

# TOWARDS A MORE NUANCED DEFINITION OF TERRORISM IN AFRICA:

A CRITICAL ASSESSMENT  
OF THE OAU CONVENTION  
ON TERRORISM AND ITS  
HUMAN RIGHTS IMPLICATIONS

Alara Lois

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## ACRONYMS

|                        |                                                             |
|------------------------|-------------------------------------------------------------|
| <b>African Charter</b> | African Charter on Human and Peoples' Rights                |
| <b>API</b>             | Additional Protocol I to the Geneva Conventions             |
| <b>AU</b>              | African Union                                               |
| <b>IAC</b>             | International armed conflicts                               |
| <b>ICCPR</b>           | International Covenant on Civil and Political Rights        |
| <b>ICRC</b>            | International Committee of the Red Cross                    |
| <b>IHL</b>             | International humanitarian law                              |
| <b>NIAC</b>            | Non-international armed conflict                            |
| <b>NSAG</b>            | Non-state armed group                                       |
| <b>OAU</b>             | Organization of African Unity                               |
| <b>OAU Convention</b>  | OAU Convention on the Prevention and Combating of Terrorism |
| <b>UN</b>              | United Nations                                              |
| <b>UNODC</b>           | UN Office on Drugs and Crime                                |

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## ABSTRACT

Despite its significant influence on national legislation in Africa, the OAU Convention's definition of terrorism falls short in several critical aspects, underscoring the need for a more precise framework. Article 1(3) fails to coherently define the legal elements constituting prohibited terrorist conduct and to meet the minimum qualitative requirements of clarity, precision and predictability mandated by the fundamental principle of legality under international law. More often than not, the drip-down effect of the Convention has led to the creation of regimes of exception or parallel justice systems which have been selectively applied to various forms of non-violent conduct, such as the activities of civil society and the opposition, as well as other forms of political threat. With a specific focus on the conceptual-definitional elements of terrorism as a crime, this research paper examines the human rights implications of the OAU definition, providing normative direction and guidance on the issue of defining terrorism. Ultimately, this paper proposes a revised definition that seeks to balance counter-terrorism needs with human rights and legality, ensuring that African counter-terrorism efforts respect fundamental freedoms and the rule of law.

**Keywords:** OAU Convention, definition of terrorism, human rights, counter-terrorism, *actus rea*, *mens rea*, international humanitarian law, criminality

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## INTRODUCTION

Terrorism and its prevention has undoubtedly become one of the defining preoccupations of contemporary political and legal discourse, and arguably of our time, with the last quarter of a century bearing witness to the adoption of counter-terrorism legislation by well over 140 States around the world.<sup>1</sup> Due to its sheer scale and constantly evolving nature, terrorism as a crime has been approached from the perspective of prevention rather than prosecution, with States and international institutions alike often introducing sweeping means and extraordinary measures through which to combat it. More often than not, these laws create regimes of exception by introducing ambiguous definitions, offences and administrative provisions. These ambiguities grant enforcement authorities extensive discretion to address terrorist threats in a manner unconstrained by the existing bounds of international law norms and democratic procedure.

The reaction to the steady upsurge of terrorist threats on the African continent has been no different. The majority of African States have introduced domestic counter-terrorism legislation, and no fewer than three regional conventions dealing with terrorism have been adopted.<sup>2</sup> Much domestic legislation across the continent has been modelled on the OAU Convention's broad definition of terrorism, resulting in the severe curtailment of human rights – ranging from arbitrary detention to the application of exceptional precautionary and investigative measures, prosecution and penalties to non-violent, and even non-criminal conduct in exceptional cases, to dispel political actors or groups deemed 'undesirable' within society.

Adopted in response to the spread of violent jihadism throughout North, West and East Africa and the Al Qaeda bombings of the United States embassies in Kenya and Tanzania in August 1998, Article 1(3) of the OAU Convention on the Prevention and Combating of Terrorism of 1999 (OAU Convention) defines a 'terrorist act' as:

- (a) *any act which is a violation of the criminal laws of a State Party 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:*
  - (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.*
- (b) *any promotion, sponsoring, contribution to, command, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in paragraph (a) (i) to (iii).*<sup>3</sup>

Furthermore, Article 3 provides that:

- (1) *Notwithstanding the provisions of Article 1, 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.*
- (2) *Political, philosophical, ideological, racial, ethnic, religious or other motives shall not be a justifiable defence against a terrorist act.*<sup>4</sup>

The definition in the OAU Convention has often been criticised on human rights grounds for being irreconcilable with the principle of legality and for exhibiting a number of amorphous features.<sup>5</sup> In particular, it encompasses an expansive *mens rea* element which lists a series of sweeping terrorist aims or purposes that have the capability to infringe on a range of civic freedoms, including the right to peaceful assembly.

While the OAU Convention does provide for the exemption of self-determination and liberation struggles waged in accordance with the principles of international law, it fails to incorporate a clause excluding activities governed by international humanitarian law (IHL) from its scope of application, as found in the AU Model Anti-Terrorism Law and the Malabo Protocol of 2014, for example,<sup>6</sup> as well as exemptions for humanitarian action and the exercise of fundamental rights. Moreover, the definition includes extended modes of criminal liability which are broadly framed and have the capacity to drastically expand the scope of criminal liability with respect to terrorist crimes.<sup>7</sup>

In terms of human rights impact, these definitional shortcomings have the ability to create friction between the applicability of IHL and criminal law instruments on terrorism and to confound the exercise of core civic freedoms and fundamental rights with terrorism.

This research paper examines the human rights implications of the OAU Convention's definition of terrorism, highlighting its potential for overreach and infringement on fundamental human rights. Through a detailed analysis of the conceptual-definitional elements of the OAU definition in light of international human rights standards and best practices with regard to defining terrorism, this paper argues for a more circumscribed definition that mitigates the risk of arbitrary application and abuse of the terrorist label. Ultimately, this paper proposes a definition of terrorism that balances the need to combat terrorism with the requirement of legality and respect for human rights, aimed at ensuring that counter-terrorism efforts on the African continent do not compromise the exercise of fundamental freedoms and the rule of law.

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## THE DIFFICULTIES OF DEFINING TERRORISM IN INTERNATIONAL LAW

The concept of terrorism remains one of the most sensitive, controversial and politically charged constructs of today, with ongoing debates over its definition. Despite efforts to establish a universally accepted definition since the 1920s,<sup>8</sup> consensus on a single definition still eludes the international community. As a result of the inability to formulate a comprehensive treaty-based definition of the crime of terrorism on an international level, the conceptualisation of terrorism has been approached from varied angles, and in a relatively fragmental manner, ranging from a focus on the political or ideological motives or aims behind specified violent acts, to a determination of certain types or forms of terrorism.

Certain international instruments such as the United Nations (UN) Conventions on Terrorism adopt the latter approach, delineating acts closely associated with terrorism such as hijacking, hostage-taking and bombing, or particular types of terrorism facilitation such as terrorism financing.<sup>9</sup> Though subject-specific, these conventions are helpful in that they are universal in nature, demonstrating that the offences described in them are indicative of international consensus on, at least, particular manifestations of terrorism.<sup>10</sup> Out of the 12 core conventions, those concerning the protection of internationally protected persons, the prohibition against hostage-taking, terrorist bombing, terrorism financing and nuclear terrorism are considered some of the most important.<sup>11</sup>

At core level, most definitions of terrorism that are found in international conventions, resolutions and UN thematic reports regard terrorism as calculated acts of violence intended to cause death or serious bodily injury to persons for the purpose of either intimidating a population or compelling a government or international organisation to do or abstain from doing something.<sup>12</sup> While this is representative of some agreement at international level on the most basic aspects of terrorism as a crime, substantial discrepancies exist with respect to the inclusion of certain other acts.

