

THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case 193/17

In the matter between:

HENRY EMOMOTIMI OKAH

Applicant

and

THE STATE

Respondent

and

SOUTH AFRICAN LITIGATION CENTRE

Amicus curiae

INSTITUTE FOR SECURITY STUDIES

Amicus curiae

RESPONDENT'S REPLY TO *AMICUS* SUBMISSIONS

CONTENTS

BASIS FOR REPLY.....	3
PEOPLE AND NATIONAL LIBERATION MOVEMENTS	3
WARS OF NATIONAL LIBERATION IN THE CONTEXT OF ARMED CONFLICTS	5
AUTHORITIES	7

BASIS FOR REPLY

1. On 15 November 2017 the Chief Justice requested inputs from experts in international law. In response thereto the South African Litigation Centre (SALC) on 24 November 2017 submitted extremely comprehensive submissions requiring the respondent to conduct further research over the weekend. This led to the discovery of two authorities which it is respectfully submitted are highly relevant to the key issue of the correct interpretation of section 1(4) of the terrorism law and should be considered by the Court.

PEOPLE AND NATIONAL LIBERATION MOVEMENTS

2. The respondent will refer to the publication "*The Status in International Law of National Liberation Movements and their use of Armed Force*" by Edre U. Olalia.¹
 - 2.1. "*While belligerents can only speak for themselves, a liberation movement represents not only itself or the territory it controls, but the whole people whose right to self-determination is being denied*".²
 - 2.2. "*Neither is there an objective or infallible criterion which makes it possible to recognize a group as a people: apart from a defined territory, other criteria could be taken into account such as that of a common language, common culture or ethnicities. The territory may not be a single unit geographically or politically, and a people can comprise various linguistic, cultural or ethnic*

¹ Published online by International Association of People's Lawyers

² Edre U. Olalia "*The Status in International Law of National Liberation Movements and their use of Armed Force*" at page 3

groups. The essential factor is a common sentiment of forming a people, and a political will to live together as such".³

- 2.3. "No matter how rationally one may justify revolutionary means in terms of the demonstrable chance of obtaining freedom and happiness for future generations, and thereby justify violating existing rights and liberties and life itself, there are forms of violence and suppression which no revolutionary situation can justify because they negate the very end for which the revolution is a means. Such are arbitrary violence, cruelty, and indiscriminate terror. "Under international law, including the law of human rights, there are certain forms of violence that are impermissible per se. Included here are strategies and tactics of arbitrary violence, cruelty, and indiscriminate terror. International law also prohibits the use of violence against certain targets, and permissible uses of force are conditioned generally by the principles of necessity and proportionality."⁴
- 2.4. "... **there must be proof that the liberation movement be truly representative of the people in whose name it is prosecuting the war of national liberation**".⁵
- 2.5. "In summary, international standards of a universal character usually do not allow or condone terrorism, notwithstanding the motivation or ideological matrix of its origin. **Rebellion against tyranny and oppression is allowed as a last resort, whether it is a struggle for national liberation or a rebellion against an authoritarian nondemocratic government that allows no form of democratic change.** Neither freedom fighters nor rebels, however, are permitted to resort to terrorism ... **Terrorism, therefore, is**

³ Olalia at page 3

⁴ Olalia at page 16

⁵ Olalia at page 18 (Own emphasis)

committed by use of impermissible methods, reliance on impermissible motivations, or attacks on impermissible targets.”⁶

- 2.6. “The trademark of terrorism is fear and this fear is stimulated in the population through horrifying forms of violence”.⁷

WARS OF NATIONAL LIBERATION IN THE CONTEXT OF ARMED CONFLICTS

3. The respondent will also refer to the online publication, *“International and Non-international Armed Conflicts”* by Sten Verhoeven.⁸

- 3.1. *“On 20 December 1965, the General Assembly adopted resolution 2105 (XX) which introduced the concept of wars of national liberation and declared the battle of peoples against colonial powers to exercise their right of self-determination and to obtain independence legitimate. This was the starting point of a number of resolutions requesting the application of the laws of international armed conflict to situations of wars of national liberation of which the most important was resolution 3103 (XXVIII), in which it was generally stated that wars of national liberation are armed conflicts in the sense of the Geneva Conventions and that the provisions of the Geneva Conventions and other relevant rules are applicable to such armed conflicts. Art. 1 § 4 indicates three groups of people whose struggle can be considered as a war of national liberation: peoples fighting against a colonial power, alien occupation and racist regimes. To determine these three categories, one has to look at the practice of the United Nations since art. 1 § 4 explicitly refers to*

⁶ Olalia at page 29 (Own emphasis)

⁷ Olalia at page 31 (Own emphasis)

⁸ Published online by the Faculty of Law of the Katholieke Universiteit Leuven, Working Paper No 107 – March 2007

it. The first group, peoples fighting colonial domination, were comprised of peoples inhabiting non-autonomous territories and territories under mandate ... the concept of alien occupation covers the situation of a territory which was not yet fully developed into a State before it came occupied by another State.”

9



RC Macadam

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Priority Crimes Litigation Unit
National Prosecuting Authority
Pretoria
27 November 2017

AUTHORITIES

Literature

Olalia, Edre U. "*The Status in International Law of National Liberation Movements and their use of Armed Force*", International Association of People's Lawyers

Verhoeven, Sten "*International and Non-international Armed Conflicts*", Faculty of Law of the Katholieke Universiteit Leuven, Working Paper No 107 – March 2007