

**IN THE CONSTITUTIONAL COURT OF THE REPUBLIC
OF SOUTH AFRICA**

CC CASE NO: CCT 315/2016

SCA CASE NO: 19/2014

SGD CASE NO: SS94/2011

In the matter between:

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| THE STATE | First Appellant |
| NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS | Second Appellant |
| THE MINISTER OF POLICE | Third Appellant |
| THE MINISTER OF INTERNATIONAL RELATIONS | Fourth Appellant |
| THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES | Fifth Appellant |
| and | |
| HENRY EMOMOTIMI OKAH | Respondent |



FILING NOTICE

KINDLY TAKE NOTICE the respondent in this matter hereby reserves and refiles its written submissions in compliance with the court rules to be substituted with the existing one.

TAKE NOTICE FURTHER the respondent further serves and files its practice notes.

ON ROLL: 28th November 2017

DOCUMENTS: **WRITTEN (SUBSTITUTED) SUBMISSIONS (HEADS)
PRACTICE NOTES**

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AND TO: THE STATE ATTORNEY: PRETORIA
3RD TO 5TH APPELLANTS ATTORNEYS
GROUND FLOOR, SALU BUILDING.
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AND TO: THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
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Received a copy hereof

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NUMBER: 315/2016

In the matter between:

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| THE STATE | First Appellant |
| NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS | Second Appellant |
| THE MINISTER OF POLICE | Third Appellant |
| THE MINISTER OF INTERNATIONAL RELATIONS | Fourth Appellant |
| THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES | Fifth Appellant |
| and | |
| HENRY EMOMOTIMI OKAH | Respondent |

RESPONDENT'S PRACTICE NOTE

Nature of the proceedings

1 The is a cross-appeal by respondent against the State's appeal. The Supreme Court of Appeal ("the SCA") overturned the respondent's convictions on four (4) of the Warri charges as well the charge pertaining to the respondent's alleged terrorist threats to South African companies situate in Nigeria.

- 2 The state is now only appealing against the overturning of the four (4) convictions pertaining to the Warri bombings. The ground of appeal is that in as much as the respondent's conduct pertaining to the said charges occurred in Nigeria, our courts nevertheless have extra-territorial jurisdiction over the said offences in terms of section 15 (1) of the Act.

- 3 The respondent supports the judgment of the SCA in this regard and has delivered written submissions to that effect. This notwithstanding, the respondent maintains that both judgments of the trial court and SCA are predicated against a wrong perception of what the law is; regard being had to section 1 (4) of the Act and the African Charter on Human and Peoples Rights of 1986.

Issues that will be argued

- 4 Whether the respondent may revive an issue which was unfortunately abandoned by his erstwhile legal representatives in the SCA contra his instructions;

- 5 Whether his acts were committed during an armed struggle, within the purview of section 1 (4) of the Act; alternatively, whether Niger-Delta conflict is redactable to a mere "protest" about the alleged wrongful application of funds derived from oil extraction in that region;

6 Whether the said armed struggle was prosecuted 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 Co-operation among States in accordance with the said Charter; and

7 Whether the grant of amnesty to members of MEND delegitimised MEND's armed struggle post-amnesty period.

Portions of the Record that are necessary for determination of the matter

8 Volume 16, pp 31-35; Volumes 18; 20; and 21.

An estimate of the duration of oral argument

9 One and a half hour

Summary of the Argument

10 The respondent maintains that he is not a "terrorist", but a fighter for the socio-economic liberation of the people of Niger-Delta, under the auspices of MEND within the contemplation of section 1 (4) and Article 22 of the African Charter.

11 It is submitted that it is in the interest of justice that the respondent's section 1 (4) argument be reconsidered for *inter-alia*; the following reasons:

- 11.1 The revival of the point in issue is not prejudicial to the appellants. *Contra-wise*, the respondent is prejudiced to the extent that he may have been convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted, *contra* section 35 (3) (l) of the Constitution.
- 11.2 The point in issue may be revived, notwithstanding the fact that same may have been conceded and/or abandoned in the SCA. It is so since in our law, a legal concession can be withdrawn and an abandoned legal contention can be revived on appeal, if no prejudice is caused thereby to the other party.
- 11.3 This apex court cannot be prevented from deciding an appeal on a poignant point of law merely because the respondent has not relied thereon in the SCA. Our courts have often permitted an appellant to rely on a new ground of appeal on the basis that the courts cannot be prevented from deciding an appeal on a point of law merely because the appellant had not relied thereon. Otherwise, the intolerable position would arise that the courts of appeal would be bound by a mistake of law on the part of the appellant.
- 11.4 The issue involved is a pure question of law covered by the pleadings and turns on facts which have been fully canvassed. It has been held that a new ground of appeal on a point of law may be allowed if same is

covered by the pleadings and turns on facts which have been fully canvased.

11.5 The contention does not raise new factual issues; is covered by the trial court and evidence; and its consideration involves no unfairness to the other parties. This court has held that an abandoned legal contention can be revived on appeal only if the contention is covered by the pleadings and the evidence and its consideration involves no unfairness to the other party.

11.6 The point in issue is an apparent point of law on the papers. Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court of appeal is not only entitled, but is in fact obliged, *ex mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law which will infringe on the principle of legality.

12 The respondent, in the main contends that, notwithstanding the provisions of the Act or any other law, his acts at all material times hereto were committed during a struggle waged by MEND, including any action during an armed struggle, in the exercise or furtherance of their legitimate economic, social and cultural rights, as contemplated in the African Charter and by extension, within the contemplation of section 1 (4) of the Act.

