**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**
**CONSTITUTION HILL**

**Case CCT: 315/16 and 193/17**

In the matter between:

**INSTITUTE FOR SECURITY STUDIES** Applicant

To intervene as an amicus curiae in the matter between:

**CCT 315/16**

**THE STATE** Applicant

and

**HENRY EMOMOTIMI OKAH** Respondent

In the matter between:

**CCT 193/17**

**HENRY EMOMOTIMI OKAH** Applicant

and

**THE STATE** Respondent

---

**NOTICE OF MOTION**
**APPLICATION TO INTERVENE AS AMICUS CURIAE IN RESPONSE TO DIRECTIONS DATED 15 NOVEMBER 2017**

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**TAKE NOTICE** that the applicant, the INSTITUTE FOR SECURITY STUDIES ("the ISS"), hereby applies to this Court for an order in the following terms:

1. The matter is treated as one of urgency.

2. The ISS is admitted as an *amicus curiae* in the above proceedings.

3. The ISS is granted the right to make written and, if so directed, oral submissions.

4. If the application is opposed, any opposing party is ordered to pay the costs of the application.

5. Further and/or alternative relief.

**TAKE NOTICE FURTHER** that the attached affidavit of **ALLAN RUTAMBO NGARI** will be used in support of the application.

**TAKE NOTICE FURTHER** that the Applicant has appointed the offices of its attorneys of record set out below as the address at which it will accept notice and service of all documents in these proceedings.

DATED at JOHANNESBURG on 23 NOVEMBER 2017.

**NORTONS INC**
Attorneys for the amicus curiae
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Anton Roets

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**TO: THE REGISTRAR**
**CONSTITUTIONAL COURT**
**CONSTITUTION HILL**

**AND TO: PI URIESI ATTORNEYS**
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**AND TO: SOUTHERN AFRICA LITIGATION CENTRE**
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**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**
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**AFFIDAVIT IN SUPPORT OF APPLICATION FOR LEAVE TO INTERVENE AS AMICUS CURIAE**

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I, the undersigned,

ALLAN RUTAMBO NGARI

do hereby make oath and say as follows:

## INTRODUCTION

1. I am an adult male employed by the Institute for Security Studies ("the ISS"), situated at Block c, Brooklyn Court, 361 Veale Street, New Muckleneuk, Pretoria. I am a senior researcher in the Transnational Threats and International Crime Programme at the ISS. I am duly authorised to depose to this affidavit and to initiate these proceedings. I attach a resolution to this effect marked Annexure "A".

2. The facts contained herein fall within my personal knowledge and are true and correct, unless where otherwise states or where the contrary appears from the context.

3. Where I rely on legal advice I do so on the advice of the ISS's lawyers, which I accept to be correct.

## THIS APPLICATION

4. The ISS seeks leave to intervene in this application as an *amicus curiae* to assist the Court in relation to the issues in the matter and pursuant to the directions issued by the Chief Justice in this matter on 16 November 2017 (dated 15 November 2017, attached as Annexure B). Accordingly, the purpose of this application is to set out

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the ISS's interest in seeking intervention, the basis for its intervention, and its submissions.

5. The directions were directed to various organisations and individuals, including "Professor Max du Plessis, Senior Research Associate at the Institute for Security Studies (ISS)".

6. Given the short time between the directions issued and the hearing, scheduled for 28 November 2017, the ISS responded by letter dated 17 November 2017 (attached as Annexure C), in which it recorded that the ISS, and Max du Plessis, would be honoured to assist the Court in relation to the issues in the matter. The letter recorded that the ISS proposes to file an amicus application to be admitted and to make written submissions that are different to those already advanced by the parties. Subject to any different directions issued by the Chief Justice, and given the shortness of time between the date of the directions and the date of the hearing, the ISS indicated that it would endeavour to file the amicus application, together with its written submissions, by 23 November 2017.

