IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

**HELD AT BRAAMFONTEIN**

**CASE NO: CCT315/16 & CCT 193/17**

In the matter between:

**SOUTHERN AFRICA LITIGATION CENTRE** Amicus Curiae

To intervene as an amicus curiae in the matter between:

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| **THE STATE** | Applicant |

and

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| **HENRY EMOMOTIMI OKAH** | Respondent |

In the matter between:

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| **HENRY EMOMOTIMI OKAH** | Applicant |

and

|  |  |
| --- | --- |
| **THE STATE** | Respondent |

**WRITTEN SUBMISSIONS FOR THE *AMICUS CURIAE***

**SOUTHERN AFRICA LITIGATION CENTRE (“SALC”)**

**INTRODUCTION**

These submissions are made pursuant to the Chief Justice’s direction of 15 November 2017. In focusing on the proper interpretation of section 1(4) of the Protection of Constitutional Democracy Against Terrorism and Related Activities Act 33 of 2004 (“**Terrorism Act**”), SALC submits that the defence of Mr Okah – namely that he committed acts of terrorism during an “armed struggle” as contemplated in the Act – is not open to him. SALC submits that Mr Okah’s interpretation, as applied to the facts before this Court, would render an unconstitutional outcome. In South Africa’s constitutional dispensation, our courts and law enforcement agencies are compelled to protect – rather than detract from – fundamental human rights.

Section 1(4) reads as follows:

“Notwithstanding any provisions of this act or any other law, any act committed during a struggle waged by peoples including any action during an armed struggle, in the exercise or furtherance of their legitimate right to national liberation, self-determination and independence against colonialism, or occupation or aggression or domination by alien or foreign forces, in accordance with the principles of international law, especially international humanitarian law, including the purposes and principles of the Charter of the United Nations and the Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the said Charter, shall not, for any reason, including for the purposes of prosecution or extradition, be considered as terrorist activity as defined in subsection (1).” (own emphasis)

The Terrorism Act, thus, creates certain exceptions to the crime of terrorism; in effect, limiting the legal consequences which would otherwise and ordinarily attach to those acts. Those exceptions include acts committed:

""in the exercise or furtherance of their legitimate right to national liberation, self-determination and independence against colonialism" during armed struggles; *or*

in an armed struggle against "occupation or aggression or domination by alien or foreign forces"; *and in addition,*

when done "in accordance with the principles of international law".

In order for Mr Okah to enjoy the benefits of the exceptions, defined above, he would need to demonstrate that the crimes he has been founding guilty of, fall within one of the specified categories.

Mr Okah’s submissions raise important issues concerning the distinction between acts of international terrorism and acts committed by peoples in the context of a struggle against oppression (i.e. "**freedom fighters**"). Mr Okah’s submissions directly raise the question whether freedom fighters can be convicted for the crime of international terrorism under the Act, personally/directly or by association/indirectly, for their involvement in the activities related to their particular struggle.

In this regard, SALC supports the State’s submissions which has been advanced in respect of the interpretation of "**Specified Offence**".

SALC will focus on who can be defined as a terrorist and under what circumstances, with particular reference to the application of regional and international criminal law principles relating to international terrorism as a means to interpret section 1(4) of the Terrorist Act.

SALC respectfully submits that:

Despite the international community not agreeing on a single instrument governing the definition of the crime of “terrorism”, there is consensus on what constitutes a definition of terrorism in times of peace. Although differences still remain on the exact definition of the crime when committed during an armed conflict, SALC submits that the relevant factual inquiries for a Judge in evaluating acts of terrorism versus those of freedom fighters include:

What was the purpose of the act: was it intended to spread terror (fear) among the population or achieve some other purpose?;

What was the situation at the time the act was either planned or executed: was the country in the midst of a civil war, subject to foreign military occupation, at peace and so on?;

Who were the envisaged targets: were the intended targets of the acts civilians, military personnel involved in belligerent operations, or military forces engaged in humanitarian aid, or other similar activities completely extraneous to belligerent operations?[[1]](#footnote-2) It may be of further relevance in determining whether the intended targets were chosen deliberately or indiscriminately.

Beyond the examination of the definition of terrorism, section 1(4) of the Terrorism Act requires judges to evaluate international law’s recognized exception where violent acts committed by freedom fighters may not qualify as terrorist acts.

The Terrorism Act provides an exception for struggles waged by peoples. This pertains to, for example, movements seeking national liberation, self-determination, and independence from colonial forces, as well as a broader right to resist as is included in the African Charter on Human and Peoples’ Rights (“**African Charter**”).

Despite a general exception under section 1(4) for acts of freedom fighters, any acts that may qualify under one of the exceptions is still subject to the constrains of international law, and in particular international humanitarian law.

Should the Court find that Mr. Okah’s argument regarding the applicability of section 1(4) to his particular circumstances have merit, it may be more appropriate that the matter is subject to additional fact-finding.

**DEFINITION OF THE CRIME OF TERRORISM**

Internationally, there is lack of consensus on the precise definition of the crime of terrorism.[[2]](#footnote-3) That notwithstanding, a trial court is obliged to analyse a statute’s language and factual context to establish whether,[[3]](#footnote-4) in all circumstances of the case, the crime of terrorism has been proven.

The Terrorism Act was enacted, *inter alia*, to provide measures to prevent and combat terrorism and related activities; to provide for an offence of terrorism and other offences associated or connected with terrorist activities and to give effect to international instruments dealing with terrorist activities, among others.[[4]](#footnote-5)

The Act gives effect to three international instruments, namely, the United Nations Security Council Resolution 1373/2001; the Convention for the Prevention and Combating of Terrorism adopted by the Organisation of African Unity, and a number of other instruments of the United Nations on the subject of terrorism.[[5]](#footnote-6) Although, all these instruments deal with different subject matters related to terrorism, they all prohibit terrorist activities in various forms.