For example, some definitions make explicit reference to hostage-taking and serious damage or destruction of property as part of the *actus reus*, while others remain silent on the inclusion of these acts,<sup>13</sup> even though hostage-taking and attacks on property are common tactics employed by terrorists to achieve their goals.<sup>14</sup> Even fewer instruments recognise the

environment or cultural heritage as terrorist targets,<sup>15</sup> despite the fact that terrorist groups often contaminate and poison water sources, sabotage oil pipelines, burn down farmlands and agricultural areas, and desecrate cultural sites for purposes of intimidation and coercion.<sup>16</sup>

Barring discrepancies about what type of conduct qualifies as terrorism and should be included in a comprehensive definition, just as many disagreements persist about what actions should be excluded or exempted from the definition due to being justifiable, excusable or inherently non-terrorist in nature.<sup>17</sup>

Perhaps the most pressing of these is the exemption of terrorist acts occurring in an armed conflict, as this significantly impacts the integrity and applicability of IHL. At UN level, six of the sectoral terrorism conventions as well as the Draft Comprehensive Convention on International Terrorism exclude from their definition terrorism occurring in an armed conflict, limiting the scope of these instruments to peacetime terrorism. The OAU Convention, however, makes no such delimitation, raising critical questions about the interplay between counter-terrorism and IHL regimes in the African context. The same can be said about the national liberation or self-determination exemption found in the OAU Convention and other conventions in the region. In contrast, none of the international terrorism conventions contain such an exemption.

Another issue of ongoing concern is the exclusion of acts that are inherently non-terrorist in nature but which may fall within the scope of certain definitions of terrorism, such as impartial humanitarian action as well as advocacy, protest, dissent and industrial action. This is especially prevalent in the OAU Convention, which broadly criminalises the disruption of service delivery and the promotion of terrorism. Where counter-terrorism measures fail to exclude humanitarian action and the exercise of freedom of expression, assembly and association, they effectively criminalise activities that are explicitly protected under other branches of international law.

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## THE PRINCIPLE OF LEGALITY UNDER INTERNATIONAL LAW

Any instrument establishing criminal liability must do so in conformity with the principle of legality, as recognised, for example, in Article 7(2) of the African Charter on Human and Peoples' Rights (the African Charter) and Article 15 of the International Covenant on Civil and Political Rights (ICCPR). With respect to legality in the context of defining the offence of terrorism, the Inter-American Court of Human Rights in *Castillo Petruzzi et al. v. Peru* held that:

*... crimes must be classified and described in precise and unambiguous language that narrowly defines the punishable offense, thus giving full meaning to the principle of nullum crimen nulla poena sine lege praevia in criminal law. This means a clear definition of the criminalised conduct, establishing its elements and the factors that distinguish it from behaviours that are either not punishable offences or are punishable but not with imprisonment. Ambiguity in describing crimes creates doubts and the opportunity for abuse of power, particularly when it comes to ascertaining the criminal responsibility of individuals and punishing their criminal behaviour with penalties that exact their toll on the things that are most precious, such as life and liberty.<sup>18</sup>*

The crime of terrorism is generally defined by two components: an objective material element (*actus reus*), and a subjective mental element (*mens rea*). The *actus reus* element is usually limited to the use of physical violence that is intended to cause death or serious bodily injury, or the extensive destruction of property which results in major economic loss (in cases where destruction of property is not intended to cause death or serious bodily injury). The *mens rea* element is construed as particular aims or purposes of the perpetrator constituting 'terrorist intent'. It is submitted that the two alternative aims of 'intimidating or creating fear among the population' and 'compelling a government or international organisation to do or abstain from doing any act' are somewhat narrow and conventional, and have been recognised as best practice in their construction of the *mens rea* element.<sup>19</sup>

Since terrorism is classified as a specific intent crime under criminal law, this entails that the offence requires proof of a desired consequence or outcome that results from the commission of a particular act, meaning that intent of the underlying crime as well as the specific or terrorist intent – which elevates an ordinary crime to the crime of terrorism – must be proven in order to sustain a terrorism conviction. In other words, the cumulative characteristics of the *actus reus* and *mens rea* elements of a definition are an important feature in the

characterisation of terrorism.<sup>20</sup> To be considered an 'act of terrorism', conduct must thus meet the requirements of each enumerated element of a definition. The culminative approach to defining terrorism, which is found in most international and national definitions, functions as a safety threshold to ensure that only conduct that is 'truly' terrorist in nature is identified and prosecuted as such.<sup>21</sup>

Regarding the offence of terrorism, it is critical that both the physical and mental elements are defined in a manner that respects legality. Whereas the *actus reus* element may be relatively easy to establish through causation, evidentiary problems may arise with regard to proving the existence or presence of a specific mental state at the time of commission, as proving subjective intention is often a question of inference by way of reference to the specific context and circumstances of a given case.<sup>22</sup> Overly broad and ambiguous definitions raise concerns that subjective assessments of available evidence and presumptions of terrorist intent may arise in terrorism prosecutions, or that the strict application of all the constitutive elements of a definition may simply be ignored, undermining the principle of legality.<sup>23</sup>

The obvious danger that this poses is that counter-terrorism measures are applied in instances where there is no clear, direct link or causal connection to a principal act of terrorism and/or no intent to contribute to or commit such an offence, as will be discussed below in the context of the OAU Convention.

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## THE DEFINITION IN THE OAU CONVENTION

### *Actus reus*

#### ***Any act which is a violation of the criminal laws of a State Party***

The definition in the OAU Convention laudably sets off by requiring that the underlying harmful act be a ‘violation of the criminal laws of a State Party’.<sup>24</sup> This is not a formulation seen across other terrorism conventions in the region, as the Arab League Convention on the Suppression of Terrorism of 1998 and the Convention of the Organisation of the Islamic Conference (OIC) on Combatting International Terrorism of 1999 merely require the commission of ‘any act’ or ‘threat of violence’ which causes the requisite harm as defined in the individual instruments.<sup>25</sup> Absent the safeguard of domestic illegality, the reference to ‘any act’ in particular is a troubling aspect of the other regional conventions as it means that a wide range of conduct could qualify as terrorist even if not criminalised by domestic laws, including non-violent and inchoate actions that pose no direct danger or threat.

#### ***Any 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***

#### **Acts which ‘may’**

A first criticism of the *actus reus* element of the definition would be that it refers to acts which ‘may’ cause the listed harms. As an instrument establishing criminal liability, the OAU Convention should be restrictive in that its application is only limited to circumstances in which there is a material or reasonable likelihood that a proscribed act will actually occur.<sup>26</sup> The use of the word ‘may’ diminishes the predictability of the proscribed conduct, creating a subjective standard that can be applied (or misapplied) to conduct that does not embody the gravity of terrorism.

