

The African Court's Jurisdiction over the "International" Eco-Crime of Trafficking in Hazardous Wastes: Challenges and Opportunities

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Abstract

This article gives an overview of the jurisdiction of the proposed African Court of Justice and Human Rights (African Court) over the transnational crime of trafficking in hazardous wastes as provided for in Article 28 L of the *Malabo Protocol*. It asserts that Article 28 L ought to be considered as emancipatory in view of the factors which motivated its inclusion in the Protocol; and that it is a significant innovation not only for the African Union but for the field of international criminal justice as a whole. The article concludes that the criminalisation of trafficking in hazardous waste through the *Malabo Protocol* is necessary as Article 28 L will help to fill the gap created by the ineffectiveness of the domestic implementation of the *Bamako Convention*, and the potential ineffectiveness of the *Basel Ban Amendment*, which entered into force in December 2019.

Keywords

African Union; African Court; *Malabo Protocol*; Article 28 L; transnational crimes; trafficking in hazardous waste.

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1 Introduction

In June 2014 the African Union (AU) Assembly adopted the *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol)*.¹ The *Malabo Protocol* expanded the jurisdiction of the proposed African Court of Justice and Human Rights (African Court) through the establishment of a criminal chamber with jurisdiction to try international crimes and transnational crimes. Article 16(1) of the Protocol provides that:

The Court shall have three (3) Sections: a General Affairs Section, a Human and People's Rights section and an International Criminal Law Section.²

Article 28A1(4)-(13) provides for jurisdiction over ten transnational crimes which do not fit within the ambit of the definition of international crimes, but which are of particular relevance to the African continent, including the crime of trafficking in hazardous wastes.³

This article gives an overview of the jurisdiction of the African Court over the transnational crime of trafficking in hazardous wastes as provided for in Article 28 L of the *Malabo Protocol*. As Sirleaf has rightly observed, there is a paucity of literature on the criminalisation of trafficking in hazardous wastes before the African Court,⁴ and it is this gap in the available knowledge that the article seeks to address. To the author's knowledge only Sirleaf⁵ and Heger⁶ have commented in detail on Article 28 L of the *Malabo Protocol*.

The article also seeks to make a fresh contribution to the existing knowledge on the inclusion of jurisdiction over the crime of trafficking in hazardous waste in the *Malabo Protocol* from a Third World Approaches to International Law (TWAAIL) perspective. Some of the fundamental aspects

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¹ *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* (2014) (hereinafter *Malabo Protocol*).

² Article 16(1) of the *Malabo Protocol*.

³ Article 28A (4)-(13) of the *Malabo Protocol* provides for jurisdiction over the transnational crimes of unconstitutional change of government; piracy; terrorism; mercenarism; corruption; money laundering; trafficking in persons; trafficking in drugs; trafficking in hazardous wastes (Art 28A1(12)); and the illicit exploitation of natural resources.

⁴ Sirleaf "Prosecuting Dirty Dumping" 553.

⁵ Sirleaf "Prosecuting Dirty Dumping" 553.

⁶ Heger "Trafficking in Hazardous Wastes" 125.

of TWAIL are drawn from critical legal theory, whose main focus is to show that the concepts of international law are neither natural nor neutral, but that they have been shaped by a history which highlights the reason why they are in their present state.⁷ TWAIL scholars approach international law issues from a critical perspective.⁸ The article asserts in this regard that the jurisdiction of the African Court over the transnational crime of trafficking in hazardous wastes ought to be understood against the background of the continued power and economic disparities between countries from the global south and countries from the global north. Before the entry into force of the *Basel Ban Amendment* in December 2019, this contributed significantly to the failure by AU member states to find common ground with countries from the global north on issues which are of particular relevance to the African continent, including trafficking in hazardous wastes.

Part 2 of the article gives an overview of the African Court's jurisdiction over the crime of trafficking in hazardous waste as provided for in Article 28 L of the *Malabo Protocol*. Part 3 highlights the past experiences of African states with trafficking in hazardous waste and examines the economic factors which motivate African governments to accept the dumping of hazardous wastes in their territories. Part 4 highlights the inadequacies of the international regulatory framework on the transboundary movement of hazardous wastes, which has largely motivated the inclusion of Article 28 L in the *Malabo Protocol*. Part 5 assesses the *Basel Ban Amendment*, which entered into force in December 2019, and its impact on the African Court's jurisdiction over the crime of trafficking in hazardous wastes. Part 6 briefly highlights the challenges and opportunities presented by the *Malabo Protocol*; and part 7 makes concluding remarks. The terms "trafficking in hazardous wastes" and "toxic dumping" are used interchangeably.

2 Trafficking in hazardous wastes: a new international crime

The *Malabo Protocol* in Article 28 L provides for jurisdiction over the crime of trafficking in hazardous wastes. Article 28 L is innovative in that when it comes into operation the African Court will be the first regional court to exercise jurisdiction over the crime of trafficking in hazardous wastes. Notwithstanding the existence of an international legal framework regulating the trans-boundary movement of hazardous wastes, there is no other

⁷ See Derrida *Dissemination* (Translator's Introduction xv), which explains that "The critique reads backwards from what seems natural, obvious, self-evident or universal in order to show that these things have their history, their reason for being the way they are, their effects on what follows from them, and that the starting point is not a (natural) given but a (cultural) construct, usually blind to itself."; Mushoriwa *Relationship between International Criminal Law and State Sovereignty* 56-57.

⁸ Bianchi *International Law Theories* 217; Gathii 2011 *TL&D Journal* 43.

regional or international court or tribunal which has criminalised the trafficking of hazardous wastes.⁹

Article 28 L(1) of the *Malabo Protocol* provides as follows:

For the purpose of this Statute, any import or failure to re-import, transboundary movement, or export of hazardous wastes proscribed by the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement of Hazardous Wastes within Africa adopted in Bamako, Mali in January 1991, shall constitute the offence of trafficking in hazardous wastes.¹⁰

Article 28 L is similar in wording to Article 2 of the *Bamako Convention*, which provides for the definition of hazardous wastes.¹¹ It refers to Annex I and II of the *Bamako Convention* for the list of what constitutes hazardous wastes;¹² and for the meaning of "failure to reimport".¹³ Article 28 L(2) provides that wastes not contained in Annex I but which are defined or considered as hazardous by the domestic legislation of the state of import, export or transit,¹⁴ and hazardous substances which have been banned, cancelled or refused registration by government regulations, or voluntarily withdrawn in the State of manufacture for human, health or environmental reasons¹⁵ constitute hazardous wastes. Article 28 L(6) includes radioactive wastes which are subject to international control systems, including international systems, within the definition of hazardous wastes.¹⁶ Like the *Bamako Convention*, Article 28 L of the *Malabo Protocol* provides that wastes deriving from the normal operations of a ship do not fall within the scope of hazardous wastes,¹⁷ but departs from the *Bamako Convention* by providing that the exporting of hazardous wastes into a member state for the purpose of rendering it safe does not constitute an offence.¹⁸

The reference to the *Bamako Convention* for the definition and scope of the crime of trafficking in hazardous wastes poses interpretative challenges for Article 28 L, given the broad scope of the *Bamako Convention*.¹⁹ According

⁹ For a detailed overview of the international legal framework regulating the transboundary movement of hazardous wastes see Sirleaf "Prosecuting Dirty Dumping" 564-574.

