African Journal of Law, Ethics, & Education [AJLEE] Vol. 8, No. 3 (2025)
Website: https://ajleejournal.com [ISSN: 2756-6870]

EXPLORING THE CRIME OF TERRORISM UNDER ARTICLE 28 (G) OF THE MALABO PROTOCOL: CHALLENGES AND PROSPECTS

Godfree Matthew*
Olalekan Jimoh Mumini**

Abstract

The crime of terrorism has gained global recognition as a transnational offence. Consequently, regional and national entities are enjoined to outlaw terrorism via legislative approach with the aim of facilitating and enhancing effective ways of checkmating terrorism as a global threat. It is from this background that the Malabo Protocol came into being. But the question is, does the Malabo Protocol really address the contemporary concerns relating to terrorism? How effective is Malabo Protocol in combating terrorism in Africa? It is in response to these posers that this paper derived its roots. This paper has established that the definition of terrorism under Malabo Protocol has not been effective in combating terrorism in Africa. It is also the finding of this paper that, the lack of institutional framework enforcing the provisions of Malabo Protocol is another setback in fighting terrorism. This paper has adopted doctrinal research methodology where recourse is had to statutes, articles in journals, books and other related sources.

Keywords: Exploring, Crime, Terrorism, Article 28 (g), Malabo Protocol

* Godfree Matthew Esq., Lecturer, Department of Jurisprudence and International Law, Adekunle Ajasin University, Akungba Akoko, Ondo State Nigeria. He is currently a PhD Student with University of Jos, Nigeria. Email: godfreematthew15@gmail.com

** Olekan Jimoh Mumini is a lecturer with Federal Polytechnic Nasarawa, Faculty of Humanities and Social Sciences, Department of General Studies, Law unit. He can be contacted via: mumeenolekan29@gmail.com.

1.0 INTRODUCTION

Terrorism is a transnational crime that attracts global ignominy. Nations are united in combating its dangerous effect on humanity.[1] In order to ensure that this menace is tackled, regional and municipal attempts were put in place via collaborations.[2] One of such regional collaborations gave birth to the framing of the Malabo Protocol. To further enhance this discourse, this paper is divided into four parts. The first part deals with the origin and evolution of the Malabo Protocol. The second part deals with the general jurisdiction of the Malabo Protocol. In the third part of this paper, the discussion is focused on the nature, scope, and extent of terrorism under the Malabo Protocol. It also examines the issue as to whether the Malabo Protocol has helped in combating terrorism in Africa. The fourth part of the paper examines the challenges associated with the crime of terrorism contemplated under the Malabo Protocol and the way forward.

2.0 ORIGIN AND STRUCTURE OF THE MALABO PROTOCOL

The Malabo Protocol is a product of negotiation. It is an outcome of the deliberation by the Assembly of the Heads of States and Governments of African Union at Malabo, Equatorial Guinea in June 2014.[3] It was enacted

---

[1] Crenshaw Martha, "Terrorism and Global", in *Leashing the Dogs of War: Conflict Management in a Divided World,* (ed.) Aall Pamela, United State Institute for Peace, Washington DC, 2007, START.umdu.edu @ https://www.start.umd.edu<accessed on October 8, 2025>

[2] Ivancik Radoslav, Jurcak Vojtech and Necas Pavel, " On Some Contemporary Global Risks and Challenges"Security and Defence Quarterly,@https://securityanddefence.pl[PDF]<Accessed on October 8, 2025>

[3] Kamarie Clarke M., Charles Jalloh C., and Nmehiele Johnson , " Origin and issues of the African Court of Justice and Human and Peoples' Rights", May 2, 2019, (Cambridge University Press, 2019) @https://doi.org/10.1017...<accessed on October 7, 2025>

as a legal framework that will establish a court that will serve as an alternative to the International Criminal Court – which is viewed by Africans as a Western hegemony.[4] It seeks to provide independent regional criminal court in Africa. It is meant to ensure that crimes that are committed by Africans are tried by African Regional Courts. It is an African Court that will try offences committed by Africans. This became more concerning in the aftermath of the Uhuru-Ruto case before International Criminal Court.[5] The Malabo Protocol as a legal framework was a product of an Amendment to the Protocol on the Statute of the African Court of Justice and Human Rights.[6] The Protocol was then enacted to give a separate court that will try criminal offences. Initially, there was an intention to allow the African Court of Justice have two separate courts - where one will exercise jurisdiction on civil matters and the other will do same on criminal matters.[7]However, it was concluded that it is better to have the criminal section of the court as a separate entity, than to fuse two divisions under the African Court of Justice and Human Rights.