#### **Acts causing death or serious bodily injury**

This element of the definition is largely unobjectionable, embodying the most fundamental components of terrorism as defined on international level. As discussed above, causing death or serious bodily injury to persons is the core essence of terrorism and is defined in

the UN International Convention for the Suppression of the Financing of Terrorism, UN Security Council Resolution 1566 and the UN Draft Comprehensive Convention on International Terrorism.<sup>27</sup>

### **Acts endangering life**

Acts which endanger life are of a comparable gravity to acts causing death or serious bodily injury.<sup>28</sup> Acts such as the release or discharge of any biological, chemical, radioactive, nuclear or explosive (BCRNE) weapons, agent or substance into the air, environment or water supply; or forcefully seizing control of or hijacking a plane, ship or fixed platform can pose a serious threat to life even where death or serious bodily injury does not occur as a result, and are criminalised under the UN terrorism conventions. Other serious threats to public health and safety resulting from terrorism would likely fall within the ambit of this element as well.

### **Acts endangering physical integrity**

This limb of the OAU's definition is also generally uncomplicated. The right to physical integrity is recognised as a fundamental, non-derogable right under international law, safeguarding individuals from unwanted physical interference and ensuring personal autonomy over their bodies. This right is intrinsically linked with the right to life and freedom from torture, cruel, inhuman or degrading treatment, and should thus be understood in that light. Examples of terrorist tactics which have a direct bearing on the right to physical integrity of victims include acts of sexual violence such as rape and forced sexual slavery.<sup>29</sup>

### **Acts endangering freedom**

The OAU's reference to acts endangering freedom, however, is rather vague and ambiguous. Strictly interpreted, it could refer to the right to liberty and security of a person, or perhaps indirectly to hostage-taking but, in principle, is broad enough to incorporate any political or civic freedom or liberty, including freedom of religion, conscience or thought.<sup>30</sup> Within the context of a definitional element focused on different forms of violence against the person, a restrictive interpretation is favourable but not guaranteed. The use of 'freedom' opens the OAU definition to subjective interpretation. Replacing the word 'freedom' with 'liberty' in this instance could help clarify the interpretation of this element by reducing potential ambiguities in a manner that would not preclude different types of unlawful deprivation of liberty perpetrated by terrorists.

Certain UN terrorism conventions, such as the International Convention against the Taking of Hostages of 1979 and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons of 1973 criminalise hostage-taking, as well as kidnapping and other attacks likely to endanger the liberty of internationally protected persons. Despite the fact that the hostage-taking convention offers a commodious definition of the latter, in the instance of the OAU Convention, the use of 'hostage-taking' to capture the element of unlawful deprivation of liberty would risk being under-inclusive as the Convention seeks to provide a comprehensive definition of terrorism.

While hostage-taking and the kidnapping of persons for leverage or ransom is a renowned terrorist tactic, reference to 'liberty' would better capture broader forms of unlawful deprivation of liberty employed by terrorists to achieve their objectives. Such deprivations include forced recruitment and conscription of children and adults to join terrorist groups to be used as fighters, spies or suicide bombers; the forced marriage of women and girls; enforced disappearance; and the use of children as human shields during combat.<sup>31</sup>

***Any act ... which causes or may cause damage to public or private property, natural resources, environmental or cultural heritage***

### **Acts causing damage to public or private property**

The alternative limb of the *actus reus* element broadly criminalises any 'damage' to property, without requiring that such damage be 'serious', 'substantial', or 'extensive' or that it 'results in major economic loss'. The criminalisation of property damage is, however, important for a definition of terrorism, as attacks on property, even in cases where they do not cause injury to persons, are commonly utilised by terrorists to further their objectives.<sup>32</sup>

International instruments such as the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, the 1980 Convention on the Physical Protection of Nuclear Material and the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism prescribe that acts must cause 'serious' or 'substantial' damage to property in order to qualify as terrorism.<sup>33</sup> Where such instruments refer to 'destruction', as in the case of the Terrorist Bombings Convention of 1997 and the Terrorism Financing Convention of 1999, destruction of a public or government place, facility or system must be 'extensive' and result in 'major economic loss'.<sup>34</sup> The requirement that damage 'results in major economic loss' reflects the tangible scale of physical destruction, harm and substantial economic consequences that an act should have to be classified as terrorism.

The threshold for an act to qualify as terrorism is thus significantly higher at international level than causing mere 'damage' as in the case of the OAU Convention, which is arguably broad enough to subsume instances of incidental, accidental, minor or deliberate but non-threatening damage to property. It has been emphasised that where the criminalisation of damage to property under counter-terrorism legislation drops below this threshold, it can negatively impact on protest rights.<sup>35</sup>

Reference to damage without the qualifications found in international conventions risks capturing instances of minor or unintentional damage or loss caused to property during an assembly that for all other intents and purposes meets the 'peacefulness' requirement under international law.<sup>36</sup> The same applies to intentional but innocuous damage to property as an act of freedom of expression. Moreover, it can result in the extraordinary prosecution of damage to property under counter-terrorism measures instead of as an ordinary offence or misdemeanour as provided for under normal criminal legislations such as the penal or criminal code, in stark contrast to international human rights law principles relating to the exercise of freedom of association and assembly.<sup>37</sup>

The risks posed to civic freedoms are particularly pervasive in the context of the OAU Convention as it does not contain a carve-out for the exercise of fundamental human rights and it frames the disruption of service delivery as part of its *mens rea* element, which will be discussed in more detail below.

Apart from the express inclusion of a clause that exempts the exercise of fundamental freedoms from the scope of the definition, a further suggestion is proposed. In order to align this limb with international practice, the definition needs to refer to acts causing 'serious damage to or extensive destruction of property, which results in major economic loss'.

## **Acts causing damage to natural resources and environmental heritage**

As mentioned above, terrorists often perpetrate deliberate attacks on natural resources or the environment. These acts cause significant environmental degradation and are intended to create fear or coerce political or ideological change. While the targets this limb of the definition seeks to protect are agreeable, the way in which it has been framed is, again, somewhat objectionable.

Firstly, reference to both 'natural resources' and 'environmental heritage' is unnecessary as the term 'environment' has a broad meaning in international law. The 1987 Commentary on article 55 of Additional Protocol I (AP I) states that 'the concept of the natural environment should be understood in the widest sense to cover the biological environment in which a population is living'.<sup>38</sup>

It clarifies that the environment does not merely consist of objects that are indispensable to survival, which are protected under Article 54, but also includes 'foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works'<sup>39</sup> and also includes forests, other vegetation, fauna, flora and other biological or climatic elements.<sup>40</sup> This view is also reflected in international environmental law, as the environment is understood to not just refer to flora, fauna, soil, water, landscape and climate but also to dependant human socio-economic systems, health and welfare, and even cultural heritage.<sup>41</sup>

Usage of the simpler, clearer term 'environment' is thus adequate to refer to natural resources such as dams, forests, minerals and fossil fuels as well as natural features of the environment valued for their ecological, historical and cultural significance. Using the term 'environment' in the context of terrorism would encompass attacks on water supplies and installations, oil pipelines, forests and woodlands, as well as instances of agroterrorism, such as the use of biological or chemical agents to harm or disrupt the agricultural sector or deliberate attacks on agricultural areas and installations.