¹⁰ Article 28 L (1) of the *Malabo Protocol*.

¹¹ See Art 2 of the *Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement of Hazardous Wastes within Africa* (1991) (hereinafter the *Bamako Convention*).

¹² Article 28 L(2)(a) and (c) of the *Malabo Protocol*; Art 2(1)(a) and (c) of the *Bamako Convention*.

¹³ Article 28 L (5) of the *Malabo Protocol*.

¹⁴ Article 28 L(2)(b) of the *Malabo Protocol*; Art 2(1)(b) of the *Bamako Convention*.

¹⁵ Article 28 L(2)(d) of the *Malabo Protocol*; Art 2(1)(d) of the *Bamako Convention*.

¹⁶ Article 28 L (3) of the *Malabo Protocol*; Art 2(2) of the *Bamako Convention*.

¹⁷ Article 28 L (4) of the *Malabo Protocol*; Art 2(3) of the *Bamako Convention*.

¹⁸ Article 28 L (6) of the *Malabo Protocol*.

¹⁹ Heger "Trafficking in Hazardous Wastes" 132; Sirleaf "Prosecuting Dirty Dumping" 574-575.

to Heger the fact that Article 28 L(2)(b) refers to the domestic legislation of the importing, exporting or transiting state for the definition of hazardous waste may result in the implementation of international law varying from country to country at the regional level in Africa.²⁰ Heger asserts that if each member state has the discretion to decide the definition of hazardous wastes, then the power of individual states to criminalise the trafficking of such hazardous waste on the basis of the *Malabo Protocol* must be curtailed to encompass only the provisions under domestic laws.²¹ Article 9 of the *Bamako Convention* provides a list of what constitutes illegal trafficking in hazardous wastes and in terms of Article 9(1)(e) the transboundary movement of hazardous waste shall be deemed illegal

if it results in deliberate disposal of hazardous wastes in contravention of this convention and of general principles of international law.²²

As argued by Sirleaf, this provision could result in a very broad interpretation of Article 28 L of the *Malabo Protocol* as there is lack of clarity as to what exactly the general principles encompass.²³ Sirleaf further argues that a broad interpretation of Article 28 L based on the provisions of the *Bamako* provisions would lead to a lack of clarity as to what exactly is being criminalised, and this in turn would violate the principle of legality, which requires that people should be adequately informed about criminal laws in order for them to be able to comply with the said laws.²⁴

In the absence of clarity with respect to what exactly is being criminalised under Article 28 L the threshold of criminalisation would be very low, and this could potentially lead to a waste of the Court's resources and time whilst prosecuting minor violations of the *Malabo Protocol*, on the basis of the wording of the *Bamako Convention*.²⁵ Concern has also been raised at the possible low threshold of criminalisation as a result of Article 28 N of the *Malabo Protocol*, which provides for modes of criminal responsibility.²⁶ Article 28 N(iv) provides that a person who attempts to commit any of the offences provided for in the *Malabo Protocol* commits an offence.²⁷ Heger has asserted that whilst it is reasonable to treat attempted core international crimes as accomplished crimes, as is the case with the *Rome Statute of the International Criminal Court (Rome Statute)*, this is not necessary with environmental crimes.²⁸ It would arguably be more feasible in this regard if the *Malabo Protocol* could be amended so as to do away with the blanket

²⁰ Heger "Trafficking in Hazardous Wastes" 132.

²¹ Heger "Trafficking in Hazardous Wastes" 132.

²² Article 9(1)(e) of the *Bamako Convention*.

²³ Sirleaf "Prosecuting Dirty Dumping" 575.

²⁴ Sirleaf "Prosecuting Dirty Dumping" 576.

²⁵ Sirleaf "Prosecuting Dirty Dumping" 576.

²⁶ Heger "Trafficking in Hazardous Wastes" 134.

²⁷ Article 28N(iv) of the *Malabo Protocol*.

²⁸ Heger "Trafficking in Hazardous Wastes" 134.

approach to modes of criminal responsibility. Although all the crimes in the *Malabo Protocol* are of serious concern to the African continent, it is important to ensure that when the African Court becomes operational, resources are not wasted in trying to pursue petty crimes, and the Court should rather focus on the most serious violations of the Protocol, including serious violations of Article 28 L.

Notwithstanding these shortcomings, however, Sirleaf has convincingly asserted that Article 28 L

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 criminalise and prosecute trafficking in hazardous waste.²⁹

3 Africa's vulnerability to toxic dumping

The criminalisation of trafficking in hazardous waste in the *Malabo Protocol* ought to be understood against the background of the continued economic and power disparities between countries from the global north and countries from the global south, which render African states vulnerable to toxic dumping and its aftereffects. This section highlights that African states have for a long time had to deal with the problems associated with hazardous waste which is dumped within their territories primarily by Multi-National Corporations (MNCs) from the industrialised global north.³⁰

African states' past experiences with toxic dumping and its aftereffects significantly motivated the inclusion of Article 28 L in the *Malabo Protocol*. The dumping of hazardous waste in African states has had devastating effects not only on the environment, but also on the lives and livelihoods of the people. Toxic dumping leads to several problems including health problems such as stunted growth, birth defects and in some cases death. It also leads to environmental damage through the contamination of soil and water sources.³¹ As the majority of African people live in rural areas and depend on subsistence farming; when groundwater and soil is contaminated agricultural production is in turn affected and this has a negative impact on their livelihoods.³² The majority of African states do not have the financial resources and technological infrastructure necessary to mitigate the impact of toxic dumping, and this makes African states and countries from the

²⁹ Sirleaf "Prosecuting Dirty Dumping" 578.

³⁰ Clapp 1994 *TWQ* 505-506 (explaining that the transboundary movement of hazardous waste began in the 1970s, but the movement of hazardous waste to Africa increased in the 1980s as a result of the rise in disposal costs in the developed world); Heger "Trafficking in Hazardous Waste" 127.

³¹ Sirleaf "Prosecuting Dirty Dumping" 557.

