous waste. International furor ensued, and a Norwegian freighter completed removal of the hazardous waste in July of 1988.

This troubling 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. This is despite the fact 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 during the civil war. The financial arrangements undoubtedly helped to fuel the conflict and provided powerful incentives to the various warlords to ignore environmental and public health repercussions. The dumping of toxic waste in Somalia gained renewed international attention following the 2004 tsunami. The waves from the tsunami exposed containers, which held “radioactive waste, lead, cadmium, mercury, flame retardants, hospital

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47 See Kelbessa, supra note 20 at 109.
48 Atteh, supra note 23 at 281.
49 For further discussion see id. at 285-286.
51 See Brooke, supra note 50.
52 See id.
53 See id.
54 See id. See also Mark Jaffe, Tracking the Khian Sea: Port to Port, Deal to Deal, PHILA. INQUIRER, July 15, 1988 at B1 available at http://articles.philly.com/1988-07-15/news/26236354_1_khian-sea-coastal-carriers-incinerator-ash (discussing how efforts to dispose of the Philadelphian ash failed in Chile, Honduras, Haiti, the Bahamas, the Dominican Republic, Costa Rica, before it reached the West Coast of Africa).
55 See Brooke, supra note 50.
56 See Barbara Huntoon, Emerging Controls on Transfers of Hazardous Waste to Developing Countries, 21 LAW & POL’Y INT’L BUS. 247 (1989).
57 See Atteh, supra note 23 at 283.
58 See Brooke, supra note 50.
60 See UNEP Report supra note 44 at 134.
61 See Bridgland, supra note 43.
62 See Kelbessa, supra note 20 at 109.
waste, and cocktails of other deadly residues” on Somalia’s shores. “Subsequent cancer clusters have also been linked to Europe’s special gift to the country, delivered by that tsunami.”63 A report by UNEP said the release of the deadly substances, has caused health and environmental problems to the surrounding local fishing communities including contamination of groundwater. Many people in these towns have complained of unusual health problems as a result of the tsunami winds blowing towards inland villages. The health problems include acute respiratory infections, dry heavy coughing and mouth bleeding, abdominal hemorrhages, unusual skin chemical reactions, and sudden death after inhaling toxic materials.64 

Italian authorities initiated an investigation into the company’s hazardous waste trade in 1997.65 Due to the continued violence and political instability in Somalia the prospects for a successful clean-up are limited. 

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 is also exhibited in Nigeria’s experience.66 In Nigeria, a businessman permitted two Italian MNCs to use his home to store 18,000 drums of hazardous waste in 1987.67 He resided in Koko, Nigeria a small rural community located on the river Niger.68 The Line ship (registered in Germany) was refused entry in Europe because the ship had been found to be carrying “highly poisonous chemical waste” before it made its way to Nigeria.69 The businessman charged $100 a month for the storage of the toxic waste.70 The ship delivered four shipments of the waste before media exposure of the crime alerted the Nigerian authorities.71 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.”72 In the aftermath of the toxic dumping, reportedly nineteen individuals died, including the businessman who stored the waste in his backyard.73 Other adverse effects included chemical burns, paralysis of a member of the crew who reloaded the waste, and the dockworkers that repackaged the waste on board the ship reportedly vomited blood.74 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 to send the waste back to Italy.75 The government also enacted a decree making the trafficking in

63 Bridgland, supra note 43.
64 UNEP Report supra note 44 at 134.
65 See Kelbessa, supra note 20 at 110.
67 See Kelbessa, supra note 20 at 109.
68 See Atteh, supra note 23 at 283.
69 Id. at 283.
70 See Kelbessa, supra note 20 at 109.
71 See Atteh, supra note 23 at 283.
72 Id. at 284.
73 See id. at 284.
74 Id. at 284. See also Kelbessa, supra note 20 at 109.
75 See Atteh, supra note 23 at 283.
hazardous waste a capital crime, but later reduced the punishment to life imprisonment.\textsuperscript{76} It also passed a decree in 1988, which barred citizens from negotiating toxic waste contracts with foreign companies.\textsuperscript{77}