The Terrorism Act provides for the offence of terrorism and associated or connected offences under Part 1; Convention offences under Part 2; and other offences under Part 3. Although the Terrorism Act provides for different categories of crimes, the definition of the crime of terrorism as established under international and comparative law can help inform the Terrorism Act’s applicability with respect to alleged acts of terrorism committed by freedom fighters.

The Special Tribunal for Lebanon’s Appeal Chamber ("**the STL**") in the *Interlocutory Decision on the applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* case[[6]](#footnote-7) made the following remarks:

"…although it is held by many scholars and other legal experts that no widely accepted definition of terrorism has evolved in the world society because of marked difference of views on some issues, closer scrutiny demonstrates that in fact such a definition has gradually emerged."[[7]](#footnote-8)

The STL arrived at this conclusion after looking at "a number of treaties, UN resolutions, and the legislative and judicial practice of States"[[8]](#footnote-9) as demonstrating that the definition of the crime of terrorism is in fact settled under customary international law. According to the STL, terrorism is defined by the following three key elements:

"(i) …the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element."[[9]](#footnote-10) (own emphasis)

Most significantly, the STL observed that the particular means used in an attack were not dispositive in determining whether an attack is terrorism or simply murder. In other words, the weapons used or the means employed to carry out such acts may nevertheless fall within the definition of the crime.[[10]](#footnote-11)

A number of national courts have also recognised the existence of the crime of terrorism under customary international law. The Supreme Court of Canada in the case **Suresh v Canada (Minister of Citizenship and Immigration)**[[11]](#footnote-12)said the following:

"*We are not persuaded…that the term ‘terrorism’ is so unsettled that it cannot set the proper boundaries of legal adjudication. The recently negotiated International Convention for the Suppression on the Financing of Terrorism, G.A. Res. 54/109, December 9, 1999, approaches the definitional problem in two ways: First, it employs a functional definition in Article 2(a), defining ‘terrorism’ as ‘[a]n act which constitutes an offence within the scope of and as defined in one of the treaties listed in annex’ … Second, the Convention supplements this offence-based list with a stipulative definition of terrorism. Article 2 (1) (b) defines ‘terrorism’ as ‘Any …act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.’ …This definition catches the essence of what we understand by ‘terrorism’*."[[12]](#footnote-13) (own emphasis)

The Italian Supreme Court of Cassation in the case of **Bouyahia Maher Ben Abdelaziz et al***,* stated that "*a rule of customary international law [is] embodied in various resolutions by the UNGA and the UNSC, as well as in the 1997 Convention for the Suppression of Terrorist Bombings*".[[13]](#footnote-14) The Court went on to define the purpose of terrorism as the creation of terror in the public through indiscriminate criminal conduct against the general public or against certain individuals because of the function they represent.[[14]](#footnote-15)

Respectfully, this Court could readily construe the elements of the crime of terrorism as being: (1) criminal conduct (2) with the purpose of intimidating the population or compelling the government or other organisation to act or to abstain from taking certain action.

In addition to the general elements of the crime of terrorism, there is also a question of when such a crime can be committed during armed conflict. Generally, under customary international law, the crime of terrorism is recognised in times of peace.[[15]](#footnote-16) The point of contention is whether customary international law recognises this principle as being of equal effect when the acts in question are committed during armed conflict.

Antonio Cassese, an international criminal law expert, stated as follows:

"Contrary to what many believe, a generally accepted definition of terrorism as an international crime in time of peace does exist. This definition has evolved in the international community at the level of customary law. However, there is still disagreement over whether the definition may also be applied in time of armed conflict, the issue in dispute being in particular whether the acts performed by ‘freedom fighters’ in wars of national liberation may (or should) constitute an exception to the definition."[[16]](#footnote-17) (own emphasis)

The difficulty in distinguishing terrorism from lawful acts committed during an armed conflict lies in the interaction between two different sources of law: domestic criminal law and international humanitarian law. The International Committee of the Red Cross (“**ICRC**”) has stated despite the different goals of these two separate sources of the law:

“[This] does not mean that some overlap cannot be created between the legal regimes governing IHL and terrorism. IHL prohibits both specific acts of terrorism committed in armed conflict and, as war crimes, a range of other acts of violence when committed against civilians or civilian objects. If states choose to additionally designate such acts as "terrorist" under international or domestic law, this will in effect duplicate their criminalisation.”[[17]](#footnote-18)

The ICRC, however, has gone on to say that determining when terrorism law can apply during a conflict depends on a fact-based inquiry into, *inter alia*, the type of conflict, the identity of the belligerents, and the identity of the victims:

“[A]cts that are not prohibited by IHL – such as attacks against military objectives or against individuals not entitled to protection against direct attacks – should not be labelled "terrorist" at the international or domestic levels, although they remain subject to ordinary domestic criminalisation where a [non-international armed conflict] is involved. Attacks against lawful targets constitute the very essence of an armed conflict and should not be legally defined as "terrorist" under another regime of law. To do so would imply that such acts must be subject to criminalisation under that legal framework, therefore creating conflicting obligations of States at the international level. This would be contrary to the reality of armed conflicts and the rationale of IHL, which does not prohibit attacks against lawful targets.”[[18]](#footnote-19)

In applying the definition of the crime of terrorism, a court must analyse whether the relevant situation constituted an armed conflict and if so, do a fact-based inquiry into the intention, method, and victims of the perpetrator’s actions.