³² Sirleaf "Prosecuting Dirty Dumping" 557.

global south in general more vulnerable to the negative effects of toxic dumping than countries from the global north.³³

The history of toxic dumping in Africa, notably the Koko dumping incident in Nigeria, the Trafigura dumping incident in Cote d'Ivoire and the Somalia tsunami discussed below largely motivated the adoption of the *Bamako Convention*, which in turn influenced the criminalisation of trafficking in hazardous waste through the inclusion of Article 28 L in the *Malabo Protocol*.³⁴ The *Malabo Protocol* criminalised transnational crimes covered in different OAU/AU treaties, including trafficking in hazardous waste, which had already been addressed by the 1989 *Basel Convention on the Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention)*; the 1990 *Lome IV Convention*;³⁵ and the 1991 *Bamako Convention*.³⁶

3.1 Africa's past experiences with trafficking in hazardous waste

3.1.1 The Koko dumping incident

In 1987 two Italian MNCs, Ecomar and Jelywax, persuaded a businessman in Koko, Nigeria, to store hazardous waste in his backyard in exchange for 100 USD per month.³⁷ The waste consisted of several hazardous substances including asbestos fibres, dioxin and formaldehyde.³⁸ The hazardous wastes caused a number of side effects for the residents of Koko and government workers who had been assigned to clear the waste. The effects ranged from burns, paralysis, nausea, premature births, brain damage, brain defects, stunted growth and other psychological side effects.³⁹ The businessman who had permitted the storage of the hazardous wastes in his backyard died of throat cancer.⁴⁰ There was severe environmental damage, and the land within a radius of 500 m from the dump site was rendered unsafe and unfit for use. In addition the livelihoods of the Koko people were destroyed both as a result of the aftereffects of the toxic dumping and the stigma that followed.⁴¹ It was noted that

The public started avoiding Koko town. Commercial vehicles would not stop at the road junction or intersection leading into the town, and private car

³³ For a detailed overview of dumping incidents in Africa, see Sirleaf "Prosecuting Dirty Dumping" 558-564.

³⁴ Agbor 2016 AJLS 243.

³⁵ *Fourth African, Caribbean and Pacific States-European Economic Community Convention of Lome* (1990) (hereinafter the *Lome IV Convention*).

³⁶ For a detailed overview of the *Bamako Convention* see generally Wylie 1992 *Columbia J Envtl L* 431.

³⁷ Adeola *Hazardous Wastes* 133.

³⁸ Adeola *Hazardous Wastes* 134.

³⁹ Adeola *Hazardous Wastes* 134.

⁴⁰ Adeola *Hazardous Wastes* 134.

⁴¹ Adeola *Hazardous Wastes* 134.

owners would hold their breath and wind up their windows as they approach the town. Traders stayed away from the community and visitors to Koko were avoided like plague. The only bank in the town closed its offices, and non-indigenes fled the town.⁴²

3.1.2 *The Somalia tsunami*

In 1992 Italian and Swiss MNCs entered into a twenty-year contract for the disposal of hazardous wastes worth \$80 million, with the purported Minister of Health of Somalia.⁴³ As observed by Sirleaf, this was despite the fact that Somalia was embroiled in a civil war and there were no legitimate office bearers.⁴⁴ More than two decades later, in the aftermath of the 2004 tsunami, containers were exposed which contained hazardous wastes including radioactive materials, hospital waste, mercury and flame retardants.⁴⁵ The exposure of these toxic wastes resulted in damage to the environment in the form of the contamination of groundwater. This in turn had a negative impact on the livelihoods of local fishing communities. The resultant health problems included acute respiratory infections, dry heavy coughing and mouth bleeding, abdominal haemorrhages, unusual skin reactions and sudden death after inhaling toxic materials.⁴⁶

3.1.3 *The Trafigura dumping incident.*

In 2006 the Probo Koala, a ship owned by Trafigura Beheer DV, a Dutch company, dumped hazardous wastes at the port of Abidjan, Cote d'Ivoire.⁴⁷ Trafigura then engaged the services of a local contractor to dump the waste in 28 open-air sites in and around Abidjan.⁴⁸ The waste consisted of a combination of hydrogen sulphide, caustic soda and fuel, and amounted to 500 tonnes.⁴⁹ The toxic wastes caused severe health problems including, "nausea, diarrhoea, vomiting, breathlessness, headaches, skin damage, and swollen stomachs".⁵⁰ Sixteen people were reported to have died as a result of exposure to the toxic wastes, and about 100 000 people needed treatment.⁵¹ The dumping incident caused environmental damage as the toxic wastes led to the contamination of the soil and water sources.⁵²

⁴² Ihonvbere 1994 *Journal of Environmental Systems* 211, cited by Adeola *Hazardous Wastes* 134.

⁴³ Sirleaf "Prosecuting Dirty Dumping" 560.

⁴⁴ Sirleaf "Prosecuting Dirty Dumping" 560.

⁴⁵ Sirleaf "Prosecuting Dirty Dumping" 560.

⁴⁶ Sirleaf "Prosecuting Dirty Dumping" 560.

⁴⁷ Sirleaf "Prosecuting Dirty Dumping" 561.

⁴⁸ Sirleaf "Prosecuting Dirty Dumping" 561.

⁴⁹ Pratt 2010-2011 *Wm & Mary Env'tl L & Pol'y Rev* 582.

⁵⁰ Sirleaf "Prosecuting Dirty Dumping" 562.

⁵¹ Greenpeace International 2012

<https://www.greenpeace.org/international/publication/7245/the-toxic-truth/> 52;

Sirleaf "Prosecuting Dirty Dumping" 562.

⁵² Greenpeace International 2012

<https://www.greenpeace.org/international/publication/7245/the-toxic-truth/> 52.

People's livelihoods were affected as a result of the safety measures adopted by the government. Farming, fishing and small-scale commercial activities near the dumping sites were banned, and fruit and vegetable crops were destroyed.⁵³ Trafigura denied having dumped toxic waste, however, and claimed that the dumped waste contained only a small amount of hydrogen sulphide.⁵⁴

3.2 Factors motivating the dumping of hazardous waste by MNCs in Africa

There are a number of factors which motivate MNCs and other actors to dump their waste in developing countries, especially in Africa. These include the strict environmental control measures and the high costs associated with dumping of hazardous wastes in global north countries.⁵⁵ Because the majority of African countries are poor, they are motivated to enter into contracts for the disposal of toxic wastes which disregard environmental laws for financial gain.⁵⁶ Of the 46 countries that were classified as the least developed countries by the United Nations Conference on Trade and Development (UNCTAD) in 2022, 33 are African countries.⁵⁷ The money offered by MNCs for the disposal of toxic wastes sometimes surpasses the gross national product (GNP) or foreign debt of an African state.⁵⁸ Thus, in 1988 Guinea-Bissau was offered an amount of USD 600 million for the disposal of 15 million tons of pharmaceutical and tannery waste from the United States and Europe.⁵⁹ According to Wynne, the value of the contract was four times the country's GNP and twice its national foreign debt.⁶⁰ The financial benefits associated with toxic dumping contracts serve as an incentive for African states to turn a blind eye to environmental regulations.⁶¹ As asserted by Kitt,

Developing countries may assess costs and risks differently than wealthy countries would because of their need to provide food, shelter, water and services to their citizens. Environmental risks may not seem as immediate as housing and disease prevention ...⁶²

⁵³ Greenpeace International 2012

<https://www.greenpeace.org/international/publication/7245/the-toxic-truth/> 52.