The patterns of economic dependence, exploitation, and inequality also characterize the toxic dumping incident in Côte d’Ivoire, which occurred more than twenty years after the Nigerian and Somalian incidents. Ironically, outrage about toxic dumping in Nigeria in 1988, led Côte d’Ivoire to adopt a law that provides for prison terms of up to 20 years and fines of up to $1.6 million for individuals who import hazardous waste.\textsuperscript{78} In August of 2006, a ship named the Probo Koala charted by the Dutch-based oil and service shipping company Trafigura Beheer BV, offloaded toxic waste. The Probo Koala left the waste at the port of Abidjan, the capital city of Côte d’Ivoire.\textsuperscript{79} A local contractor of Trafigua disposed of the waste at approximately eighteen open-air sites in and around the city of Abidjan.\textsuperscript{80} Similar to the hazardous dumping incident in Nigeria, the ship attempted to discharge its’ waste in Europe, but was unable to, due to the toxicity of the waste.\textsuperscript{81} Following the toxic dumping in Abidjan, people living near the discharge sites began to suffer from a range of illnesses including: nausea, diarrhea, vomiting, breathlessness, headaches, skin damage, and swollen stomachs.\textsuperscript{82} The exposure to this waste caused the death of sixteen people, and more than 100,000 people sought medical attention.\textsuperscript{83} Trafigura denied any wrongdoing.\textsuperscript{84} In early 2007, the company paid approximately $195 million for cleanup to the Ivorian government.\textsuperscript{85} The government waived its right to prosecute the company.\textsuperscript{86} Today, almost 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.\textsuperscript{87}

According to a three-year investigative report by Amnesty International and Greenpeace,

\textsuperscript{77} See Atteh, \textit{supra} note 23 at 283.
\textsuperscript{78} See Brooke, \textit{supra} note 50.
\textsuperscript{82} See \textit{The Toxic Truth supra} note 79 at 57.
\textsuperscript{83} See \textit{id.} at 10.
\textsuperscript{85} See \textit{The Toxic Truth supra} note 79 at 9.
\textsuperscript{86} See \textit{id.}
\textsuperscript{87} For further discussion see Part III.
“too little has been done to strengthen national and international regulations, even after the scale of the toxic dumping became clear.”

Greenpeace International Executive Director Kumi Naidoo stated 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.

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

The incidents of toxic colonialism discussed above indicate that a number of countries attempted to take steps to limit toxic dumping in their territories by resorting to criminal sanctions. 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) 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.” The OAU passed the resolution in 1988, shortly after the toxic dumping scandal in Nigeria had come to light. The Resolution condemned the dumping of hazardous waste by MNCS, and urged its members to stop arranging for waste dumping. It also sought to require that dumpers “clean up the areas that have already been contaminated by them.” Although a non-binding political statement, this Resolution would 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 in regulating hazardous waste was needed. This Part has also illustrated how the experience with toxic colonialism on the Continent would later influence the decision to attempt to regionally criminalize the trafficking of hazardous waste in the Malabo Protocol.

94 Id. art. 2.
95 Id. art. 3.
96 Id. art. 2.
3. **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. 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.

**A. The Inadequate Legal Framework for Regulating Hazardous Waste**

The Basel Convention of 1989, which entered into force in 1992 is the primary international agreement for the regulation of hazardous waste. 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. Global concerns regarding hazardous waste “sparked a desire to create a more binding agreement” and led to the Basel Convention.

The Basel Convention works more like a trade regime – in that it seeks to control the movement of hazardous waste “through a system of prior informed consent, strict notification, and tracking requirements.” 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. 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. As of March 2016, 183 states are party to the Basel Convention.
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 (ACP) states signed the Lomé IV Convention in 1990 with the European Economic Community. 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. The agreement between the ACP states noted that in interpreting the provisions of the ban it would be guided by the principles and provisions in the OAU Resolution, which amongst others considered the trafficking in hazardous waste to be a “crime against Africa and the African people.” The Lomé IV Convention expired in 2000.

Significantly, the OAU adopted the Bamako Convention in 1991, which created a regional ban on the importation of all hazardous waste into Africa and limits the transfer of hazardous waste within Africa. 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. Moreover, the Convention stipulates that any importation of hazardous waste into Africa, “shall be deemed illegal and a criminal act.” The Bamako Convention also imposes, “strict, unlimited liability as well as joint and several liability on hazardous waste generators.” With respect to hazardous waste generated within Africa, the Convention mimics the Basel Convention provisions. As of March 2016, the Bamako Convention had twenty-nine signatories, and twenty-five parties.

