A. Definition of the Crime of ‘Terrorism’ and Interpretive Issues

The Malabo Protocol confers jurisdiction over the crime of ‘terrorism’ in article 28A(1)(6) and defines the crime of ‘terrorism’ in article 28G. The elements of the definition are:

- An underlying act that violates national criminal law, AU law or African regional economic community law, 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 definition is drawn largely verbatim from the OAU Convention on the Prevention and Combating of Terrorism 1999, which has been heavily criticised on human rights grounds as being vague and over-broad, and infringing the principle of legality.

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 the approach of the international counter-terrorism conventions.

Any individual may bear criminal responsibility for the crime of terrorism, whether a state official or agent, member of non-state terrorist group, 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.

1. ‘“terrorism’ means any of the following acts:’

It is 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’

The Malabo Protocol departs from the OAU Convention by referring not only to violations of national criminal law but also of ‘the laws of the African Union or a regional economic community recognized by the African Union, or by 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 such laws.
In an instrument establishing criminal liability, such ambiguity may fail to meet the requirements of the principle of legality recognised in article 7(2) of the African Charter on Human and Peoples’ Rights and article 15 of the International Covenant on Civil and Political Rights. The principle of legality requires an offence to be sufficiently certain to enable a person to prospectively know the scope of their legal liabilities. 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.

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. 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). Notably, the South African law implementing the OAU Convention imposes more stringent conditions on the character of the underlying criminal act, by requiring the ‘systematic, repeated or arbitrary use of violence’.

(i) ‘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. Causing death or serious bodily injury is the essence of terrorism as defined in the Terrorist Financing Convention 1999, Security Council resolution 1566 (2004), and the UN Draft Comprehensive Terrorism Convention. 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 resulting from hostage taking or witnessing mass casualty attacks.

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 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 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.
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. Caution is warranted; the crime of terrorism should be reserved for serious harms. 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. Prosecutorial discretion must be sensibly exercised.

**Damage to property**

Attacks on property, even where they do not cause injury to persons, are common methods instrumentally utilized by terrorists. 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 but then 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’ certainly encompasses 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)). It could also cover intangible economic, financial, intellectual and ‘cyber’ property (such as computer or electronic networks). Caution is, however, warranted in respect of attacks on intangible property, if the harm is not sufficiently grave to warrant being treated as 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’. Reference may also be made to African regional law on the right of peoples to freely dispose of their wealth and natural resources, and to international law on permanent sovereignty over natural resources. 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. The African Commission has found violations of the right to freely dispose of natural resources in various cases, including through the harmful effects of violent oil exploitation and tourism and mining projects. In the context of terrorism, damage to natural resources (or the partly overlapping category of ‘environmental heritage’) could be caused by activities such as illicit exploitation or trade in oil, minerals, timber, and wildlife.

**Damage to environmental heritage**

As regards ‘environmental heritage’, international instruments, including in Africa, generally do not attempt to define the ‘environment’. 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 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. Article 28L additionally mentions radioactive wastes subject to international control.
In international environmental law, 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. 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. 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.

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, by which 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 and providing for the restitution of stolen or illegally exported cultural objects.

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. 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, including the Taliban’s notorious destruction of the Bamiyan Buddhas. In Iraq, museums have been looted and the cultural heritage of religious minorities attacked.

(b) **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’). However, there is no further special intent requirement of a political, religious or ideological purpose, unlike in the African Model Anti-Terrorism Law 2011, a 1994 UN Declaration, and various national laws (including in South Africa). Consequently, the Malabo Protocol also covers both publicly and privately-motivated violence, such as acts driven by profit, family disputes, jealousy, revenge and so forth. As such, some of what is distinctive about terrorism – its political 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.
(i) ‘and is calculated or intended to… 1. intimidate, put in fear, 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’. 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.

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. South Africa’s terrorism law refers to acts which ‘unduly compel’ a target.

