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The Crime of Terrorism within the Jurisdiction of the African Court of Justice and Human and Peoples' Rights

Article 28G of the AU's Malabo Protocol 2014

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1. INTRODUCTION

The proposed African Court of Justice and Human Rights is set to become the first regional court to have jurisdiction over a crime of 'terrorism', with the adoption of article 28G of the Malabo Protocol 2014. No international criminal court, nor any other regional tribunal, can presently adjudicate terrorism cases. The closest body is the hybrid Special Tribunal for Lebanon, established by agreement of the United Nations and Lebanon and including a minority of international judges. But that tribunal is only competent to apply Lebanese criminal law to specific, geographically and temporally confined events.[1] A war crime of terrorism has also been prosecuted before the International Criminal Tribunal for the former Yugoslavia (ICTY) and the hybrid Special Court for Sierra Leone (SCSL),[2] but those tribunals do not have jurisdiction over a general crime of peacetime terrorism.

[1] Art. 2 Statute of the Special Tribunal for Lebanon, SC Res. 1757 (2007). The STL has, however, interpreted Lebanese domestic terrorism offences in the light of a purported customary international crime of transnational peacetime terrorism: Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, *Prosecutor v Ayyash et al.* (STL-11–01) Appeals Chamber, 16 February 2011, § 85. For a critique see B. Saul, 'Legislating from a Radical Hague: The UN Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism' 24 *Leiden Journal of International Law* (2011) 677–700, at 677.

[2] Judgment, *Prosecutor v Galić* (ICTY-98–29-T), Trial Chamber, 5 December 2003; Judgment, *Prosecutor v Galić* (IT-98–29-A), Appeals Chamber, 30 November 2006; Judgment, *Prosecutor v Milošević* (IT-98–29/1-T), Trial Chamber, 12 December 2007; Judgment, *Prosecutor v Brima et al.* (SCSL-04–16-T), SCSL Trial Chamber, 20 June 2007; Judgment, *Prosecutor v Fofana et al.* (SCSL-04–14-T), Trial Chamber, 2 August 2007; Judgment, *Prosecutor v Fofana et al.* (SCSL-04–14-T), Appeals Chamber, 28 May 2008; Judgment, *Prosecutor v Sesay et al.* (SCSL-04–15-T), Trial Chamber, 2 March 2009; Judgment, *Prosecutor v Taylor* (SCSL-03–1-T) Trial Chamber, 26 April 2012. See B. Saul, 'Terrorism' in M. Zgonec-Rožej and J.R.W.D. Jones (eds), *Blackstone's International Criminal Practice* (Oxford: Oxford University Press, forthcoming).

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Even at the normative level, there is still no agreement on an international crime of terrorism to guide regional criminal justice initiatives. This is so despite episodic efforts since the League of the Nations through to the ongoing negotiations, since 2000, on a UN Draft Comprehensive Terrorism Convention.[3] No crime of terrorism was included in the ICC Statute in 1998 and African states were divided on whether to include it within the ICC's jurisdiction. Of the 34 states that spoke in favour of including terrorism, 11 were African;[4] of the 23 states that spoke against, 3 were from Africa.[5]

At the regional level, there are five instruments that require national criminalization of a general crime of terrorism.[6] At least some African states are parties to the instruments adopted by three of the relevant regional organizations, including the Arab League Convention on the Suppression of Terrorism 1998, the Organisation of the Islamic Conference (OIC) Convention on Combating International Terrorism 1999 (now an instrument of the Organisation of Islamic Cooperation), and the Organisation of African Unity (OAU) Convention on the Prevention and Combating of Terrorism 1999 (now an instrument of the African Union [AU]).

As discussed in the next section, the Malabo Protocol's crime of terrorism is closely modelled on the OAU Convention, which reflects certain historical experiences and understandings of terrorism in Africa, including a concern to exclude liberation and self-determination violence from the legal concept of terrorism. This chapter then examines the drafting history of the Malabo Protocol's terrorism offence, its elements, the extended modes of criminal liability, and the clauses excluding self-determination struggles, armed conflicts governed by international humanitarian law (IHL), and political or other justifications. In doing so it discusses a range of technical, criminological and

[3] See B. Saul, *Defining Terrorism in International Law* (Oxford: Oxford University Press, 2006).

[4] *Official Records of the UN Diplomatic Conference of Plenipotentiaries on an ICC, Rome*, UN Doc. A/CONF.183/13, vol. III, 15 June–17 July 1998, (Algeria, Benin, Burundi, Cameroon, Comoros, Congo, Egypt, Ethiopia, Libya, Nigeria, Tunisia).

[5] Ibid. Ghana, Morocco and Senegal.

[6] Arab Convention on the Suppression of Terrorism (adopted 22 April 1998, entered into force 7 May 1999); Convention of the Organization of the Islamic Conference (OIC) on Combating International Terrorism (adopted 1 July 1999, entered into force 7 November 2002); Organisation of African Unity (OAU) Convention on the Prevention and Combating of Terrorism 1999 (adopted 14 July 1999, entered into force 6 December 2002) 2219 UNTS 179 (hereafter 'OAU Convention'); Shanghai Cooperation Organisation (SCO) Convention on Combating Terrorism, Separatism and Extremism of 2001 (adopted 15 June 2001, entered into force 29 March 2003); European Union (EU) Framework Decision on Combating Terrorism 2002/475/JHA (13 June 2002), Official Journal L 164 (22 June 2002), 3–7.

human rights issues, and contextualizes the offence within the context of international and regional practice.

2. BACKGROUND IN OAU COUNTER-TERRORISM INITIATIVES

The inclusion of a crime of terrorism in the Malabo Protocol was the culmination of over two decades of African regional counter-terrorism cooperation that began in 1992. Until the early 1990s, many African states primarily conceived of terrorism as repressive colonial state violence against African peoples by western powers, including during the decolonization wars from the 1950s to the 1980s. By contrast, violence relating to national liberation or self-determination was often seen as justifiable or excusable, even where terror tactics were used, and western labelling of liberation movements as 'terrorists' was vehemently rejected.[7] Terrorism was also a label applied by African states to the apartheid regime in South Africa and to various Israeli actions, such as the occupation of the Egyptian Sinai in the 1973 Arab-Israeli war.[8] African states were typically indifferent to non-state terrorist acts targeting western or foreign interests in Africa.[9] The OAU condemned Israel's surprise rescue of Israeli hostages at Entebbe Airport in 1976, from an airliner hijacked by Palestinians, as aggression against Ugandan sovereignty and territorial integrity.[10] It also expressed solidarity with Libya in the face of UN Security Council condemnation and sanctions for Libya's suspected involvement in the PanAm aircraft bombing over Lockerbie, Scotland in 1988.[11]

The 1990s brought a sea-change in African government attitudes to terrorism, following the rise of Islamist extremists endangering various states in North and West Africa (including Algeria, Tunisia, Morocco, Egypt, Sudan, Mali, Mauritania, Nigeria and Senegal) and East Africa (especially Somalia, Kenya and Tanzania).[12] Algeria took the lead in promoting regional counter-terrorism cooperation, prompted by concerns about transnational support for

[7] M. Ewi and A. du Plessis, 'Criminal Justice Responses to Terrorism in Africa: The Role of the African Union and Sub-Regional Organizations' in A.M. Salinas, K. Samuel, and N. White (eds) *Counter-Terrorism: International Law and Practice*, 993, at 996.

[8] M. Ewi and A. du Plessis, 'Counter-terrorism and Pan-Africanism: From Non-Action to Non-Indifference' in B. Saul (ed), *Research Handbook on International Law and Terrorism* (Cheltenham: Edward Elgar, 2014) 734, at 735, 737–8. See Assembly of Heads of State and Government of the OAU Res 70 (X), 27–28 May 1973.

[9] Ewi and du Plessis, *Counter-Terrorism and Pan-Africanism*, supra note 8, at 735.

[10] Assembly of Heads of State and Government of the OAU Res 83 (XIII), 2–6 July 1976, § 1.

[11] Ewi and du Plessis, *Counter-Terrorism and Pan-Africanism*, supra note 8, at 739–41. See Council of Ministers of the OAU Res 1525 (LX), 6–11 June 1994, § 2.

[12] Ewi and du Plessis, *Criminal Justice*, supra note 7, at 993.

Islamist militants in Algeria's civil war (1991–8),[13] a threat itself catalyzed by the Algerian military overruling democratic elections won by the Islamic Salvation Front in 1991.

Accordingly, in 1992, for the first time, the OAU called for stronger cooperation and coordination among African states to counter extremism and terrorism, to prevent hostile activities against other states, and to refrain from supporting violence against the stability and territorial integrity of other states.[14] In 1994, at the initiative of Tunisia, the OAU adopted a Declaration on a Code of Conduct for Inter-African Relations which, for the first time in Africa, condemned 'as criminal all terrorist acts, methods and practices' and resolved to increase 'cooperation in order to erase this blot on security, stability and development'.[15] The Declaration also reiterated international legal obligations 'to refrain from organizing, instigating, facilitating, financing, encouraging or tolerating activities that are terrorist in nature or intent, and from participating in such activities in whatsoever manner', including by preventing terrorist training camps, indoctrination centres and sanctuaries.[16] It further called for the prosecution or extradition of terrorist offenders, albeit without requiring states to criminalize a regionally consistent terrorist offence.[17]

A. *OAU Convention on the Prevention and Combating of Terrorism 1999*

Terrorist acts continued to escalate, including high profile attacks such as the attempted assassination of President Mubarak of Egypt by Islamists in Addis Ababa, Ethiopia in 1995, with Sudanese complicity, and the Al Qaeda bombings of the United States embassies in Kenya and Tanzania in 1998. The OAU responded by adopting the OAU Convention on the Prevention and Combating of Terrorism in 1999.[18] The OAU Convention was drafted by

[13] Ewi and du Plessis, *Counter-Terrorism and Pan-Africanism*, supra note 8, at 741.

[14] See OAU Assembly of Heads of State and Government, Resolution 213 (XXVIII), 29 June–1 July 1992, §10.

[15] OAU Assembly of Heads of State and Government, Declaration on a Code of Conduct for Inter-African Relations, 13–15 June 1994, AHG/Decl.2 (XXX), §.10.

[16] Ibid. §.15.

[17] Ewi and du Plessis, *Criminal Justice*, supra note 7, at 999.

[18] Art. 2(a) OAU Convention. See generally H. Boukrif, 'Quelques commentaires et observations sur la Convention de l'Organisation de l'Unite africaine sur la Prevention et la Lutte Contre le Terrorism' *African Journal of International and Comparative Law* (1999) 753; R.G. David, 'Le terrorisme: cadre juridique au plan de l'Union Africaine' in SOS Attentats (ed), *Terrorisme, victimes et responsabilité pénale internationale* (Paris: Calmann-Lévy, 2003), at 102; I. Kane,

a sub-committee of the OAU Central Organ of the Mechanism for Conflict Prevention, Management and Resolution, comprising five states (Algeria as chair, Burundi, Namibia, Senegal and Tanzania), in collaboration with the OAU legal division.[19] At the time, few African states had already enacted specific criminal laws against terrorism. Algeria, chairing the drafting committee, had criminalized subversive or terrorist acts in September 1992.[20] Egypt had also criminalized terrorism in July 1992,[21] a definition which heavily influenced the Arab League Convention 1998. The drafting of the OAU Convention was in turn influenced by Algeria's leadership,[22] the Arab League Convention 1998 and the OIC Convention 1999 (with partially overlapping

'Reconciling the Protection of Human Rights and the Fight against Terrorism in Africa' in A.M. Salinas, K. Samuel, and N. White (eds), *Counter-Terrorism: International Law and Practice* (Oxford: Oxford University Press, 2012) 838, at 841–8; Ewi and du Plessis, Criminal Justice, supra note 7, at 1000–4; Ewi and du Plessis, Counter-Terrorism and Pan-Africanism, supra note 8, at 734; Jolyon Ford, *African Counter-Terrorism Legal Frameworks a Decade After 2001* (Institute for Security Studies, Pretoria, 2011); M. Ewi and K. Aning, 'Assessing the Role of the African Union in Preventing and Combating Terrorism in Africa' 15 *African Security Review* (2006) 32.