OAU member states were dissatisfied with the Basel Convention, which does not explicitly ban the export of hazardous waste. Instead, the Basel Convention has a limited ban on exports and imports of hazardous waste to and from non-parties to the Convention. Accordingly, almost all OAU countries except for Nigeria, refused to ratify the initial Basel Convention. 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

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106 Id. art. 39.
108 OAU Resolution supra notes 93–96 and accompanying text.
109 See Pratt supra note 22 at 166.
110 See Bamako Convention supra note 7.
111 See id. art. 4.
112 Id.
113 Id. art. 4(3)(b); art. 1(20) (defining 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”).
114 See Bamako Convention supra note 7 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).
117 See Basel Convention supra note 98 art. 4(5).
118 See Vu, supra note 59 at 410.
the Global South demanding a total ban on toxic waste.\textsuperscript{119} Both views emanate from concerns over enforcement – with the Global North viewing a total ban as impossible to enforce, and the Global South viewing the free-trade model as impossible to monitor or control effectively due to disparities in technological and environmental infrastructure.\textsuperscript{120} The Global South’s view was reinforced by the series of toxic dumping scandals that took place in Africa even after the Basel Convention came into force.\textsuperscript{121} This may also help to explain why the scope of what constitutes hazardous waste in the Bamako Convention is much wider, than what the Basel Convention covers.\textsuperscript{122}

Some scholars have postulated that overlapping regimes can “generate positive feedback: providing incentives for a “race to the top.”\textsuperscript{123} This occurs where countries take stronger action on a given issue in one regime, which generates imitation by others.\textsuperscript{124} An excellent example of this is how the Bamako Convention’s imposition of strict liability on “hazardous waste generators”\textsuperscript{125} influenced the Basel Convention’s Protocol on Liability and Compensation.\textsuperscript{126} The Bamako Convention entered into force in 1998,\textsuperscript{127} while the Basel Convention required parties to create and adopt a protocol on liability in 1989.\textsuperscript{128} The Basel Protocol was only adopted after heated negotiations in December of 1999.\textsuperscript{129} 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.\textsuperscript{130} The Protocol needs twenty ratifications to enter into force, and as of March 2016, only had eleven ratifications.\textsuperscript{131}

Another instance of how the Bamako Convention influenced international law regulating hazardous waste is the Basel Ban Amendment.\textsuperscript{132} In 1995, state parties to the Basel Convention

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\item[119] See Atteh, supra note 23 at 283.
\item[120] See id.
\item[121] See Part 2B.
\item[122] Compare Basel Convention supra note 98 art. 1, Annex I, Annex II, with Bamako Convention supra note 7 art. 2, annex I, annex II (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).
\item[124] See id.
\item[125] Bamako Convention supra note 7 art. 4(3)(b); art. 1(20).
\item[127] See Bamako Convention supra note 7.
\item[128] See Basel Convention supra note 98 art. 12.
\item[129] See Pratt supra note 22 at 163-164.
\item[130] See Basel Convention supra note 98 arts. 4, 5.
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decided by consensus that a total ban of hazardous waste should be developed. The Ban Amendment would go further than the Bamako Convention by prohibiting all exports of hazardous wastes between developed and developing countries. The Ban Amendment technically needs sixty-two ratifications to come into effect. And as of March 2016, eighty-five parties have ratified the Ban, yet the amendment has still not entered into force. Countries have failed to reach agreement on how the provisions relating to amendment of the Basel Convention should be interpreted. This controversy 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 had to be lower in order to get more state parties to join the regime. 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.

Overlapping regimes can also result in a “race to the bottom” with countries seeking lower barriers to entry. That is instead of states deciding to bind themselves to higher obligations, states can seek to lower their obligations. The Cotonou Agreement, which replaced the Lomé IV Convention between the European Community and ACP states in 2000 illustrates this point. The Cotonou Agreement backtracks from the hazardous waste ban contained in the Lomé IV Agreement, and instead takes “into account issues relating to the transport and disposal of hazardous wastes.” Without the total ban, the Cotonou Agreement is significantly weakened.

The same can also be said for the Basel Convention without ratification of the Ban Amendment. Currently, the only international agreement, which bans the import of hazardous waste is the Bamako Convention. The rest of the international agreements in this area seek to put varying levels of control on the transboundary movements of such wastes. In sum, the regional ban on

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133 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 September 22, 1995. Id. See also Basel Convention supra note 98 art. 4A and Annex VII [hereinafter Ban Amendment].
134 See id. art. 17(5) (provides 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 22 at 163 (noting that sixty-two ratifications represents three-fourths of the parties present at the Third Meeting of the Conference of the Parties).
137 See Pratt supra note 22 at 163 (discussing how the option of a total ban was tabled until future conferences of the parties).
140 See Pratt supra note 22 at 166.
hazardous waste in the Bamako Convention allowed for more innovation than was possible at the global level.