7. No further directions were issued by the Chief Justice at the time of deposing to this affidavit.

8. If it is granted leave to intervene, the ISS offers the written submissions attached to this application as annexure D, which have

been prepared by Max du Plessis, with the assistance of Andreas Coutsoudis and the ISS. Before discussing those submissions, I set out briefly the ISS's interest in the matter.

**THE ISS's INTEREST**

9. The ISS is a locally based non-profit organisation that builds knowledge and skills to enhance human security to achieve sustainable peace and prosperity. Our work covers transnational crimes, migration, peacekeeping, crime prevention and criminal justice and the analysis of conflict and governance.

10. We undertake qualitative and quantitative research and analysis to provide evidence-based policy advice, technical support and capacity building to a variety of stakeholders including regional bodies, governments and civil society.

11. Our aim is to improve national, regional and continental actors' capacity to respond effectively and appropriately to acts of violent extremism, including terrorism.

12. Using our networks and influence, we seek to promote better policy and practice, so that senior officials can make informed decisions about how to deal with Africa's human security challenges.

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13. The ISS, as a key institution focusing on strengthening, through a human rights approach, African national criminal justice systems to respond effectively to terrorism within the context of the established rule of law, wishes to intervene as an amicus. The ISS's submissions proceed from the premise that the exception in section 1(4) of the Protection of the Constitutional Democracy Against Threats and Related Acts, No. 33 of 2004 ("**the Act**") qualifies acts that are not considered to be terrorist activity.

14. The ISS will further make submissions to the effect that for any party to rely on the section 1(4) exemption from terrorist activity under the Act, the conjunctive requirements of an armed struggle for the listed purposes, in accordance with the principles of international law, including of international humanitarian law, must be met.

15. The ISS also makes submissions on the effect of the Security Council Resolutions regarding terrorism, and their impact on the domestic court's jurisdiction and the interpretation of section 1(4).

16. Finally, the ISS will contend that it is not open to Mr Okah to resist application of the Act by reliance on the rights, specifically the rights to economic, social and cultural development and a general satisfactory environment favourable to their development, espoused under Articles 22(1) and 24 the African Charter on Human and Peoples' Rights.

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**THE ISS's WRITTEN SUBMISSIONS**

17. The written submissions that the ISS's intends to place before this Court if the relief sought in the notice of motion is granted, are attached as Annexure D.

18. The ISS has annexed the written submissions to this affidavit given the fact that the matter is to be heard on Tuesday, 28 November 2017. Thus, if the Court does grant the ISS leave to place these written submissions before it, then it will need to be in possession thereof prior to the hearing.

19. The written submissions have been furnished so that they might be of assistance to the Court, and should the Court not grant the ISS's application for admission an *amicus*, then it need have no regard to these submissions.

**CONCLUSION**

20. I accordingly submit that it would be in the interests of justice for the ISS to be admitted as an *amicus curiae*, and for the submissions annexed hereto to serve before the Court.

ALLAN RUTAMBO NGARI

I HEREBY CERTIFY that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at Sandton on this 23rd day of NOVEMBER 2017, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

Swanepoel

COMMISSIONER OF OATHS

**Erina Swanepoel**
**Commissioner of Oaths ex Officio**
**Admitted Attorney**
A de Vos & Co. Inc.
140 Daisy Street
Sandton JHB

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**RESOLUTION OF THE INSTITUTE FOR SECURITY STUDIES ("THE ISS")**

On 17 November 2017, the Executive Management Committee of the Institute for Security Studies resolved by way of round robin:-

1.1 to intervene as amicus curiae in the application brought by THE STATE under case number 315/16 in the Constitutional Court and in the application brought by HENRY EMOMOTIMI OKAH under case number 193/17 in the Constitutional Court, in response to the directions issued by the Chief Justice dated 15 November 2017;

1.2 that Advocates Max du Plessis and Andreas Coutsoudis be mandated to act on ISS's behalf in the litigation, instructed by Nortons Inc;

1.3 that Allan Ngari, the Acting Head: Transnational Threats and International Crime Programme at the Institute for Security Studies, be authorized to sign all documents and court papers that are required to pursue such an application on ISS's behalf.