[19] Boukrif, supra note 18, at 753.

[20] Art. 1 Legislative Decree No. 92–03 of 30 September 1992 on Combating Subversion and Terrorism (Algeria), amended and supplemented by Legislative Decree No. 93–05 of 9 April 1993; reproduced in Art. 87 bis of Ordinance No. 95.11 of 25 February 1995, amending and supplementing Ordinance No. 66.156 of 8 June 1966 and enacting the Penal Code: 'any offence targeting state security, territorial integrity or the stability or normal functioning of institutions through any action seeking to:

- Spread panic among the public and create a climate of insecurity by causing emotional or physical harm to people, jeopardizing their lives or freedom, or attacking their property;
- Disrupt traffic or freedom of movement on roads and obstruct public areas with gatherings (this has reference to roadblocks as a modus operandi used by the GIA);
- Damage national or republican symbols and profane graves;
- Harm the environment, means of communication or means of transport;
- Impede the activities of public authorities and bodies serving the public, or the free exercise of religious and public freedoms; and
- Impede the functioning of public institutions, endanger the lives or damage the property of their staff, or obstruct the implementation of laws and regulations.'

[21] Art. 86, Law No. 97 of 18 July 1992 on Terrorism (Egypt): 'any use of force or violence or any threat or intimidation to which the perpetrator resorts in order to disturb the peace or jeopardize the safety and security of society and of such nature as to harm or create fear in persons or imperil the lives, freedoms or security; harm the environment; damage or take possession of communications; prevent or impede the public authorities in the performance of their work; or thwart the application of the Constitution or of laws or regulations.'

[22] M. Ewi, 'The Role of Regional Organizations in Promoting Cooperation on Counter-Terrorism Matters: The European and the African Institutions in a Comparative Perspective' in L. van den Herik and N. Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order* (Cambridge: Cambridge University Press, 2013) 128, at 148.

memberships between the three regional groupings),[23] and a concern to accommodate civil and common law traditions.[24]

The preamble to the OAU Convention describes terrorism as a 'serious violation of human rights', particularly rights to physical integrity, life, freedom and security, and notes that it impedes socio-economic development by destabilizing states. It also notes the dangers to state stability and security, and the links between terrorism and organized crime (including arms and drug trafficking and money laundering). Article 1(3)(a) defines a '[t]errorist act' as any domestic criminal act 'which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage'. Such act must be 'calculated or intended to':

(i) intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or
(ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or
(iii) create general insurrection in a State.

Terrorist acts are further defined to include various extended modes of criminal liability, including 'any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to' above (Article 1(3)(b)). As discussed below, the Malabo Protocol virtually replicates this definition.

As in the Arab League and OIC Conventions,[25] article 3(1) of the OAU Convention excludes 'the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces'. This exclusion exists despite article 3(2) stating that '[p]olitical, philosophical, ideological, racial, ethnic, religious or other motives shall not be a justifiable defence against a terrorist act' – an exclusion borrowed from the language of the UN General Assembly's 1994 Declaration

[23] Ibid. at 149.
[24] Boukrif, supra note 18, at 756.
[25] Arts. 2(a) and 2(a) respectively.

on Measures to Eliminate International Terrorism.[26] The exemption reflects the heightened importance of national liberation struggles in African political histories, even if excessive liberation violence could still be prosecuted, for instance, as war crimes or crimes against humanity. It could even exclude, for instance, Al Shabaab attacks on AU peacekeepers in Somalia, 'on the pretext that they are fighting a foreign invasion and domination by foreign forces'.[27] There is, however, no exclusion in the OAU Convention of conduct in armed conflict covered by IHL.

States are then required to criminalize terrorist acts (article 2); eliminate political or other motives as a defence (article 3); establish extensive jurisdiction over the offences (article 6); investigate (article 7) and prosecute or extradite (article 8) suspects (thus addressing the problem of impunity). States must also cooperate in a range of ways (article 4), including exchange of information (article 5) and mutual legal assistance (Section V).

The OAU Convention shares some elements of the Arab League and OIC definitions, is more restrictive in other respects, and is more expansive in other ways. In addition to the national liberation exception, the OAU Convention follows the Arab and OIC Conventions in referring to instilling fear in the public; endangering life, physical security or freedom; harming public or private property, or the environment; and endangering 'natural resources' (the Arab and OIC Conventions refer comparably to a 'national resource').

The OAU Convention appropriately requires an underlying harmful act to also be 'a violation of the criminal laws of a State Party', whereas the Arab League and OIC Conventions more loosely extend to any act or violence that causes the requisite harm. It also does not reproduce the vague element from the OIC Convention of 'threatening the stability, territorial integrity, political unity or sovereignty of independent States'.

On the other hand, the OAU Convention goes further than the other treaties by referring to acts against 'cultural heritage';[28] or which disrupt public or essential services or create a public emergency; or that create 'general

[26] GA Res. 49/60, 9 December 1994, Annex, § 3: 'Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them'.

[27] Ewi and du Plessis, *Criminal Justice*, supra note 7, at 1001.

[28] Algeria's 1992 domestic law definition, supra note 20, more narrowly mentions damage to 'national or republican symbols and… graves'.

insurrection' in a state. The latter offence reorients terrorism as a national security or political offence,[29] focused on protecting governments from rebellion or revolution, or averting civil war. The references to public or essential services bear some resemblance to the Algerian and Egyptian national definitions of 1992, with the Algerian law mentioning disruption to traffic, communication, transport, public authorities and public institutions, and the Egyptian law referring to damage to communications or impeding public authorities.[30]

Further, whereas the Arab and OIC Conventions focus on the terrorization of people, the OAU Convention includes an alternative 'special intent' (or motive) element of coercing or inducing a government, body or institution. A similar element was included in the UN Terrorist Financing Convention half a year later, in December 1999,[31] and has since appeared in the UN Draft Comprehensive Terrorism Convention, the EU Framework Decision on Combating Terrorism 2002, and in various national terrorism offences.[32]

The definition of terrorist offences in the OAU Convention have been criticized on human rights grounds as being vague and over-broad, and infringing the principle of legality[33] (which requires sufficient specificity and predictability in the definition of offences).[34] The protected targets are wide and ill-defined. 'Inducing' a government to adopt or abandon a particular standpoint is a basic aim of democratic politics, sometimes occasioned by overzealous acts of protest which amount to criminal violence but fall short of the concept of terrorism and which ought not be treated as such. Regarding acts which create a 'public emergency' or a 'general insurrection' as terrorism conflates national security or emergency laws with terrorism, eroding any meaningful distinction between these categories. There have also been concerns about the impact on the right to strike.[35]

[29] See also Kane, supra note 18, at 842, 849–51.

[30] Supra notes 20–1.

[31] Art. 2(1)(b) International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197 (hereafter 'Terrorist Financing Convention 1999').

[32] See Saul, *Defining Terrorism*, supra note 3, at 266–8.

[33] Kane, supra note 18, at 842.

[34] See, e.g., *Kokkinakis v Greece* (1993) 17 EHRR 397, § 52; *Castillo Petruzzi et al. v Peru* [1999] IACHR 6 (30 May 1999), § 121.

[35] *Sub-Commission on the Promotion and Protection of Human Rights, Terrorism and Human Rights: Additional progress report prepared by Kalliopi K. Koufa*, UN Doc. E/CN.4/Sub.2/2003/WP.1, 8 August 2003, § 78.

B. *Subsequent AU Counter-Terrorism Developments*

Several normative developments at the regional level, also potentially relevant to the interpretation of the Malabo Protocol terrorism offence, should be mentioned. The definition and exception in the OAU Convention supply the operative norms for an AU Protocol 2004 to the OAU Convention 1999,[36] spurred in part by concerns about the slow domestic implementation of the Convention. The Protocol 2004 creates no new offences, but aims to enhance the implementation of the Convention and to coordinate and harmonize African efforts to prevent and combat terrorism.[37] States undertake to implement a range of measures on terrorist training and financing, mercenarism, weapons of mass destruction, compensation for victims of terrorism, preventing the entry of terrorists, and exchange of information and cooperation.[38] The Protocol forbids the torture or degrading or inhumane treatment of terrorist suspects, but asks States to 'take all necessary measures to protect the fundamental human rights of their populations against all acts of terrorism'.[39] It tasks the AU's Peace and Security Council with harmonizing and coordinating African counter-terrorism, and states undertake to submit regular reports to the Council.[40]

At a 'soft' law level, the AU developed an African Model Anti-Terrorism Law in 2011[41] to stimulate and guide domestic implementation of international counter-terrorism obligations. While the model law defines 'terrorist act' by reference to UN and AU instruments, its other cumulative elements of definition significantly narrow the scope of liability and bring African practice more into line with international standards. In particular, relevant treaty offences must be intended 'to intimidate the public or any section of the public or compel a government or international organization to do or refrain from doing any act and to advance a political, religious or ideological cause, if the act':

(a) involves serious violence against persons;
(b) involves serious damage to property;

[36] Protocol to the OAU Convention on the Prevention and Combating of Terrorism (adopted 8 July 2004) (hereafter '2004 Protocol').
[37] Art. 2(2) 2004 Protocol, and pursuant to Art. 3(g) Protocol Relating to the Establishment of the Peace and Security Council of the African Union (adopted 9 July 2002).
[38] Art. 3(1) 2004 Protocol. The Convention also supplies a basis for extradition (art. 8) and contains a dispute settlement provision: art. 7.
[39] Art. 3(1)(k) and (a) 2004 Protocol, respectively.
[40] Arts 4–5 and 3(1)(h)–(i) 2004 Protocol, respectively. Regional mechanisms play a complementary role: Art. 6 2004 Protocol.
[41] African Model Anti-Terrorism Law, (endorsed 30 June–1 July 2011) (hereafter 'Model Law').

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(c) endangers a person's life;
(d) creates a serious risk to the health or safety of the public or any section of the public;
(e) involves the use of firearms or explosives;
(f) involves exposing the public to any dangerous, hazardous, radioactive or harmful substance, any toxic chemical or any microbial or other biological agent or toxin;
(g) is designed to disrupt, damage, destroy any computer system or the provision of services directly related to communication infrastructure, banking and financial services, utilities, transportation or key infrastructure;
(h) is designed to disrupt the provision of essential emergency services such as the police, civil defence and medical services; or
(i) involves prejudice to public security or national security.[42]

While these elements overlap in significant respects with the acts mentioned in the OAU Convention, they tend to be more tightly circumscribed (for example, 'serious' violence, property damage, or risk to public health). In broad terms they are drawn from the elements of the Terrorist Financing Convention 1999. In addition, the further specific intent or motive element is required of a 'political, religious or ideological cause', which is drawn from some common law jurisdictions (such as the UK, Canada, Australia, New Zealand and South Africa) and partly reflects the UN General Assembly's 1994 Declaration (which refers to 'political purposes').