B. African Regional Innovation

Regional systems have demonstrated creativity and flexibility in other areas of law by adopting regional human rights treaties to fill the gaps in international law. Regional systems also innovated to cover rights and duties not recognized in the main international human rights treaties. 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. 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. For example, the Basel Convention does not provide for any enforcement mechanisms for illegal trafficking. Instead, it provides that parties should adopt domestic legislation for the prevention and punishment of trafficking in hazardous waste. Since the OAU resolution in 1988, African states have considered the trafficking in hazardous waste to be a “criminal act”. This view was encapsulated in the Bamako Convention provision that states should adopt national laws to impose criminal penalties “on all persons who have planned, committed, or assisted” in the illegal trafficking in hazardous waste. These penalties were to be “sufficiently high to both punish and deter such conduct.” The analysis above has shown that despite the strong provisions of the Bamako Convention, the state parties to Bamako simply lacked the capacity to effectively enforce the provisions domestically and prevent toxic colonialism within their borders. Indeed, none of the international legal agreements discussed above have contained the illegal trade in hazardous waste, which is often transported under false pretenses. Indeed, no state has the ability to check and inspect each shipment that enters its port to see, if it contains hazardous waste.

143 See e.g. Chaloki Beyani, Reconstituting the Universal: Human Rights as a Regional Idea, in CAMBRIDGE COMPANION TO HUMAN RIGHTS LAW, 176 (Conor Gearty and Costas Douzinas eds., 2012).
146 See Basel Convention supra note 98 art. 4(5).
147 See OAU Resolution supra note 93.
148 See Bamako Convention supra note 7 art 9(2).
149 Id.
150 See id. art 4.
151 See Part 2B.
152 See Pratt supra note 22 at 167.
153 Id. at 167 n. 173.
The Court’s expansive jurisdiction might assist with more effective prosecutions of toxic dumping incidents. When the Protocol enters into force, the court can exercise jurisdiction over trafficking in hazardous waste and other crimes committed after that date.\(^\text{154}\) The Assembly of the Heads of State and Government, and the Peace and Security Council\(^\text{155}\) of the AU, as well as State parties, and the independent prosecutor\(^\text{156}\) will be able to submit cases to the court.\(^\text{157}\) The court can 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 when the vital interests of a state are threatened by the extraterritorial acts of non-nationals.\(^\text{158}\) The court does not have jurisdiction over persons under the age of eighteen during the alleged commission of the crime.\(^\text{159}\) The court’s provision for corporate criminal liability\(^\text{160}\) will be important in prosecutions of traffickers. Controversially, the court does not have 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.”\(^\text{161}\) This immunities provision is in stark contrast with the statutes of other international criminal tribunals.\(^\text{162}\) It has caused significant backlash towards the court from scholars and practitioners.\(^\text{163}\) I discuss some of the challenges raised by the corporate criminal liability and immunity provision for prosecuting traffickers of hazardous waste below.\(^\text{164}\)

Additionally, there are numerous political, financial, and other obstacles that may impede the regional criminal court’s ability to offer a robust prosecution mechanism for the trafficking in hazardous waste. Once established, it is likely that the court will face challenges regarding political will to enforce decisions. It is also likely, that the regional criminal court will face credibility issues because of the issue of official immunity. Moreover, the court will likely have difficulty guarding against bias accusations, particularly when the individuals or entities are from outside of the African region. Additionally, the regional court will 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 less judicial and lawyering experience than exists at the international level. Notwithstanding these logistical and conceptual concerns, the Malabo Protocol’s criminalization of the trafficking

\(^{154}\) See Malabo Protocol, supra note 3 art. 46E.


\(^{156}\) See Malabo Protocol, supra note 3, art. 46G.

\(^{157}\) See id. art. 15.

\(^{158}\) See id. art. 46E.

\(^{159}\) See id. art. 46D.

\(^{160}\) See id. art. 46C.

\(^{161}\) Id. art. 46A bis.

\(^{162}\) See 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; SCSL Statute supra note 5, art. 6.


\(^{164}\) See Part 4. For further discussion see Regionalism, Regime Complexes and International Criminal Justice in Africa See Sirleaf, supra note 26.
of hazardous waste, pushes the boundaries of international environmental and criminal law in a much needed direction. In essence, 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 and attempt to change the status quo by utilizing a regional institution to criminalize and prosecute the trafficking in hazardous waste.