**INTERPRETATION OF SECTION 1(4) OF THE TERRORISM ACT**

**Relevant Provisions of the Constitution of South Africa**

South Africa is a constitutional democracy founded on remedying injustices suffered by the people in the past.[[19]](#footnote-20) The State is obliged to respect, protect, and promote the Bill of Rights enshrined in the Constitution,[[20]](#footnote-21) as this is the cornerstone of the country’s democracy, guaranteeing a number of rights for its citizens and other persons within the territorial jurisdiction of the Republic.

Courts of law in the Republic also have a duty to affirm and give effect to the provisions of the Bill of Rights, customary international law, to the extent it is consistent with the Constitution or an Act of Parliament, and to reasonably interpret any legislation consistent with international law.[[21]](#footnote-22)

Of particular importance to this case are the provisions of section 235 of the Constitution, which recognises "*the notion of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any way, determined by national legislation.*" In light of the foregoing, it is important to consider self-determination’s importance under the Constitution of the Republic when interpreting section 1(4) of the Terrorism Act.

**International Conventions**

International conventions can also shed light on the proper interpretation of the so-called “freedom fighter” exception. In similar language to section 1(4), article 3(1) of the OAU Convention on the Prevention and Combating of Terrorism, which remains extant and thus binding on South Africa, provides as follows:

"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."[[22]](#footnote-23)

Article 20(1) of the African Charter on Human and Peoples’ Rights guarantees people’s inalienable right to self-determination and also the right to "*free themselves from the bonds of domination by resorting to any means recognised by the international community*".[[23]](#footnote-24)

Another relevant convention is the International Convention against the Taking of Hostages. Article 12 of the Convention provides that,

"…the present Convention shall not apply to an act of hostage-taking committed in the course of armed conflicts as defined in the Geneva Conventions of 1949 and the protocols thereto, including armed conflicts mentioned in article 1, paragraph 4 of Additional Protocol I of 1977, in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations."[[24]](#footnote-25)

In choosing whether acts are terrorist activities or legitimate acts of freedom fighters, a court of law must look at a number of factors, including the following:

"a) the situation existing at the time of the planning of attack; time of war, foreign military occupation, peace or preliminary operations for subsequent occupation); b) the targets who could be civilians, military personnel involved in belligerent operations, military personnel engaged in actions of humanitarian aid or other similar activities completely extraneous to belligerent operations; c) the perpetrator’s subjective status – in order to establish whether or not he belongs to the category of freedom fighters. The task of a domestic judge is more complex than simply establishing the boundaries between terrorism and national liberation war. The judge must also consider the multifaceted context of the country where the attacks are, or may have been realised and the status and individual situations of those involved."[[25]](#footnote-26)

**Comparative Case Law**

These principles have also been confirmed by a number of foreign national courts.[[26]](#footnote-27)

In the case of **Bouyahia Maher Ben Abdelaziz et al** (as above), the Italian Supreme Court had significant opportunity to consider these principles. That case involved Moroccan and Tunisian nationals who were accused in 2003 of taking part in the recruitment and dispatching of volunteers to be trained as Islamic fighters, mainly in the framework of the Islamic organization Ansar-al-Islam. Two lower courts held that the suspects were supporting legitimate guerrilla warfare directed against military personnel or military objectives to fight foreign military occupation in Iraq.

The Public Prosecutor appealed against the decisions to the Supreme Court of Cassation and, in a landmark decision, the Supreme Court laid out the law on the crime of terrorism.

1. The Court held that in order to identify an act as terrorism, it should not only look at those elements provided for in domestic criminal law, but also those set out in, for example, the Financing Convention. After making that observation, the Court, relying on the provisions of the Financing Convention, defined terrorist acts as any acts carried out against civilians, or in belligerent contexts against anyone not taking active part in the hostilities, in order to spread terror among the population or to force the state or an international organisation to carry out (or to abstain from carrying out) an action.[[27]](#footnote-28)

The Court also held that for conduct to qualify as terrorist conduct it needs to have a specific ultimate purpose, i.e. ideological, religious or political. On the basis of these elements, the Court established that:

"[T]he legal regulation to which any terrorist conduct has to be subjected differs in the identity of the perpetrators and the victims. The application of the relevant regulation, i.e. international humanitarian law or common criminal law, depends on whether the action has been carried out by combatants and against civilians or people not involved directly in the hostilities. It follows that changing these subjective prerequisites, the conduct will amount either to war crimes or to crimes against humanity."[[28]](#footnote-29)

The Court of Appeal of England and Wales has also interpreted the definition of terrorism as contained in United Kingdom law in the case of **R v Mohammed Gul**.[[29]](#footnote-30) Mohamed Gul was convicted for disseminating terrorist publications contrary to section 2 of the Terrorism Act 2006 and sentenced to 5 years in prison. In his defence, he argued that he was a freedom fighter, even though it is unsettled whether terrorism extends to acts of insurgents or "freedom fighters" in non-international armed conflicts."[[30]](#footnote-31) The Court rejected these arguments and held that freedom fighters would still be guilty of terrorism if they attack armed forces during armed conflict.

The Terrorism Act clearly invites Courts in the Republic to look at the provisions in Act, but also to rely on the number of international instruments to which it gives effect. As held by the Italian Supreme Court, and as set forth in section 233 of the Constitution, these international instruments could assist the court in reaching a proper definition of the crime including its defence for freedom fighters.

**INTERPRETATION OF SECTION 1(4)**

As stated above, in order to prove a defence under section 1(4) of the Terrorism Act, a defendant must establish the act was done:

(1) "*during a struggle waged by peoples*",

(2) "*in accordance with the principles of international law, especially international humanitarian law, including the purposes and principles of the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the said Charter*".