While the Model Law remains broad in other respects – such as an ambiguous reference to 'prejudice to public security or national security' – it is narrowed in an important way by the inclusion of a 'democratic protest' defence (excluding any act that is the result of 'advocacy, protest, dissent or industrial action' and which does not cause certain types of serious harm to people or property).[43] Unlike the OAU Convention, the Model Law further excludes 'acts covered by international humanitarian law, committed in the course of an international or non-international conflict by government forces or members of organized armed groups',[44] while also replicating the exemption for liberation or self-determination struggles.[45]

More generally, the AU's Plan of Action on the Prevention and Combating of Terrorism in Africa of 2002 makes further recommendations in the criminal field to states, including specific suggestions for legislative and

[42] Model Law, supra note 41, § xxxix.
[43] Ibid. § xl(a).
[44] Ibid. § xl(c).
[45] Ibid. § xl(b).

judicial measures.[46] These include measures in relation to investigation and prosecution, criminalization and punishment, evidence, judicial capacity building, harmonization of laws, extradition and mutual legal assistance, exclusion of the political offence exception to extradition, establishment of jurisdiction, extended modes of criminal liability (to place the mastermind, the apologist, the accomplice, the instigator and the sponsor of a terrorist act on the same pedestal as the perpetrator'); dissemination of propaganda; and terrorist financing.

3. DEFINITION AND ELEMENTS OF TERRORIST CRIMES

A. *Drafting History*

The Report of the Committee of Eminent African Jurists on the Case of Hissene Habre, which recommended in 2006 that the African Court be granted criminal jurisdiction,[47] did not enumerate which crimes the Court should have jurisdiction over. The Habre case primarily concerned the Convention against Torture. The AU Assembly subsequently requested, in February 2009, the AU Commission to study the implications of the Court being empowered to try 'international crimes, such as genocide, crimes against humanity and war crimes',[48] but again no mention was made of terrorism.

In February 2009 the AU Commission asked the Pan African Lawyers Union (PALU) to provide recommendations. PALU proposed the first draft of the Protocol in its June 2010 report to the Commission.[49] No general crime of terrorism was included and the only operative reference to terrorism was in the war crime of 'acts of terrorism' (which was ultimately excluded from the Malabo Protocol as adopted in 2014). There was also a preambular reference to terrorism, which reiterated the AU's 'respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities, unconstitutional changes of governments

[46] *Plan of Action of the African Union High-Level Inter-Governmental Meeting on the Prevention and Combating of Terrorism in Africa*, High-Level Inter-Governmental Meeting on the Prevention and Combating of Terrorism in Africa, Algiers, Mtg/HLIG/Conv.Terror/Plan.(I), 11–14 September 2002, §§ 12–13.

[47] *Report of the Committee of Eminent African Jurists on the Case of Hissene Habre*, available online at www.hrw.org/legacy/justice/habre/CEJA_Repor0506.pdf (visited 31 March 2016), § 39.

[48] AU Assembly, Decision on the Implementation of the Assembly Decision on the abuse of the principle of universal jurisdiction, Decision Assembly/AU/Dec.366 (XVII), § 8.

[49] Draft Supplementary Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, April 2010, Legal/ACJHR-PAP/4(II) Rev.2.

and acts of aggression'. That wording was retained through to the final Protocol as adopted in June 2014.

The first draft of June 2010 was reviewed by the AU Commission's Office of Legal Counsel in June 2010 and considered in 'validation' workshops with AU organs and Regional Economic Communities in August and November 2010. The crime of 'terrorism' appeared for the first time in the November 2010 draft Protocol.[50] The offence was drawn almost verbatim from the OAU Convention, including its extended modes of criminal liability, the liberation/self-determination exception, and the exclusion of political or other motives. Like the OAU Convention, the draft did not exclude conduct in armed conflict covered by IHL.

The only significant change of language between the OAU Convention and the draft Protocol was in the description of the underlying acts. Whereas the OAU Convention stipulates that an act must be a violation of national criminal law, the draft Protocol added to that formulation the alternatives of an act being a violation of 'the laws of the African Union or a regional economic community recognized by the African Union, or by international law'.[51]

The draft Protocol was considered further at a meeting of government experts in November 2011 and a May 2012 draft of the Protocol was endorsed by a meeting of Ministers of Justice and Attorneys-General in July 2012.[52] By that the stage the draft Protocol contained one further amendment to the terrorism provision: acts covered by IHL, committed in the course of an international or non-international armed conflict by government forces or members of organized armed groups, were not to be considered as terrorist acts. Such acts were thus left to be regulated by the special law (*lex specialis*) of IHL, including war crimes liability. As noted earlier, in 2011 the AU had adopted the African Model Anti-Terrorism Law, which excluded acts covered by IHL.

Thereafter the final adoption of the draft Protocol was delayed because of lingering controversies over the definition of the crime of unconstitutional change of government, the scope of immunities, and financing issues. There were, however, no further changes to the terrorism offence when the Protocol

[50] *Fifth Meeting of Government Experts on Legal Instruments on the Transformation of the AU Commission in AU Authority and on the Review of the Protocols relating to the Pan African Parliament and the African Court on Human and Peoples' Rights*, ACJHR-PAP/4(II) Rev.2., 8–12 November 2010, Annex: Draft Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, draft Art. 28A(9)-(11).

[51] Ibid., draft Art. 28A(9)(a).

[52] *The Report, The Legal Instruments and Recommendations of the Ministers of Justice/Attorneys General*, EX.CL/731(XXI), 9–13 July 2012, Annex: Draft Protocol on the African Court of Justice and Human and Peoples' Rights (revisions up to 15 May 2012).

was adopted in June 2014. There was also little opportunity for civil society input into the AU's internal drafting process.[53]

B. *Definition of the Crime of 'Terrorism' and Interpretive Issues*

As adopted, the Malabo Protocol confers jurisdiction over the crime of 'terrorism' in article 28A(1)(6) and defines the crime of 'terrorism' in article 28G as follows:

> For the purposes of this Statute, 'terrorism' means any of the following acts:
>
> A. Any act which is a violation of the criminal laws of a State Party, the laws of the African Union or a regional economic community recognized by the African Union, or by international law, and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to:
>   1. intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or
>   2. disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or
>   3. create general insurrection in a State.
> B. Any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in sub-paragraph (a) (1) to(3).
> C. Notwithstanding the provisions of paragraphs A and B, the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts.
> D. The acts covered by international Humanitarian Law, committed in the course of an international or non-international armed conflict by government forces or members of organized armed groups, shall not be considered as terrorist acts.
> E. Political, philosophical, ideological, racial, ethnic, religious or other motives shall not be a justifiable defence against a terrorist act.

[53] M. Du Plessis, 'Implications of the AU Decision to Give the African Court Jurisdiction over International Crimes', Institute for Security Studies Paper (No. 235)(June 2012), at 11.

As mentioned, the definition is drawn largely verbatim from the OAU Convention and consequently the drafting debates, and subsequent interpretation and practice surrounding that instruments since 1999, are relevant in shedding light on the Malabo Protocol offence. At the same time, practice under the OAU Convention is scarce; African states have been slow in both ratifying and domestically implementing it, and prosecutions and recorded judgments concerning its terrorist offences are rare.

The complex, compound definition of terrorism in the Malabo Protocol gives rise to numerous interpretive issues. The elements of the definition of terrorism are:

- An underlying act that violates national criminal law, AU law or African regional economic community, or international law; and
- Danger to life, physical integrity or freedom; or serious injury or death to a person or group; or damage to public or private property, natural resources, environmental or cultural heritage; and
- A special intent, or motive, to: (1) intimidate, put in fear, coerce or induce a government, body, institution, the public (or part of it); or (2) disrupt a public or essential service, or create a public emergency; or (3) create general insurrection.

The Malabo Protocol does not require any transnational element to the crime of terrorism, such that purely domestic terrorism comes within the jurisdiction of the African Court. This contrasts with, for instance, the approach of the international counter-terrorism conventions,[54] the UN Draft Comprehensive

[54] The treaties typically do not apply where an offence is committed in a single state, the offender and victims are nationals of that state, the offender is found in the state's territory and no other state has jurisdiction under those treaties: Art. 5(1) Convention on Offences and Certain Other Acts Committed on Board Aircraft (adopted 14 September 1963, entered into force 4 December 1969) 704 UNTS 219 (hereafter 'Tokyo Convention 1963'); Art. 3(3)-(4) Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970, entered into force 14 October 1971), 860 UNTS 105 (hereafter 'Hague Convention 1970'); Art. 3(5) Hague Convention 1970 as amended by the Convention on the Suppression of Unlawful Acts relating to International Civil Aviation 2010 (adopted 10 September 2010, not yet in force) (hereafter 'Beijing Convention 2010'); Arts 4(2)-(5) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971 (adopted 23 September 1971, entered into force 26 January 1973), 974 UNTS 178 (hereafter 'Montreal Convention 1971'); Art. 4(1)-(2) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (adopted 10 March 1988, entered into force 1 March 1992), 1678 UNTS 221 (hereafter 'Rome Convention 1988'); Art. 1(2 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (adopted 10 March 1988, entered into force 1 March 1992), 1678 UNTS 304 (hereafter 'Rome Protocol 1988'); Art. 13 International Convention against the Taking of Hostages (adopted 17 December 1979, entered into force

Terrorism Convention, and the nascent customary international crime of terrorism identified by the Special Tribunal for Lebanon.[55]

In light of protracted international debates about state versus non-state terrorism, it may be observed that any individual may bear criminal responsibility for the crime of terrorism, whether a state official or agent, members of non-state terrorist groups, or lone individuals. However, heads of state or government, and senior officials based on their functions, enjoy immunity from jurisdiction during their tenure in office pursuant to article 46A bis of the Malabo Protocol. There is also corporate criminal liability of legal persons, but not states, under article 46C of the Protocol.

1. '"Terrorism" Means Any of the Following Acts'

It is immediately apparent that there are technical problems of poor drafting. Article 28G begins by indicating that terrorism 'means any of the following acts', before listing paragraphs A to E. However, it is evident that the intended meaning 'terrorism' is actually confined to paragraphs A (the definition of terrorism) and B (extended modes of liability), whereas paragraphs C and D instead refer to what is *not* terrorism (liberation struggles and armed conflict), while paragraph E excludes political justifications.

(a) 'any act which is a violation of the criminal laws of a state party, the laws of the African Union or a regional economic community recognized by the African Union, or by international law'

A more troubling ambiguity stems from the cross-referencing of acts that are unlawful under other regional or international laws. As noted earlier, underlying acts must be 'a violation of criminal laws of a State party', which is tolerably clear (even allowing for disparities in domestic criminalization of relevant conduct). By contrast, the Malabo Protocol departs from the OAU Convention by also referring to 'the laws of the African Union or a regional economic community recognized by the African Union, or by

3 June 1983), 1316 UNTS 205 (hereafter 'Hostages Convention 1979'); Art. 14 Convention on the Physical Protection of Nuclear Material (adopted 3 March 1980, entered into force 8 February 1987) (hereafter 'Vienna Convention 1980'); Art. International Convention for the Suppression of Acts of Nuclear Terrorism (adopted 13 April 2005, entered into force 7 July 2007) (hereafter 'Nuclear Terrorism Convention 2005'); Art. 3 International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1997, entered into force 23 May 2001), 2149 UNTS 256 (hereafter 'Terrorist Bombings Convention 1997'); Art. 3 Terrorist Financing Convention.