4. Implications of Criminalizing and Prosecuting Dangerous Waste Regionally

This Part analyzes the potential implications of criminalizing and prosecuting trafficking in hazardous waste regionally. It does so by considering whether the regional prosecution of trafficking in hazardous waste contributes towards some of the newer theories of punishment like restorative justice and expressive condemnation, as well as some of the more traditional goals of punishment like retribution and deterrence. This Part also examines how some of the more pressing challenges might be resolved through creative interpretation of the Protocol.

A. Regional Criminalization of Trafficking in Hazardous Waste & Retributive Justice

The prosecution of trafficking in hazardous waste through the regional court will have limited impact in furthering retribution. Retributive justice theories of punishment emanated from the desire for vengeance and “just deserts” for offenders. 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. The Malabo Protocol allows for the imposition of prison sentences, pecuniary fines, and forfeiture of property acquired unlawfully. 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.” The analysis above indicated 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. It is not clear how “grave” the Court will determine the crime of trafficking in hazardous waste is, and 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 is significantly at variance with domestic norms, this could frustrate the ability of the regional court to further retributive justice goals. The Court might need to develop something akin to the “margin of appreciation” doctrine used by the European Court of Human Rights, for sentencing and to make sure its judgments comport with the majority of state’s practice in the region.

165 See Malabo Protocol, supra note 3 art. 28L.
166 See e.g. IMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL PROPOSAL (1927); SUSAN JACOBY, WILD JUSTICE: THE EVOLUTION OF REVENGE (1985).
168 Malabo Protocol, supra note 3, art. 43A.
169 Id. art 43A(4).
170 See Part 2B.
171 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.”).
Furthermore, because the Malabo Protocol bars the prosecution of not only Heads of States, but also of “senior state officials” based on their functions, leaders who are accused of trafficking in hazardous waste could not 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 dumping of hazardous waste in their territories. Failure to prosecute all equally culpable individuals violates the retributive principles of just deserts, as well as the principle of proportionality that all like crimes should be treated the same.

The ability of the Court to contribute towards retributive justice goals may also be limited because it is dependent on member states for the enforcement of its sentences and fines. 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 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. In these circumstances, the regional court can issue a pardon or commutation of a sentence based on the “interests of justice and the general principles of law.” Depending on how the 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. Of course, the existence of a connection with regional institutions does not completely deal with issues of non-compliance. For all of the reasons above, the regional prosecution of trafficking in hazardous waste may have limited ability to further retribution.

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

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172 Malabo Protocol, supra note 3, art. 46Abis.
173 See Part 2B for further discussion.
174 See Malabo Protocol, supra note 3, arts. 46J and 46Jbis.
175 Id. art 46K.
176 Id.
177 See PSC Protocol, supra note 155, at art. 7, 11, and 13(1) (providing the authority for the Peace and Security Council, establishing the Panel of the Wise, and providing for the African Standby Force); AU Constitutive Act, supra note 2 arts. 3-4.
178 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, 307-310 (Mainsuli Ssenyonjo ed. 2012); (discussing the difficulties securing state cooperation with the criminal tribunals in Rwanda and Sierra Leone); see also Beyani, supra note 143 at 87.
agree on a response to a crime." 179 The overwhelming focus is to assist with “re-establishing social equilibrium”180 and facilitating “corrective changes in the record, in relationships, and in future behavior.”181 The regional court is empowered to provide compensation and reparation to victims.182 The Malabo Protocol also provides for the establishment of a trust fund for victims to provide legal aid and assistance.183 The ability of the Court to contribute towards restorative justice goals may be limited, if the court interprets these provisions narrowly. The Court’s ability 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 reparations,184 or formulate broad reparative and restorative measures185, which require the state to end the consequences of a violation through formulating specific policies and programs.186 There may also be insufficient compliance with restorative justice orders because of the Court’s dependence on member states for enforcement.187

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 will construe these provisions. 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.188 Restorative justice approaches

182. See Malabo Protocol, supra note 3 art. 20.
183. See id. at art. 46M.
184. See, e.g., Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations and Costs Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146 (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. 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).
186. See e.g. Miguel Castro Prison v. Peru Merits, Reparations and Costs Judgment, Inter-Am. Ct. H.R. (ser. C) No. 160 (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).
187. See Part 4B for further discussion.
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. 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, and reconciliation, and redistributive, rather than retributive process.” Consequently, the regional criminalization of trafficking in hazardous waste may further restorative justice goals.