Tonette Grütter

Head of Operations and Human Resources



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**CONSTITUTIONAL COURT OF SOUTH AFRICA**

**Cases: CCT 315/16 & CCT 193/17**

In the matter between:

**CCT 315/16**

**THE STATE** Applicant

and

**HENRY EMOMOTIMI OKAH** Respondent

In the matter between:

**CCT 193/17**

**HENRY EMOMOTIMI OKAH** Applicant

and

**THE STATE** Respondent

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**DIRECTIONS DATED 15 NOVEMBER 2017**

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The Chief Justice has directed the Registrar to serve the State's and Mr Okah's written arguments relating to section 1(4) of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 on the following parties, and to make available to them the other written arguments and documentation in the case:

1. Southern Africa Litigation Centre;
2. International Committee of the Red Cross;

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3. Dr Hannah Woolaver of the University of Cape Town, and her associates;

4. Professor Max Du Plessis, senior research associate at the Institute for Security Studies; and

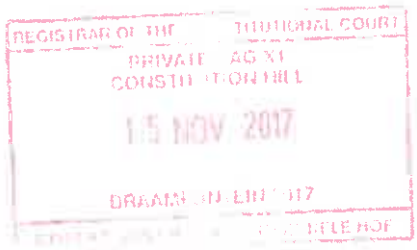
5. Other experts in the applicable principles of international law who may establish an interest in the issues to be argued.

This matter has been set down for hearing on Tuesday, 28 November 2017.

Further directions may be issued.

Makgakga

**MR KGWADI MAKGAKGA**
**REGISTRAR**
**CONSTITUTIONAL COURT**

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17 November 2017

**The Honourable Mogoeng Mogoeng**
**Chief Justice of the Republic of South Africa**
**Midrand, SOUTH AFRICA**

Dear Chief Justice:

**RE: CASE CCT 315/16 AND CCT 193/17**

We note the directions in the above-mentioned case dated 17 November, and their reference to Professor Max du Plessis, Senior Research Associate at the Institute for Security Studies (ISS).

The ISS, and Max du Plessis, would be honoured to assist the Court in relation to the issues in the matter. The ISS proposes to file an amicus application to be admitted and to make written submissions that are different to those already advanced by the parties. Subject to any different directions issued by the Chief Justice, and given the shortness of time between now and the date of the hearing, the ISS shall endeavour to file the amicus application, together with its written submissions, by 23 November.

The ISS looks forward to further directions in this regard, including in respect of the right to make oral submissions.

Yours faithfully,

**Tonette Grütter**
**Head of Operations and Human Resources**

CC. **Mr. Kgwadi Makgakga**
**Registrar**
**Constitutional Court**



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Annexure D

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

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and

**THE STATE** Respondent

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**ISS'S WRITTEN SUBMISSIONS**

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## INTRODUCTION

1. In these written submissions we deal primarily with the proper interpretation of section 1(4) of the Protection of Constitutional

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Democracy against Terrorist and Related Activities Act 33 of 2004 (**the Terrorism Act**) in light of relevant international law authorities.

2. We also submit that properly interpreted, in accordance with international law, the Terrorism Act confers jurisdiction on South African courts over all the charges against Mr Okah under the Terrorism Act.

3. These submissions are made within the context that section 233 of the Constitution requires this Court to prefer a reasonable interpretation of legislation that is consistent with international law over any other interpretation which is inconsistent with international law.

## THE MEANING OF THE EXCEPTION IN SECTION 1(4) OF THE TERRORISM ACT

4. The exception mentioned in section 1(4) the Terrorism Act applies to an armed struggle, which Mr Okah would need to demonstrate. This armed struggle ought to be in the exercise of *"their legitimate right to national liberation, self-determination and independence against colonialism, or occupation or aggression or domination by alien or foreign forces."*

5. As the State has argued in its written submissions, MEND was not seeking to exercise any of these listed rights in section 1(4) of the

Terrorism Act. Rather, MEND sought to expose the alleged exploitation and oppression of the people of the Niger Delta and devastation of the natural environment by public-private partnerships between the government of Nigeria and corporations involved in the production of oil in the Niger delta.