[55] Interlocutory Decision on the Applicable Law, *Prosecutor v Ayyash et al.* (STL-11–01), Appeals Chamber, 16 February 2011, § 90.

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international law'. Problematically, unlike the reference to national laws, these are not required to be violations of 'criminal' regional or international laws, but could conceivably extend to breaches of any regional or international treaty or customary law.

In an instrument establishing criminal liability, such ambiguity may fail to meet the requirements of the principle of legality recognized in article 7(2) of the African Charter on Human and Peoples' Rights[56] and article 15 of the International Covenant on Civil and Political Rights.[57] The principle of legality requires an offence to be sufficiently certain to enable a person to prospectively know the scope of their legal liabilities.[58] International and African regional law cover a vast range of areas; African instruments alone span such diverse subjects as fertilizer development, trade promotion, energy, transport, investment, youth, statistics, public service, and plant health, among many others.[59]

There is thus a risk that the Malabo Protocol may invite law enforcement authorities to reclassify breaches of ordinary regional and international law as terrorist crimes, where they in truth have little to do with terrorism. As a general rule, to satisfy the principle of legality, this element of the definition of terrorism should be restrictively interpreted as referring only to 'criminal' breaches of regional or international law (including the other crimes under the Malabo Protocol itself). This would also harmonize with the requirement that breaches of national law be criminal, and reflect the policy intention that the terrorism label should be reserved for serious (that is, criminal) breaches. UN Security Council resolution 1566 (2004), for example, confines its conception of terrorism to underlying acts that are crimes under the international counter-terrorism conventions. Notably, the South African law implementing the OAU Convention, on which the Malabo Protocol is based, imposes more stringent conditions on the character of the underlying criminal act, by requiring the 'systematic, repeated or arbitrary use of violence'.[60]

[56] Adopted 27 June 1981, entered into force 21 October 1986, 21 ILM 58, 'No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.'

[57] The prohibition on retrospective criminal punishment in Art. 15 encompasses the principle of legality.

[58] *Kokkinakis v Greece* (1993) 17 EHRR 397, § 52; *Castillo Petruzzi et al. v Peru* [1999] IACHR 6 (30 May 1999), § 121.

[59] See list of AU treaties available online at www.au.int/en/treaties (visited 31 March 2016).

[60] S. 1(1) Protection of Constitutional Democracy against Terrorist and Related Activities Act 2004 (South Africa).

(b) 'WHICH MAY ENDANGER THE LIFE, PHYSICAL INTEGRITY OR FREEDOM OF, OR CAUSE SERIOUS INJURY OR DEATH TO, ANY PERSON, ANY NUMBER OR GROUP OF PERSONS' This element of the definition is reasonably objective, tightly circumscribed, embodies the core of terrorism, and is broadly unobjectionable.[61] Causing death or serious bodily injury is the essence of terrorism as defined in the Terrorist Financing Convention 1999, Security Council resolution 1566 (2004),[62] and the UN Draft Comprehensive Terrorism Convention.[63] Serious injury is not limited to 'bodily' injury (as in the aforementioned UN instruments), such that the Malabo Protocol could extend to serious psychological injury or mental suffering, such as that typically resulting from hostage taking or witnessing mass casualty attacks on others.

The Malabo Protocol adds the alternative limb of acts endangering life, which could occur even when no death or injury is caused, but is of a comparable gravity to those harms. Examples might include, for instance, acts endangering public health or safety, such as the release of toxins into a human water supply, or chemical, biological or nuclear attacks, which do not actually result in death or injury in the circumstances.

This element of the definition also provides an alternative limb of endangering 'physical integrity or freedom'. This expression is somewhat vague and ill-defined. The African Charter of Human and Peoples' Rights includes a right to integrity of person within the same provision protecting the right to life[64] and this element should be understood in that light.

The reference to danger to a person's 'freedom' is more ambiguous and in principle could encompass all political or civil liberties (such as freedoms of

[61] Lord Carlile of Berriew QC, *The Definition of Terrorism*, UK Independent Reviewer of Terrorism Legislation (CM 7052), March 2007, at 40 (referring to comparable elements in the UK definition).

[62] SC Res. 1566 (2004), § 3: 'criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism'.

[63] Its definition of terrorism is settled; disagreement persists on the exceptions: see Saul, *Defining Terrorism*, supra note 3, at 184–90.

[64] Art. 3 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217: 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.' The 2002 definition of terrorism in the EU Framework Decision on Combating Terrorism likewise refers to 'physical integrity', which is drawn from the right to physical and mental integrity of the person in Article 3 of the Charter of Fundamental Rights of the European Union (adopted 7 December 2000, entered into force 1 December 2009) (which primarily concerns medical and biological issues).

expression, opinion, conscience religion, assembly, association, and so on). In the context of an element focused on violence against the person, the better approach is to restrictively interpret it as referring to the various kinds of unlawful *deprivation of liberty*. These include, for example, unlawful or arbitrary detention, hostage taking, abduction, kidnapping for ransom, and enforced disappearance.

For all of the above alternatives, the Malabo Protocol refers to acts which 'may' endanger or cause the relevant harms. However, an instrument establishing criminal liability should be restrictively interpreted. Speculative, hypothetical or distant risks of the respective harms are not sufficient. There should be a *reasonable likelihood* that acts 'may' have those results.

(c) 'or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage'

This alternative element of the definition shifts the focus from danger to persons to damage to various types of property or certain other objects. The Malabo Protocol covers *any* 'damage' to property or these objects, and is not limited to 'serious' harm. In this respect it departs from international practice. For example, the UN Draft Comprehensive Terrorism Convention is confined to acts causing 'serious' damage to public or private property or 'major economic loss'. South African law also requires 'substantial' damage to property, natural resources, or environmental or cultural property.[65]

Caution is thus warranted; the crime of terrorism should be reserved for more serious harms rather than any ordinary or trivial damage to property, resources, or environmental or cultural heritage. This is particularly the case given that, unlike the African Model Anti-Terrorism Law 2011, the Malabo Protocol does not contain a 'democratic protest' exception, which contemplates the ordinary kinds of robust political protests in a democratic society which sometimes result in public disorder and property damage. There is a need for prosecutorial discretion to be sensibly exercised in this regard.

Damage to Property

Plainly, attacks on property, even where they do not cause injury to persons, are common methods instrumentally utilized by terrorists to pursue their goals. Examples could include attacking government buildings or schools at night, on the weekend, or after warnings to evacuate are given (thus avoiding civilian casualties); or attacking public utilities such as energy, water,

[65] S. 1(1) Protection of Constitutional Democracy against Terrorist and Related Activities Act 2004 (South Africa).

sanitation, transportation or communications infrastructure.[66] Such attacks not only cause fear but can result in major economic losses.

Whereas terrorists commonly attack public targets, private property may also be the focus of attacks (as was the case on 11 September 2001, when Al Qaeda attacked commercial buildings in New York). Terrorists may also target private businesses or non-governmental organizations that support their adversaries, such as contractors or donors to governments, or NGOs that provide education or healthcare services that a terrorist group opposes.

The Malabo Protocol does not define 'property'. Useful reference may be made to the UN Draft Comprehensive Terrorism Convention, which likewise refers to damage to public or private property and non-exhaustively enumerates such property as 'including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment'. An ordinary interpretation of the term 'property' encompasses not only physical property (such as buildings, vehicles, and infrastructure such as roads, railways, ports, airfields and public spaces (such as parks, sports fields and the like)) but also intangible economic and financial assets (and potentially even intellectual property).

Thus 'cyber' attacks which damage computer or electronic networks could fall within the definition. These might include attacks on computers controlling physical infrastructure (for instance, to disable a dam, water supply, or transport network), digital records of economic transactions or assets (such as banking, financing, investment, or taxation), and other proprietary data (such as plans of military weapons, industrial espionage, or public health records). Caution is, however, warranted in regarding harmful cyber activities as 'terrorism'; such acts are very diverse, many fall short of the gravity of terrorism, and the emphasis should remain on acts that endanger or intimidate people. That, after all, is a defining characteristic of terrorism.

Damage to Natural Resources

The Malabo Protocol does not define the closely related concepts of 'natural resources' or 'environmental heritage'. 'Natural resources' may be usefully understood by reference to the definition in the African Convention on the Conservation of Nature and Natural Resources, namely 'renewable resources, tangible and non-tangible, including soil, water, flora and fauna and non-renewable resources'.[67] Reference may also be made to African regional law

[66] See also the examples given by Carlile, supra note 61.

[67] Art. 5(1) African Convention on the Conservation of Nature and Natural Resources (Revised Version) (adopted 1 July 2003) 1001 UNTS 3.

on the right of peoples to freely dispose of their wealth and natural resources,[68] and to international law on permanent sovereignty over natural resources.[69] A further, more specific link may be made to the separate crime of the 'illicit exploitation of natural resources' in article 28L bis of the Malabo Protocol.

Illustratively, the African Commission on Human and Peoples' Rights has previously found violations of the right to freely dispose of natural resources. In *Social and Economic Action Rights Centre (SERAC) v Nigeria* (2001), the Commission found that Nigeria had 'facilitated the destruction of Ogoniland' and its people's well-being by approving, and supporting with military violence, private oil exploitation that contaminated the environment (water, soil and air) and harmed human health.[70] In another case, *Endorois Welfare Council v Kenya* (2010), the Commission held that Kenya's approval of tourism and mining projects unlawfully interfered in the traditional lands and resources (such as water and minerals) of an indigenous community, which depends on them for their survival.[71]

In the context of terrorism, damage to natural resources (or indeed the partly overlapping category of 'environmental heritage') could be caused by activities such as the illicit exploitation or trade in oil,[72] minerals (such as diamonds or gold), timber,[73] and wildlife.

Damage to Environmental Heritage

As regards 'environmental heritage', international instruments, including in Africa, generally do not attempt to legally define the 'environment'.[74] The African Charter on Human and Peoples' Rights refers only to a people's 'right to a general satisfactory environment favourable to their development' (article 24). The Malabo Protocol elsewhere includes a crime of the 'trafficking in

[68] Art. 21 African Charter on Human and Peoples' Rights.

[69] GA Res. 1803 (XVII), 14 December 1962.

[70] African Commission on Human and Peoples' Rights (ACHPR), *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, ACHPR Communication No. 155/1996, 2001 AHRLR 60 (27 October 2001), § 58.

[71] ACHPR, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya*, ACHPR Communication No. 276/2003, 2009 AHRLR 75 (4 February 2010), §§ 263–8.

[72] SC Res. 2199 (2015) condemned, in the context of the conflict in Syria and Iraq, 'any engagement in direct or indirect trade, in particular of oil and oil products, and modular refineries and related material, with ISIL, ANF and any other individuals, groups, undertakings and entities designated as associated with Al-Qaida'.