- 13 In the premise, the respondent maintains that the armed conflict between MEND and the Nigerian Government is not governed by the International Convention for the Suppression of Terrorist Bombings or Act 33 of 2004.
- 14 At the heart of the controversy between the parties is thus whether or not the respondent's acts during the struggle waged by MEND, in the exercise or furtherance of the Niger-Delta legitimate right to foster their economic, social and cultural development with due regard to their freedom and identity and the equal enjoyment of the common heritage of mankind, as contemplated in Article 22 of the African Charter and extension, section 1 (4) of the Act.
- 15 The respondent thus contends that the trial court's interpretation of section 1 (4) of the Act was not reasonable or consistent with International Law and therefore inconsistent with the Constitution; regard being had to section 233 of the Constitution.

LIST OF AUTHORITIES

- 1 The Constitution of the Republic of South Africa
- 2 **Statutes**
- 2.1 Protection of Constitutional Democracy Against Terrorist and Related Activities Act of Act 33 of 2004.

3 Case law

- 3.1 State v Okah 2015 Vol, SARC 561 (GJ);
- 3.1 Dengetenge Holdings v Southern Sphere Mining & Development 2014 (5) SA 138 (CC) at 155D-E.
- 3.2 Minister of Justice v Southern African Litigation Centre 2016 (3) SA 317 (SCA).
- 3.3 Workmen's Compensation Commissioner v Crawford 1987 (1) SA 296 at 307G-I.
- 3.4 Alexcor v The Richtersveld Community 2004 (5) SA 460 (CC) at 477C.
- 3.5 Cusa v Tao Ying Metal Industries 2009 (2) SA 204 (CC) at 225A-C.
- 3.6 SERAP v Federal Republic of Nigeria Case Number: ECW/CCJ/APP/08/09.
- 3.7 Aniso & Others v The President of the Republic of Nigeria & Others Case Number FHC/PH/CP/11/2000.

4 International Instruments

- 4.1 Charter of the United Nations and the Declaration on the Principles of International Law.
- 4.2 OAU Convention on the Prevention and Combating of Terrorism, 1999.
- 4.3 African Charter on Human and Peoples' Rights.
- 4.4 The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomats.

4.5 The Convention for the Suppression of Terrorist Bombings.

4.6 The Convention on the Prevention and Combating of Terrorism.

5 Literature

5.1 Dugard, 4th Edition, International Law.

5.2 The Chambers Dictionary 10th Edition

APS NXUMALO

PM MAHLATSI

CHAMBERS

JOHANNESBURG

08 NOVEMBER 2017

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CASE NUMBER: 315/2016

In the matter between:

THE STATE First Appellant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Second Appellant

THE MINISTER OF POLICE Third Appellant

THE MINISTER OF INTERNATIONAL RELATIONS Fourth Appellant

**THE MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES** Fifth Appellant

and

HENRY EMOMOTIMI OKAH Respondent

**RESPONDENT'S SUPPLEMENTARY SUBMISSIONS WRT SECTION 1 (4) OF THE
ACT¹**

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

INTRODUCTION

- 1 The respondent, is currently a 52-year-old Nigerian male citizen. He is a permanent resident with his wife and children in the Republic of South Africa. At the time of his arrest on **30 September 2010**, he was residing with his family at 19 Dibberic Drive, Bassonia, in the district of Johannesburg.

- 2 The Respondent is alleged to be a leader of a militant organisation, the Movement for the Emancipation of the Niger Delta ("MEND"), an umbrella body of various militant groups from the oil-rich Niger Delta region, in the southern parts of Federal Republic of Nigeria. He was arrested for his involvement in the planning and organising of two car-bomb attacks in Nigeria, wherein several people were killed and some injured.

- 3 The respondent was convicted in the South Gauteng High Court on 13 main charges under the Act. He was charged with 13 counts in contravention of the Act. Counts 1-12 arose from two incidents which occurred, respectively, on 15 March 2010 in Warri, and 1 October 2010 in Abuja, Nigeria. In each instance, two car bombs exploded killing and injuring several people and causing damage to property.

- 4 Each of the main counts 1-12 carried alternative charges of conspiracy to commit such crimes, alternatively to induce and/or others to commit such crimes. The respondent has thus been convicted also on the basis that he provided the finance and the necessary equipment in order for these bomb explosions to take place. The thirteenth charge pertains to allegedly making terrorist threats to South African companies situate in Nigeria.
- 5 The respondent pleaded not guilty to all counts as well as the alternative counts thereto. Unfortunately, no plea explanation was offered as the respondent elected to remain silent during the trial. The respondent was therefore obliged to argue its case only on the State's evidence.²
- 6 The Supreme Court of Appeal ("the SCA") however overturned the respondent's convictions on four (4) of the Warri charges as well the charge pertaining to the respondent's alleged terrorist threats to South African companies situate in Nigeria.
- 7 The state is now only appealing against the overturning of the four (4) convictions pertaining to the Warri bombings. The ground of appeal is that in as much as the respondent's conduct pertaining to the said charges occurred in Nigeria, our courts

² See Judgment (State v Okah), Vol 18, at p 12 at paras 9 and 12.

nevertheless have extra-territorial jurisdiction over the said offences in terms of section 15 (1) of the Act.³

- 8 The respondent supports the judgment of the SCA in this regard and has delivered written submissions to that effect. This notwithstanding, the respondent maintains that both judgments of the trial court and SCA are predicated against a wrong perception of what the law is, regard being had to section 1 (4) of the Act and the African Charter on Human and Peoples Rights of 1986.

THE SCOPE AND PURPOSE OF THESE SUBMISSIONS

- 9 The respondent thus wants more. He maintains that he is not a "terrorist", but a fighter for the socio-economic liberation of the people of Niger-Delta, under the auspices of MEND.