6. Furthermore, the State has shown that the facts in Nigeria mean that Mr Okah's activities would in any event never fall within the definition of "*an 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*" since the acts could never be a struggle against "*colonialism*" or "*alien or foreign forces*".

7. But even if Mr Okah submits that MEND was exercising any of the rights listed, section 1(4) further states that such an armed struggle must be "*in accordance with the principles of international law, especially international humanitarian law*".

8. In our submission, in light of relevant international law, the section falls to be understood in the following way.

9. The national liberation struggle exception found in some regional instruments (for instance the AU Convention on the Prevention and

Combating of Terrorism)[1] is limited by the fact that the actions must be in accordance with international law. The question, of course, is what "international law" is intended to mean. There is a debate amongst international law scholars about this.[2]

10. For example, some have interpreted the reference to international law (in the national liberation exceptions) to include international humanitarian law.[3] The importance of doing so is to ensure that any national liberation exceptions remain consistent with broader international law, including the protections accorded to civilians under international humanitarian law, the persons who usually bear the brunt of terrorist acts.

11. If the reference to international law includes "*international humanitarian law*", then that would result in an exclusion of terrorism in any event, since the exception would not protect terrorism even in an armed struggle.

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[1] AU (previously the OAU) Convention on the Prevention and Combating of Terrorism, 1999 (**AU Terrorism Convention**).

[2] See Robert Cryer, Hakan Friman, Darryl Robinson, Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, Third Edition (2014), CUP, at 339. And see for detail on the debate, CH Powell and GH Abraham, "Terrorism and International Humanitarian Law" (2006) 1 African Yearbook on International Humanitarian law 118-47. See also CH Powell, 'Defining Terrorism: How and Why' in Nicole LaViolette and Craig Forcese (eds) (2008) *The Human Rights of Anti-Terrorism*, Irwin Law Toronto

[3] See for instance Michael de Feo, 'The Political Offence Concept in Regional and International Conventions Relating to Terrorism' in Nesi, *International Cooperation in Counter-Terrorism*, 116 – 19.

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12. As a leading commentary on international criminal law explains, "*if [reading "international law" to include "international humanitarian law"] is a permissible interpretation of these agreements [including the AU Terrorism Convention], **those committing terrorist acts would be excluded from the exemption since terrorism is prohibited by international humanitarian law**. It ought to be acknowledged by all that **the targeting of civilians, however just the cause of the conflict, is unacceptable**.*"[4]

13. Importantly, South Africa's Terrorism Act settles this debate, since our Act refers **expressly to international humanitarian law** in the national liberation exception found in section 1(4).

14. The rules and principles of international humanitarian law would thus act as an internal limitation on the exception, and any invocation of the exception would have to be read consistently with the detailed rules of international humanitarian law providing for the protection of civilians.

15. Those rules rest on three main premises:

    a. civilians and civilian objects may never be the target of attack,[5]

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[4] See Robert Cryer, Hakan Friman, Darryl Robinson, Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, Third Edition, CUP, at 339.

[5] J-M Henckaerts & L Doswald-Beck, *Customary International Humanitarian Law*, vol 1 (CUP), 2005 at 3 – 8.

b. attacks whose primary purpose is to cause terror amongst civilians are illegal,[6] and

c. the principle of proportionality, while recognising that civilians might suffer collateral harm when a military target is attacked, prohibits excessive harm to civilians.[7]

16. In short, if the criminal activities in question are directed at civilians in a manner that breaches any of those rules of international humanitarian law, then the exception in section 1(d) can be of no assistance to an accused.

17. The same principled position is arrived at through considering the developments regarding the political offence exception under extradition law. As Professor Dugard has explained:

> *"Extradition law and practice exempt the political offender from extradition. This rule had its origins in the 19th century, when the governments of the new liberal democracies refused to return political dissidents to the despotic states of the ancient regime. ... Over the years the romantic image of the political dissident fighting for democracy has been tarnished by the political*

[6] Ibid at 8 – 11.