[73] SC Res. 1521 (2003) banned log exports from Liberia; SC Res. 2036 (2012) banned the export of charcoal from Somalia.

[74] P. Birnie and A. Boyle, *International Law and the Environment* (2nd edn., Oxford: Oxford University Press, 2002), at 3.

hazardous wastes' (article 28L), which in turn cross-refers to the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa 1991.[75] Article 28L additionally mentions radioactive wastes subject to international control.

In the international environmental law context, references to environmental effects, impacts or damage typically address harm to flora, fauna, soil, water (fresh and sea), landscape, cultural heritage, ecosystems and the climate, as well as dependent human socio-economic systems, health and welfare.[76] This encompasses a very wide range of legal norms and regimes, addressing natural resources, biodiversity, endangered and migratory species, deforestation and desertification, Antarctica, world heritage areas, oceans, international watercourses, climate change, ozone, the marine environment, and pollution and waste.[77] A few instruments require states to criminalize certain conduct, such as trade in or possession of endangered wild fauna or flora species, or maritime pollution.[78]

For both resources and the environment, the Malabo Protocol does not criminalize *lawful* damage to natural resources that is inevitably caused by their exploitation (such as by mining or logging), or lawful damage to the environment (for instance, caused by regulated development), but harms caused by predicate acts that are either criminal under national law, or criminal or otherwise illegal under African or international law.

Damage to Cultural Heritage

The Malabo Protocol does not define 'cultural heritage'. Reference may be made to the international standards developed by UNESCO,[79] by which

[75] Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (adopted 30 January 1991, entered into force 22 April 1998) 2101 UNTS 177 (hereafter 'Bamako Convention').

[76] Birnie and Boyle, supra note 74, at 4.

[77] Ibid.

[78] Respectively, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (adopted 1 March 1973, entered into force 1 July 1975) 993 UNTS 243 (hereafter 'CITES') and the International Convention for the Prevention of Pollution from Ships (adopted 2 November 1973, entered into force 2 October 1983) 1340 UNTS 184 (hereafter 'MARPOL').

[79] Convention Concerning the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975) 1037 UNTS 151; Convention on the Protection of the Underwater Cultural Heritage (adopted 2 November 2001, entered into force 2 January 2009) 2562 UNTS 3; Convention on the Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003, entered into force 20 April 2006) 2368 UNTS 1; UNESCO, Declaration on the Intentional Destruction of Cultural Heritage (17 October 2003); see also

cultural heritage may be tangible (such as buildings, monuments, landscapes, books, works of art, and artefacts) or intangible (such as oral traditions, folklore, performing arts, songs, rituals, languages and traditional knowledge). Tangible heritage may be movable (such as paintings, sculptures, coins, manuscripts, clothes, and documents); immovable (such as monuments and archaeological sites); or underwater (shipwrecks, ruins and cities). There are also specific regimes prohibiting the illicit trade in cultural property[80] and providing for the restitution of stolen or illegally exported cultural objects.[81]

In the context of terrorism, there are numerous examples of terrorist organizations damaging cultural heritage, including in Africa. In Mali, for example, Islamist militants attacked ancient Sufi shrines, mosques, historic monuments, libraries and manuscripts in Timbuktu in 2012, precipitating an ICC investigation into a suspect surrendered by Niger in 2015.[82] Elsewhere, the Islamic State has systematically destroyed 'idolatrous' cultural heritage, including museums, mosques and historic monuments (such as Palmyra in Syria), and illegally traded artefacts for profit. In Afghanistan, archaeological sites have been illegally excavated, looted and vandalized,[83] including the Taliban's notorious destruction of the Bamiyan Buddhas. In Iraq, museums have been looted and the cultural heritage of religious minorities attacked.[84]

Special Intent/Purpose/Motive Requirement

In addition to proving damage to one or more of the protected interests discussed above, the Malabo Protocol requires proof of one of three alternative special intentions, purposes or motives ('is calculated or intended to').

Art. 15(1)(a) International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966 entered into force 3 January 1976) 993 UNTS 3 (hereafter 'ICESCR') (cultural rights are interpreted to include cultural heritage).

[80] UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted 14 November 1970, entered into force 24 April 1972) 823 UNTS 231 (covering inventoried and declared property).

[81] UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects (adopted 24 June 1995, entered into force 1 July 1998) 34 ILM 1322 (covering all objects).

[82] M. Lostal, 'ICC opens a case for the destruction of cultural heritage in Mali' (2 October 2015) available online at www.globalpolicy.org/home/163-general/52814-icc-opens-a-case-for-the-destruction-of-cultural-heritage-in-mali.html (visited 1 April 2016). The suspect is Ahmad Al Mahdi Al Faqi. The Islamist groups involved were Ansar Dine, Al-Qaeda in the Islamic Maghreb (AQIM) and the Movement for Unity and Jihad in West Africa (MUJAO).

[83] Committee on Economic, Social and Cultural Rights (CESCR), Concluding Observations: Afghanistan, E/C.12/AFG/CO/2–4 (7 June 2010), § 44.

[84] CESCR, Concluding Observations: Iraq, E/C.12/1994/6 (30 May 1994), § 12. See also Angola, E/C.12/AGO/CO/3 (1 December 2008), § 40.

However, there is no further special intent requirement of a political, religious or ideological purpose, unlike in the African Model Anti-Terrorism Law 2011, the UN Declaration of 1994, and some common law systems (including South African law). Consequently, the Malabo Protocol also covers privately-motivated violence, such as acts driven by profit, family disputes, jealousy, revenge and so forth;[85] another example is a gangland stabbing to intimidate the community or a rival gang.[86] As such, some of what is distinctive about terrorism – its political or public orientation – is lost. This approach is, nonetheless, consistent with some other international and regional approaches, including the Terrorist Financing Convention 1999, Security Council resolution 1566 (2004), and the UN Draft Comprehensive Terrorism Convention.[87]

(d) 'and is calculated or intended to ... 1. intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles' The first option is broadly consistent with international practice, in that the Terrorist Financing Convention 1999, Security Council resolution 1566 (2004), and the UN Draft Comprehensive Convention all comparably refer to acts intended 'to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act'.[88] The Malabo Protocol nonetheless blurs the clarity of the international approach in a number of respects and widens the scope of liability.

First, it is not limited to the public, governments and international organizations, but extends to any 'body or institution', without defining them. The latter could include, for instance, social organizations such as NGOs, trade unions, media, or religious groups – although these would arguably already be well covered by the reference to a 'segment' of the general public.

[85] See generally B. Saul, 'The Curious Element of Motive in Definitions of Terrorism: Essential Ingredient – Or Criminalizing Thought?' in A. Lynch, E. MacDonald and G. Williams (eds), *Law and Liberty in the War on Terror* (Sydney: Federation Press, 2007), at 28.

[86] D. Anderson QC, *The Terrorism Acts in 2012*, UK Independent Reviewer of Terrorism Legislation (July 2013), at 58.

[87] See also *Prosecutor v Ayyash*, supra note 1.

[88] The Security Council resolution additionally requires that the act is committed 'with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons', but this largely repeats the alternative notion of intimidating a population.

Whereas the international instruments focus on the *intimidation* of the public or *compulsion* of a government or international organization, the Malabo Protocol supplements these with the alternative intentions of 'fear', 'force', or 'induce'. Moreover, it does not reserve particular intentions for specific groups or entities, but extends *all* of the intentions to *any* of the protected targets. Thus, a government may be intimidated or put in fear, while the public may be coerced, and so on. The term 'induce' also sets the bar of terrorism considerably lower than the other terms (intimidate, fear, force, or coerce). Further, some other regional instruments raise the bar higher by requiring, for example, 'serious' intimidation or 'undue' compulsion.[89] South Africa's terrorism law refers to acts which 'unduly compel' a target.[90]

Significantly, the Malabo Protocol follows the international approach in shielding all governments from terrorism, regardless whether a government is democratic or human rights-respecting. As mentioned earlier, there is no democratic protest exception for less harmful violent acts, as in the African Model Anti-Terrorism Law 2011. More importantly, there is also no exception or defence for acts of morally justifiable rebellion or resistance against repressive authoritarian, tyrannical, dictatorial or military governments.[91] A UK court held that where a terrorism law unambiguously covers all governments, it cannot be interpreted to imply an exception or defence for terrorist acts motivated by morally just causes.[92]

(e) 'AND IS CALCULATED OR INTENDED TO ... 2. DISRUPT ANY PUBLIC SERVICE, THE DELIVERY OF ANY ESSENTIAL SERVICE TO THE PUBLIC OR TO CREATE A PUBLIC EMERGENCY' This special intention is an alternative to the element of intimidation or coercion above. As such, it considerably lowers the threshold for establishing the crime of terrorism. For example, a criminal act (say, vandalism) which damages property (such as a bus stop) in order to disrupt a public bus could qualify as terrorism. Again, mere disruption is sufficient, without *serious* disruption being required. By contrast, South Africa's terrorism law demands 'serious' disruption or interference with essential services.[93]

[89] EU Framework Decision on Combating Terrorism (adopted and entered into force 13 June 2002) 2002/475/JHA.

[90] S. 1(1) Protection of Constitutional Democracy against Terrorist and Related Activities Act 2004 (South Africa).

[91] See generally Saul, *Defining Terrorism*, supra note 3, at chapter 2; Carlile, supra note 61, at 43–5.

[92] Court of Appeal of England and Wales, *R v F* [2007] EWCA Crim 243, §§ 19–40.

[93] S. 1(1) Protection of Constitutional Democracy against Terrorist and Related Activities Act 2004 (South Africa).

Again, proper exercise of prosecutorial discretion will be vital in ensuring that ordinary, relatively harmless crimes are not re-characterized as terrorism. Likewise, there is a risk that that unruly democratic protest or industrial action may be captured by the offence. For instance, public servants on strike over labour conditions, who damage property (such as a chair, desk or computer) in a government building, and disrupt the work of their department, could be regarded as terrorism.

The provision is unusual in that it is not reflected in other international or regional instruments. As noted earlier, the UN Draft Comprehensive Convention non-exhaustively defines property to include damage to a public place or public transport system, or a state or infrastructure facility, but these are cast as types of damage rather than as specific or ulterior intentions. The result is that disruption of public or essential services need not also intimidate the public or coerce a government; the fact of disruption is enough to establish terrorism.

The provision covers three different categories. 'Any public service' covers services provided by a government (directly or through privately contracted providers) in any area, such as health care, education, social security, housing, social services, libraries and cultural services, public broadcasting, mail, and regulatory authorities (from car registration to tax inspection).

'Any essential service' could include utilities such as water, energy, sanitation, emergency services (including hospitals, ambulances, fire services and police), communications, transport, prisons and air traffic control.[94] Certain electronic services could also be covered under one or both categories, from mobile and internet communications to banking facilities.

By way of example, South Africa's terrorism law non-exhaustively defines an 'essential service, facility or system' to include electronic systems (including an information system); telecommunications, banking or financial services or systems; systems for the delivery of essential government services; systems for essential public utilities or transport providers; and an essential infrastructure facility.[95] It further (non-exhaustively) defines an 'essential emergency service' to include police, medical or civil defence services, a definition shared by the African Model Anti-Terrorism Law 2011. While the latter does not also specifically mention other 'essential services', it does

[94] Some examples of essential services in the different context of international labour law are given by the International Labour Organization (ILO), *Freedom of Association: Digest of Decisions and Principles* (5th ed, Geneva, 2006), § 585.