(3) The Terrorism Act, as well as international law, contemplates two scenarios in which the act might occur:

(a) "*in the exercise or furtherance of their legitimate right to national liberation, self-determination and independence against colonialism*" in an armed struggle, or

(b) in an "*occupation or aggression or domination by alien or foreign forces*".

First this submission considers the scenario of acts in furtherance of a legitimate interest in national liberation, self-determination, and independence against colonialism. In international law, the concepts of national liberation, self-determination, and independence against colonialism overlap:

'National liberation' can be defined as armed conflict between a stateless people or national liberation movement against a colonial or occupying power or racist regime, controlling the territory.[[31]](#footnote-32)

The International Court of Justice defined self-determination as "*the need to pay regard to the freely expressed will of peoples*".[[32]](#footnote-33)

"The term 'colonialism' can generally be defined as a form of conquest involving alien dominance and subjugation."[[33]](#footnote-34) Therefore, independence against the same would be, for example, African, American and Asian states’ movements to self-governance from the control of European powers.

For the purposes of determining what this scenario entails, the most informative of these rights may be the right of self-determination, which is enshrined in the Charter of the United Nations,[[34]](#footnote-35) Universal Declaration of Human Rights,[[35]](#footnote-36) International Covenant on Economic, Social and Cultural Rights,[[36]](#footnote-37) International Covenant on Civil and Political Rights,[[37]](#footnote-38) and, as stated above, the African Charter and the South African Constitution.

While emphasizing the right of self-determination, these legal conventions also support the territorial integrity of a state. The African Charter states in Article 29: *"The individual shall also have the duty: In Art 29 (3) Not to compromise the security of the State whose national or resident he is; and in Art 29 (5) To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law".*

The Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations (hereinafter Declaration on Friendly Relations) offers the distinction made between peoples’ right to self-determination and states’ right to territorial integrity.[[38]](#footnote-39) The Declaration on Friendly Relations is not meant to authorise or encourage "any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."

This gives support to the modern parlance of internal self-determination versus external self-determination. "*Internal self-determination may refer to various political and social rights; by contrast, external self-determination refers to full legal independence/secession for the given ‘people’ from the larger politico-legal state.*"[[39]](#footnote-40) Every people has the right to internal self-determination or representative governance, but not necessarily external self-determination, which is only available under restricted circumstances in international law.

In other words, as stated by the Canadian Supreme Court in its decision regarding secession for the province of Quebec:

"a state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity."[[40]](#footnote-41)

Therefore, under the first scenario contemplated by the section 1(4) of the Terrorism Act, a defendant must show that his action was undertaken in an armed struggle wherein the government did not provide or deprived peoples of internal self-determination. Relevant factual findings related to whether internal self-determination exists include the deprived peoples’ (1) occupation and use of high office, (2) equitable representation in national institutions, and (3) freedom to make "political choices and pursue economic, social and cultural development".[[41]](#footnote-42)

Further, however, this Court should determine if legitimate self-determination actually means external self-determination. Considering the context of self-determination in section 1(4), in the midst of "national liberation" and "independence from colonialism", this seems an appropriate result. If so, "[c]ommentators agree that there are three requirements before a group may successfully assert their right to [external] self-determination; a) they must be a people, b) they must be oppressed, and c) they must have been a colony."[[42]](#footnote-43)

UNESCO outlined seven characteristics that define a people: a common history, a common racial or ethnic identity, cultural homogeneity, linguistic unity, common religion or ideological affinity, territorial connectedness, and a common economic life.[[43]](#footnote-44)

It is generally accepted that physical oppression of a group may give rise to a right of self-determination.[[44]](#footnote-45) Cultural oppression may also exist, if the threat to a culture is grave and immediate; it must be demonstrated through an unwillingness of the government to allow a particular culture to express itself.[[45]](#footnote-46) The African Charter further recognizes a right to assistance from States in a liberation struggle against foreign economic domination.[[46]](#footnote-47)

The Declaration on Friendly Relations provides that in certain circumstances the right to self-determination may be applied to groups that are not considered traditional former colonies when peoples are subjugated, dominated and exploited.[[47]](#footnote-48) This aligns with the African Commission on Human and Peoples’ Rights (hereinafter the African Commission) determination that oppression and domination must be shown to warrant invoking the right to self-determination.[[48]](#footnote-49)

However, the text of the Terrorism Act explicitly limits the first scenario to instances of legitimate action for self-determination along with "national liberation" and "independence against colonialism", which has the apparent effect of narrowing the first scenario to the traditional requirements for self-determination. The exception recognised in the Declaration on Friendly Relations seems to be contemplated in the second scenario included in section 1(4).

The second circumstance is when there is (1) occupation or aggression or domination and (2) by alien or foreign forces.

Under international humanitarian law, occupation occurs "when a State exercises an unconsented-to effective control over a territory on which it has no sovereign title."[[49]](#footnote-50) This ends when force is withdrawn or self-determination is exercised.

Aggression has been defined by the UNGA to mean the use of armed force by one state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.[[50]](#footnote-51) Article 3 of the same resolution offers a non-exhaustive list, though only includes state actions against another state.

The Oxford Dictionary defines ‘domination’ as "*the exercise of power or influence over someone or something, or the state of being so controlled.*"[[51]](#footnote-52)

Before this Court, the State argues that alien or foreign forces allows for this scenario to interface with various treaties which refer to non-nationals as either ‘alien’ or ‘foreign’. This is in support of limitation of the second scenario to a situation where a non-Nigerian military force had taken over the Niger Delta.