Today, the Malabo Protocol is a recognized regional framework exercising jurisdiction on criminal matters with respect to any crime relating to African parties and territories. These countries are by legal implications bound to observe and respect the contents of the Malabo Protocol.[8] Some

[4] Ibid. See Nimigan Sarah, " The Malabo Protocol, the ICC, and the Idea of Regional Complementarity", Journal of International Criminal Justice, 2019, 17(5) @https://www.researchgate.net<accessed onOctober 17 2025 >
[5] Kiprono Justus, "What is the Malabo Protocol That President Ruto Signed? 5 Things to Know?", How Africa, August 9, 2023@https://www.how.africa.org<accessed on October 7, 2025>
[6]Ibid.
[7] Amnesty International, "Legal and Institutional Implications of the Merged and Expanded African Court",P.5 @ https:/www.amnesty.org<accessed on October 7, 2025>
[8] Section 26 of the Vienna Convention on the Laws of Treaty, 1969

of the countries who are signatories to the Malabo Protocol are outlined in the table below:[9]

Nos	**Countries**	**Years of Ratification**
1	Benin Republic	2014
2	Cameroun	2014
3	Chad	2014
4	Equatorial Guinea	2014
5	Gambia	2014
6	Ghana	2014
7	Madagascar	2014
8	Mali	2014
9	Morocco	2014
10	Niger	2014
12	Sahrawi Arab Democratic Republic	2014
13	Sierra Leone	2014

[9] See Kiprono Justus Loc Cit.

14	Somalia	2014
15	Togo	2014
16	Kenya	2023

The above exposition has demonstrated the origin and evolution of the Malabo Protocol. It has also identified the nations that have ratified it. Out of the 54 countries of Africa, it is only 16 countries that have shown commitment by ratifying the Malabo Protocol.

3.0 STRUCTURE OF THE MALABO PROTOCOL

The structure of the Malabo Protocol can be classified into two; the administrative structure and the judicial structures. The administrative structures are the organs which include:

(a) The Presidency;
(b) The Office;
(c) The Registry; and
(d) The Defence.[10]

The above classifications are administrative and are not of prime interest to this paper, rather, more attention will be given to the judicial structure of the Malaba Protocol. The judicial structure of the Malabo Protocol is reflected in Article 16 as follows:

(a) The General Affairs Section,
(b) A Human and Peoples' Right Section, and
(c) The International Criminal Law Section

[10] Article 2 of the Malabo Protocol.

The General Affairs section is the department of the court that handles other general matters that are not criminal matters. It is a department of the Presidency which is an administrative arm of the judicial structure of the Malabo Protocol.[11]They include issues relating to interpretation of treaties, political and diplomatic matters. This section of the court could also discuss matters relating to property.

The Human and Peoples' Right Section is a specialised section that deals with issues pertaining to human right. Issues relating to cultural rights attributed to comminities as well as fundamental rights of citizens are entertained by this court. This court specialises on issues relating to human and people rights guaranteed under the African Charter on People and Human Rights.[12] :

The International Criminal Law section is solely responsible for trying offences relating to international crimes.[13] It is expected to try international offences such as the genocide, war crimes, crimes against humanity, aggression and terrorism. For this reason, the International Criminal Law section has three Chambers designated as (a) Pre-Trial Chamber, (b) A trial Chamber, and (c) An Appellate Chamber. This classification is designated in a similar manner akin to that of the International Criminal Court. Thus, the Pre-Trial Chamber is responsible for fact-gathering, inquiries, investigation and assessment of evidence by the prosecution and the parties involved. Issuing of orders and warrant of arrests is also the function of this

[11]Amnesty International, "Malabo Protocol ", P.21 @https://www.amnesty.org<accessed on October 8, 2025>
[12] Ibid at P. 19
[13] Ibid 2.Pp.1-22

organ.[14] Pre-Trial Chamber also handles administrative tasks such as the filing of processes.

The Trial Chamber is the litigation and the adjudicatory department of the Court. It is the section that is presided by judges to listen and evaluate the evidence tendered during litigation. It is in this Chamber that the judgement is delivered. The trial Chamber also has the power to review the decision of the Pre-Trial Chamber.[15] The Appeal Chamber reviews the decision of the Trial Court. It exercises supervisory jurisdiction over the Trial Chamber and the findings of the Pre-Trial Chamber.