[95] S. 1(1) Protection of Constitutional Democracy against Terrorist and Related Activities Act 2004 (South Africa).

enumerate instances of such services, including communication infrastructure, banking and financing services, utilities, transportation or key infrastructure, as well as computer systems.

The concept of a 'public emergency' is well articulated in the international and regional jurisprudence on derogation under human rights treaties.[96] A public emergency is 'a situation of exceptional and [actual or] imminent danger or crisis affecting the general public, as distinct from particular groups, and constituting a threat to the organized life of the community',[97] and where normal responses are inadequate.[98] Severe terrorist threats, such as that confronted by the United Kingdom from Al Qaeda after the 11 September 2001 attacks on the United States, may qualify as a public emergency.[99] South Africa's terrorism law, which implements the OAU Convention definition on which the Malabo Protocol is based, imposes the additional stringent condition that a public emergency must be 'serious'.[100]

(f) 'AND IS CALCULATED OR INTENDED TO ... 3. CREATE GENERAL INSURRECTION IN A STATE' This alternate limb of the definition is one of the broadest. It conflates terrorism with other distinct species of political violence. The concept of insurrection is also described in different national laws as rebellion, revolution or other public security offences concerning challenges to a state's political authority or constitutional order. Given the exclusion of armed conflicts from the Malabo Protocol terrorism crime, this element is concerned only with insurrections beneath the intensity threshold of a non-international armed conflict. Classically, insurrection is regarded under national law as an archetypal political offence exempt from extradition (unless atrocious, indiscriminate or disproportionate means are used).

Whereas crimes of insurrection in domestic law commonly protect a particular state from violence, the Malabo Protocol (and OAU Convention on

[96] Art. 4 International Covenant on Civil and Political Rights (adopted 16 December 1966 entered into force 23 March 1976) 999 UNTS 171 (hereafter 'ICCPR'); Art. 15 European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221. There is, however, no derogation clause in the African Charter on Human and Peoples' Rights: see African Commission on Human and Peoples' Rights, *Media Rights Agenda and Others v Nigeria*, Communication Nos. 105/93, 128/94, 130/94 and 152/96 (1998), §§ 67–8.

[97] *Lawless v Ireland* (No. 3) (1961) 1 EHRR 15, at 31.

[98] *The Greek Case*, European Commission on Human Rights, Application Nos. 3321/67, 3322/67, 3323/67 and 3344/67 (1969).

[99] *A and Others v United Kingdom*, Application No. 3455/05, ECtHR (19 February 2009), § 179.

[100] S. 1(1) Protection of Constitutional Democracy against Terrorist and Related Activities Act 2004 (South Africa).

which it is based) internationalizes the offence of insurrection to protect *any* state. Again, no distinction is drawn between insurrection against democratic governments and those against authoritarian or repressive ones. The Malabo Protocol shields even totalitarian regimes from insurrectionist violence.

This contrasts starkly with the separate crime in the Malabo Protocol of 'unconstitutional change of government' (article 28E), which was controversial in the drafting because of the proposed criminalization of 'popular uprising'. Reference to popular uprising was ultimately omitted because of concerns about repressing legitimate resistance. Moreover, the crime in article 28E is limited to acts against 'democratically elected governments'. The drafters seem to have overlooked similar concerns in the context of terrorism, by criminalizing insurrection as terrorism regardless of whether a state is democratic. This was probably because the Malabo Protocol unreflectively adopted the OAU Convention definition.

An insurrection may or may not use terrorist methods, in the sense of deliberate or indiscriminate violence against civilians or other protected objects. The Malabo Protocol treats all insurrections utilizing violence as terrorism, even those which only target state authorities (such as military, intelligence, security or police officials), avoid indiscriminate or atrocious attacks, and spare civilians. In doing so, it conflates the question of the legitimacy of resort to violence with the legitimacy of the means and methods used. Given the cautious drafting of article 28E, restraint should be exercised by prosecutors in utilizing the insurrection element of the terrorism crime in article 28G, such as by only prosecuting insurrections where violence is disproportionate or indiscriminately targets civilians.

C. *Extended Modes of Criminal Liability*

Article 28G(B) of the Malabo Protocol further defines the crime of terrorism to include '[a]ny promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in subparagraph (a)(1) to (3)'. The provision replicates the extended modes of criminal liability for terrorism in the OAU Convention.

The inclusion of these extended modes of criminal liability is both largely unnecessary and technically problematic. The extended modes were necessary in the OAU Convention because that instrument dealt solely with the crime of terrorism, designed for implementation in domestic law, and accordingly there were no common or general provisions on extended liability which the instrument could fall back upon. Extended modes otherwise vary in

national law, and the OAU Convention aims to encourage domestic harmonization and transnational cooperation on commonly identified forms of criminal participation.

In contrast, the Malabo Protocol demarcates a regional court's jurisdiction over a bundle of different crimes and contains a common provision on extended modes of liability. Article 28N sets out the 'modes of responsibility', and addressed fully in a separate chapter, is applicable to all crimes in the Protocol:

> An offence is committed by any person who, in relation to any of the crimes or offences provided for in this Statute:
>
> i. Incites, instigates, organizes, directs, facilitates, finances, counsels or participates as a principal, co-principal, agent or accomplice in any of the offences set forth in the present Statute;
> ii. Aids or abets the commission of any of the offences set forth in the present Statute;
> iii. Is an accessory before or after the fact or in any other manner participates in a collaboration or conspiracy to commit any of the offences set forth in the present Statute;
> iv. Attempts to commit any of the offences set forth in the present Statute.

Unlike terrorism, most of the other crimes in the Malabo Protocol are not defined to include their own specific modes of extended liability, but rely on the common modes in article 28N. There are only a few crime-specific exceptions to this general approach (such as recruiting, using, financing or training mercenaries in article 28H(2)) – as well as some troubling omissions (such as the failure to specifically include direct and public incitement to genocide, as required by the Genocide Convention 1948).

The combination of the terrorism-specific modes of extended liability in article 28G(B) and the general modes of extended liability in article 28N both creates grave confusion and overly broad criminal responsibility. In means, for instance, that a person may be liable for inciting incitement to terrorism; or attempting to attempt terrorism; or aiding the aiding of terrorism, and so on.

Oddly, one of the most important terrorism-specific extended offences, financing terrorism, is not found in the terrorist crimes in article 28G(B) at all (though it does appear as a separate offence in the African Model Anti-Terrorism Law 2011), while financing any offence under the Malabo Protocol is found in the general provision on extended liability in article 28N. Only the 'threat' to commit terrorism is appropriately located in article 28G(B) (and does not appear in the general provision concerning all crimes).

Given this confusion, two interpretive approaches are available. The first would be to treat articles 28G(B) and 28N as mutually exclusive and regard the former as the only forms of extended liability applicable to terrorism. This - straight-forward approach treats article 28G(B) as the more special law (*lex specialis*) relevant to terrorism, thus displacing the general provision applicable to other crimes, particularly given that most other crimes do not have their own specific modes of extended liability. As noted above, however, this would have the disadvantage of excluding one of the most important forms of extended liability for terrorism, namely terrorist financing, unless it can be characterized under some other mode (such as sponsoring, contributing to, or aiding).

The alternative approach is to consider, in the first instance, applying the terrorism-specific modes of extended liability in article 28G(B), then falling back on the general provision in article 28N to fill any gaps or plug any holes left by the former provision (for instance, concerning financing). The former provision remains the *lex specialis* but is flexibly supplemented (rather than displacing) by the latter.

In international law, there are three points of comparison for the Malabo Protocol. Firstly, the ICC Statute recognizes the following extended modes of criminal responsibility: commission and joint commission; ordering, soliciting, or inducing; aiding, abetting or assisting; intentionally contributing to the commission of a crime by a group; and attempt.[101]

Secondly, most of the international counter-terrorism instruments recognize a number of bases of liability: (a) threats;[102] (b) attempts;[103] (c) organizing or directing others;[104] (d) participating as an accomplice;[105]

[101] Art. 25, ICCSt.

[102] Art. 1(a) Hague Convention 1970; Art. 1(2) Hague Convention 1970 as amended by the Beijing Protocol 2010; Art. 2(1)(c) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (adopted 14 December 1973, entered into force 20 February 1977), 1035 UNTS 167 (hereafter 'Protected Persons Convention 1973'); Art. 3(2)(c) Rome Convention 1988; Art. 2(c) Rome Protocol 1988; Art. 7(e) Vienna Convention 1980; Arts. 2(2)(a)-(b) Nuclear Terrorism Convention 2005.

[103] Art. 1(a) Hague Convention 1970; Art. 1(3)(a) Hague Convention 1970 as amended by the Beijing Protocol 2010; Art. 1(2)(a) Montreal Convention 1971; Art. 2(1)(d) Protected Persons Convention 1973; Art. 3(2)(a) Rome Convention 1988; Art. 2(a) Rome Protocol 1988; Art. 1(2)(a) Hostages Convention 1979; Art. 7(f) Vienna Convention 1980; Art. 2(3) Nuclear Terrorism Convention 2005; Art. 2(2) Terrorist Bombings Convention 1997; Art. 2(4) Terrorist Financing Convention 1999.

[104] Art. 1(3)(b) Hague Convention 1970 as amended by the Beijing Protocol 2010; Art. 2(4)(b) Nuclear Terrorism Convention 2005; Art. 2(3)(b) Terrorist Bombings Convention 1997; Art. 2 (5)(b) Terrorist Financing Convention 1999.

[105] Art. 1(b) Hague Convention 1970; Art. 1(3)(c) Hague Convention 1970 as amended by the Beijing Protocol 2010; Art. 1(2)(b) Montreal Convention 1971; Art. 2(1)(e) Protected Persons Convention 1973; Art. 3(2)(b) Rome Convention 1988; Art. 2(b) Rome Protocol 1988;

(e) knowingly assisting another to evade investigation, prosecution or punishment;[106] (f) agreeing with one or more persons to commit an offence;[107] or (g) otherwise contributing to or participating in the commission of an offence by a group.[108] The latter mode is found in article 25(3)(d) of the ICC Statute, which was modelled on the Terrorist Bombings Convention 1997.[109] The scope of extended criminal liability expanded over time.[110] Up to the 1990s, the sectoral treaties were limited to criminalizing commission, attempt, and participation. Since the Terrorist Bombings Convention 1997, it became an offence in new (and amended) treaties to organize or direct others to commit an offence, or to contribute in any other way to the commission of an offence by a group acting with a common purpose (article 2(3)).[111]

Thirdly, again in a terrorism-specific context, the UN Security Council has required states to bring to justice not only those who 'perpetrate' terrorist acts, but also those who participate in 'financing, planning, preparation... or in supporting terrorist acts'.[112] It has further required states to combat foreign terrorist fighters, namely by criminalizing those who (a) travel or attempt to travel to a foreign state for 'for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training'; (b) finance such travel, or (c) organize, facilitate or recruit for such travel.[113] Finally, it has encouraged (but not required) states to prohibit incitement to terrorism.[114]

Art. 1(2)(b) Hostages Convention 1979; Art. 2(4)(a) Nuclear Terrorism Convention 2005; Art. 2(3)(a) Terrorist Bombings Convention 1997; Art. 2(5)(a) Terrorist Financing Convention 1999.