The Malabo Protocol follows the international approach in shielding all governments from terrorism, regardless whether a government is democratic or rights-respecting. There is no democratic protest exception for less harmful violent acts, as in the African Model Anti-Terrorism Law 2011. There is also no exception for acts of morally justifiable rebellion or resistance against repressive authoritarian, tyrannical, dictatorial or military governments.

(ii) ‘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.

Again, 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 (such as strikes) may be captured by the offence.

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. Certain electronic services could also be covered under one or both categories, from mobile and internet communications to banking facilities.

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. It further 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 mention other ‘essential services’, it enumerates 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. 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 organised life of the community’, and where normal responses are inadequate. 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. South Africa’s terrorism law, which implements the OAU Convention definition, requires that an emergency be ‘serious’.

(iii) ‘and is calculated or intended to… 3. create general insurrection in a State.’

This alternate limb of the definition is very broad and conflates terrorism with another quite distinct form of political violence (namely, insurrection or rebellion). Given the exclusion of armed conflicts from the Malabo Protocol terrorism offence, this element is concerned only with insurrections beneath the intensity threshold of a non-international armed conflict. Classically, insurrection is regarded by 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 which it is based) internationalise the offence of insurrection to protect any state. Again, no distinction is drawn between insurrection against democratic governments and those against repressive ones. The Malabo Protocol thus 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, such as by only prosecuting insurrections where violence is disproportionate or indiscriminate.

B. 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 sub-paragraph (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.

In contrast, the Malabo Protocol demarcates a regional court’s jurisdiction over a bundle of different crimes and contains a common provision (article 28N) on extended modes of liability. 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)).

The combination of the terrorism-specific modes of extended liability in article 28G(B) and the general modes of extended liability in article 28N creates both 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. 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 financing any offence under the Malabo Protocol is found in article 28N. Only the ‘threat’ to commit terrorism is appropriately located in article 28G(B) (and does not appear in the general provision).

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.

C. 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 provision follows the OAU Convention, the Arab League Convention, the OIC Convention, and the African Model Anti-Terrorism Law 2011.

The provision is rooted in Africa’s historical experience of colonialism and decolonization struggles. Most African peoples have now attained independence, with the exception of the people of Western Sahara, occupied by Morocco, and some small European possessions. In this sense, in practice the provision may prove to be of largely symbolic value.

However, if an African state became a victim 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. 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 under the Malabo Protocol). The provision does not 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.

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.

The provision further refers to ‘the struggle waged by peoples in accordance with the principles of international law’ (emphasis added). It unclear whether this qualification refers to the legal entitlement to struggle for self-determination or to the lawfulness of the means and methods by which the struggle is waged. If the latter, a liberation movement that violates other principles of international could lose the benefit of the exclusionary provision.

Where such struggles involve armed conflicts under IHL, they will already be excluded by article 28G(D) of the Malabo Protocol – 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. 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.

D. Exclusion of Acts Covered by IHL

The Malabo Protocol provides that ‘[t]he 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’ (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.

The provision excludes such acts from being treated as terrorism and defers to IHL as the lex specialis. Acts need not be ‘in conformity’ with IHL (as proposed by the OIC in UN negotiations) but merely ‘covered by’ it. Thus acts which comply with or violate IHL are equally excluded. War crimes liability still applies to serious violations of IHL.

Excludable acts must have a nexus to an international or non-international armed conflict and do not include regular criminal violence committed alongside armed conflict. Further, 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 excluded, nor would organized criminal violence by gangs or drug cartels that are not armed groups.

The Malabo Protocol does not contain a further exemption for state military forces exercising their official duties that is found in some recent treaties. Official duties could include law enforcement, evacuation operations, peace operations, UN operations, or humanitarian relief.

E. Exclusion of Certain Defences

The Malabo Protocol follows the OAU Convention (article 3(2)), recent counter-terrorism conventions, and UN resolutions 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 provision would not, however, prevent a convicted person from explaining their motives by way of mitigation in sentencing.

Ordinary criminal law defences also 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 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.

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. Such provision would operate as an exception to the definition, rather than as a democratic protest ‘defence’. It would have the same effect of precluding criminal responsibility for terrorism.