4.0 THE PROVINCE OF TERRORISM UNDER THE MALABO PROTOCOL

The crime of terrorism is covered in Malabo Protocol to include a range of illegal activities by an individual or group of persons that disturb public peace, order and national security of a nation. It is a menacing act perpetrated by wrongdoers that threatens the safety and security of innocent citizens and their properties. The crime of terrorism is prescribed in the Malabo Protocol under Article 28G in the following words:

> *For the purpose of this Statute, "terrorism' means any of the following acts;*
> *A. Any act which is a violation of the criminal laws of a State Party, the laws of the African Union or a regional economic community recognized by the African union, or by international law and which may endanger the site, physical integrity or freedom of, or cause serious injury of death to*

[14]Article 19(1)-(3) of the Malabo Protocol
[15]Article 19 (4) of the Malabo Protocol

any person, any number of group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to

1. 1. Intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles.

2 Disrupt any public service. Delivery of any essential service to the public or to create a public emergency, or

3 create general insurrection in a State

B. Any promotion, sponsoring, contribution to, command aid, incitement encouragement, attempt threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in sub-paragraph (a) (1) to (3)

C. Notwithstanding the provisions of paragraphs A and B, the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts.

D. The acts covered by International Humanitarian Law, committed in the course of an international or non-international armed conflict by government forces or members of organized armed groups, shall not be considered as terrorist acts.

> *E. Political, philosophical, ideological, racial, ethnic, religious or other motives shall not be a justifiable defence against a terrorist act.*

The above prescription of terrorism by the Malabo Protocol shows the multifaceted approach adopted by Africa in criminalising terrorism. The first notion of terrorism under the Malabo Protocol is that it refers to any act that contravenes the municipal laws of State Parties, the laws of African Union, regional laws or any international law which is capable of endangering the lives and properties of citizens, natural resources, environment or cultural heritage. The imports of this definition is that it conforms with the basic principle of international criminal law, *Nolle Poene Sine Lege,* which states that there is no punishment without a law.[16] Hence, within this context, the Malabo Protocol has prescribed an act of terror as any act that amounts to the breach of penal laws of the State parties, African Union, Regional laws or international law. This view accords with the acid test of criminality propounded by Lord Atkins in the case of *Proprietary Article Trade Association and Others v A.G For Canada and Others*[17], where he held that: "*the Criminal quality of an act cannot be discerned by intuition nor can it be discerned by inference to any standard by one; is the act prohibited by penal consequences?*" In this context, we can agree with Lord Atkins that by virtue of Article 28 G, the Malabo Protocol has a penal prohibition for the offence of terrorism.[18]

[16] This agrees with the features of international Criminal law. See ICRC, "General Principles of International Criminal Law", April 2021 https://www.icrc.org<accessed on October 8, 2025>
[17] 1931 AC 310
[18] ICRC Loc. Cit.

Another angle of the crime of terrorism under the Malabo Protocol is the fact that, it prohibits any act that will amount to harm and injury on natural resources, environment and or cultural heritage. This appears to be in tandem with international practice that promotes respect for human and people's right to cultural heritage. Thus, any harm towards natural resources, and environment that is indispensable for the survival of a particular community and their culture, could amount to terrorism.[19]

Furthermore, any act that is aimed at putting fear, intimidation or coercion of a certain people to make them do something against their collective or individual will could be termed as terrorism under the Malabo Protocol.[20] In the same vein, any person or group of persons that disrupt any public services like social amenities indispensable for the survival of the society is liable for an act of terrorism.[21] Also, where such acts resulted in creating public emergency and invoke fear in a given community, it will amount to terrorism.[22]

Acts of insurrection is also penalized as terrorism under the Malabo Protocol. The acts of insurrection could be carried out either by the state actors or non-state actors. [23]Where an act of insurrection is perpetrated by any group of persons against a constituted authority of a state party, it will amount to terrorism. This means that even if the insurrection is aimed at unconstitutional change of power in a territory of a State Party to the Malabo Protocol, it will be regarded as terrorism.