[7] Ibid at 3 – 8.

*terrorist fanatically determined to overthrow the regime of his home state by all means, including hostage-taking and hijacking. As a result the political offence exception has become highly controversial and courts have sought to define the political offence in such a way that it excludes the political terrorist but does not abandon the protection of the genuine political dissident*".[8]

18. As Professor Dugard further notes, a South African court has yet been called upon to examine this problem in any detail, and there is little doubt that guidance will be sought in English law.[9]

19. In that regard, of particular importance is the decision of the House of Lords in *T v Secretary of State for the Home Department* [1996] 2 All ER 865 (HL). Although it concerned an application for asylum, by a member of the Front Islamique du Salut (FIS) responsible for placing a bomb at Algiers Airport which killed ten people, the House of Lords comprehensively examined the political offence exception. It held that the applicant failed to qualify for asylum in terms of article 1F(b) of the Convention Relating to the Status of Refugees of 1951, which denies the granting of asylum to a person who has committed a "*serious non-political crime outside the country of refuge*".

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[8] Dugard, *International Law: A South African Perspective*, 4th edition (2012), 221, emphasis added.

[9] Ibid, 222.

20. As Professor Dugard stresses, Lord Lloyd, for the majority, "*defined a 'political crime' in language, that by necessary implication excluded terrorism as a political offence.*"[10] He stated:

> "*A crime is a political crime for the purposes of article 1F(b) of the 1951 convention if, and only if: (1) it is committed for a political purpose, that is to say, with the object of overthrowing or subverting or changing the government of a state or inducing it to change its policy; and (2) there is a sufficiently close and direct link between the crime and the alleged political purpose. In determining whether such a link exists, the court will bear in mind the means used to achieve the political end, and will have particular regard to whether the crime was aimed at a military or governmental target, on the one hand, or a civilian target on the other, and in either event whether it was likely to involve the indiscriminate killing or injuring of members of the public.*"[11]

21. Notably, in 2004, the South African Extradition Act of 1962 was amended by the Terrorism Act, to exclude the political offence defence to extradition when a person is charged with "*terrorist activity*".[12]

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[10] Dugard, *International Law* supra, at 223 to 224.

[11] *T v Secretary of State for the Home Department* [1996] 2 All ER 865 (HL) at 899, emphasis added. See, too, the dictum of Lord Mustill at 878–8.

[12] The Schedule to the Terrorism Act amends the Extradition Act by the insertion of section 22, which only excludes the political offence defence in the case of violations of sections 4

22. We thus respectfully submit that both the limitations imposed by international humanitarian law in respect of the protection of civilians, and the exclusion of terrorist activities from the definition of a political offence, conduce to the same result: where indiscriminate targeting and killing of civilians occurs as part and parcel of terrorist activities, no defence or exemption arises under the Terrorism Act.

23. That is for the simple but profound reason, as confirmed by the International Court of Justice in the *Israeli Wall Advisory Opinion*, that "***deliberate and indiscriminate attacks against civilians with the intent to kill are the core element of terrorism which has been unconditionally condemned by the international community regardless of the motives which have inspired them.***"[13]

**THE DUTY TO EXERCISE JURISDICTION OVER MR OKAH'S TERRORIST ACTS AS A DOMESTIC COURT – AND THE SECURITY COUNCIL'S DEMANDS UPON SOUTH AFRICA**

24. If the acts committed by Mr Okah are not covered by the section 1(4) exception, then there is thus a duty on South Africa, through its

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and 5 of the Terrorism Act, dealing with the financing of terrorism and offences relating to explosive or lethal devices. Section 1(5) of Terrorism, however, goes further and excludes the political offence defence in all crimes involving terrorist activity.

[13] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* 2004 ICJ Reports 136 paras 4-5, emphasis added.