⁵⁴ Bernard, Fillorou and Stroobauts 2006

<https://www.theguardian.com/world/2006/oct/20/outlook.development>; Pratt 2010-2011 *Wm & Mary Env'tl L & Pol'y Rev* 583.

⁵⁵ Lassana *Pollution in Africa* 19; Agbor 2016 *AJLS* 243.

⁵⁶ Sirleaf "Prosecuting Dirty Dumping" 558; Lassana *Pollution in Africa* 19.

⁵⁷ UNCTAD 2022 <https://unctad.org/publication/least-developed-countries-report-2022>.

⁵⁸ Dzidzornu 1995 *Queens Law Journal* 451; Wynne 1989 *TWQ* 121.

⁵⁹ Wynne 1989 *TWQ* 121.

⁶⁰ Wynne 1989 *TWQ* 121.

⁶¹ Agbor 2016 *AJLS* 242; Sirleaf "Prosecuting Dirty Dumping" 558.

⁶² Kitt 1995 *Geo Int'l Env'tl L Rev* 491.

The economic disparities that exist between countries from the global north and countries from the global south therefore contribute significantly to the prevalence of toxic waste dumping in Africa. Although African states bear the brunt of the aftereffects of the dumping of hazardous wastes, it is the countries from the global north who enjoy the economic benefits of the processes which lead to the production of the hazardous wastes.⁶³ The practice whereby MNCs from the global north dump their waste in territories in the global south has been referred to as toxic colonialism.⁶⁴ An analogy can be drawn between historical colonialism and toxic colonialism. According to Pratt,

Even though historical colonialism focused on the political and legal domination over an alien society, some of the characteristics of colonialism involving economic dependence, exploitation and cultural inequality are intimately associated with the new realm of toxic waste colonialism.⁶⁵

Heger has explained that during the colonial period the colonisers systematically extracted Africa's natural resources; and although formal colonialism has ended, the former colonisers are now using the territories of their former colonies as a dumping ground for the toxic waste they produce.⁶⁶ The former Kenyan President Daniel Arap Moi said in this regard:

Africa has rejected all forms of external domination ... we do not want external domination to come in through the back door in the form of garbage colonialism.⁶⁷

These sentiments resonate with the views expressed by adherents to TWAIL, including Anghie⁶⁸ and Gathii,⁶⁹ regarding the enduring impact of the 19th century colonial encounter on present day international law and international relations. According to Gathii and other adherents to TWAIL,

while international law guarantees sovereign equality and self-determination, it carries forward the legacy of imperialism and colonial conquest.⁷⁰

The factors which motivate toxic dumping in Africa as opposed to dumping these toxic wastes in the industrialised countries where they are generated are indicative of the economic and power disparities that continue to exist between the global north and global south. These disparities are arguably a

⁶³ Pratt 2010-2011 *Wm & Mary Env'tl L & Pol'y Rev* 587; Sirleaf, "Prosecuting Dirty Dumping" 554.

⁶⁴ Pratt 2010-2011 *Wm & Mary Env'tl L & Pol'y Rev* 584; Sirleaf "Prosecuting Dirty Dumping" 554.

⁶⁵ Pratt 2010-2011 *Wm & Mary Env'tl L & Pol'y Rev* 587.

⁶⁶ Heger "Trafficking in Hazardous Wastes" 127. For a similar view, see Lassana *Pollution in Africa* 19.

⁶⁷ Lassana *Pollution in Africa* 18.

⁶⁸ Anghie *Imperialism, Sovereignty and the Making of International Law* 196-197, 208.

⁶⁹ Gathii 2011 *TL&D Journal* 26.

⁷⁰ Gathii 2011 *TL&D Journal* 30-31. For a similar view see generally Anghie and Chimni 2003 *Chinese JIL* 77; Bianchi *International Law Theories*.

result of the enduring impact of the colonial confrontation of the 19th century on present day international relations. Although African states have gained political independence they have not gained economic independence as is evidenced by their continued economic dependence on their former colonisers. According to Anghie

The end of formal colonialism, while extremely significant, did not mean the end of colonial relations. Rather, in the view of Third World societies, colonialism was replaced by neo-colonialism; Third World states continued to play a subordinate role in the international system because they were economically dependent on the West, and the rules of international economic law continued to ensure that this would be the case.⁷¹

The *Malabo Protocol* criminalised transnational crimes covered in different OAU/AU treaties, including trafficking in hazardous waste, which had already been addressed by the 1989 *Basel Convention*, the 1990 *Lome IV Convention* and the 1991 *Bamako Convention*.⁷²

4 Inadequacies of the international regulatory system on the transboundary movement of hazardous wastes

Dumping incidents in Africa, particularly the Koko incident, motivated the Organisation of African Unity (OAU) to adopt a resolution calling on member states to implement a ban on the import of hazardous waste;⁷³ and to refer to the import of hazardous wastes into Africa as "a crime against Africa and the African people".⁷⁴ Notwithstanding that the resolution was a non-binding political statement; it was instrumental in informing OAU member states' position regarding the criminalisation of trafficking in hazardous wastes.⁷⁵ The resolution paved the way for the adoption of the *Basel Convention*.

The main shortcoming of the *Basel Convention* was its failure to provide for a total ban on the trafficking of hazardous wastes.⁷⁶ Instead it operated like a trade system by providing for each party to prevent and punish the illegal trafficking in hazardous waste through its domestic legislative instruments.⁷⁷ This provision was not obligatory and for this reason between 1989 and 1990 OAU member states refused to sign the initial *Basel Convention* in line

⁷¹ Anghie 2006 *TWQ* 748-749.

⁷² For a detailed overview of the *Bamako Convention*, see generally Wylie 1992 *Columbia J Envtl L* 431.

⁷³ *Organisation of African Unity Council of Ministers Resolution on Dumping of Nuclear and Industrial Waste in Africa* (1988) (hereinafter the *OAU Council of Ministers Resolution 1988*).

⁷⁴ *OAU Council of Ministers Resolution 1988 Art 1*; Sirleaf "Prosecuting Dirty Dumping" 563; Agbor 2016 *AJLS* 247.