"Alien" is defined as non-national,[[52]](#footnote-53) but "foreign" has a broader common definition: "*Of, from, in, or characteristic of a country or language other than one’s own.*"[[53]](#footnote-54)

SALC submits that the inclusion of "domination" and "foreign" suggests that the second scenario does not require the involvement of another State’s armed forces, but is more expansive, using the language of African Charter Article 20(3): "All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural." (Emphasis added.)

Domination is also present in Article 20(2), which codifies a right of resistance for oppressed peoples "*to free themselves from the bonds of domination by resorting to any means recognized by the international community.*"

Drawing on the constructions the African Commission has established, Murphy proposed an article 20(2) test with the following elements in the African Human Rights Law Journal.[[54]](#footnote-55) The right to resist exists when there is:

physical, cultural or economic oppression,[[55]](#footnote-56)

of a people,[[56]](#footnote-57)

dominated, or denied their right to political or economic self-determination and democratic means of change, particularly by way of exclusion from democratic political participation and representation rights under article 13(1),[[57]](#footnote-58)

without prospect of any other ‘available, effective and sufficient’ remedy,[[58]](#footnote-59)

utilising means of resistance authorised under international law, such as the African Charter’s broader human rights framework and the article 27(2) requirement of due regard for the rights of others.

SALC submits the above test and discussion of Article 20 of the African Charteris a relevant and material consideration for the Court in its determination of the breadth of the second scenario provided by section 1(4) of the Terrorism Act. There are strong connections between the language adopted by the Legislature and the right to resist as evaluated, implying intent to create an exception for peoples beyond the typical scenario of a colony or occupied territory or State.

As in Murphy’s Article 20(2) test, even if the potential terrorist action meets the factual basis of either scenario contemplated in section 1(4), the act must be undertaken in accordance with the principles of international law.

Section 1(4) qualifies the exception of "any act committed during a struggle waged by peoples" with the requirement that this act must be done "*in accordance with the principles of international law, especially international humanitarian law, including the purposes and principles of the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the said Charter.*" This suggests that even if the act was done in furtherance of a legitimate struggle waged by peoples, it would only become an exception to prosecution under the Terrorism Act if it was done in accordance with international law principles.

In paragraph 78 of the Mr Okah’s supplementary written submissions, he argues that the conflict in which he participated was an "*armed conflict, ‘not of an international character.*'" As discussed, courts have convicted people of committing terrorism during times of armed conflict; the existence of an armed conflict does not entirely preclude the possibility of terrorist action if the requisite elements of the crime have been proven.

There are several international law principles that could be applicable to the facts presented. International law prohibits, among other things, the targeting of civilians particularly with the aim to spread terror, use of indiscriminate weapons, and non-proportional attacks.

Article 13(2) of Additional Protocol II which is applicable in non-international armed conflicts explicitly outlaws attacks against the civilian and those whose primary purpose is to terrorise civilians: "The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited." Both South Africa[[59]](#footnote-60) and Nigeria[[60]](#footnote-61) are state parties to Additional Protocol II.

In addition, the protection of civilians and the prohibition of directing attacks at civilians is a norm under customary international law. According to the ICRC, the customary rule is "*[t]he parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.*"[[61]](#footnote-62) In addition, "*State practice established this rule as a norm of customary international law applicable in both international and non-international armed conflicts.*"[[62]](#footnote-63)

Mr Okah argues that the attacks were carried out in compliance with international standards in that "the armed struggle … never targeted ‘protected persons’ as contemplated in Article 8 (2) (c) of the Rome Statute. Such protected persons are described in Article 8 (2) (c) of the Statute as persons taking no active part in the hostilities [civilians], including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause."[[63]](#footnote-64)

Even if Mr Okah is correct in his assertion that he was targeting appropriate targets, the means used must comport with the international law requirements that govern how one carries out an attack. The ICRC has also found that state practice and other international instruments establish customary rules prohibiting indiscriminate attacks and requiring the use of proportionality in non-international armed conflicts.[[64]](#footnote-65) The rule against indiscriminate attacks prohibit attacks "*which are not directed at a specific military objective*" or "*which employ a method or means of combat which cannot be directed at a specific military objective.*"[[65]](#footnote-66) Additionally, although civilian casualties are not explicitly prohibited in an armed conflict, attacks expected to have civilian casualties must not be excessive in relation to their military advantage.[[66]](#footnote-67)

The central contention of Mr Okah is that he was at war with the government, and that in the two bombings of which he was a participant, they targeted the government itself: Government House Annex (Warri bombing) with several high-ranking state officials[[67]](#footnote-68) and Eagle Square (Abuja Bombing) where the President and other state officials were located.[[68]](#footnote-69)

What this Court should bear in mind, however, is that despite these justifications, in both cases, the car bombs were placed on public streets due to the presence of state security forces in the vicinity of the state officials.[[69]](#footnote-70) Furthermore, the findings of the trial court seemingly serve to contradict Mr. Okah’s claim that the means used in executing the attacks could, in fact, discriminate between “appropriate” targets and civilians.

The Supreme Court noted that the purpose of the bombings was to cause mass casualties as opposed to selectively hitting the identified targets:

"In respect to both the Warri and Abuja bombings, two sets of explosives had been utilised, and timing devices had been used to delay the detonation of the second explosion until sometime after the first explosion. The intention was that a crowd would be attracted to the site of the first explosion, which would then be caught in the blast zone of the second explosion, resulting in maximum injury and death."[[70]](#footnote-71) (Emphasis added)

In conclusion, in order for an act to qualify as an exception to charges under the Terrorism Act section 1(4), it must be done "*in accordance with the principles of international law, especially international humanitarian law*". Therefore, even if Mr. Okah’s assertions are correct that he is a freedom fighter within the meaning of 1(4) who was acting in a non-international armed conflict, the international law applicable to such a situation must still be followed. The Court must analyse from the facts whether Mr. Okah’s conduct not only falls within the conduct of a legitimate freedom fighter, but also whether it comports with international legal standards, some of which have been laid out above, and which nonetheless serve as a disciplining mechanism on terrorist acts that may be subject to any of the section 1(4) exceptions.