³ Section 15 (1), expressly stipulates as follows:
"(1) A court of the Republic has jurisdiction in respect of any specified offence as defined in paragraph (a) of the definition of 'specified offence', if- (a) the accused was arrested in the territory of the Republic, or in its territorial waters or on board a ship or aircraft registered or required to be registered in the Republic; or (b) the offence was committed- (i) in the territory of the Republic; (ii) on board a vessel, a ship, an off-shore installation, or a fixed platform, or an aircraft registered or required to be registered in the Republic at the time the offence was committed; (iii) by a citizen of the Republic or a person ordinarily resident in the Republic; (iv) against the Republic, a citizen of the Republic or a person ordinarily resident in the Republic; (v) on board an aircraft in respect of which the operator is licensed in terms of the Air Services Licensing Act, 1990 (Act 115 of 1990), or the International Air Services Act, 1993 (Act 60 of 1993); (vi) against a government facility of the Republic abroad, including an embassy or other diplomatic or consular premises, or any other property of the Republic; (vii) when during its commission, a national of the Republic is seized, threatened, injured or killed; (viii) in an attempt to compel the Republic to do or to abstain or to refrain from doing any act; or (c) the evidence reveals any other basis recognised by law."

- 10 The scope and purpose of these supplementary submissions is therefore limited to reviving the respondent's contention that the bombings pertaining to his conviction are all acts committed during a struggle waged by MEND, in the exercise or furtherance of the Niger-Delta peoples' legitimate right to foster their economic, social and cultural development with due regard to their freedom and identity and the equal enjoyment of the common heritage of mankind, as contemplated in article 22 of the African Charter and by extension, section 1 (4) of the Act.⁴
- 11 Whilst this contention was raised in the trial court, it was unfortunately abandoned *contra* the respondent's instructions in the SCA on **24 August 2016**, even though it was alluded to in the respondent's supplementary heads of argument dated 31 March 2016.⁵ The respondent only became aware of this mishap on **17 May 2016**.⁶

THE OPPOSITION

- 12 The appellants are opposed to the revival of this point of law even though they concede it is apparent on the record and the judgment of the trial court.⁷

⁴ See Vol 21, p 7, para 6.

⁵ See Vol 21, para 23, at p? [It is noted that pages containing paragraphs 20-33 are missing from Volume 21]

⁶ See Vol 21, p 7, para 6.

⁷ See S v Okah Judgment, Vol 18, p 11 at paragraph 8.

13 The grounds of the appellants' objection are adumbrated in paragraph 3 of their affidavit opposing respondent's request to raise a new matter dated 28 July 2017, as well as paragraph 13 of their affidavit dated 13 October 2017.

14 It is submitted that the appellants' objection demonstrates a wrong perception of what the law about the revival of issues on appeal is.

THE RESPONDENT'S CONTENTION WRT REVIVAL OF A NEW POINT ON APPEAL

15 It is submitted that it is in the interest of justice that the respondent's section 1 (4) argument be reconsidered for *inter-alia*; the following reasons:

15.1 The revival of the point in issue is not prejudicial to the appellants. *Contra-wise*, the respondent is prejudiced to the extent that he may have been convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted, *contra* section 35 (3) (l) of the Constitution.

15.2 The point in issue may be revived, notwithstanding the fact that same may have been conceded and/or abandoned in the SCA. It is so since in our law, a legal concession can be withdrawn and an abandoned legal

contention can be revived on appeal, if no prejudice is caused thereby to the other party.⁸

15.3 This apex court cannot be prevented from deciding an appeal on a poignant point of law merely because the respondent has not relied thereon in the SCA. Our courts have often permitted an appellant to rely on a new ground of appeal on the basis that the courts cannot be prevented from deciding an appeal on a point of law merely because the appellant had not relied thereon. Otherwise, the intolerable position would arise that the courts of appeal would be bound by a mistake of law on the part of the appellant.⁹

15.4 The issue involved is a pure question of law covered by the pleadings and turns on facts which have been fully canvassed. It has been held that a new ground of appeal on a point of law may be allowed if same is covered by the pleadings and turns on facts which have been fully canvassed.¹⁰

⁸ See *Dengetenge Holdings v Southern Sphere Mining & Development* 2014 (5) SA 138 (CC) at 155D-E.

⁹ *Minister of Justice v Southern African Litigation Centre* 2016 (3) SA 317 (SCA).

¹⁰ See *Workmen's Compensation Commissioner v Crawford* 1987 (1) SA 296 at 307G-I.

15.5 The contention does not raise new factual issues; is covered by the trial court and evidence; and its consideration involves no unfairness to the other parties. This court has held that an abandoned legal contention can be revived on appeal only if the contention is covered by the pleadings and the evidence and its consideration involves no unfairness to the other party.¹¹

15.6 The point in issue is an apparent point of law on the papers. Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court of appeal is not only entitled, but is in fact obliged, *ex mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law which will infringe on the principle of legality.¹²

A BRIEF OVERVIEW AND STATEMENT OF THE RELEVANT LAW

Provisions of our Constitution

16 Our Constitution expressly recognises the injustices of our past. Ours is a democratic state founded *inter-alia* on human dignity, the achievement of equality and the advancement of human rights and freedom.¹³

¹¹ See *Alexcor v The Richtersveld Community* 2004 (5) SA 460 (CC) at 477C.

¹² See *Cusa v Tao Ying Metal Industries* 2009 (2) SA 204 (CC) at 225A-C.

¹³ See the Preamble and section 1 (1) (a) of the Constitution.