[19] Article 28 (g)(1)
[20] Artcle 28 G(a) (1) of the Malabo Protocol
[21] Ibid (2)
[22] Ibid (3)
[23] Ibid

The offence of terrorism also extends to instances of *participis criminis* and abatement. In this regard, any person or group of persons that physically participates in an act of terrorism, by promoting, sponsoring, inciting and encouraging terrorism should be held liable for the crime of terrorism. This instance contemplates prohibiting, financing, condoning and sponsoring of terrorism by natural persons or corporate entities.

Another impressive position of Malabo Protocol on terrorism, is that it cannot be justified on certain grounds. This means that one cannot use these grounds as defence for perpetrating terrorism on people or communities. As such it will not be a defence to carry out terrorism for political, philosophical, racial, ethnic, religious or other motives. For where a person relies on any of such grounds and committed acts of terrorism, he will not be exempted from the penal sanctions of the law.

However, the exceptions relating to acts that will not amount to terrorism include the following:

> (a) Acts carried out by liberation fighters or freedom fighters against colonial oppressors or foreign aggressors;
> (b) Acts carried out by state actors during armed conflicts either in international armed conflict or non-international armed conflict;

The above ground stipulates that if any act that carries some elements akin to that of terrorism is carried out in the course of liberation movement or challenging aggression by external forces, it will not amount to crime. It will also not amount to the crime of terrorism where such acts are carried out by State armed forces in armed conflicts covered by the principle of

international humanitarian law. These exceptions cannot be accepted as legally appeasing because it goes against the principles of non-discrimination of international humanitarian law and international human rights.[24] Also, some of the exceptions contemplated by Article 28 G2 (c-d) are inconsistent with the principles of the Malabo Protocol as well as the international criminal law. These concerns will be explored further in the next part of this paper.

5.0 THE FLAWS ASSOCIATED WITH PRESCRIPTION OF TERRORISM UNDER ARTICLE 28 G OF THE MALABO PROTOCOL

From the discourse on the previous part of this paper, it is evident that the notion of terrorism raised some concerns. Some of these concerns include the following:

(a) Malabo Protocol condone state terrorism;
(b) It does not address instances of cyber-terrorism;
(c) It shows instances of intra- statutory conflicts;
(d) Lack of physical African Regional Criminal Court,
(e) Little subscription to the treaty.

The first area of concern on the prescription of terrorism under the Malabo Protocol is that it condones state terrorism. State terrorism involves the indiscriminate use of force against individuals it seeks to protect. Barkely defines state terrorism as:

> *(a) ...a deliberate act of violence against individuals that the state has a duty to protect, or a threat of such an act if a*

[24] Rule 88 of the Customary International Humanitarian Law prohibits adverse distinction on the grounds of race, colour, religion or belief or political belief.

> *climate of fear has already been established through the preceding acts of state violence; (b) the act must be prepared by actors on behalf of or in conjunction with the state, including paramilitaries and private security agents; (c) the act or threat of violence is intended to induce extreme fear in some target observers who identify with that victim; and (d) the target audience are forced to consider changing their behaviour in some way.* [25]

The above definition shows that any act by state can amount to terrorism where the intention is to spread fear on the people through the previous and subsequent acts of the state. Such dreadful acts must be carried out by state agents either regular armed forces, militias, rebels supported by the state or civilians. Once such violence is executed on innocent civilians with the purpose of making them to change their position or ideology, it will amount to terrorism. This accords with the doctrine of attributions of wrongful acts of state responsibility under international law; where state will be held liable for the wrongful acts of its agents.[26] Therefore, the provision of Article 28G (3)(d) of the Malabo Protocols that says acts committed by government forces or members organized armed group during armed conflict does not amount to terrorism amounts to condonation of state terrorism.

[25] Rodriguez Daniella, "State Terrorism in Practice: The Guatamelan Coup d'etat in 1954", Pp. 15-16 , (Being a Thesis Submitted to the Department of Political Science, Peace and Conflict Studies, 2019), Lund University Publications, 2019@https://lup.lub.lu.se[PDF]<accessed on October 8, 2025>

[26] Tehrans'case (United States of America v Iran) 1980 ICJ rEP 3…….

Another silent omission of the Malabo Protocol, is the failure to refer to the role of advanced technology in perpetrating terrorism. Today, the tendency of terrorists to have access to advanced technology is one of the global challenges. This is evident in the lamentation of the United Nations when it noted that:

> Today we are witnessing a "democratization" of new and emerging technologies. Never in the history have violent non-state actors been so resourceful, rich, dynamic and technologically savvy.[27]

The above concerns by the United Nations ought to have inspired the framers of Malabo Protocol to contemplate the role of technology in facilitating acts of terror. It ought to have contemplated the branch of cyber-terrorism where terrorists can utilise the cyberspace to perpetrate heinous acts.