[106] Art. 1(3)(d) Hague Convention 1970 as amended by the Beijing Protocol 2010.

[107] Art. 1(4)(a) Hague Convention 1970 as amended by the Beijing Protocol 2010.

[108] Art. 1(4)(b) Hague Convention 1970 as amended by the Beijing Protocol 2010; Art. 7(g) Vienna Convention 1980; Art. 2(4)(c) Nuclear Terrorism Convention 2005; Art. 2(3)(c) Terrorist Bombings Convention 1997; Art. 2(5)(c) Terrorist Financing Convention 1999.

[109] Art. 2(3)(c) Terrorist Bombings Convention 1997.

[110] A. Sambei, A. du Plessis and M. Polaine, *Counter-Terrorism Law and Practice: An International Handbook* (Oxford: Oxford University Press, 2009), at 34.

[111] See, e.g. Art. 2 Terrorist Financing Convention 1999; Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988 (adopted 14 October 2005; entered into force 28 July 2010) (hereafter 'Protocol 2005 to the Rome Convention 1988'), inserting Art. 3 *quater*; Protocol 2005 to the Rome Protocol 1988, inserting Art. 2 *ter*; Art. 1(4)-(5) Beijing Convention 2010.

[112] SC Res. 1373 (2001), § 2(e).

[113] SC Res. 2178 (2014), § 6.

[114] SC Res. 1624, 14 September 2005, § 1.

D. *Exclusion of Liberation or Self-Determination Struggles*

Article 28G(C) of the Malabo Protocol provides that 'the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts'. This exclusionary provision follows in the footsteps of the OAU Convention, the Arab League Convention, the OIC Convention, and the African Model Anti-Terrorism Law 2011. The OIC also continues to argue for the inclusion of such a provision in the UN Draft Comprehensive Terrorism Convention, while Pakistan (an OIC member) lodged a reservation upon signing the Terrorist Bombings Convention 1997 purporting to exclude self-determination movements from its application.

The provision is rooted in Africa's historical experience of colonialism and decolonization struggles, as well as contemporary sympathizers for fellow travellers such as the Palestinians. Most African peoples have now attained independence, with the important exception of the people of Western Sahara, occupied by Morocco, and some small European possessions (such as the Spanish territories of Ceuta, Melilla and the Canary Islands near Morocco; Portuguese Madeira off the Moroccan coast; and the French Réunion off Madagascar). In this sense, in practice the provision may prove to be of largely symbolic value.

However, to the extent that African states become victims of foreign occupation (by other African states or foreign states), it will retain its significance. Africa has experienced a number of inter-state wars in recent years, including Uganda's partial occupation of the Democratic Republic of the Congo, conflicts between Ethiopia and Eritrea, and foreign interventions in Libya. In this respect, article 28G(C) elaborates that liberation or self-determination struggles can include 'armed struggle against colonialism, occupation, aggression and domination by foreign forces'.

The provision does not exempt liberation or self-determination struggles from other international or regional criminal liabilities, including for war crimes and crimes against humanity (including elsewhere under the Malabo Protocol). The provision does not, therefore, confer impunity on liberation movements, but reflects a political concern not to label and stigmatize such just causes as 'terrorist', even if their methods are excessive. Again, this reflects the acute sensitivities of the decolonization period, in which liberation forces were sometimes branded and delegitimized as 'terrorists' by colonial powers.

By contrast, none of the 18 or so international counter-terrorism treaties excludes liberation or self-determination violence, while regular UN General

Assembly resolutions since the mid-1990s also do not exempt it. As such, certain conduct not regarded as terrorism under the Malabo Protocol may also still be criminal under transnational counter-terrorism instruments (regulating, for example, terrorist bombings, terrorist financing, nuclear terrorism, or attacks on targets such as diplomats, aircraft, airports, ships and maritime platforms, among others).

The precise legal scope of the provision must be determined by resort to the international law concepts it references. The term 'peoples' classically refers to the whole population of a colonized or occupied territory, rather than minority or indigenous groups forming a sub-set of it. A people may be represented by a movement recognized by the United Nations, or the relevant regional organization. The right of 'self-determination' entitles a people to 'freely determine their political status and freely pursue their economic, social and cultural development',[115] and African human rights law reiterates the right.[116] It can include a right to claim independent statehood, as well as other forms of political organization.

The provision further refers to 'the struggle waged by peoples *in accordance with the principles of international law*' (emphasis added). The latter qualifying phrase may be interpreted in two different ways. Firstly, it may refer to the international law right of peoples to wage a struggle for liberation or self-determination; that is, to the legal entitlement to pursue those goals. Secondly, it may refer to the legality of the *means or methods* by which a people struggles for those goals. Both are plausible interpretations and both limit the benefit of the provision to those acting lawfully ('in accordance with' international law). It is self-evident that the exclusionary provision cannot be claimed by those who do not enjoy a right of self-determination in the first place; it is more difficult to determine when a people entitled to self-determination would lose the benefit of the exclusionary provision because they utilized means or methods of struggle which were not in accordance with international law. (The Malabo Protocol's other exclusionary provision,

[115] Art. 1(1) ICCP and ICESCR.

[116] Art. 20, African Charter on Human and Peoples' Rights: '1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen. 2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community. 3. All peoples shall have the right to the assistance of the State Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.'

concerning armed conflict covered by IHL, excludes all hostile acts in conflict, not just those in conformity with IHL.)

The distinction is historically significant because of long running divisions amongst states within the United Nations about the permissible means of pursuing self-determination. Many decolonized states claimed that there existed a right of people to resort to armed struggle to secure self-determination, while primarily western states opposed such a right; an intermediate view held that liberation movements were entitled to use violence in response to violent repression of their self-determination right by a colonial power. Even if the former view were correct, it would still not exempt liberation fighters from other international criminal liabilities, including for war crimes, genocide or crimes against humanity. Again, on this approach the provision is more about political labelling than criminal liability per se.

Where such struggles involve armed conflicts under IHL, they will already be excluded by article 28G(D) of the Malabo Protocol (discussed below) – either as international conflicts between liberation forces and a state party to Additional Protocol I of 1977, or as non-international conflicts between state forces and a liberation movement qualifying as an organized armed group under IHL. Given the existence of a more specific exclusion for armed conflicts covered by IHL, article 28G(C) should be understood as excluding liberation or self-determination struggles that neither rise to the intensity of an non-international armed conflict, nor involve 'organized armed groups' participating in such conflicts.

Struggles beneath the intensity of armed conflict could include, for example, low level, sporadic or intermittent violence (including attacks on civilian or governmental personnel or objects), civil unrest or disorder, or violent protests, demonstrations, rallies and the like. Violence during armed conflicts by liberation movements that are not 'organized armed groups' could include, for example, the sporadic participation of civilians in hostilities, including individual resistance in occupied territory.

E. *Exclusion of Acts Covered by IHL*

The Malabo Protocol provides that '[t]he acts covered by international Humanitarian Law, committed during an international or non-international armed conflict by government forces or members of organized armed groups, shall not be considered as terrorist acts' (article 28G(D)). In this respect it departs from the OAU Convention and instead follows the approach of the African Model Anti-Terrorism Law 2011. This is also consistent with the approach in recent international counter-terrorism treaties, which exclude

the activities of armed forces during armed conflict, as those terms are understood under IHL, which are governed by that law.[117] The International Committee of the Red Cross has further endorsed this approach in the negotiations for the UN Draft Comprehensive Terrorism Convention.[118] The effect of the provision is to exclude such acts from being treated as terrorism and to defer to the special law (*lex specialis*) of IHL.

The provision applies where there exists an international or non-international armed conflict. Those categories are defined by IHL, particularly the Geneva Conventions of 1949, Additional Protocols I and II of 1977, and customary IHL. An international conflict involves military hostilities between two or more states, or an occupation of foreign territory even in the absence of hostilities.[119] An international conflict can also be constituted by hostilities between a state party to Additional Protocol I of 1977 and a self-determination movement representing a people,[120] as is the case between Morocco (occupying the Non-Self-Governing Territory of Western Sahara) and Polisario (representing the Saharawi people).[121]

[117] Art. 3 *bis* Hague Convention 1970 as amended by the Beijing Protocol 2010; Art. 4(2) Nuclear Terrorism Convention 2005; Art. 19(2) Terrorist Bombings Convention 1997; Art. 2(1)(b) Terrorist Financing Convention 1999; Art. 3 Protocol 2005 to the Rome Convention 1988 (adding Art. 2 *bis* (2)); Amendment 2005 to the Convention on the Physical Protection of Nuclear Material 1980 (adopted 8 July 2005, not yet in force) (hereafter 'Amendment 2005 to the Convention on the Physical Protection of Nuclear Material 1980'), inserting Art. 2(4)(b). Many of the earlier treaties do not explicitly address the issue: see *R v Gul (Appellant)* [2013] UKSC 64, §§ 47–8.

[118] International Committee of the Red Cross, *Terrorism and International Law: Challenges and Responses: The Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law* (Geneva: International Institute of Humanitarian Law, 2002).

[119] Common Art. 2, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949; entered into force 21 October 1950) 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949; entered into force 21 October 1950) 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949; entered into force 21 October 1950) 75 UNTS 135 (hereafter 'Third Geneva Convention'); and Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949; entered into force 21 October 1950) 75 UNTS 287 (hereafter 'Geneva Conventions').

[120] Art. 1(4) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977; entered into force 7 December 1978) 1125 UNTS 3 (hereafter 'Protocol I').

[121] In June 2015 Polisario deposited a unilateral declaration of adherence to the Geneva Conventions and Protocol I under the procedure provided for in article 96(3) of Protocol I. The depository state, Switzerland, duly notified the declaration to states parties, formally accepting the first ever article 96(3) declaration. See B. Saul, 'The Status of Western Sahara as Occupied Territory under International Humanitarian Law and the Exploitation of Natural Resources' (2015) 27 *Global Change, Peace and Security*, available online at www.tandfonline.com/doi/

A non-international conflict exists where there are 'intense' military hostilities between a state and an organized armed group.[122] Such conflicts may include civil wars within a state's territory or hostilities between a state and a non-state group on another state's territory. It can also include hostilities between national liberation or self-determination forces and a state which is not a party to Protocol I.

The Malabo Protocol excludes acts committed only by government (armed) forces or organized armed groups. These are significant limitations. The exclusion of acts by 'government forces' must be interpreted to refer to state *armed* forces, which can include regular military personnel as well as militias or resistance movements 'belonging' to the state and which are under responsible command, respect IHL, carry weapons openly, and display an identifying insignia.[123] It would not exclude acts by any government officials (such as civilian police or intelligence officers, or other public servants), or loosely affiliated paramilitaries not controlled by the state.

Likewise, only acts by 'organized' armed groups are excluded and again the provision refers to IHL concepts. Under IHL, factors relevant in considering whether a group is 'organized' include: the existence of a command structure, disciplinary rules and mechanisms, and a headquarters; control of territory; the ability of the group to procure, transport and distribute weapons and military equipment, and to recruit and militarily train fighters; the ability to plan, coordinate and carry out military operations, including troop movements and logistics; the ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and

pdf/10.1080/14781158.2015.1075969 (last visited 31 March 2016); B. Saul, 'Many Small Wars: The Classification of Armed Conflicts in Spanish Sahara (Western Sahara) in 1975–76' (2016) *African Yearbook on International Humanitarian Law* 85.