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domestic courts, to assert jurisdiction in respect of the crimes alleged against him.

25. The source of that duty has been described by the National Prosecuting Authority (NPA) in their written submissions at paragraphs 30 to 40.4.

26. Of particular importance is the third source of international duty recognised in the fifth and ninth paragraphs of the preamble to the Terrorism Act, which are a series of binding resolutions of the UN Security Council adopted under chapter VII of the UN Charter. They include the following provisions:

a. Resolution 1373 (2001) which in paragraph 2(e) stresses that all states shall "*ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.*"

b. Resolution 1566 (2004) which in paragraph 2 reiterates that the Security Council, "*[c]alls upon States to co-operate fully in the fight against terrorism ... in accordance with their obligations*

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*under international law, in order to find, deny safe haven and bring to justice, on the basis of the principle to extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe havens."*

c. Resolution 2178 (2014), underlines and recalls its decision in Resolution 1373 (2001), "*[t]hat all Member States shall ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice, and decides that all states shall ensure that their domestic laws and regulations establish serious criminal offences sufficient to provide the ability to prosecute and to penalise in a manner duly reflecting the seriousness of the offence."*

d. The Security Council in Resolution 2253 (2015) in paragraph 12 most recently reaffirmed that Member States (including South Africa) must hold accountable those responsible for committing, organising, or supporting terrorist acts, "*in accordance with their obligations under international law, in order to find and bring to justice, extradite, or prosecute any person who supports, facilitates, participates or attempts to participate in the direct or indirect financing of activities conducted by ISIL, Al-Qaida and associated individuals, groups, undertakings and entities."*

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27. What the NPA has not drawn attention to, but which we highlight, are two further consequences arising from those obligations.

28. The first is that the main objective of the UN counter-terrorism instruments (being to ensure the apprehension, prosecution, or extradition of persons suspected of committing acts of terrorism), cannot be achieved without the assistance of domestic courts.

29. That is because there are no international tribunals with jurisdictional competence to try acts of terrorism as defined in the counter-terrorism instruments.[14]

30. Accordingly, the duty to bring perpetrators of terrorist acts to justice falls solely on domestic courts.[15]

31. No doubt for that reason, in the *Madan* case, the Supreme Court of India was of the view that terrorist violence "*affects society as a whole by terrorising and disturbing the harmony of society.*"[16] Similarly, the Argentinian Supreme Court in the *Clavel* case defined terrorism as a

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[14] The Rome Statute of the International Criminal Court, 1998, which created the ICC, would only be applicable to acts of terrorism when committed as a crime against humanity (that is on a widespread or systematic basis). It is not suggested that Mr Okah's crimes meet that standard.

[15] Arvinder Sambei, Anton du Plessis and Martin Polaine, *Counter-terrorism Law and Practice: An International Handbook*, OUP 2009, 2.44 at pp 35 - 36.

[16] *Madan Singh v state of Bihar* (2004) INSC 225 (2 Apr 2004).

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"'*crime jus gentium' the prosecution of which is not in the exclusive interest of the state injured by it, but ....benefits, ultimately, all civilised nations who are therefore obligated to co-operate in the global fight against terrorism...*".[17]

32. With that duty accentuated for domestic courts, it is submitted that a preferable interpretation of the Terrorism Act, which is consistent with South Africa's obligations under international law (as required by section 233 of the Constitution), is that the High Court had jurisdiction over all the charges against Mr Okah under the Terrorism Act in terms of:

    a. section 15(1)(a) because Mr Okah had been arrested in South Africa; and

    b. section 15(1)(b)(iii) because Mr Okah was ordinarily resident in South Africa.

33. The second, is that section 233 of the Constitution makes clear that any interpretation of section 1(4) exemption must be consistent with international law, which includes Security Council Resolutions. Those Resolutions make no allowance by way of exception for the actions of national liberation movements.

34. According to Articles 25 and 103 of the UN Charter, Member States are obliged to carry out Security Council decisions even if they conflict with

[17] *Enrique Lautaro Arancibia Clavel* 259 (Arg Supreme Court) (2004) at 51 to 52.