Further concern associated with the Malabo Protocol is the intra-statutory conflicts associated with criminal responsibility. Article 28 G (3) (e) of the Malabo Protocol states political, philosophical, racial, ethnic, religious or any other reasons cannot be used as justification for carrying out an act of terrorism. However, under Article 28G (3) (c-d), nefarious acts carried out by combatant involved in struggle for political independence will not amount to the crime of terrorism. Similarly, if any dastard act is carried out by regular armed forces or any organised armed groups that are bound by the international humanitarian law, such actions will not be deemed as terrorism. The import of this law is that it has condoned the notion of state

[27] United Nations, "Technology and Terror: The New Arsenal of Anarchy", Welcome to the United Nations, @ https: //www.un.org[PDF] <Accessed on October 8, 2025>

terrorism and shield state actors from accountability. Also, the fact that armed forces and organised armed group are exempted from liability for acts of terrorism, is a discriminatory principle which is against the major premises of IHL.[28] It is the position of this paper that views such as this is highly controversial.[29]

Additionally, the lack of physical regional criminal court contemplated under Article 16 of the Malabo Protocol is another setback. Since 2014, when the Malabo protocol was enacted, there is no regional criminal court that will serve as alternative to international criminal court. The lack of this viable institution makes enforcing the crime of terrorism a theory. This is a major setback.

Low patronage of the Malabo Protocol is another problem. Many African countries did not sign the Malabo Protocol. Out of the 54 countries in Africa, only 16 countries are signatories to the Malabo Protocol.[30]This number is not encouraging to a continent that is facing a lot of humanitarian crises, partly due to terrorism. This will not help in combating terrorism - a trans-boundary crime. As a result, collaboration and synergy in combating terrorism will not be effective.

6.0 WAY FORWARD

As a way out of the flaws associated with the the rendition of terrorism within the provision of Article 28G of the Malabo Protocol, this paper

[28] Article 27 of the AP 1
[29] Jalloh Charles , Clarke Kamari Nmehile Vincent "Classification of the Crimes in the Malabo Protocol", Cambridge University Press, May 2, 2019 @https://www.cambridge.org<accessed on October 8, 2025>
[30] Kiprono Justus, Loc Cit.

proposes some recommendations to be adopted. One area that should be addressed is the re-enactment and review of the Malabo Protocol. The Protocol was made in June 2014, it is about 11 years now. A lot of development has occurred in this digital age that ushered in a lot of changes. Thus, there is the need to review this law to align with the recent developments in international law ushered in by social changes and the advent of advanced technologies.

Equally, there is the need to hold state actors and non-state actors accountable for the crime of state-terrorism. The use of parties bound by the principle of international humanitarian law and the use of political independence as a justification for terrorism, is not good law. If international law can prohibit granting amnesty or the application of Statute of Limitations to heads of states,[31] it will not be fair to exempt the security personnel of a state from being tagged as a terrorist because they are fighting liberation wars or are under the cover of international humanitarian law.

Furthermore, more states should subscribe to the Malabo Protocol. This will help in fostering good and effective collaboration in fighting terrorism and other trans-boundary crimes. This partnership will help in the arrest, investigation and prosecution of offenders. So, many states should be encouraged and persuaded to ratify this treaty. This will help in collective fight against trans-national crime such as terrorism and other related crimes.

Lastly, it is high time the Regional Criminal Court of Africa came into being. It is very important that by now the African Regional Criminal Court

[31] *Ex parte Pinocchet v Barte and Ors*, [Appeal] UKHL; 17

should have started operation. This is because it is over ten years since the enabling statute creating it has come to being, and the court has not yet commenced sitting. There is the need for the African Regional Criminal Courts to start sitting.

7.0 CONCLUSION

In conclusion, the offence of terrorism contemplated under Article 28G of the Malabo Protocol, does not tally with the contemplation of international law and justice. It shows selective application of the law and contradictions. This will in turn affect the application of the law as well as the interpretation. Similarly, the definition of terrorism within the province of Article 28G. It is for this reason that this paper seeks to draw the attention of the readers, learning community and policy makers to rethink the concept of the offence of terrorism contemplated under Article 28G.