[122] Art. 3 Geneva Conventions; Interlocutory Appeal on Jurisdiction, *Prosecutor v Tadic* (IT-94–1), 2 October 1995, § 70. Additional Protocol II may also apply where the armed group controls territory. Factors relevant to the intensity of a conflict include 'the seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and, whether any resolutions on the matter have been passed': Judgment, *Prosecutor v Limaj et al.* (IT-03–66-T), 30 November 2005, § 90. Also relevant are the type of weapons and military equipment used, the calibre of munitions, the number of fighters and type of forces, the number of casualties and extent of destruction, and the scale of civilian displacement: Interlocutory Appeal on Jurisdiction, *Prosecutor v Tadic* (IT-94–1), 2 October 1995, § 60.

[123] Art. 4(2) Third Geneva Convention.

conclude agreements (such as cease-fire or peace accords).[124] Also relevant are the number of fighters and designated zones of operation.[125]

On the above test, it is certainly possible for 'terrorist' organizations to constituted organized armed groups involved in a non-international armed conflict. However, individual civilians who take a direct part in hostilities, for instance by sporadically attacking state forces, but who are not part of an organized armed group, will not be covered by the exclusion. Likewise organized criminal violence by gangs or drug cartels will not be excluded.

Moreover, the provision excludes acts by government forces and organized armed groups only where 'committed in the course' of an armed conflict. The act must therefore have a nexus to the conflict; not every act of violence that occurs in an area affected by conflict is excluded. For instance, a government soldier on weekend recreational leave who murders someone would not be excluded under the provision.

The effect of the provision is to completely exclude the relevant acts from the crime of terrorism under the Malabo Protocol. The exclusion applies where acts are 'covered by' IHL, but is not limited to acts that are *in conformity* with IHL (as proposed by the OIC in current negotiations over the UN Draft Comprehensive Terrorism Convention). Thus acts which comply with or violate IHL are equally excluded. Thus proportionate, discriminate attacks directed only against military targets are exempted, but so are deliberate attacks on civilians or perfidiously feigning civilian status to mount a suicide bombing attack against state forces.

This does not mean that the Malabo Protocol confers impunity on those who violate IHL. Rather, acts in armed conflict are left to be regulated by IHL, other international criminal laws (such as those on genocide, torture and crimes against humanity, and international human rights law insofar as it applies, including extraterritorially). IHL already prohibits, and often criminalizes as war crimes, much terrorist-type conduct in armed conflict.[126] This includes, for example, deliberate or indiscriminate attacks on civilians and civilian objects; reprisals; the use of prohibited weapons (including incendiaries, or chemical or biological weapons); perfidy; attacks on cultural property, objects indispensable to civilian survival, or works containing dangerous forces (including dams, dykes and nuclear facilities); or through illegal detention,

[124] Interlocutory Appeal on Jurisdiction, *Prosecutor v Tadic* (IT-94–1), 2 October 1995, § 60.
[125] Judgment, *Prosecutor v Limaj et al.* (IT-03–66-T), 30 November 2005, § 90.
[126] See H. Gasser, 'Acts of Terror, "Terrorism" and International Humanitarian Law' 84 *International Review of the Red Cross (IRRC)* (2002) 547.

torture or inhuman treatment. The Malabo Protocol brings many war crimes under IHL within the jurisdiction of the African Court.

The Malabo Protocol does not, however, contain a further exemption for state military forces in peacetime that is found in some recent international counter-terrorism treaties. Some of these treaties include an exception for the activities of military forces (in peacetime) when exercising their official functions.[127] Official duties could include law enforcement, evacuation operations, peace operations, UN operations, or humanitarian relief.

F. *Exclusion of Certain Defences*

The Malabo Protocol follows the OAU Convention (article 3(2)), recent international counter-terrorism conventions,[128] and UN resolutions[129] in proclaiming that '[p]olitical, philosophical, ideological, racial, ethnic, religious or other motives shall not be a justifiable defence against a terrorist act' (article 28G(E)). The foremost effect of this provision in a criminal law instrument is to preclude such motives from being pleaded as a defence to a criminal charge, so as to justify the accused's conduct and exonerate them from liability.

The wording of the provision would not, however, prevent a convicted person from explaining their motives by way of mitigation in sentencing. Pleas in mitigation are not 'defences' as such, but part of the ordinary criminal process of calibrating the punishment to fit the crime, considering all relevant circumstances. There is plainly a difference in moral and legal culpability, for example, between a rebel wounding a member of the Gestapo in an attempt to overthrow Hitler in Nazi Germany, and a Boko Haram Islamist in Nigeria conscripting child suicide bombers to indiscriminately kill civilians.

Ordinary criminal law defences remain unaffected. Strangely, the Malabo Protocol does not mention the availability of criminal law defences to crimes within the Court's jurisdiction, other than to exclude the relevance of official position, affirm command responsibility, and exclude the defence of superior orders (article 46B(2)-(4)). By contrast, the ICC Statute affirms the grounds

[127] Art. 3 *bis* Hague Convention 1970 as amended by the Beijing Protocol 2010; Arts. 3–4 Plastic Explosives Convention 1991; Art. 4(2) Nuclear Terrorism Convention 2005; Art. 19(2) Terrorist Bombings Convention 1997; Art. 3 Protocol 2005 to the Rome Convention 1988 (adding Art. 2 *bis* (2)); Amendment 2005 to the Convention on the Physical Protection of Nuclear Material 1980, inserting Art. 2(4)(b).

[128] Terrorist Bombings Convention 1997, article 5; Terrorist Financing Convention 1999, article 6; International Convention for the Suppression of Acts of Nuclear Terrorism 2005, article 6.

[129] See, e.g., GA Res. 49/60, 9 December 1994.

excluding criminal responsibility as including mental disease or defect, intoxication, self-defence, duress, and other grounds deriving from international law and general principles of law (article 31). For example, there have been cases where hijacking by persons escaping imminent threats of death or serious injury as a result of persecution abroad have been excused by a defence of necessity.[130] The issues concerning defences that would be available to suspects have been taken up by a different author for a different chapter contained in this volume.

There are two further possible legal implications of the exclusion of political or other motives under the Malabo Protocol. First, the provision might suggest that the crime of terrorism should not be regarded as a 'political' offence for the purpose of refusing an extradition request. The Malabo Protocol does not otherwise expressly 'depoliticize' its terrorism offence for extradition purposes – unlike some recent international counter-terrorism treaties.[131] Contrarily, the absence of an express provision depoliticizing terrorism in the extradition context could indicate that the issue remains one to be determined by national law – as is the case under many of the earlier international counter-terrorism treaties. The latter approach is preferably because restrictions on protections (such as the political offence exception to extradition) should not be made by implication in the absence of express words.

Secondly, the provision could similarly have a bearing on whether an offence is treated as 'serious non-political crime' in considering whether to exclude a person from refugee protection under article 1F of the Refugee Convention 1951. Again, the Malabo Protocol does not expressly purport to exclude all terrorist offenders from refugee status. The exclusion of political motives as a criminal defence is certainly a relevant factor, but as in the

[130] Court of Appeal of England and Wales (Criminal Division), *R v Abdul-Hussein* [1998] Criminal Law Reports 570; Court of Appeal of England and Wales, *R v Safi* [2003] EWCA Crim 1809; US Court for Berlin, *US v Tiede*, Criminal Case 78–001 (1980) 19 *International Legal Materials* 179; see also Court of Appeal of England and Wales (Criminal Division), *R v Moussa Membar* [1983] Criminal Law Reports 618; UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses*, HCR/GIP/03/05, 4 September 2003, § 22; UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/ENG/REV.3, January 1992, §§ 159–61.

[131] Art. 8 *bis* Hague Convention 1970 as amended by the Beijing Protocol 2010; Art. 15 Nuclear Terrorism Convention 2005; Art. 11 Terrorist Bombings Convention 1997; Art. 14 Terrorist Financing Convention 1999; Protocol 2005 to the Rome Convention 1988, inserting Art. 11 *bis*; Amendment 2005 to the Convention on the Physical Protection of Nuclear Material 1980, inserting Art. 11A.

extradition context, not determinative. The UNHCR cautions that every act labelled as 'terrorism' is not automatically excludable under article 1F(b); the test is whether it constitutes 'serious non-political crime' in the context and circumstances.[132]

Notably, the AU's African Model Anti-Terrorism Law 2011 recommends that national laws exclude any act that is the result of 'advocacy, protest, dissent or industrial action' and which does not cause certain types of serious harm to people or property.[133] Strictly such provision would operate as an exception to the definition of terrorism, rather than as a democratic protest 'defence'. It would have the same effect of precluding criminal responsibility for terrorism. It remains to be seen whether such exclusion could be included in any Elements of Crimes of Rules of Procedure developed by the AU to give effect to the Malabo Protocol.

4. CONCLUSION

The crime of terrorism in article 28G of the Malabo Protocol is closely modelled on the offences in the OAU Convention 1999. As such, it replicates the problematic features of that earlier instrument, without critical reflection on its continuing appropriateness, particularly given the well-known human rights concerns and post-9/11 normative developments.

Certainly some elements of the crime of terrorism are clearly expressed and focus on objectively serious harms, such as death, serious injury or other public dangers. Consistent with international practice, the crime is also capable of targeting instrumental violence to intimidate or coerce governments, international organizations, or populations. The exclusion of acts in armed conflict is also welcome, since it preserves the primacy of the special regime of IHL that is best adapted to regulating intense armed violence. The exclusion of liberation or self-determination violence distinguishes the African approach from general international practice, although it reflects Africa's historical experience. In practice it will often be of little consequence because excessive liberation violence can still be prosecuted as war crimes or crimes against humanity (though those crimes do not cover lesser liberation violence outside armed conflict or not constituting a systematic or widespread attack on civilians).

[132] UNHCR, *Guidelines on International Protection No. 5*, HCR/GIP/03/05, 4 September 2003, § 26; UNHCR, *Background Note on the Application of the Exclusion Clauses*, HCR/GIP/03/05, 4 September 2003, § 81.

[133] African Model Anti-Terrorism Law 2011, § xl(a).

Other elements of the African crime of terrorism are, however, ambiguous or over-broad and potentially infringe the principle of legality and other human rights protected in African and international law. The underlying unlawful acts are open-ended and imprecise, referring to violations of any African or international law. The threshold for damage (to property, resources, or environmental or cultural heritage) is too low and may sweep up minor harms. So too does merely 'inducing' a government set a low threshold and potentially interfere in protected political expression or action. There is an unhelpful conflation of terrorism with other political violence, such as insurrection, regardless of whether terrorist methods are used, or whether acts aim to overthrow repressive regimes and restore democracy and human rights. The problem is compounded by the absence of a democratic protest exception, as found in the African Model Anti-Terrorism Law 2011. The extended modes of criminal liability confusingly compound the general provision on extended liability in the Malabo Protocol, generating great uncertainty and unpredictability about the scope of liability.

All of this suggests a need for great caution to be exercised by prosecutors and judges when considering characterizing violence as terrorism. As the UN Security Council and General Assembly have repeatedly affirmed, counter-terrorism efforts must always comply with fundamental international human rights law obligations. Interpretively, the African crime of terrorism must also be read down to ensure compatibility with African human rights law; the latter is the higher law prevailing over the former in the event of inconsistency.