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any "other international agreement".[18] Accordingly, even if section 1(4) of the Act is to be understood as modelled on the AU Terrorism Convention,[19] the Security Council Resolutions must be understood as imposing overriding obligations on South Africa.

35. Furthermore, the AU Terrorism Convention's – and section 1(4)'s – internal limitation which requires that the struggle "*must be waged in accordance with the principles of international law*", means that any acts that are committed contrary to the Security Council's Resolutions on Terrorism are in any event not in accordance with those principles.

**THE RIGHT OF DEVELOPMENT**

36. Mr Okah seeks to rely on the right to development as progressively provided for under Articles 22(1) and 24 the African Charter on Human and Peoples Rights (**the African Charter**).

37. If his argument is understood correctly, he contends that his conduct was committed in furtherance of the Niger-Delta legitimate right to foster economic, social and cultural development with due regard to

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[18] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Provisional Measures*, Order of 14 April 1992, ICJ Reports 1992, 114 and para 42.

[19] Article 3(1) of which provides that "*the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts*".

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the right of freedom and identity and the equal enjoyment of the common heritage of mankind, as contemplated in Article 22 of the African Charter – as extended under section 1(4) of the Terrorism Act.[20]

38. As already submitted above, under the Terrorism Act, the motivations for one's terrorist acts (or political reasons) are no excuse for committing crimes that are contrary to the clear rules of international humanitarian law which prohibit the targeting and killing of civilians and acts of terror against civilians.

39. In any event, to the extent that Mr Okah attempts to rely on *Socio-Economic Rights and Accountability Project (SERAP) and the Federal Republic of Nigeria* before the Court of Justice of the Economic Community of West African States (ECOWAS),[21] that reliance is misplaced. In that case SERAP requested from the ECOWAS Court of Justice a declaration that Nigeria had violated the rights of the people in the Niger Delta to socio-economic development, the enjoyment of an environment suitable for their development, among other rights, as a result of the devastation of the natural environment by public-private partnerships between the government of Nigeria and corporations involved in the production of oil in the Niger Delta.

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[20] Para 14 of Mr Okah's practice note before this Court.

[21] GENERAL LIST N°ECW/CCJ/APP/08/09 JUDGMENT N° ECW/CCJ/JUD/18/12.

40. Although the exhaustion of local remedies before approaching the ECOWAS Court of Justice is not a requirement under that Court's founding treaty, SERAP had sought local remedies in Nigeria before approaching the ECOWAS Court of Justice.

41. In the same way, it was always open to MEND to seek legal or administrative remedies from the Government of Nigeria, for the violations of the socio-economic and development rights of the people of Niger Delta that it alleges formed the motivation for its terrorist conduct.

42. Having abhorred those remedies in favour of terrorism, it is not open to Mr Okah to invoke the African Charter's rights in his favour. This is particularly so since Mr Okah's actions, for which he has been tried and convicted, flagrantly violated numerous rights in the African Charter.

43. In construing the African Charter, it should be recalled that even in Article 20 of the African Charter, which deals with the right to self-determination, the African Charter is clear that all actions must comply with international law. In particular, Article 20(2) provides that "*[c]olonised or oppressed peoples shall have the right to free themselves from the bonds of domination by* ***resorting to any means recognised by the international community***." (emphasis added)

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44. For all the reasons set out above, terrorism is not a means recognised by the international community – it is anathema to the fundamental principles of international law, and is expressly, and rightly, condemned by the international community.

**CONCLUSION**

45. In conclusion, constitutionally interpreted, in accordance with international law:

a. section 1(4) of the Terrorism Act does not exempt Mr Okah from conviction for the terrorist activities he has been found to have committed; and

b. the Terrorism Act confers jurisdiction on South African courts over all the charges against Mr Okah under the Terrorism Act.

**Max du Plessis**

**Andreas Coutsoudis**

Chambers, Durban, 23 November 2017

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