**INTERPRETATION OF THE DEFINITION OF "*SPECIFIED OFFENCE*"**

The State has argued that the Supreme Court erred in its interpretation of the definition of "specified offence". The State argues that the reference to sections 4, 14 and 23 in the definition of specified offence in the Terrorism Act does not qualify its meaning but rather that the concept bears its defined meaning (*inter alia*) in sections 4, 14 and 23 of the Act.

SALC submits that the use of the term "specified offence" throughout the Terrorism Act shows that it bears a meaning broader than merely the financing of offences as held by the Supreme Court of Appeal (SCA). A general rule of statutory interpretation is that a term used in a statute must have the same meaning across the entirety of an act.[[71]](#footnote-72) As referenced by the Applicant in para 44 of their founding affidavit, section 4 is titled "Offences associated or connected with financing of specified offences", meaning that the financing itself is not the "specified offence", the terror-related crime is the specified offence which is then financed.

Section 4 criminalizes acts such as acquiring, collecting, using, owning, providing or making available, etc. property, "*intending that the property, financial or other service or economic support, as the case may be, be used, or while such person knows or ought reasonably to have known or suspected that the property, service or support concerned will be used, directly or indirectly, in whole or in part- (i) to commit or facilitate the commission of a specified offence; (ii) for the benefit of, or on behalf of, or at the direction of, or under the control of an entity which commits or attempts to commit or facilitates the commission of a specified offence*" Again the only logical interpretation is that "specified offence" is the terror-related act which is being financed, not the financing itself. The further subsections of section 4, criminalise different aspects of contributing to those who are committing "specified offences".

Specified offence is also referenced in section 11, which prohibits harbouring or concealing "*persons committing specified offences*". Under the SCA’s definition of "specified offence", it is only a crime to harbour or conceal those financing terrorism, but not those who are committing the acts of terrorism or other related acts. In the case, **S v Bogaards***[[72]](#footnote-73)*, the Supreme Court of Appeal, addressed a defendant charged under sections 11 and 12 of the Act. In defining "specified offence" the Court just relied on what was listed in paragraph (a) under the definition, stating:

"In paragraph (a) of the definition of ‘specified offence’ the words are said to mean ‘the offence of terrorism referred to in section 2, an offence associated or connected with terrorist activities referred to in section 3, a Convention offence, or an offence referred to in section 13 or 14’."

The Supreme Court did not find that the references to sections 4, 14, and 23 put any limitation on the definition listed in paragraph (a) or (b). When discussing both the Terrorism Act and the Internal Security Act (the Terrorism Act’s predecessor), they acknowledged that "*the Legislature’s express intention in both Statutes [was] to criminalise terrorism and terrorist activities and the harbouring, concealing and assisting of such offenders*",[[73]](#footnote-74) not just limited to financing of terrorism. Sections 11 and 12 were not limited to just financial crimes, as the judge stated:

"I am mindful that the Terrorism Act did not create new offences as such in ss 11 and 12 in view of the provisions of s 54(4) of the Internal Security Act (quoted above) which also criminalised harbouring and concealing a person known or suspected to have committed acts of terrorism and failing to report such person’s presence."[[74]](#footnote-75)

Given the way that the court has previously interpreted "specified offences" in the context of this piece of legislation, the SCA’s interpretation confining the definition of "specified offenses" to financing crimes does not amount to a logical reading of the definition.

The "specified offence" definition states that "with reference to section 4, 14 (in so far as it relates to section 4), and 23" could easily be read just to mean that the term "specified offences" is relevant to those provisions and in those provisions mean the following definitions under subsections (a) and (b). It does not have to be interpreted to "limit" subsection (a) and (b) to only include financial aspects of the offences listed in subsections (a) and (b).

Furthermore, the SCA’s interpretation would mean that South African Courts would only have extraterritorial jurisdiction over the financing of the offence of terrorism and related offences, but not the actual commission of the offence of terrorism. It makes no sense for the legislature to limit the jurisdiction over such crimes in such an arbitrary manner. The purpose of the Terrorism Act as articulated in the long title and preamble is to provide for measures "*to prevent and combat terrorist and related activities*" not just the financial aspects of these crimes. Giving courts extraterritorial jurisdiction only in the case of financing a terrorism offence does not serve the greater purpose of the Act.

**CONCLUSION**

SALC respectfully submits that from the reading of both the State and Mr. Okah’s arguments, the crime of terrorism was committed by Mr. Okah. However, should this Honourable Court decide to accept Mr. Okah’s argument that he should be able to assert his section 1(4) defence at this stage of litigation, SALC’s recommendation is that this Honourable Court should send the matter back to the adjudicating Court for further findings of fact in accordance with the law set forth in these submissions.