- 17 The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. The state is therefore obliged to respect, protect and fulfil all the rights in the Bill of Rights, subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.¹⁴
- 18 It should be so simply because a provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, considering the nature of the right and the nature of any duty imposed by the rights. Thus, when applying a provision of the Bill of Rights to a natural or juristic person in terms of section 8 (2), it is incumbent on our courts, in order to give effect to a right in the Bill, to apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right. Our courts may also develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1) of the Constitution.¹⁵
- 19 Every accused person has the right to a fair trial, which include the right not be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted.¹⁶

¹⁴ See section 7 (1) *ibid.*

¹⁵ See section 8 *ibid.*

¹⁶ See section 35 (3) (l), *ibid.*

- 20 I also important to point that, when interpreting the Bill of Rights, our courts are obliged to promote the values that underline an open and democratic society based on human dignity, equality and freedom; and to consider international law. Our courts are also permitted to consider foreign law in this regard.¹⁷
- 21 More, section 233 of the Constitution, also expressly enjoins our courts, when interpreting any legislation, to prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.
- 22 Of significance, moreover is the fact that customary international law is only valid law in the Republic, to the extent that it is consistent with the Constitution or an Act of Parliament.¹⁸
- 23 Quite poignantly, it should be noted that section 24 guarantees everyone the right to an environment that is not harmful to their health or well-being; and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures.

¹⁷ See section 39, *ibid.*

¹⁸ See sections 2 and 232, *ibid.*

24 Moreover, it must be emphasised that section 235 of the Constitution expressly stipulates that the right of the South African people as whole to self-determination as manifested in the Constitution, does not preclude, within the framework of this right, recognition of the notion of the right to self- determination of any community sharing common cultural and language heritage, within a territorial entity in the Republic or any other way, determined by national legislation.

Provisions of the Act

25 The relevant provisions of the Act are sections 1 (4) and (5); 2; 3; 15; 16; and 17 (2) of the Act. Not all sections however fall within the purview of these submissions.

26 Sections 1 (4) and (5) expressly stipulates as follows:

*“(4) Notwithstanding any provisions of this act or any other law, any act committed during a **struggle waged by people’s 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 Co-operation 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).

(5) Notwithstanding any provision in any law and subject to subsection (4) a political, philosophical, ideological, racial, ethnic, religious or any similar motive, shall not be considered for any reason including for the purposes of prosecution or extradition to be a justifiable defence in respect of an offence in which the definition of terrorism forms an integral part¹⁹.

- 27 The jurisdiction of our courts to try the respondent is mainly predicated against the proposition that he was engaged in terrorist activities; regard being had to sections 2; 3; 15 and 17 (2) of the Act.¹⁹

¹⁹ Section 2 laconically stipulates that any person who engages in a terrorist activity is guilty of the offence of terrorism. Section 3 (1) of the Act for its own part, expressly stipulates that any person who: (a) does anything which will, or is likely to, enhance the ability of any entity to engage in a terrorist activity, including to provide or offering to provide a skill or an expertise; (b) enters or remains in any country; or (c) makes himself or herself available, for the benefit of, at the direction of, or in association with any entity engaging in a terrorist activity, and who knows or ought reasonably to have known or suspected, that such act was done for the purpose of enhancing the ability of such entity to engage in a terrorist activity, is guilty of the offence associated with a terrorist activity.

Section 3 (2) simply states that any person who: (a) provides or offers to provide any weapon to any other person for use by or for the benefit of an entity; (b) solicits support for or gives support to an entity; (c) provides, receives or participates in training or instruction, or recruits an entity to receive training or instruction; (d) recruits any entity; (e) collects or makes a document; or (f) possesses a thing, connected with the engagement in a terrorist activity, and who knows or ought

International Law

- 28 It is trite that South Africa is a member of the United Nations and therefore committed to executing its obligations in terms of international instruments dealing with terrorism and related activities. South Africa is bound to do so by virtue of the fact that it became a signatory and party to certain United Nations Universal Conventions relevant to this matter.

The African Charter

- 29 It is however pertinent to point out that in addition to the foregoing international instruments, South Africa, ratified the African Charter on Human and Peoples Rights (African Charter) on **07 January 2000**.²⁰

reasonably to have known or suspected that such weapons, soliciting, training, recruitment, document or thing is so connected, is guilty of an offence connected with terrorist activities

Section 15 of the Act simply gives our courts jurisdiction in respect of any specified offence as defined in paragraph (a) of the definition of "specified offences".

A "specified offence", is defined in paragraph (a) of the definition of the phrase with reference to section 4, 14 (in so far as it relates to section 4) and 23 as: (a) the offence of terrorism referred to in section 2; (b) an offence associated or connected with terrorist activities referred to in section 3 of the Act; (c) a Convention offence; or (d) as offence referred to in section 13 or 14 (in so far as it relates to the aforementioned sections).

- ²⁰ In its preamble, the African Charter expressly and unambiguously states as follows:

"Convinced that it is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights."²⁰

In term of Article 7.2 of the African Charter:

- 30 Whilst for strengthening peace, solidarity and friendly relations, State Parties to the African Charter are obliged to ensure that their territories are not used as bases for subversive or terrorist activities against the people of any other State Party to the Charter; or not to compromise the security of the State whose national or resident a national or resident is.
- 31 Article 20 (2) of the African Charter, however expressly stipulates that colonised or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.

THE RESPONDENT'S MAIN CONTENTION

- 32 It is against this backdrop that the respondent for his own part, in the main contends that, notwithstanding the provisions of the Act or any other law, his acts at all material times hereto were committed during a struggle waged by MEND, including

"2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed."

The African Charter also expressly states the following: (a) All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another – see Article 19; (b) All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen – see Article 20; (c) All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it- see Article 21; (d) All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. States shall have the duty, individually or collectively, to ensure the exercise of the right to development – see Article 22; (e) All peoples shall have the right to a general satisfactory environment favourable to their development – Article 24.

any action during an armed struggle, in the exercise or furtherance of their legitimate economic, social and cultural rights, as contemplated in the African Charter and by extension, within the contemplation of section 1 (4) of the Act.

- 33 In the premise, the respondent maintains that the armed conflict between MEND and the Nigerian Government is not governed by the International Convention for the Suppression of Terrorist Bombings or Act 33 of 2004.