⁷⁵ Sirleaf "Prosecuting Dirty Dumping" 563.

⁷⁶ Sirleaf "Prosecuting Dirty Dumping" 564.

⁷⁷ *Basel Convention on the Transboundary Movements of Hazardous Wastes and their Disposal* (1989) (hereinafter the *Basel Convention*) Art 9(5), Sirleaf "Prosecuting Dirty Dumping" 565.

with the 1988 Resolution.⁷⁸ Nigeria was the only African state to ratify the initial *Basel Convention* - in 1991.⁷⁹ Other African countries, including Benin, Botswana, Burkina Faso, Eswatini, Ghana, South Africa and Zimbabwe, did not ratify the Convention but acceded to it instead.⁸⁰ More African countries have since ratified the *Basel Ban Amendment*, however, including Nigeria, Congo, Guinea, Malawi, South Africa and Zambia.⁸¹

Following the adoption of the *Basel Convention*, African states, Caribbean states (ACP) and the European Economic Community signed the *Lome IV Convention* in 1990; the interpretation of which was based on the principles in the 1988 Resolution, including the perception of trafficking in hazardous waste as a crime against Africa and its people.⁸² The Convention banned the movement of hazardous wastes from the European Community to ACP states and ACP states committed themselves to not accepting the import of hazardous wastes from the European Community states.⁸³ The *Lome IV Agreement* expired in 2000 and was succeeded by the *Cotonou Agreement* in the same year.⁸⁴ Unlike the *Lome IV Agreement*, the *Cotonou Agreement* does not provide for a ban on the export and import of hazardous waste, but seeks to regulate the disposal and transportation of hazardous wastes.⁸⁵

The OAU's discontent with the *Basel Convention* culminated in the adoption of the *Bamako Convention* in January 1991.⁸⁶ The *Bamako Convention* was a result of a resolution adopted by the OAU in 1989 which called for the drafting of a reciprocal regional treaty in response to the perceived shortcomings of the *Basel Convention*, with the aim of ensuring the total ban on the import of hazardous wastes into Africa.⁸⁷ The *Bamako Convention* imposes a regional total ban on the import of hazardous waste into Africa,

⁷⁸ Agbor 2016 AJLS 247.

⁷⁹ Agbor 2016 AJLS 247; Sirleaf "Prosecuting Dirty Dumping" 569.

⁸⁰ UNEP date unknown

<https://www.basel.int/Countries/StatusofRatifications/PartiesSignatories/tabid/4499/Default.aspx>.

⁸¹ UNEP date unknown

<https://www.basel.int/Countries/StatusofRatifications/BanAmendment/tabid/1344/Default.aspx>.

⁸² *Lome IV Convention* Annex VIII "Joint Declaration on Article 39 on Movements of Hazardous Wastes or Radioactive Wastes"; Sirleaf "Prosecuting Dirty Dumping" 567.

⁸³ *Lome IV Convention* Art 39; Sirleaf "Prosecuting Dirty Dumping" 567.

⁸⁴ *Partnership Agreement between Members of the African, Caribbean and Pacific Group and the European Community and its Member States* (2000) (hereinafter the *Cotonou Agreement*).

⁸⁵ *Cotonou Agreement* Art 32(i)(d); Sirleaf "Prosecuting Dirty Dumping" 568.

⁸⁶ For a detailed overview of the *Bamako Convention*, see generally Wylie 1992 *Columbia J Env'tl L* 431.

⁸⁷ *Organisation of African Unity Council of Ministers Resolution on Control of Transboundary Movements of Hazardous Wastes and their Disposal in Africa* (1989); Agbor 2016 AJLS 247.

and limits the transboundary movement of hazardous wastes between African states. The Convention obliges member states to take measures at the domestic level to enforce the import ban on hazardous wastes.⁸⁸ Like the 1988 Resolution, the *Bamako Convention* provides that the import of hazardous waste into Africa is illegal and a criminal act.⁸⁹ This is a significant departure from the *Basel Convention*, which stipulated that trafficking in hazardous waste is illegal but did not criminalise it.⁹⁰

The inclusion of jurisdiction over trafficking in hazardous wastes in the *Malabo Protocol* therefore also ought to be understood in the context of the inadequacies of the international legal framework governing the transboundary movement of hazardous wastes. The inadequacies of the international legal framework regulating the transboundary movement of hazardous wastes contributed significantly to the inclusion of Article 28 L in the *Malabo Protocol*. This inadequacy ought to be understood partly against the background of the distinction to be drawn between international crimes and transnational crimes. International crimes are those in respect of which criminal responsibility derives directly from international law. These include genocide, crimes against humanity, war crimes and aggression.⁹¹ Transnational crimes are those crimes which have trans-boundary effects, either potential or actual, or both.⁹² Criminal responsibility in respect of transnational crimes arises indirectly through international and regional treaties which oblige the States party thereto to criminalise the conduct in question through domestic legislation.⁹³ The *Rome Statute*, the *Statute for the International Criminal Tribunal for the Former Yugoslavia*, and the *Statute for the International Criminal Tribunal for Rwanda* only include the core international crimes within the jurisdiction of the respective courts, with the *Rome Statute* including the newly agreed crime of aggression.⁹⁴ The *Rome Statute* criminalises as a war crime widespread, long-term and severe environmental damage when it results from an attack during an international armed conflict.⁹⁵

Prior to the Koko dumping incident in 1988, there was no international legal framework in place to regulate the trans-boundary movement of hazardous wastes. Previous attempts to regulate the movement of hazardous wastes

⁸⁸ *Bamako Convention* Art 4; Sirleaf "Prosecuting Dirty Dumping" 568.

⁸⁹ *Bamako Convention* Art 4, Sirleaf "Prosecuting Dirty Dumping" 568.

⁹⁰ Sirleaf "Prosecuting Dirty Dumping" 568. For a detailed comparison of the *Basel Convention* and the *Bamako Convention*, see Tladi 2000 *CILSA* 210-216.

⁹¹ Jessberger "Piracy" 75.

⁹² Jessberger "Piracy" 75.

⁹³ Jessberger "Piracy" 75.

⁹⁴ *International Criminal Tribunal for the Former Yugoslavia Statute* (1993) Arts 2-5; *International Criminal Tribunal for Rwanda Statute* (1994) Arts 2-5; *Rome Statute of the International Criminal Court* (1998) (hereinafter the *Rome Statute*) Art 5(a)-(d).