**Advocate Kameel Premhid**

24 November 2017

*SALC’S* CHRONOLOGICAL LIST OF AUTHORITIES

1. Protection of Constitutional Democracy Against Terrorism and Related Activities Act 33 of 2004

African Charter on Human and Peoples’ Rights

Antionio Cassesse “The Multifaceted Criminal Notion of Terrorism in International Law” (2006) (4) (5*) J. Int’l Crim. J.* 933

United Nations Security Council Resolution 1373/2001

The Convention for the Prevention and Combating of Terrorism adopted by the Organisation of African Unity

*Interlocutory Decision on the applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* case, STL-11-01/I (16 February 2011)

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*Morocco v Spain* (Advisory Opinion) 1975 ICJ 12 (16 October 1975)

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Charter of the United Nations

Universal Declaration of Human Rights United Nations General Assembly Resolution 217A U.N. Doc A/810 (1948)

International Covenant on Economic, Social and Cultural Rights UN GA Resolution 220 UN Doc A/ 6316, 993 (1996)

International Covenant on Civil and Political Rights UN GA Resolution 220 UN Doc A/6316 at 52 (1966)

United Nations General Assembly's Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations UN GA Resolution 2625 (XXV) UN Doc A/RES/25/2625 (24 October 1970) available at http://www.un-documents.net/a25r2625.htm (last accessed: 22 November 2017)

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H Moodrick-Even Khen “Between Kurdistan and Catalonia: On the Right to Self-Determination of Peoples” (3 November 2017) available at https://ilg2.org/2017/11/03/between-kurdistan-and-catalonia-on-the-right-to-self-determination-of-peoples/ (last accessed: 22 November 2017)

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Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol III to the Convention on Certain Weapons)