ISSUES FOR DETERMINATION

- 34 Regard being had to the foregoing, it can be deduced that whether the respondent has a justifiable defence within the contemplation of section 1 (4), in respect of the offences for which he has been convicted mainly turns around:

34.1 Whether his acts were committed during an armed struggle, within the purview of section 1 (4) of the Act; alternatively, whether Niger-Delta conflict is redactable to a mere "protest" about the alleged wrongful application of funds derived from oil extraction in that region;

34.2 Whether the said armed struggle is being prosecuted 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 Co-operation among States in accordance with the said Charter; and

- 34.3 Whether the grant of amnesty to members of MEND delegitimised MEND's armed struggle post-amnesty period.

A BRIEF HISTORICAL OVERVIEW OF THE CONFLICT IN THE NIGER-DELTA

- 35 Oil was first discovered in commercial quantities in 1956. Economically viable petroleum was discovered in Niger-Delta region in 1957, just one year after the discovery of Nigeria's first commercial petroleum deposit. Royal Dutch Shell and Chevron Corporation set up shop there throughout the next two decades. During this time, the Nigerian Government began forcing the Niger-Delta people to abandon their land to oil companies without consultation, offering negligible compensation.

The genesis of MEND contextualised

- 36 The current conflict in the Niger-Delta arose in the early 1990's over tensions between the foreign oil corporations and a number of Niger-Delta's minority ethnic groups who felt they were being exploited, particularly the Ogoni and the Ijaw. Ethnic and political unrest has continued throughout the 1990s and persists as of

2007 despite the conversion to democracy and the election of former President Obasanjo government in 1999.

- 37 The origins and context of MEND and the armed struggle in the Niger-Delta are succinctly described in the documents admitted during the trial.²¹

BRIEF OVERVIEW OF THE RELEVANT EVIDENCE BEFORE THE TRIAL COURT

The evidence of Selekaye Victor Ben (Sele)

- 38 In this regard, this Honourable Court is referred to the evidence of Selekaye Victor Ben (Sele).²²

The evidence of Charles Maree²³

- 39 In this regard, this Honourable Court is referred to evidence of Charles Maree.²⁴

²¹ See Vol 18, pp 1-2 para 1, Record.

²² See Vol 18, pp 62-65, paras 192-207, Record.

²³ See Vol 16, pp 31-34, para 22, Record.

²⁴ See Vol 16, pp 31-35, para 22, Record.

THE ARGUMENT

40 We now turn to engage the issues that fall for determination *seriatim* hereunder.

The respondent's acts were committed during an armed struggle, within the purview of section 1 (4) of the Act; alternatively, the Niger-Delta conflict is not a mere "protest" about the alleged wrongful application of funds derived from oil extraction in that region

41 In paragraph 8 of the impugned judgment, the following is stated by the trial court:

"[8] ... counsel for the accused sought to rely on the provisions of section 1(4) to oust the jurisdiction of this Court to try the accused. Such reliance is misplaced. Section 1(4) excludes from the ambit of the Act any armed struggle in the exercise of a people's 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. As stated earlier, it is common cause that a militant campaign was waged against the Nigerian Government by its own civilians living in the southern states of Nigeria in protest to the alleged wrongful application of funds derived from oil extraction occurring within the jurisdiction of those southern states. Subsequent to the grant of amnesty by the Government of Nigeria to

its civilians who had been engaged in such armed struggle, and subsequent to the accused accepting the terms of such amnesty for himself, no further armed struggle was legitimate. In any event, at no stage prior to amnesty was the struggle directed at the occupation of foreign forces or for the purpose of national liberation or self-determination and independence against colonialism. No basis in fact or in law was placed before this Court by the accused to bring himself within the four corners of section 1(4). Counsel's argument in this regard is therefore rejected." - Our emphasis.²⁵

SERAP v Federal Republic of Nigeria, case number ECW/CCJ/APP/08/09²⁶

42 The Federal Republic of Nigeria was sued by the Socio-Economic Rights and Accountability Project, ("SERAP"), a non-governmental organization registered in Nigeria in the Court of Justice of the Economic Community of West African States ("ECOWAS"). This case originated from a complaint brought on 23 July 2009, by SERAP pursuant to Article 10 of the ECOWAS Supplementary Protocol A/SP.1/01/05, against the President of the Federal Republic of Nigeria, the Attorney General of the Federation, Nigerian National Petroleum Company, Shell Petroleum Development Company, ELF Petroleum Nigeria Ltd, AGIP Nigeria PLC, Chevron Oil Nigeria PLC, Total Nigeria PLC and Exxon Mobil.

²⁵ See Vol 18, p 11, para 8, Record.

²⁶ See Vol 20, p 1-30.

43 SERAP *inter-alia* alleged violation by the Nigerian government and others of the rights to health, adequate standard of living and rights to economic and social development of the people of Niger-Delta and the failure of the Nigerian government and others to enforce the relevant laws and regulations to protect the environment of the Niger-Delta people and prevent pollution of their environment.

44 In paragraphs 32-35, of its judgment, the said Court observed as follows:²⁷

"32. *Indeed, there are situations in which the enjoyment of the economic, social and cultural rights depends on the availability of State resources. In those situations, it is legitimate to raise the issue of enforceability of the concerned right. But there are others in which the only obligation required from the State to satisfy such rights is the exercise of its authority to enforce the law that recognises such rights and prevent powerful entities from precluding the most vulnerable from enjoying the right granted to them. (Emphasis supplied)*

33. *In the instant case, what is in dispute is not a failure of the Defendants to allocate resources to improve the quality of life of the people of Niger Delta,*

²⁷ See Vol 20, pp 10-11.

but rather a failure to use the State authority, in compliance with international obligations, to prevent the oil extraction industry from doing harm to the environment, livelihood and quality of life to the people of that region.