⁹⁵ *Rome Statute* Art 8(2)(b)(iv); Heger "Trafficking in Hazardous Wastes" 128-129.

had not been effective. These included the adoption of the *Resource Conservation and Recovery Act* in 1976 by the United States; the issuing of Directives in 1975 and 1978 by the European Commission Council;⁹⁶ and the issuing of several decisions by the Organisation of Economic Cooperation and Development (OECD).⁹⁷ As highlighted above, the problem of toxic dumping is more prevalent in developing countries, including African countries. Because countries from the global north are not as often affected by trafficking in hazardous wastes as those from the global south, they do not share the same determination to criminalise and prosecute the crime of trafficking in hazardous waste. This is highlighted by the lack of consensus regarding the criminalisation of toxic dumping between countries from the global south and those from the global north before the adoption of the *Basel Convention Ban Amendment* (the *Ban Amendment*) in December 2019. Prior to the adoption of the *Ban Amendment*, African states had attempted unsuccessfully to criminalise toxic dumping, starting with the adoption of the *Cairo Guidelines* by the United Nations Environmental Programme (UNEP) in 1987.⁹⁸

5 The *Basel Ban Amendment*: towards a ban on trafficking in hazardous wastes

At the second Conference of Parties (COP) in March 1994, states parties to the *Basel Convention* adopted Decision II/12 (the Basel Ban Resolution), which resolved to amend the Convention to provide for a total ban on exports between developed and developing countries.⁹⁹ This was at the instigation of developing countries and civil society organisations including Greenpeace, who were of the view that the exception provided for in Article 11 of the *Basel Convention* allowed for the trafficking of hazardous waste under the guise of recycling.¹⁰⁰ Article 11 of the *Basel Convention* provides as follows:

- 1 Notwithstanding the provisions of Article 4 paragraph 5, Parties may enter into bilateral, multilateral, or regional agreements or arrangements regarding transboundary movement of hazardous wastes or other wastes with Parties or non-Parties provided that such agreements or arrangements do not derogate from the environmentally sound management of hazardous wastes and other wastes as required

⁹⁶ *European Commission Council Directive 75/442* [1975] OJ (L194) 39 (EC); *European Commission Council Directive 78/319* [1978] OJ (L84) 43 (EC); Pratt 2010-2011 *Wm & Mary Env'tl L & Pol'y Rev* 595.

⁹⁷ Pratt 2010-2011 *Wm & Mary Env'tl L & Pol'y Rev* 594.

⁹⁸ *Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Waste* (1987).

⁹⁹ Ahmed 2020 *Washington International Law Journal* 418; Andrews 2009 *LEAD Journal* 171; *Decision II/12 in Report of the Second Meeting of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* UN Doc UNEP/CHW.2/30 (1994).

¹⁰⁰ Ahmed 2020 *Washington International Law Journal* 417.

by this Convention. These agreements or arrangements shall stipulate provisions which are not less environmentally sound than those provided for by this Convention in particular taking into account the interests of developing countries.

- 2 Parties shall notify the Secretariat of any bilateral, multilateral or regional agreements or arrangements referred to in paragraph 1 and those which they have entered into prior to the entry into force of this Convention for them, for the purpose of controlling transboundary movements of hazardous wastes and other wastes which take place entirely among the Parties to such agreements. The provisions of this Convention shall not affect transboundary movements which take place pursuant to such agreements provided that such agreements are compatible with the environmentally sound management of hazardous wastes and other wastes as required by this Convention.

Decision II/12 was not incorporated into the text of the *Basel Convention* and consequently the issue as to whether it was legally binding on the states parties to the Convention was contentious.¹⁰¹ To remedy this uncertainty, the parties to the *Basel Convention*, following a proposal by the European Union (EU), adopted Decision III/1 (the *Ban Amendment*) at COP 3 in November 1995.¹⁰² The *Ban Amendment* was incorporated into the text of the *Basel Convention* through the insertion of a new preambular paragraph 7 bis, a new Article 4A and Annex VII.¹⁰³ The new Article 4A provides for a total ban on exports of hazardous wastes including the export of hazardous wastes for recycling purposes,¹⁰⁴ and Annex VII distinguishes between developing and developed countries for the purposes of the convention by listing the developed countries from the OECD, EU and Lichtenstein.¹⁰⁵ The pertinent amendments to the *Basel Convention* read as follows:

- Recognising that transboundary movements of hazardous wastes, especially to developing countries, have a high risk of not constituting an environmentally sound management of hazardous wastes as required by the Convention.¹⁰⁶
- Each Party listed in Annex VII shall prohibit all transboundary movements of hazardous wastes which are destined for operations according to Annex IV A, to states not listed in Annex VII;¹⁰⁷

¹⁰¹ Ahmed 2020 *Washington International Law Journal* 418; Andrews 2009 *LEAD Journal* 171.

¹⁰² Ahmed 2020 *Washington International Law Journal* 418; Andrews 2009 *LEAD Journal* 171; *Decision III/1 in Report of the Third Meeting of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal* UN Doc UNEP/CHW.3/35 (1995) (hereinafter the *Ban Amendment*). For a detailed overview of the *Ban Amendment*, see BAN and IPEN 2020 https://ipen.org/sites/default/files/documents/ban-basel-fact-sheet-v2_1-en.pdf.

¹⁰³ Ahmed 2020 *Washington International Law Journal* 418; Andrews 2009 *LEAD Journal* 171.

¹⁰⁴ Ahmed 2020 *Washington International Law Journal* 418.

¹⁰⁵ Andrews 2009 *LEAD Journal* 171.

¹⁰⁶ Paragraph 7 bis: Preamble of the *Basel Convention*.

¹⁰⁷ Article 4A1 of the *Basel Convention*.

- Each Party listed in Annex VII shall phase out by 31 December 1997, and prohibit as of that date, all transboundary movements of hazardous wastes under article 1 (1) (a) of the Convention which are destined for operations according to Annex IV B to states not listed in Annex VII. Such transboundary movement shall not be prohibited unless the wastes in question are characterised as hazardous under the Convention.¹⁰⁸

The *Basel Ban Amendment* required 62 ratifications to become operational, and by October 1998 it had been ratified by 95 states. Notwithstanding this, it did not enter into force as states parties did not agree on the interpretation of the provisions of the *Ban Amendment*.¹⁰⁹ Ahmed has observed that the *Ban Amendment* was opposed not only by developed countries but also by some developing countries that were concerned about the loss of the income generated by the recycling of waste materials.¹¹⁰ At COP 10 in October 2011 the state parties to the *Basel Convention* adopted Decision BC-10/3 (an Indonesian-Swiss country-led initiative to improve the effectiveness of the *Basel Convention*) to the effect that the *Ban Amendment* would come into effect upon ratification by three quarters of the states parties who were parties at the time the amendment was adopted.¹¹¹ With the ratification of the *Ban Amendment* by St Kitts and Nevis and finally Croatia, the required ratification threshold was achieved, and the *Ban Amendment* finally came into effect on 5 December 2019, 90 days after Croatia ratified the ban, bringing the total number of ratifications to 97.¹¹²

The entry into force of the *Ban Amendment* has the following legal implications, as outlined by the Basel Action Network and IPEN.