Secondly, this element of the definition does not require that damage to the environment be of a serious or substantial nature. Under international law the threshold for an act against the environment to qualify as terrorism is again considerably higher. The International Convention for the Suppression of Acts of Nuclear Terrorism of 2005 requires 'intent to cause substantial damage to ... the environment' through the possession, use or release of radioactive material.<sup>42</sup> International customary law also establishes as a norm the prohibition against inflicting widespread, long-term and severe damage to the natural environment,<sup>43</sup> which is also observed in the prohibitions found in AP I and the Rome Statute.<sup>44</sup>

As with damage to property, for damage to the environment to qualify as an act of terrorism in peacetime, the damage caused should be of a comparable gravity. Requiring 'serious damage to or extensive destruction of the environment, which results in permanent harm' denotes impact that is not temporary or inconsequential but extensive, lasting (and often) irreparable damage. Maintaining this heightened threshold ensures that instances of vandalism and contentious forms of environmental protest, such as pouring biodegradable dye into ponds and rivers,<sup>45</sup> would not qualify as terrorism, but may be prosecuted under normal criminal legislations if applicable.

## Acts causing damage to cultural heritage

This limb of the definition is in some measure suitable with respect to the target it seeks to protect. With reference to the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 (the 1954 Hague Convention) and international customary law, the notion of 'cultural heritage' is broader than the term 'cultural property' which specifically denotes tangible movable and immovable property which is of great cultural importance.<sup>46</sup> It is acceptable that the OAU Convention makes use of the broader term instead, as these instruments serve different purposes and are based on different rationales. Cultural heritage encompasses both tangible and intangible heritage. Examples of tangible heritage are artefacts, works of art, monuments, sites, museums that have a diversity of values including symbolic, historic, artistic, aesthetic, ethnological or anthropological, scientific and social significance. Intangible heritage includes traditions, oral expressions, performing arts, social practices, rituals, knowledge and expressions that are not physical objects but are vital to cultural identity.<sup>47</sup>

The protective measures under IHL are primarily concerned with safeguarding and protecting the physical manifestations of culture during armed conflict where physical damage and destruction is likely to occur to such property. In contrast, a criminal law instrument such as the OAU Convention, which should apply solely in peacetime through the express inclusion of an IHL saving clause, serves as a complementary legal regime whose protection extends not only to tangible cultural property but also to the intangible aspects of cultural life – recognising that terrorists often target both to erase cultural identity, histories and diversity, destabilise communities and legitimise their ideological dominance over populations.

As with damage to the environment and non-cultural property, it is recommended that the OAU Convention adopts the more stringent requirement of 'causing serious damage to or extensive destruction of cultural property'. This approach would avoid criminalising incidental damage and instances of minor damage as terrorism, reserving lesser cases for ordinary criminal law.

## Cyber-terrorism

A critical oversight of the definition of terrorism in the OAU Convention is that it does not contain a clause that adequately addresses instances of cyber-terrorism. Just as there is no universally accepted definition of terrorism, there is no consensus on the definition of cyber-terrorism, and no specific international convention on the issue. Broad conceptions of cyber-terrorism range from any online terrorist activity to the use of the internet for terrorist purposes. The UN Office on Drugs and Crime (UNODC) has issued guidance on narrower understandings of the concept, often referred to as 'pure cyber-terrorism'.<sup>48</sup>

According to the UNODC, a narrow definition of cyber-terrorism is:

*a cyber-dependent crime perpetrated for political objectives to provoke fear, intimidate and/or coerce a target government or population, and cause or threaten to cause harm.*<sup>49</sup>

While this definition is problematic in its own right, it is further clarified that cyber-terrorism includes attacks leading to death or serious bodily injury, plane crashes, explosions, water contamination and is closely linked to serious or malicious attacks aimed at destroying or interfering with the functioning of critical infrastructure.<sup>50</sup> Though it is noted that there is not wide agreement that cyber-terrorism should be limited to cybercrimes committed against critical infrastructure, this is the standard reflected in UN Security Council Resolution 2341 and in the offence-creating provisions of some of the UN terrorism conventions which deal with acts of terrorism against critical infrastructure sectors such as civil aviation, maritime navigation, nuclear and government facilities.<sup>51</sup>

The UN International Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 1988, for example, requires 'serious' disruption or interference with the operation of maritime navigational facilities, or 'serious damage or destruction' of such facilities,<sup>52</sup> as mirrored by other provisions within the UN terrorism conventions dealing with property damage. As mentioned, maritime navigational facilities would form part of critical infrastructure, but so would any communications or public communications, television and radio, emergency services, public services, finance, industry, transport, health, information technology, commercial facilities, energy, dams, food and water, as 'critical infrastructure' is broadly understood as any 'asset or system which is essential for the maintenance of vital societal functions'.<sup>53</sup>

While the OAU Convention concerningly does criminalise the disruption of service delivery as a *mens rea* element, which should be revised, it does not address the serious disruption of critical infrastructure as part of the *actus reus*. In following with the threshold set by international instruments, the *actus reus* should prohibit the 'serious disruption of critical infrastructure or serious damage to or extensive destruction of critical infrastructure, which results in major economic loss or permanent harm' where such acts meet the requirements of the (revised) *mens rea*. Disruption must be 'serious' and result in impact that is lasting or irreversible, and the provision read in context with the entirety of the definition and the exemptions to the definition to ensure that interferences or disruptions caused by lawful advocacy, protest, dissent or stoppage of work are not criminalised as terrorism.

## **Mens rea**

Aside from the perpetration of certain enumerated acts the OAU Convention requires that acts of terrorism be 'calculated' or committed with the intent to further one or more of the broadly framed aims or purposes listed in its definition in order to be categorised as terrorism.

***Any act ... which ... is calculated or intended to ... 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***

In international practice, the *mens rea* element has typically been approached through the construction of two alternative terrorist aims centred around 'intimidation or provoking a state of terror in the general public' or 'compelling a government or international organisation to do or abstain from doing any act'.<sup>54</sup> This formulation is also generally considered to be in line with the principle of legality.

The definition in the OAU Convention, however, deviates from this position, firstly by merging the latter two terrorist aims together in a way that blurs the clarity between them and significantly broadens the scope of criminal liability.<sup>55</sup>

The effect is to extend the purposes of intimidation or compulsion across the board to all protected targets, meaning that the government could be put into fear and the public could be coerced or compelled.<sup>56</sup> Ben Saul has noted that extending the intention of intimidating or invoking fear in the government could have the effect of shielding governments from challenge, regardless of whether or not they are democratic or human rights respecting.<sup>57</sup>

Moreover, the criminalisation of the intent to 'intimidate or compel the government to adopt or abandon a particular standpoint', or to 'act according to certain principles' can easily subsume most civil liberties including peaceful political protests, sit-ins, demonstrations and movements, as the core rationale behind such contestations is precisely to influence and

pursue policy changes or to bring about direct governmental action on a specific matter, as the case may be. The breadth of this particular aim also has the potential to encompass any unpopular or dissenting opinion or stance that does not conform with the official narrative of the State, thereby infringing on the right to freedom of expression.

***Any act ... which ... is calculated or intended to disrupt any public service, the delivery of any essential service to the public or to create a public emergency***

### **Intention to disrupt public services or the delivery of essential services**

Criminalising the disruption of public services and the delivery of any essential services is a problematic aspect of the *mens rea* element, especially since the OAU Convention does not contain an exemption for the exercise of fundamental rights.