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, which is required to reverse the false message sent by the offender’s actions about the value of the victim relative to the criminal. 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 a number of reasons. First, regional powers may tend to distort or even abuse regional processes 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. 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 hegemons on the Continent, this may counteract the ability of one state to exercise undue influence over the regional criminal chamber. Additionally, there is no reason to think of African states as a monolith - regional hegemons may have drastically different views on expressing condemnation on the trafficking of hazardous waste.

programs/faculty/facultyPubsPDF.php?facID=517&pubID=41.

189 See Part 2A for further discussion.
190 Sergey Vasiliev, Between International Criminal Justice and Injustice: On the Methodology of Legitimacy, 29 (draft paper on file with author).
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. 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. 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,” which limits the ability of such trials to express social solidarity and condemnation. The regional criminal court’s 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 in Africa could develop a regional jurisprudence on trafficking in hazardous waste given the prevalence of these issues in Africa, 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.

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 as a means to achieve some desired end, usually the prevention of future crimes. 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. Individual or specific deterrence seeks to prevent future crime by setting sentences that are strict enough to ensure that a particular offender will not reoffend. 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

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196 See id.
198 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, Inter-American Commission on Human Rights, Jun. 8, 1994, at Preamble, available at http://www.oas.org/en/iachr/mandate/Basics/disappearance.asp
199 See Part 2B.
200 See generally JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1781); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW (2d ed. 2008).
because it is dependent on member states for cooperation. In order for deterrence theory to work as applied to the crime of trafficking in hazardous waste - the risk of getting caught and being punished cannot be so low as to be discounted. Yet, the regional court is dependent on state parties to effectively carry out any investigation and prosecution of trafficking in hazardous waste 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. 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, which may be exceedingly difficult to investigate, and prosecute. Moreover, the domestic prosecution of the “war on drugs” demonstrates 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. Additionally, the regional criminal court’s inability to prosecute the trafficking in hazardous waste effectively could 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.

On the other hand, the Court might be able to contribute to deterrence in other ways. For example, the penalties would have to be adequately publicized regionally to further deterrence. The Protocol provides that “penalties shall be pronounced in public.” 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 due to 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 for those found guilty of trafficking in hazardous waste 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), significant penalties and sentences should be imposed in order to further the goals of specific and general deterrence.

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. 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

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202 See Malabo Protocol, supra note 3, art. 46L.
203 See id.
204 See id.
205 See Part 2 for further discussion.
206 There are 123 countries that are State parties to the Rome Statute; African States form the biggest regional block, with thirty-four state parties. See International Criminal Court, The State Parties to the Rome Statute http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last checked on Oct. 24, 2015).
207 See Malabo Protocol, supra note 3 art. 43A(3).
208 See id. 43A(1) and (2).
taking individual circumstances into account when imposing sentences or penalties.\textsuperscript{209} 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. This is because, 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, as well as waste brokers. This prosecution strategy may be useful because it will be difficult for the Court to obtain jurisdiction over higher-level perpetrators, or individuals and entities outside the Continent.

Deterrence theory depends on the perpetrator being a “rational actor;” in other words, the actor contemplating engaging in trafficking in hazardous waste has to be deterable. 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 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.\textsuperscript{210} The Malabo Protocol seeks to disrupt this calculus from the reported “$2.50 per ton to dump hazardous waste in Africa as opposed to $250 per ton in Europe.”\textsuperscript{211}

In addition, actors may not engage in 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 engaging in trafficking in hazardous waste. For these individuals, the 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 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.

5. Conclusion

Given the analysis above, there are many reasons to be cautiously optimistic about the regional criminal court’s criminalization of trafficking in hazardous waste. It is unlikely that the regional criminalization of trafficking in hazardous waste will contribute to retribution. However, there are many theories of punishment that support the regional court’s innovation in this area, including restorative justice, expressive condemnation, and deterrence. It is also important to bear in mind that the regional criminal court is one tool amongst many for combatting the trafficking

\textsuperscript{209} See Malabo Protocol, \textit{supra} note 3 art. 43A(4).
\textsuperscript{210} See Pratt \textit{supra} note 22 at 154.
\textsuperscript{211} UNEP Report \textit{supra} note 44.
in hazardous waste. While by no means perfect, the regional criminal court presents another option for African states whose domestic judiciaries and related institutions may not be able to prosecute trafficking in hazardous waste at all. Additionally, the court certainly helps to fulfill many criminal justice goals when compared to the international system, which has failed to prosecute trafficking in hazardous waste or corporations involved in toxic dumping.