- Countries listed in Annex VII (members of the EU, OECD, and Liechtenstein) that have ratified the *Ban Amendment* may not export hazardous wastes to countries not listed in Annex VII - Annex VII countries include Belgium, Luxembourg, Netherlands, Spain and United Kingdom.
- Countries not listed in Annex VII that have ratified the *Ban Amendment* may not import hazardous wastes from Annex VII countries.
- All states parties to the *Basel Convention* must respect the domestic waste import or export bans imposed by other states parties; regardless of whether or not they have ratified the *Ban Amendment*.
- The *Ban Amendment* has a binding effect on states parties that will ratify the *Basel Convention* after its entry into force.

¹⁰⁸ Article 4A2 of the *Basel Convention*.

¹⁰⁹ Sirleaf "Prosecuting Dirty Dumping" 572.

¹¹⁰ Ahmed 2020 *Washington International Law Journal* 418.

¹¹¹ *Decision BC-10/3 in Report of the Tenth Meeting of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* UN Doc UNEP/CHW.10/28 (2011); UNEP 2019 <http://www.basel.int/Implementation/LegalMatters/BanAmendment/Overview/tabid/1484/Default.aspx>.

¹¹² BAN and IPEN 2020 https://ipen.org/sites/default/files/documents/ban-basel-fact-sheet-v2_1-en.pdf 19; DowntoEarth 2019 <https://www.downtoearth.org.in/news/waste/basel-ban-amendment-becomes-law-66651>.

- Any violation of the *Ban Amendment* by individuals or corporations is considered as illegal trafficking in hazardous wastes; and failure by states parties that have ratified the *Ban Amendment* to enforce its provisions is considered as an act of non-compliance which will be subjected to the non-compliance mechanism of the *Basel Convention*.¹¹³

It was partly the delays in the coming into effect of the *Ban Amendment*, coupled with the inadequacies of the initial *Basel Convention* and the *Bamako Convention* which motivated the AU to include the crime of trafficking in hazardous wastes in the jurisdiction of the African Court.

As observed by Pratt, notwithstanding that the *Bamako Convention* received unequivocal political support from OAU member states, the individual states were unable to implement its provisions effectively at the domestic level.¹¹⁴ There is therefore a possibility that the states that have ratified the *Basel Ban Amendment* may not effectively implement its provisions, as was the case with the *Bamako Convention*. The criminalisation of trafficking in hazardous wastes through Article 28 L of the *Malabo Protocol* will help fill the gap in the implementation of both the *Bamako Convention* and the *Basel Ban Amendment* at the domestic level.

Parties to the *Bamako Convention* that have implemented domestic legislation have not done so in an effective manner as the penalties are generally low. For example, Kenya's *Environmental Management Coordination Act* provides for imprisonment for not more than 18 months or a fine of not more than 150 shillings, or both.¹¹⁵ Zimbabwe's *Environmental Management Act* provides that any person who discharges hazardous substances in any waters or any parts of the environment shall pay the cost of the removal of the hazardous substance and pay compensation, restitution or restoration damages to third parties affected by this disposal.¹¹⁶

6 The regional prosecution of international crimes in Africa: challenges and opportunities

A number of concerns have been raised with respect to the provisions of the *Malabo Protocol* and the AU's readiness to implement the Protocol, should it get the requisite ratifications from 15 AU member states. Woolaver, commenting on the African Court, said:

there are significant caveats that must be addressed before the African Court can be seen as a viable alternative to the ICC, including: the severe lack of resources at the Court; the unclear scope of the proposed international

¹¹³ BAN and IPEN 2020 https://ipen.org/sites/default/files/documents/ban-basel-fact-sheet-v2_1-en.pdf 6-9.

¹¹⁴ Pratt 2010-2011 *Wm & Mary Env'tl L & Pol'y Rev* 603.

¹¹⁵ *Environmental Management Coordination Act* Cap 387 s 144.

¹¹⁶ *Environmental Management Act* Cap 20:27 s 73(2)(a) and (b).

criminal jurisdiction, encompassing the classic international crimes, as well as transnational crimes, and new categories of crimes such as the crime of 'unconstitutional change of government'...and, perhaps most troublingly, the grant of immunity to sitting African leaders, potentially protecting a much wider range of officials than the 'troika' currently recognised as benefiting from immunity *ratione personae* in customary international law ...¹¹⁷

The *Malabo Protocol* contains a provision granting immunity to heads of state and senior state officials from the jurisdiction of the proposed African Court of Justice and Human Rights.¹¹⁸ This immunity provision has been criticised on the basis that the scope of the officials to be covered by Article 46A bis is presumably very wide,¹¹⁹ and that it is likely to promote impunity when the proposed court becomes operational.¹²⁰ Du Plessis has asserted that the provision is at odds with the AU's stated commitment to fight impunity on the continent.¹²¹

Another major challenge is the lack of political will displayed by AU member states in ratifying the *Malabo Protocol* so that the African Court becomes operational. In terms of Article 11(1) of the *Malabo Protocol*, the establishment of the African Court is subject to the ratification of the *Malabo Protocol* by 15 AU member states. Fifteen member states have to date signed the Protocol, but none have ratified it yet.¹²² The AU Assembly has repeatedly called upon all member states to ratify the *Malabo Protocol*,¹²³ and expressed concern at the slow pace of ratification,¹²⁴ which has led to scholars including Mahdi arguing that the establishment of the African Court is a pipe dream which is far from becoming a reality.¹²⁵ According to Niyungeko, however, the idea of the African Court cannot be thought to have been stillborn, given that the idea of the International Criminal Court was conceived in the late 1940s but the Court became operational only 50

¹¹⁷ Woolaver 2016 <https://www.ejiltalk.org/international-and-domestic-implications-of-south-africas-withdrawal-from-the-icc>.

¹¹⁸ Article 46A bis of the *Malabo Protocol*.

¹¹⁹ Woolaver 2016 <https://www.ejiltalk.org/international-and-domestic-implications-of-south-africas-withdrawal-from-the-icc> para 12.

¹²⁰ Njeri 2014 <http://issafrica.org/iss-today/can-the-new-african-court-truly-deliver-justice-for-serious-crimes>.

¹²¹ Du Plessis 2014 <https://issafrica.s3.amazonaws.com/site/uploads/Paper278.pdf>.

¹²² Malabo Protocol Status list in AU 2014 <https://au.int/en/treaties/protocol-amendments-protocol-african-court-justice-and-human-rights>.