34. *The Court notes that behind the thesis developed by the Federal Republic of Nigeria is the principle contained in its own Constitution that the economic, social and cultural rights, being mere policy directives, are not justiciable or enforceable.*

35. *But it should also be noted that the sources of Law that the Court takes into consideration in performing its mandate of protecting Human Rights are not the Constitutions of Member States, but rather the international instruments to which these States voluntarily bound themselves at the international level, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples' Rights."*

45 SERAP alleged violation of Articles 1- 5, 9, 14- 17, and 21-24 of the Charter, Articles 1, 2, 6, 9, 10, 11, 12.1, 12.2, 12.2 (b) of the International Covenant on Economic, Social and Cultural Rights, Articles 1, 2, 6, 7 and 26 of the International Covenant on Civil and Political Rights, Article 15 of the Universal Declaration of

Human Rights. The Plaintiff particularly brings claims in respect of violation of the right to an adequate standard of living – including adequate food – and the violation of the right to economic and social development.²⁸

46 SERAP argued that, Article 11 of the International Covenant on Economic Social and Cultural Rights establishes “the right of everyone to an adequate standard of living-- including adequate food”. The right to adequate food requires States to ensure the availability and accessibility of food. Availability includes being able to feed oneself directly from productive land or other natural resources. They submit that the Nigerian government has clearly failed to protect the natural resource upon which people depend for food in the Niger -Delta, and has contravened its obligation to ensure the availability of food in that thousands of oil spills and other environmental damage to fisheries, farmland and crops have occurred over decades without adequate cleanup. They referred to African Commission’s decision in the Ogoni case to the effect that Nigeria had violated the right to food by allowing private oil companies to destroy food sources and submitted that several years after this decision, the government of Nigeria has continued to violate its obligations under the Covenant and the African Charter by failing to take effective measures to enforce laws to prevent contamination and pollution of the food sources (both crops and fish) by private oil companies in the Niger- Delta.²⁹

²⁸ See Vol 20, p 18, para 63.

²⁹ See Vol 20, p 18, para 64.

47 SERAP also submitted that Article 6 of the ICESCR obliges State Parties to recognize the right of everyone to the opportunity to earn their living by work and as such the Government of Nigeria is obliged to take all necessary measures to prevent infringements of the right to earn a living through work by third parties.

48 On the right of everyone to an adequate standard of living, SERAP submitted that it is linked with the rights to food and housing, as well as the right to gain a living by work and to the right to health.

49 On the right to health SERAP referred to Articles 16 and 24 of the African Charter and Article 12.1 of the ICESCR and submit that the government of Nigeria has failed to promote conditions in which people can lead a healthy life due to its failure to prevent widespread pollution because of the oil industry which has directly led to the deterioration of the living situation for affected communities in the oil producing areas of the Niger -Delta.

50 The Court observed that, whilst:

50.1 Frequent oil spills are a serious problem in the Niger-Delta. The failure of the oil companies and regulators to deal with them swiftly and the lack of

effective cleanup greatly exacerbates the human rights and environmental impacts of such spills.

- 50.2 Clean up of oil pollution in the Niger Delta is frequently both slow and inadequate, leaving people to cope with the ongoing impacts of the pollution on their livelihoods and health.
- 50.3 There was no effective monitoring by the Nigerian government of the volumes of oil-related pollutants entering the water system, or of their impacts on water quality, fisheries or health.
- 50.4 And the Federal Government is yet to put in place modalities and logistics for the protection of the Niger-Delta people as well as laws that will regulate activities in the Niger-Delta and has not acted with due diligence to ensure that foreign companies operating in the Niger- Delta do not violate human rights.
- 51 SERAP accordingly submitted that by failing to deal adequately with corporate actions that harm human rights and the environment, the government of Nigeria

has not only compounded the problem but has aided and abetted the oil companies operating in the Niger Delta in the violation of human rights.³⁰

52 In its final analysis of the merits the said Court noted that the SERAP correctly alleged violation of several articles of the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

53 The Court found that considering all the instruments invoked, including the Universal Declaration of Human Rights, 29 articles, were alleged to have been violated.

54 It opined that the success of an application for human rights protection does not depend on the number of provisions or international instruments AN applicant invokes as violated. Therefore, when various articles of different instruments sanction the same rights, the said instruments may, as far as those specific rights are concerned, be considered equivalent. And that it suffices therefore to cite the one which affords more effective protection to the right allegedly violated.

³⁰ See Vol 20: Summary of the counter- argument of the Nigerian Government at pp 20-22, paras 73-90, Record .

55 It pronounced that at any rate, it is incumbent upon it to shape out the dispute along its essential lines and examine no more than the violations which, regarding the facts and circumstances of the suit, appear to it to constitute the heart of the grievances brought before it.

56 It held that, in its view, the heart of the grievances is to be looked for in relation to the facts of the case it considers as established. It thus held in that light, although the report produced by Amnesty International may be in the public domain and may contain well known facts reported by other numerous sources (international organisation, the media, etc.), it was of the view that this report cannot on its own, alone, be considered as conclusive evidence. The report however, as well as other well-known facts, constituted for the Court a kaleidoscope of elements and indices that specifically helped enlighten it on the actual existence and scope of the problem.

57 As a result, it held that in the instant case, it upholds as decisive and convincing the facts on which there is agreement among the parties or those on which one of the parties does not raise objection while able to do so.

58 It observed that:

58.1 From the submissions of both parties, it emerged that the Niger -Delta is endowed with arable land and water which the communities use for their social and economic needs; several multinational and Nigerian companies have carried along oil prospection as well as oil exploitation which caused and continue to cause damage to the quality and productivity of the soil and water; the oil spillage, which is the result of various factors including pipeline corrosion, vandalisation, bunkering, etc. appears for both sides as the major source and cause of ecological pollution in the region.

58.2 It is a key point that the Federal Republic of Nigeria has admitted that there has been in Niger-Delta occurrences of oil spillage with devastating impact on the environment and the livelihood of the population throughout the time. 96.