A cumulative reading of Article 1(3)(a) and (ii) reveals that mere participation in a protest involving incidental property damage that disrupts a service could potentially be classified as a terrorist act, in spite of the fact that the right of peaceful assembly inherently involves a certain level of disruption to economic activities and daily State operations occurring as a consequence of its exercise, which is recognised and protected under article 11 of the African Charter and Article 21 of the ICCPR.<sup>58</sup> While interruption must be intended or calculated under the OAU Convention, it is often the very purpose of a protest or demonstration to interfere with or disrupt State function or activity so as to effectively capture or draw attention to the respective causes or grievances of the assembly in question.

In addition, the aim of disrupting services considerably lowers the threshold of terrorism as a crime. The fact that disruption need not occur cumulatively with the intent to 'intimidate the public' or 'coerce the government' seems to upend the act-intention construct by listing certain actions, such as disrupting services, as terrorist purposes. Conflating the mental and physical elements of the crime broadens terrorist intent to include both non-violent, non-criminal acts as well as normal criminal acts regardless of how inconsequential they may be.

The OAU Convention's lack of a set of clearly and narrowly construed terrorist purposes to elevate the status of a particular act to that of an act of terrorism in accordance with international standards essentially renders terrorism a strict liability offence where either the commission of a singular 'act' or 'purpose' could lead to a conviction.<sup>59</sup> As the definition currently stands, the act of simply interrupting or impeding the work of public authorities through mass protest is likely to achieve the same ends as an act of terrorism due to the level of discretion the definition currently provides.

### **Intention to create a public emergency**

The concept of public emergency is well established in key international human rights treaties such as the ICCPR. 'Public emergency' refers to a situation of imminent danger or crisis that 'threatens the life of a nation' and must be officially proclaimed by a State.<sup>60</sup> The emergency must be of such a scale and severity that it justifies taking exceptional measures as normal responses are inadequate.

While certain severe terrorist threats may create conditions that would justify the declaration of a public emergency, not all isolated terrorist acts or incidents meet this threshold or require the suspension of normal legal protections and activation of emergency powers.<sup>61</sup> This limb of the definition is both unnecessary and problematic as conflating terrorism with public emergency risks normalising emergency measures and can erode the distinction between ordinary and exceptional legal regimes. Just as it creates broad discretion which may be abusively or

opportunistically used as a justification to derogate from norms, leading to disproportionate restrictions on civil liberties, for example, and impinging on fair trial rights in cases where military or emergency courts are used. It can create a perverse incentive for governments to declare national emergencies in response to actions they want to criminalise, since doing so might seem to legitimise the notion that those actions are indeed terrorist-related.

***Any act ... which ... is calculated or intended to create general insurrection in a State***

Like the previous limb, this one conflates terrorism with insurrection which makes it perhaps one of the broadest elements of the definition. Inclusion of insurrection as a form of terrorism purpose effectively criminalises distinct species of political violence such as organised and armed resistance, revolution, rebellion aimed at the overthrow of a government, regime change or secession, for example. Moreover, the OAU Convention does not distinguish between insurrection against democratic governments or authoritarian or totalitarian governments, raising concerns about the repression of legitimate resistance.<sup>62</sup>

The inclusion of the intention to create an insurrection also causes much confusion as to the recognition or preservation of the right to self-determination exempted from the definition in Article 3(1) of the Convention.<sup>63</sup> While this limb of the definition (as well as the self-determination exemption) would criminalise any violent resistance below the threshold of an armed conflict. The interplay between these two provisions and Article 3(2) which removes any 'political, philosophical, ideological, racial, ethnic and religious' motive as a justifiable defence for terrorist activities would make it incredibly difficult to determine which movements would benefit from the protection provided by the self-determination exemption in the context of an armed conflict – as armed struggle pursuing autonomy or independence from an oppressive regime on the basis of ethnic, racial or cultural considerations could be framed as terrorism as the definition currently stands.

## **Extended modes of criminal participation**

Another feature of the OAU Convention is that it includes extended modes of criminal liability under its definition of terrorism. Article 1(3)(b) identifies the forms of criminal participation, as 'any promotion, sponsoring, contribution to, command, incitement, encouragement, attempt, threat, conspiracy, organising, or procurement of any person, with the intent to commit any act referred to in paragraph (a)(i) to (iii)' of Article 1(3) of the OAU Convention.<sup>64</sup>

While this is not out of place in an instrument geared towards assisting States in the domestic implementation of international obligations and the criminalisation of terrorism and common forms of criminal participation,<sup>65</sup> the way in which the modes of criminal liability are framed are excessively broad and can drastically expand the scope of criminal liability on national level with reference to the requirements placed on States in article 2(a) of the Convention.<sup>66</sup> This is especially pertinent with regard to the 'promotion', 'encouragement' and 'sponsoring' of acts defined as terrorist within the definition.

Criminalising the 'promotion' or 'encouragement' of terrorism has the ability to disproportionately or unnecessarily interfere with the exercise of freedom of expression,<sup>67</sup> as these offences are broad enough to incorporate indirect inducements or incitement which does not anticipate explicit, intentional and public advocacy that creates an imminent risk of violence against a target group.<sup>68</sup> This entails that speech may be prosecuted in the absence of a link or connection between the speech act and any subsequent harm or influence on other persons.<sup>69</sup>

The criminalisation of 'sponsoring' acts of terrorism is much broader than the financing of terrorism (which is notably absent within this provision of the OAU Convention), and does not envisage the establishment of a direct link between the funding or provision of material means, goods or services and the commission of a specific terrorist offence, setting a low evidentiary threshold. The Terrorism Financing Convention of 1999 requires the 'intention' or 'knowledge' that funds will be used in order to carry out an act of terrorism.<sup>70</sup>

As a result, any conduct simulating or mimicking the support of, assistance towards or sympathy for terrorists or terrorist groups may fall within the purview of this offence. This may have a marked effect on organisations carrying out activities that are exclusively humanitarian and impartial in character in the absence of an explicit humanitarian exemption, as humanitarian activities may be construed as unlawful or as a form of prohibited support of terrorism if they are not exempted from the scope of application of the definition.<sup>71</sup>

Other core civic freedoms such as the freedoms of expression, association and assembly may also be affected by the broad modes of criminal participation in the Convention as there is no explicit carve-out for the exercise of fundamental human rights.

To ensure clarity, this provision of the OAU Convention should be revised to exclude these vague forms of criminal participation as they drastically expand the scope of criminal liability and are capable of subsuming conduct where there is no causal connection between a particular act and the commission of a specific terrorist offence. Incorporating the extended offence of 'financing' terrorism as outlined in the Terrorism Financing Convention is much more precise and circumscribed than the 'sponsoring' of terrorism and is thus less likely to infringe on the activities of civil society and humanitarian organisations.