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2. See Antonio Cassese "The Multifaceted Criminal Notion of Terrorism in International Law" (2006) (4) (5*)* J. Int’l Crim. J. 933-958, see the Abstract. [↑](#footnote-ref-3)
3. **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA). [↑](#footnote-ref-4)
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5. Ibid. [↑](#footnote-ref-6)
6. *Interlocutory Decision on the applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* case, STL-11-01/I (16 February 2011). [↑](#footnote-ref-7)
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12. Ibid. paras 96 and 98. [↑](#footnote-ref-13)
13. *Bouyahia Maher Ben Abdelaziz et al,* Cass. Crim. Sez. 1, 17 January 2007, n. 1072, para 2.1 (unofficial translation). [↑](#footnote-ref-14)
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15. *Interlocutory Decision on the applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* case, STL-11-01/I (16 February 2011). [↑](#footnote-ref-16)
16. Antonio Cassese "The Multifaceted Criminal Notion of Terrorism in International Law" (2006) (4) (5) *J. Int’l Crim. J. 933-958*, see the Abstract. [↑](#footnote-ref-17)
17. "The applicability of IHL to terrorism and counterterrorism" *International Committee of the Red* Cross (1 October 2015) available <https://www.icrc.org/en/document/applicability-ihl-terrorism-and-counterterrorism>, (last accessed: 22 November 2017). [↑](#footnote-ref-18)
18. "The applicability of IHL to terrorism and counterterrorism" *International Committee of the Red* Cross (1 October 2015) available <https://www.icrc.org/en/document/applicability-ihl-terrorism-and-counterterrorism>, (last accessed: 22 November 2017). [↑](#footnote-ref-19)
19. Preamble of the Constitution of the Republic of South Africa, 1996. [↑](#footnote-ref-20)
20. See Section 7(2) of the Constitution. [↑](#footnote-ref-21)
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23. Article 20 of the African Charter on Human and Peoples Rights. South Africa ratified this instrument on 9 July 1996. "Ratification Table: African Charter on Human and Peoples’ Rights" *African Commission on Human and Peoples’ Rights* available at <http://www.achpr.org/instruments/achpr/ratification/>, (last accessed: 22 November 2017). [↑](#footnote-ref-24)
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29. *R v Mohammed Gul*, Case No. 2011/01697/C5, [2012] EWCA Crim 280; See also Antonio Coco, "The Mark of Cain: The Crime of Terrorism in Times of Armed Conflict as Interpreted by the Court of Appeal of England and Wales in R v Mohammed Gul" (2013) (11) (2) J. Int’l Crim. Just. 425-440 [↑](#footnote-ref-30)
30. *R v Gul* [2013] UKSC 64 at para 45. [↑](#footnote-ref-31)
31. D Galzier "Wars of National Liberation" *Max Planck Encyclopaedia of Public International Law* (May 2009) available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e442 (last accessed: 22 November 2017). [↑](#footnote-ref-32)
32. *Morocco v Spain* (Advisory Opinion) 1975 ICJ 12 (16 October 1975) at para 59. [↑](#footnote-ref-33)
33. J Kämmerer "Colonialims" *Max Planck Encyclopaedia of Public International Law* (May 2008) available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e690 (last accessed: 22 November 2017). [↑](#footnote-ref-34)
34. Art. 1, para 2 and art. 55 of the Charter of the United Nations. [↑](#footnote-ref-35)
35. Universal Declaration of Human Rights United Nations General Assembly Resolution 217A U.N. Doc A/810 Art. 21 Para. 3 (1948). [↑](#footnote-ref-36)
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39. "Self-determination (international law)" *Legal Information Institute* available at https://www.law.cornell.edu/wex/self\_determination\_international\_law (last accessed: 22 November 2017); see also H Moodrick-Even Khen "Between Kurdistan and Catalonia: On the Right to Self-Determination of Peoples" (3 November 2017) available at https://ilg2.org/2017/11/03/between-kurdistan-and-catalonia-on-the-right-to-self-determination-of-peoples/ (last accessed: 22 November 2017). [↑](#footnote-ref-40)
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43. Roya M. Hanna "Right to Self-Determination in In Re Secession of Quebec" 23 *Md. J. Int'l L.* 213, 231 (1999) (citing Derege Demissie "Note, Self-Determination Including Secession vs. The Territorial Integrity of Nation-States: A Prima Facie Case for Secession" 20 *Suffolk Transnat’l L. Rev.* 165, 172 (1996)); see also *Kevin Mgwanga Gunme & Others v Cameroon* (Decision) ACHPR No. 266/03 (27 May 2009) paras 169-180. [↑](#footnote-ref-44)
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57. Shannonbrooke Murphy "Unique in international human rights law: Article 20(2) and the right to resist in the African Charter on Human and Peoples' Rights" 2 *AHRLJ* 465, 490-491 (2001); *Katangese Peoples' Congress v Zaire*(Decision) ACHPR No. 75/92 (22 March 1995) at para 6. [↑](#footnote-ref-58)
58. *Jawara v The Gambia*(Decision) ACHPR No. 147/95 and 149/96 (11 May 2000) at paras 34-37, 40, and 74. [↑](#footnote-ref-59)
59. South Africa ratified/acceded to the Protocol on November 21, 1995. "Treaties, States Parties and Commentaries Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977" *International Committee of the Red Cross* available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475#panelRatification>, (last accessed: 22 November 2017). Additional Protocol II is domesticated into South African law with the Implementation of the Geneva Conventions act, No. 8 of 2012. [↑](#footnote-ref-60)
60. Nigeria ratified/acceded to the Protocol on October 10, 1988. "Treaties, States Parties and Commentaries Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977" *International Committee of the Red Cross* available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475#panelRatification>, (last accessed: 22 November 2017) [↑](#footnote-ref-61)
61. "Rule 1. The Principle of Distinction between Civilians and Combatants" *International Committee for the Red Cross* available at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule1>, (last accessed: 22 November 2017). [↑](#footnote-ref-62)
62. "Rule 1. The Principle of Distinction between Civilians and Combatants" *International Committee for the Red Cross* available at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule1>, (last accessed: 22 November 2017). In determining that there is customary international law that prohibits targeting civilians, the ICRC relied on authorities such as: Additional Protocol II of the Geneva Conventions; Amended Protocol II to the Convention on Certain Weapons; Protocol III to the Convention on Certain Weapons; the Ottawa Convention; the Rome Statute of the International Criminal Court; various UN resolutions and international jurisprudence (*Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) ICJ 1996 (8 July 1996) at paras 61, 434; *Prosecutor v Dusko Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995); *Prosecutor v Martić* (Review of the Indictment) IT-95-11-1 (March 8, 1996) at paras 437 and 552; *Prosecutor v Kupreškić* (Judgment) IT-95-16-T (14 January 2000) at paras 441 and 883; *Juan Carlos Abella v Agentina* Inter-American Commission on Human Rights Case No. 11.137 (18 November 1997) at paras 64, 443 and 810). [↑](#footnote-ref-63)
63. Okah’s Supplementary Written Submissions at para 79. [↑](#footnote-ref-64)
64. "Rule 12. Definition of Indiscriminate Attacks" *International Committee of the Red Cross* available at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule12>, (last accessed: 22 November 2017) (to establish such a customary rule in international law, the ICRC relied on: Article 13(2) of Additional Protocol II; Article 3(8)(a) of Amended Protocol II to the Convention on Certain Conventional Weapons; various military manuals; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) ICJ 1996 (8 July 1996) at para 243; *Prosecutor v Martić* (Review of the Indictment) IT-95-11-1 (March 8, 1996) at para 246). "Rule 14. Proportionality in Armed Attack" *International Committee of the Red Cross* available at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14>, (last accessed: 22 November 2017) (to establish such a customary rule in international law, the ICRC relied on: "the principle of humanity" in the preamble of Additional Protocol II; various military manuals and state legislation; *Military Junta Case* (Judgment of Court of Appeals) Case No. 13/84 (9 December 1985) (Argentina) at 81; *Prosecutor v Martić* (Review of the Indictment) IT-95-11-1 (March 8, 1996) at para 139; and *Prosecutor v Kupreškić* (Judgment) IT-95-16-T (14 January 2000) at para 140; Inter-American Commission on Human Rights Third Report on Human Rights in Colombia OEA/Ser.L/V/II.102, (26 February 1999) at para 138). [↑](#footnote-ref-65)
65. "Rule 12. Definition of Indiscriminate Attacks" *International Committee of the Red Cross* available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\_rul\_rule12 (last accessed: 22 November 2017). [↑](#footnote-ref-66)
66. "Rule 14. Proportionality in Attack" *International Committee of the Red Cross* available at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14>, last accessed on: 22 November 2017. [↑](#footnote-ref-67)
67. *S v. Okah* 2015 (2) SACR 561 (GJ) at paras 52-53. [↑](#footnote-ref-68)
68. *S v. Okah* 2015 (2) SACR 561 (GJ) at, para 59. [↑](#footnote-ref-69)
69. The High Court stated in regard to the Abuja bombing that "Due to the visible presence of State security officials, the vehicles were parked on the main public road in proximity to Eagle Square where public vehicles were parked and persons using public transport were being dropped off to attend the celebrations." *S v. Okah* 2015 (2) SACR 561 (GJ) at para 59. In regard to the Warri bombing, the High Court found that "due to the visible presence of State security officials they parked the vehicles in the public road in front of Government House Annex." *S v. Okah* 2015 (2) SACR 561 (GJ) at para 52. [↑](#footnote-ref-70)
70. *Okah v.* S (19/2014) [2016] SASCA 155 (3 October 2016) at para 14. [↑](#footnote-ref-71)
71. Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 23. [↑](#footnote-ref-72)
72. (864/2010) [2011] ZASCA 196. [↑](#footnote-ref-73)
73. *S v Bogaards* (864/2010) [2011] ZASCA 196 at para 4. [↑](#footnote-ref-74)
74. *S v Bogaards* (864/2010) [2011] ZASCA 196 at para 2. [↑](#footnote-ref-75)