58.3 Though the Nigerian government's contention is that the SERAP's allegations are mere conjectures, it highlighted and considered the fact that it is public knowledge that oil spills pollute water, destroy aquatic life and soil fertility with resultant adverse effect on the health and means of livelihood of people in its vicinity. Thus in so far as there is consensus by both parties on the occurrence of oil spills in the region, it had to presume that in the normal cause of events in such a situation, *to wit*,

consequential environmental pollution exists there. [Cf. Torrey Canyon (1967), Amoco Cadiz (1978), Exxon Valdez (1989), Erika (1999), Prestige (2002), Deepwater Horizon (Avril 2010)] 97.

58.4 In the face of this finding, the question as to the causes or liability of the spills is not in issue in the instant case. What was being canvassed was the attitude or behavior of the Nigerian government, as an ECOWAS Member State and party to the African Charter.

58.5 Indeed, it is incumbent upon the Federal Republic of Nigeria to prevent or tackle the situation by holding accountable those who caused the situation and to ensure that adequate reparation is provided for the victims.

58.6 As such, the heart of the dispute was to determine whether in the circumstances referred to, the attitude of the Federal Republic of Nigeria, as a party to the African Charter on Human and Peoples' Rights, is in conformity with the obligations subscribed to in the terms of Article 24 of the said instrument, which provides:

"All peoples shall have the right to a general satisfactory environment favourable to their development".

58.7 To that extent, the scope of such a provision must be looked for in relation to Article 1 of the Charter, which provides:

“The Member States of the Organization of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them. ”

58.8 Thus, the duty assigned by Article 24 to each State Party to the Charter is both an obligation of attitude and an obligation of result.

58.9 The environment, as emphasised by the International Court of Justice:

*“Is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn” - see **Legality of the Threat or Use of Nuclear Arms, ICJ Advisory Opinion of 8 July 2006, at paragraph 28.***

58.10 The environment must be considered as an indivisible whole, comprising:

"Biotic and abiotic natural resources, notably air, water, land, fauna and flora and the interaction between these same factors"- see International Law Institute, Resolution of 4 September 1997, Article 1.

- 58.11 The environment is essential to every human being. The quality of human life depends on the quality of the environment.
- 58.12 Article 24 of the African Charter thus requires every State to take every measure to maintain the quality of the environment understood as an integrated whole, such that the state of the environment may satisfy the human beings who live there, and enhance their sustainable development. It is by examining the state of the environment and entirely objective factors that one judges, by the result, whether the State has fulfilled this obligation. If the State is taking all the appropriate legislative, administrative and other measures, it must ensure that vigilance and diligence are being applied and observed towards attaining concrete results.
- 58.13 To the extent that in its defense, the Federal Republic of Nigeria exhaustively lists a series of measures it has taken to respond to the environmental situation in the Niger- Delta and to ensure a balanced development of this region. Among these measures, the Court took note

of the numerous laws passed to regulate the extractive oil and gas industry and safeguard their effects on the environment, the creation of agencies to ensure the implementation of the legislation, and the allocation to the region, 13% of resources produced there, to be used for its development.

58.14 However, compelling circumstances of this case lead the Court to recognise that these measures did not prevent the continued environmental degradation of the region, as evidenced by the facts abundantly proven in this case and admitted by the very same Federal Republic of Nigeria.

58.15 This means that the adoption of the legislation, no matter how advanced it may be, or the creation of agencies inspired by the world's best models, as well as the allocation of financial resources in equitable amounts, may still fall short of compliance with international obligations in matters of environmental protection if these measures just remain on paper and are not accompanied by additional and concrete measures aimed at preventing the occurrence of damage or ensuring accountability, with the effective reparation of the environmental damage suffered.

58.16 As stated before, as a State Party to the African Charter on Human and Peoples' Rights, the Federal Republic of Nigeria is under international obligation to recognise the rights, duties and freedoms enshrined in the Charter and to undertake to adopt legislative or other measures to give effect to them.

58.17 If, notwithstanding the measures the Nigerian government alleges having put in place, the environmental situation in the Niger-Delta region has still been of continuous degradation, this Court must conclude that there has been a failure on the part of the Federal Republic of Nigeria to adopt any of the "other" measures required by the said Article 1 of African Charter to ensure the enjoyment of the right laid down in Article 24 of the same instrument.

58.18 From what emerged from the evidence produced before it, the core of the problem in tackling the environmental degradation in the Region of Niger-Delta resides in lack of enforcement of the legislation and regulation in force, by the Regulatory Authorities of the Federal Republic of Nigeria in charge of supervision of the oil industry.

58.19 Contrary to the assumption of the Federal Republic of Nigeria in its attempt to shift the responsibility on the holders of a license of oil

exploitation (see paragraph 82), the damage caused by the oil industry to a vital resource of such importance to all mankind, such as the environment, cannot be left to the mere discretion of oil companies and possible agreements on compensation they may establish with the people affected by the devastating effects of this polluting industry.

58.20 It is significant to note that despite all the laws it has adopted and all the agencies it has created, the Federal Republic of Nigeria was not able to point out in its pleadings a single action that has been taken in recent years to seriously and diligently hold accountable any of the perpetrators of the many acts of environmental degradation which occurred in the Niger-Delta Region.

58.21 And that it is precisely this omission to act, to prevent damage to the environment and to make accountable the offenders, who feel free to carry on their harmful activities, with clear expectation of impunity, that characterises the violation by the Federal Republic of Nigeria of its international obligations under Articles 1 and 24 of the African Charter.

58.22 Consequently, the Court concludes and adjudged that the Federal Republic of Nigeria, by comporting itself in the way it is doing, in respect of the continuous and unceasing damage caused to the environment in

the Region of Niger-Delta, has defaulted in its duties in terms of vigilance and diligence as party to the African Charter and has violated Articles 1 and 24 of the said instrument.