## Exemptions

### *Exemption of self-determination struggles*

Along with the other two African terrorism conventions, the OAU Convention is one of the very few international instruments that excludes self-determination and liberation struggles from the purview of its definition of terrorism. It has been noted that the exemption reflects the heightened importance of national liberation and self-determination against Africa's historical experience of colonialism and decolonisation struggles as liberation forces were often branded as 'terrorists' by colonial powers.<sup>72</sup>

The exemption, incorporated in article 3(1), reads:

*Notwithstanding the provisions of Article 1, 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.*<sup>73</sup>

Under international law, the right to self-determination is understood to include the right to 'resist' forcible denials of self-determination by States.<sup>74</sup> This in itself does not imply that liberation movements have a right to use force against the State, but rather that they do not breach international law by using force (defensively) against the forcible denial of self-determination.<sup>75</sup> This, however, does not mean that all actions of liberation forces are exempt from criminalisation. The wording of the clause is of utmost significance to distinguishing between which acts can be criminalised and which cannot. The clause delineates that 'struggle waged ... in accordance with the principles of international law ... shall not be considered ... terrorist'.<sup>76</sup>

This indicates, that in peacetime, liberation movements are constrained by the limitations of international human rights law, which prescribes non-violent resistance and contestation as the permissible means of pursuing rights-based causes.<sup>77</sup> Where the self-determination struggle reaches the threshold of an armed conflict, IHL applies as *lex specialis* and exempts the actions of liberation forces only where they do not breach the established rules of IHL. Unlawful acts such as attacking civilians or civilian objects would still be subject to prosecution as terrorism or as war crimes depending on their seriousness.

The way in which the exemption clause is drafted could be considered one of the strengths of the OAU Convention. The phrase 'in accordance with the principles of international law' denotes not only that human rights law and IHL should be complied with, but also international customary law. In effect this prescribes that peremptory norms of international law must be observed, including those relating to the right of self-determination. This is significant because the *jus cogens* norm of self-determination supports the recognition of self-determination struggles as international armed conflicts (IACs), extending the full protections of IHL to these conflicts, including combatant privilege and prisoner-of-war (POW) status for fighters.

Essentially, this suggests that the self-determination exemption in the OAU Convention reinforces the recognition of self-determination struggles as IACs, thereby legitimising such movements and excluding them from the scope of terrorism in as far as their actions are consistent with IHL. Though AP I is nearing universal ratification, this is helpful in cases where conflicts arise between non-state actors (NSAs) and States not party to AP I, as well as States party to AP I who have adopted a narrow interpretation of Article 1(4), as there is potential that fighters may not be granted full protection under IHL.<sup>78</sup>

### ***Exemption of activities governed by IHL***

As mentioned before, the OAU Convention does not contain a clause exempting activities governed by IHL from the definition of terrorism. This creates much friction between the application of the OAU Convention as a criminal law instrument and IHL as the activities of non-state armed groups (NSAGs) and their affiliates in the context of a non-international armed conflict (NIAC) could qualify as terrorist offences under the Convention, even where such acts are permissible under IHL.<sup>79</sup> As only the activities of self-determination movements that comply with international law, including IHL in an armed conflict, are currently exempted from being prosecuted as terrorism.

Combatants participating in an IAC have combatant privilege or immunity, meaning that their mere participation in hostilities cannot be criminalised as terrorism, but they may face prosecution for war crimes for acts prohibited under IHL.<sup>80</sup> In contrast, members of NSAGs in a NIAC operate without combatant privilege, meaning that their actions can be criminalised as terrorism by States even if they are in accordance with IHL.<sup>81</sup> This is because criminal instruments, such as the OAU Convention, do not distinguish between permissible and prohibited acts under IHL, criminalising both as terrorism.<sup>82</sup>

Due to the stigma surrounding the terrorist label, criminalising the activities of an NSAG that meets the organisational requirements to qualify as a party to a NIAC can undermine the incentive for armed groups to comply with IHL.<sup>83</sup> The International Committee of the Red Cross (ICRC) has posited that acts permitted under IHL should not be defined as terrorist under another regime of law since these acts are inherent to armed conflict.<sup>84</sup> It has also been noted that labelling an NSAG as 'terrorist' may escalate hostility and hinder future attempts at peace and reconciliation efforts.<sup>85</sup>

The frictions that arise between the interaction of criminal law instruments on terrorism such as the OAU Convention and IHL can be resolved through the inclusion of an IHL saving clause as such a clause would exempt activities governed by IHL from the scope of the Convention's application. This can contribute towards depoliticising the notion of terrorism as IHL does not distinguish between terrorist and non-terrorist groups on the basis of the aim behind the acts they perpetrate. It is concerned only with distinguishing between parties to an armed conflict on the basis of factors of intensity and organisation and those not involved in the conduct of hostilities.<sup>86</sup> It thus deals with groups of a 'dual nature', meaning those that are both party to an armed conflict and designated as 'terrorist', in a neutral manner.<sup>87</sup>

Where IHL is exempted from the OAU definition and 'dual nature' groups perpetrate acts that are prohibited by IHL in the context of an armed conflict such acts will not be prosecuted as terrorism, but as war crimes, as would violations of IHL by any other armed group party to the conflict. But where such acts are perpetrated outside the context of an armed conflict or do not have a nexus to the armed conflict, they can still constitute terrorism offences under criminal law instruments.

Again, the wording of such a clause is important. Six of the international conventions on terrorism as well as the UN Draft Comprehensive Convention on International Terrorism contain what is known as the 'standard' exclusion clause, which reads:

*The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention.*<sup>88</sup>

While the interpretation of 'armed forces' remains a topic of debate in negotiations on the Comprehensive Convention on International Terrorism,<sup>89</sup> the fact that this clause refers to 'acts governed by IHL' is what is important. This indicates that the exclusion applies to all acts contemplated under IHL rules, whether they conform with IHL or not.<sup>90</sup> Other examples of exclusion clauses sometimes limit their exemption only to 'acts in accordance with IHL', indicating that acts in violation of IHL may still be prosecuted under criminal instruments as terrorism, disrupting the application of IHL in the context of armed conflict.<sup>91</sup>

This raises two key considerations for the inclusion of an IHL exemption clause. One, it must ensure that there is no ambiguity as to whether it applies to both State forces and members of NSAGs. Secondly, it should exclude all activities covered by IHL. On this basis, it is recommended that the term 'armed forces' in the standard exclusion clause be substituted by 'government forces' and 'members of organised armed groups' as found in the AU's Malabo Protocol and the African Model Anti-Terrorism Law to remove any ambiguity.<sup>92</sup>

### ***Exemption of humanitarian action***

As previously discussed, the criminalisation of 'sponsoring' acts of terrorism under Article 1(3)(b) of the OAU definition could adversely affect humanitarian activities as they could be deemed an unlawful form of terrorist association or support if not expressly exempted from the definition.

The rationale for the inclusion of such an exemption is to ensure that impartial humanitarian organisations can carry out their work without fear of prosecution under counter-terrorism measures. This is crucial as the OAU Convention does not differentiate between association or material support of terrorism and conduct authorised under IHL, such as impartially providing assistance to wounded fighters during an armed conflict even if the group has been deemed 'terrorist' by the government. The inclusion of a humanitarian exemption creates a space for

humanitarian actors to operate in accordance with IHL and helps to reconcile the tension between the need to counter terrorism and the imperative to provide humanitarian aid without discrimination or impediment.<sup>93</sup>

With respect to the formulation of such a clause, the ICRC has recommended the following as best practice:

*Activities of an exclusively humanitarian and impartial character conducted by neutral and impartial humanitarian organisations in accordance with international humanitarian law do not constitute a terrorist act.*<sup>94</sup>

This limits its scope of application to organisations of an exclusively humanitarian character acting in accordance with IHL and thereby does not impede or hamper the capacity of States to fight terrorism.<sup>95</sup> It also reflects the standards outlined in UN Security Council Resolution 2462.<sup>96</sup>

### ***Exemption of the exercise of fundamental human rights***

The definition in the OAU Convention poses significant threat to civic freedoms as it includes mere damage to property as part of its *actus reus* element and the disruption of service delivery as part of its *mens rea* element. It also broadly criminalises the 'promotion' or 'encouragement' of terrorism which could unduly restrict freedom of expression without an explicit carve-out for the exercise of fundamental rights.