¹²³ AU Assembly *Decision on the International Criminal Court* AU Doc Assembly/AU/Dec.672(XXX) (2018) para 3(i); AU Assembly *Decision on the International Criminal Court* AU Doc Assembly/AU/Dec.738(XXXII) (2019) para 2(d).

¹²⁴ AU Assembly *Decision on the International Criminal Court* AU Doc Assembly/AU/Dec.672(XXX) (2018) para 3(i).

¹²⁵ Mahdi 2019 <https://issafrica.org/iss-today/africas-international-crimes-court-is-still-a-pipe-dream>.

years thereafter.¹²⁶ It is therefore not a matter of whether the court will become operational, but when. As Tiba has rightly asserted,

It is a foregone conclusion that a regional international criminal court will be up and running in Africa in the not too distant future, when the necessary ratifications of the Protocol...are obtained.¹²⁷

Notwithstanding the concerns raised with regard to the *Malabo Protocol*, it presents an opportunity for African states to effectively address the problems which affect the African continent at the regional level. The ten transnational crimes included in the *Malabo Protocol* are not provided for in the *Rome Statute*, the *International Criminal Tribunal for the Former Yugoslavia Statute* or the *International Criminal Tribunal for Rwanda Statute*, nor are they adequately dealt with through the existing international legal framework. The inclusion of the transnational crimes within the purview of the African Court therefore provides an opportunity for African states to put in place an effective regional mechanism to deal with issues which inherently affect the African continent, but in which the international community has no prosecutorial interest.¹²⁸ As Tiba has rightfully observed,

Africa has been watching itself helplessly as numerous governments were unconstitutionally overthrown, its human and material resources looted, became a dumping ground for hazardous wastes and its waters infested by pirates.¹²⁹

Article 46C of the *Malabo Protocol*, which provides for corporate criminal liability, is a strikingly innovative provision, as the African Court will be the first Court to provide for corporate criminal liability.¹³⁰ Africa is prone to internal conflicts, toxic dumping, corruption, the illegal exploitation of natural resources and the unconstitutional change of government, among other such challenges faced by the continent. In some instances it is the MNCs which fuel the conflicts by funding warring sides to advance their own agendas.¹³¹ MNCs are also complicit in human rights violations and other problems including toxic dumping, money laundering and the illicit exploitation of natural resources.¹³² By providing for corporate criminal liability in the *Malabo Protocol* African states have delivered on their stated commitment to deal with impunity on the continent. It has also been argued that this provision will ensure justice for victims in that MNCs can be ordered to compensate victims in cases where the natural persons who committed the crime are not able to compensate but the corporation which was

¹²⁶ Mahdi 2019 <https://issafrica.org/iss-today/africas-international-crimes-court-is-still-a-pipe-dream>.

¹²⁷ Tiba 2016 *Cardozo Journal of Conflict Resolution* 547.

¹²⁸ Abass "Historical and Political Background to the Malabo Protocol" 15.

¹²⁹ Tiba 2016 *Cardozo Journal of Conflict Resolution* 544.

¹³⁰ Jalloh, Clarke and Nmehielle "Introduction" 26.

¹³¹ Jalloh, Clarke and Nmehielle "Introduction" 26.

¹³² Jalloh, Clarke and Nmehielle "Introduction" 26.

complicit in the crime has the financial means to do so.¹³³ According to Kyriakakis, the provision for corporate criminal liability in the Malabo Protocol might help to clarify the international law position on corporate criminal liability, thereby contributing to the development of international criminal law.¹³⁴

7 Concluding remarks

This article has assessed the inclusion of the crime of trafficking in hazardous wastes in the jurisdiction of the African Court through Article 28 L. It has explained that economic factors have motivated African countries to allow for the dumping of hazardous wastes in their territories. The article has also highlighted that the lack of an effective international legal framework on trafficking in hazardous wastes motivated the AU to confer the African Court with jurisdiction over toxic dumping.

The coming into effect of the *Basel Ban Amendment* is a step in the right direction and highlights the fact that despite the differences in opinion among states, the international community is finally cognisant of the need to criminalise trafficking in hazardous waste. It is possible, however, that the *Basel Ban Amendment* could prove to be ineffective as it requires individual states to criminalise trafficking in hazardous wastes. In addition, the *Basel Ban Amendment* is operational only in the 97 states parties that have ratified the Amendment. This means that African states are still vulnerable to the effects of toxic dumping from those countries that have not ratified the ban amendment and that have no obligation to comply with the provisions of the ban amendment. When the African Court becomes operational, therefore, Article 28 L will help to fill the gap in the effectiveness of the domestic implementation of both the *Bamako Convention* and the *Basel Ban Amendment*.

The African court's jurisdiction over the transnational crime of trafficking in hazardous wastes will ensure that African states that are the most vulnerable to the effects of toxic dumping as discussed above are protected from this practice of toxic colonialism. Article 28 L therefore ought to be considered as emancipatory, in view of the factors which motivated its inclusion in the *Malabo Protocol*. As argued in this article, Article 28 L ought also to be understood against the background of the TWAIL theory on the continued power and economic disparities between countries from the global south and those from the global north. This is aptly summed up by Okafor's assertion that

Another key TWAIL technique and sensibility is to take the equality of third-world peoples much more seriously; to insist that all thought and action

¹³³ Tiba 2016 *Cardozo Journal of Conflict Resolution* 521.

¹³⁴ Kyriakakis "Article 46C" 793.

concerning international law should proceed on the assumption that third-world peoples deserve no less dignity, no less security, and no less rights or benefits from international action than do citizens of Northern states. And so, claims that international law should allow the 'consensual' transfer of toxic waste from the Northern states to the Third World are rejected when viewed from this kind of equality optic.¹³⁵

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¹³⁵ Okafor 2005 *Osgoode Hall LJ* 179.

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List of Abbreviations

ACP	African Caribbean States
AJLS	African Journal of Legal Studies
AU	African Union
BAN	Basel Action Network
Chinese JIL	Chinese Journal of International Law
CILSA	Comparative International Law Journal of Southern Africa
Columbia J Envtl L	Columbia Journal of Environmental Law
COP	Conference of Parties
EU	European Union
Geo Int'l Envtl L Rev	Georgetown International Environmental Law Review
GNP	Gross National Product
LEAD Journal	Law, Environment and Development Journal
MNCs	Multi-National Corporations
OAU	Organisation of African Union

OECD	Organisation of Economic Cooperation and Development
Osgoode Hall LJ	Osgoode Hall Law Journal
TL&D Journal	Trade, Law and Development Journal
TWAIL	Third World Approaches to International Law
TWQ	Third World Quarterly
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environmental Programme
Wm & Mary Env'tl L & Pol'y Rev	William and Mary Environmental Law and Policy Review