Exempting the exercise of fundamental rights will ensure that the exercise of civic freedoms, such as protest rights, are not mislabelled as terrorism and clarifies that in instances where acts cross over the line into public order offences they be treated as ordinary offences under normal criminal law.<sup>97</sup> The inclusion of such an exemption is also significantly important in the construction of a definition of terrorism as non-democratic States or those with poor human rights records are less likely to exercise prosecutorial restraint in selecting appropriate criminal charges.<sup>98</sup>

In keeping with the principle of legality and international practice, it is recommended that this exemption be formulated in the clearest, least ambiguous manner possible.

A general provision that is applicable to the entire Convention and not just specific offences, which reads: 'Advocacy, protest, dissent or industrial action, which is not intended to result in the harm mentioned in subsections (x) to (y) does not constitute a terrorist act under this Convention' would suffice.

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## NORMATIVE DIRECTION AND GUIDANCE ON DEFINING TERRORISM

On the whole, the definition in the OAU Convention is particularly vulnerable to political and subjective use due to its expansive *actus reus* and *mens rea* elements. While the Convention has certain strengths, such as the requirement that underlying harmful acts be a violation of domestic criminal laws and the inclusion of a self-determination exemption that reinforces the recognition of legitimate resistance as a peremptory norm under international law. Its many weaknesses call into question its conformity with international human rights standards.

To reiterate, the purpose of this research paper is to propose a revision to the OAU's definition of terrorism that respects human rights and the requirements of clarity and precision mandated by the principle of legality. Through the application of the following key standards and principles, the OAU Convention's definition can be brought into alignment with international norms. Moreover, domestic laws across the region, both party to the Convention and beyond, could be materially improved with reference to these key guiding principles.

### Revisions to the *actus reus* element

- As an instrument establishing criminal liability, the OAU's definition of terrorism should refer only to acts causing the underlying harms instead of 'acts that may', as this standard diminishes the predictability of the proscribed conduct.
- In the context of the *actus reus* element focused on the various types of violence against the person, use of the word 'liberty' would better capture different forms of unlawful deprivation of liberty and reduce the ambiguities stemming from the use of the word 'freedom'.
- It is pertinent that, where the definition refers to property damage and damage to the environment and cultural heritage, it adopts the thresholds set by international law. To align this limb of the definition with international standards it should criminalise acts 'causing serious damage to or extensive destruction of property, the environment or cultural heritage, which results in major economic loss or permanent harm'.
- The *actus reus* should address instances of cyber-terrorism by criminalising the 'serious disruption of critical infrastructure, which results in major economic loss or permanent harm'. Given that 'property' is not defined by the OAU Convention, the term is assigned its

ordinary meaning, denoting that serious damage or extensive destruction occurring to any movable, immovable, corporeal or incorporeal property would fall within the ambit of a given definition, including such damage to critical infrastructure, so it is not necessary to include this standard separately.

## Revisions to the *mens rea* element

- To align the *mens rea* element with international practice it is recommended that it refers solely to the two alternative aims of 'intimidating the population' or 'compelling a government or international organisation to do or abstain from doing any act'. These purposes are conventional and narrowly framed in a manner that respects legality.

## Revisions to the extended modes of criminal liability

- Rather than exactly replicating Article 1(3)(b), it is recommended that this article is revised to exclude 'promotion', 'sponsoring' and 'encouragement' as modes of criminal participation, as they pose a threat to the exercise of civic freedoms due to their ability to subsume conduct where there is no causal link between a particular act and the commission of a specific terrorist offence.
- It is further suggested that 'financing' as framed under the Terrorism Financing Convention of 1999 be included as form of criminal liability as it envisages a direct connection between the funding or provision of goods or services and the commission of a terrorist offence and is therefore less likely to infringe on the activities of civil society and humanitarian organisations in contrast to 'sponsoring' terrorism.

## Revisions to the exemptions

- It is recommended that the exemption in Article 3(2) which removes any 'political, philosophical, ideological, racial, ethnic and religious' motive as a justifiable defence be omitted, as it causes much confusion as to the actual treatment and preservation of the right to self-determination exempted by Article 3(1).
- The OAU Convention should include an IHL saving clause that unambiguously applies to both State forces and members of organised armed groups and excludes all acts governed by IHL. This would preserve the integrity and rationale of IHL in armed conflict and ensure clarity on the legal relationship between IHL and the OAU Convention.
- An exemption for humanitarian action should also be incorporated to ensure that activities of an exclusively humanitarian nature are not criminalised as a form of unlawful association or support under counter-terrorism measures. Such an exemption should apply only to 'activities of an exclusively humanitarian and impartial character conducted by neutral and impartial humanitarian organisations in accordance with international humanitarian law'.
- Lastly, lawful advocacy, protest, dissent or industrial action should be expressly excluded from the purview of the definition. This would ensure that the exercise of civic freedoms are not conflated with terrorism where they do not result in the harm contemplated by the revised definition.

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## PROPOSAL OF A NEW DEFINITION OF TERRORISM

To present the standards and principles discussed throughout this paper in the form of a working definition – for purposes of this Convention a ‘terrorist act’ means:

- 1(1)(a) any act which is a violation of the criminal laws of a State Party and which involves:
    - (i) endangering the life, physical integrity or liberty of persons; or
    - (ii) causing death or serious bodily injury; or
    - (iii) causing the serious disruption of critical infrastructure or serious damage to or extensive destruction of property, the environment, or cultural heritage, which results in major economic loss or permanent harm; and
  - (b) is intended to:
    - (i) intimidate the population or a segment of it; or
    - (ii) compel a government or international organisation to do or abstain from doing any act.
  - (c) any contribution to, command, financing, incitement, attempt, threat, conspiracy, organising, or procurement of any person, with the intent to commit any act referred to in paragraph (1)(a) to (1)(b).
- 
- 2(1) Notwithstanding the provisions of Article 1, 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.
  - (2) The activities of government forces and members of organised armed groups during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention.
  - (3) Activities of an exclusively humanitarian and impartial character conducted by neutral and impartial humanitarian organisations in accordance with international humanitarian law do not constitute terrorist acts under this Convention.
  - (4) Advocacy, protest, dissent or industrial action, which is not intended to result in the harm mentioned in Article 1 does not constitute a terrorist act under this Convention.

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## CONCLUSION

This research paper has demonstrated that the OAU Convention's overbroad definition of terrorism poses significant human rights concerns, risking overreach and infringement on fundamental freedoms. To address these concerns, a more precise definition that is grounded in international human rights standards is necessary to balance the competing interests of counter-terrorism and human rights. By proposing a revised definition that prioritises legality, clarity and respect for human rights, this paper aims to contribute to a more nuanced approach to combating terrorism in Africa. The analysis and normative guidance presented in this paper can drive the reform of domestic laws by informing legislative revisions and judicial interpretation of domestic legislation, influencing policy debates, and providing a framework for legal reform that is both balanced and effective. Ultimately, by harmonising the OAU Convention's definition with international norms this paper seeks to advance greater consistency and human-rights-compliance in counter-terrorism laws across the region.

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## ENDNOTES

- 1 Fionnuala Ni Aolain 'Impact of measures to address terrorism and violent extremism on civic space and the rights of civil society actors and human rights defenders' *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism* (1 March 2019) [A/HRC/40/52] para.3.
- 2 Namely, the 1998 Arab League Convention on the Suppression of Terrorism, the 1999 Convention of the Organisation of the Islamic Conference (OIC) on Combating International Terrorism, and the 1999 Organisation of African Unity (OAU) Convention on the Prevention and Combating of Terrorism.
- 3 Article 1(3) of the OAU Convention on the Prevention and Combating of Terrorism of 1999.
- 4 *Ibid.*, Article 3.
- 5 Ben Saul 'The Crime of Terrorism within the Jurisdiction of the African Court of Justice and Human and Peoples' Rights' in Charles C Jalloh, Kamari M Clark & Vincent O Nmehielle (eds) *The African Court of Justice and Human and Peoples' Rights in Context* (Cambridge: Cambridge University Press, 2019) p.416.
- 6 The African Union (AU) *The African Model Anti-Terrorism Law* (2011) p.13. See Article 28(G)(D) of the Malabo Protocol of 2014.
- 7 Article 1(3)(b) of the OAU Convention on the Prevention and Combating of Terrorism of 1999.
- 8 Ben Saul 'Attempts to Define "Terrorism" in International Law' 57 *Netherlands International Law Review* (May 2005) p.58.
- 9 See for example, the UN International Convention Against the Taking of Hostages of 1979; the UN International Convention for the Suppression of Terrorist Bombings of 1997; and the UN International Convention for the Suppression of the Financing of Terrorism of 1999.
- 10 Martin Scheinin *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism* (28 December 2005) [E/CN.4/2006/98] para.33.
- 11 Laws on Countering Terrorism Worldwide 'International Standards on Countering Terrorism'(2023) available at: <https://counterterrorlaw.info/standards>.
- 12 See for example Article 2 of the UN International Convention for the Suppression of the Financing of Terrorism of 1999; Article 2 of the UN Draft Comprehensive Convention on International Terrorism of 2000; UN Security Council Resolution 1566 (8 October 2004) [S/RES/1566] para.3, and; Martin Scheinin 'Ten areas of best practices in countering terrorism' *Report of the Special Rapporteur on the protection of human rights and fundamental freedoms while countering terrorism* (22 December 2010) [A/HRC/16/51] para.28.
- 13 See for comparison UN Security Council Resolution 1566 (8 October 2004) [S/RES/1566] para.3; Article 2 of the UN Draft Comprehensive Convention on International Terrorism of 2000; Article 2 of the UN International Convention for the Suppression of Terrorist Bombings of 1997, and; Martin Scheinin 'Ten areas of best practices in countering terrorism' (n 12 above) para.28.
- 14 Ben Saul 'The Crime of Terrorism within the Jurisdiction of the African Court of Justice and Human and Peoples' Rights' (n 5 above) p.427.
- 15 Article 2 of the UN International Convention for the Suppression of Acts of Nuclear Terrorism of 2005 makes reference to the environment, while Article 1(3)(a) of the OAU Convention on the Prevention and Combating of Terrorism of 1999 refers to both the environment and cultural heritage.
- 16 Elizabeth L. Chalecki 'Environmental Terrorism Twenty Years On' 24.1 *Global Environmental Politics* (February 2024) p.1.
- 17 Ben Saul 'Reasons for Defining and Criminalising Terrorism' in *Defining Terrorism in International Law* (Oxford: Oxford University Press, 2006) p.63.

- 18 *Castillo Petruzzi et al. v. Peru* Case No. 078-TP-93-L IACHR (1999) para.121.
- 19 Martin Scheinin 'Leading the World Requires a New Approach to Terrorism, Based on a Moral Principle' *Global Governance* 27 (2021) p.334-335.
- 20 Martin Scheinin *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism* [E/CN.4/2006/98] (n 10 above) para.38.
- 21 *Ibid.* para.38.
- 22 Martin Scheinin 'A proposal for a Kantian definition of terrorism: Leading the world requires cosmopolitan ethos' *European University Institute (EUI) Working Paper 2020/15* (2020) p.6. See Martin Scheinin 'Leading the World Requires a New Approach to Terrorism, Based on a Moral Principle' (n 19 above) p.337. See Ben Saul 'Reasons for Defining and Criminalising Terrorism' (n 17 above) p.41.
- 23 Martin Scheinin 'A proposal for a Kantian definition of terrorism: Leading the world requires cosmopolitan ethos' (n 22 above) p.3 & 7.
- 24 Article 1(3)(a) of the OAU Convention on the Prevention and Combating of Terrorism of 1999.
- 25 Article 1(2) of the Arab League Convention on the Suppression of Terrorism of 1998 and Article 1(2) of the Convention of the Organisation of the Islamic Conference (OIC) on Combating International Terrorism of 1999.
- 26 Ben Saul 'The Crime of Terrorism within the Jurisdiction of the African Court of Justice and Human and Peoples' Rights' (n above) p.426.
- 27 *Ibid.* p.425.
- 28 *Ibid.* p.425.
- 29 Christiana E. Attah 'Boko Haram and sexual terrorism: The conspiracy of silence on the Nigerian anti-terrorism laws' 16.2 *African Human Rights Law Journal* (2016) p.395.
- 30 Ben Saul 'The Crime of Terrorism within the Jurisdiction of the African Court of Justice and Human and Peoples' Rights' (n 5 above) p.425-426.
- 31 See generally, UNODC 'Handbook on Children Recruited and Exploited by Terrorist and Violent Groups: The Role of the Justice System' (2017).
- 32 Ben Saul 'The Crime of Terrorism within the Jurisdiction of the African Court of Justice and Human and Peoples' Rights' (n 5 above) p.427.
- 33 Article 1 *bis* of the UN Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Aviation of 1988; Article 7(1) of the UN International Convention on the Physical Protection of Nuclear Material of 1980, and; Article 2 of the UN International Convention for the Suppression of Acts of Nuclear Terrorism of 2005.
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## ABOUT THIS REPORT

Despite its significant influence on national legislation in Africa, the definition of terrorism in the OAU Convention on the Prevention and Combating of Terrorism falls short in several critical aspects, underscoring the need for a more precise framework. With a specific focus on the conceptual defining elements of terrorism as a crime, this study examines the human rights implications of the OAU definition, and presents a proposed revision to the definition of terrorism that seeks to balance counter-terrorism needs with human rights and legality, ensuring that African counter-terrorism efforts respect fundamental freedoms and the rule of law.

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The African Policing Civilian Oversight Forum (APCOF) is a Not-for-Profit Trust working on issues of police accountability and governance in Africa. APCOF promotes the values which the establishment of civilian oversight seeks to achieve; namely to assist in restoring public confidence, developing a culture of human rights, promoting integrity and transparency within the police, and nurturing good working relationships between the police and the community. While APCOF is active in the field of policing, its work is located in the broader paradigm of promoting democratic governance and the rule of law.

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