59 Regard being had to the foregoing, the court adjudged that the Federal Republic of Nigeria to have violated Articles 1 and 24 of the African Charter.

60 In the premise, the court ordered the Federal Republic of Nigeria to:

60.1 Take all effective measures, within the shortest possible time, to ensure restoration of the environment of the Niger Delta;

60.2 Take all measures that are necessary to prevent the occurrence of damage to the environment; and

60.3 Take all measures to hold the perpetrators of the environmental damage accountable.

61 In addition to the foregoing, the court directed the Federal Republic of Nigeria to fully comply with and enforce this decision, in accordance with Article 15 of the Revised Treaty and Article 24 of the 2005 Supplementary Protocol on the Court. The Nigerian never did.

Aniso & Others v The President of the Republic of Nigeria & Others³¹

62 In this case the applicants were and still are indigenes and prominent members of the Odi Community in Kolukuma/Opokuma LGA, Bayelsa State of Nigeria. They brought this application on behalf of the entire people of their community. The said community is a town on the bank of River Nun and is mostly populated by the Ijaws of the Niger-Delta.

63 Nigerian soldiers invaded that community maimed and killed members of the applicant's and destroyed their properties.

64 The applicants sued the President of Nigeria on behalf of themselves and entire people and members of Odi Community *inter-alia*:

64.1 a declaration that the invasion of the applicants' community and its attendant assault, battery, maiming shelling, shooting and cold blooded murder of the members of the applicants' community and the destruction of their properties by the troops under command of the first respondent, on the order(s) of the third respondent is a gross violation of the fundamental rights of the people of Odi to the rights of life, dignity of human person, personal liberty, fair hearing, freedom of movement and

³¹ See Vol 20, pp 1-75, Record.

to acquire and own immovable property anywhere in Nigeria, as respectively guaranteed under sections 33- 36, 41 and 43 of the 1999 Constitution of Nigeria and Articles 2, 4-6, 12, 14, 20- 24 of the African Charter; and

64.2 Special damages in the sum of N17,6 billion, only.

65 The court *inter-alia* found as follows; that:

65.1 The respondents' troops unjustifiably and wantonly entered Odi maimed and killed thousands of innocent and unarmed Odi people there by violating their fundamental rights to life in such a brute, sudden, premature, ill-motivated, outrageous, tyrannical and callous manner;³²

65.2 The troops' action amounted to genocide and thus contrary to article 5 of the United Nations Code of Conduct for Law Enforcement Officers;³³

65.3 This genocide also did not only violate the applicants' fundamental rights to life as guaranteed by section 33 of the Nigerian Constitution but also the Universal Declaration of Human Rights;³⁴

³² See Vol 20, p 56, Record.

³³ *ibid*

³⁴ *ibid*

65.4 the massacre exemplified flagrant disregard for human rights and due process in unimaginable proportions;³⁵

65.5 Odi was bombed by the agents of the respondent in such a vicious and malicious manner that any civilised society will readily and roundly condemn;³⁶

66 Regard being had to the foregoing, the court substantially granted the relief sought, and awarded the applicants general damages. Observing that from the facts and circumstances of this case, no amount of money in the Central Bank of Nigeria, local or hard currency can atone the damages suffered by the applicants, the court awarded the sum N 20 billion, as general damages, which it found to be moderate and generous.

67 The court also ordered that the special and general damages be paid by within 21 days from the date of the judgment i.e. 19 February 2013. Needless to state, these damages were never paid.

³⁵ *ibid*

³⁶ *ibid*

68 It is submitted that the common cause facts before the trial court; foreign law and customary international law show that the struggle of the people of the Niger-Delta is "*a struggle waged by peoples*" as contemplated in section 1 (4) of the Act and that MEND and the respondent are not "civilians" but soldiers;³⁷ engaged in an armed struggle in the exercise or furtherance of the Niger-Delta peoples' right to national liberations, self-determination against occupation or aggression or domination by an alien force.

69 The trial court therefore erred in finding that no basis in fact or in law was placed before it by the respondent to bring himself within the four corners of section 1 (4).

70 It is so; as the term "peoples", according the Chambers Dictionary (10th Edition) *inter-alia*; connotes:

"[A] set of persons; a nation; a community; a body of persons held together by a common origin, speech, culture, political union, or by common leadership, headship; etc." ³⁸

71 The term "*alien*", for its own part *inter-alia*; denotes the following:

³⁷ See Vol 18, pp 17-81, paragraphs 28, 32,34,45,79,126, 131,135,139,180,182,193-195,197,205, 215—220,255,281-282

³⁸ Emphasis supplied.

*"[B]elonging to something else; from elsewhere; extraneous; repugnant or offensive; inconsistent (with to) incompatible irreconcilable; estranged."*³⁹

- 72 It is submitted to the extent that the conduct of the Nigerian government in the Niger-Delta region and its people, like the erstwhile apartheid regime; is aggressive and dominant, it amounts to an occupation or aggression or domination by an "alien" (even though not "foreign"), force and/or "colonialism of a special type", like apartheid and as contemplated by section 1 (4) of the Act.
- 73 It is so because like the South African National Liberation Struggle ("the NDR") which was prosecuted under the auspices a various liberation movements; the legitimacy of the struggle of the Niger-Delta people for national liberation and self-determination is not discounted simply because the Nigerian government is not literally a "foreign force" or a colonial government, as suggested by the trial court.
- 74 Customary international law is law in the Republic, unless it is inconsistent with Constitution or an Act parliament. And when interpreting legislation, every court must prefer any reasonable interpretation of legislation that is consistent with international law, over any alternative interpretation that is inconsistent with international law.

³⁹ Emphasis supplied.

- 75 It is submitted that the narrow and literal interpretation of section 1 (4) of the Act, is unreasonable and inconsistent with our Constitution and international law; *contra* sections 39 (1) and (2); and therefore invalid, regard being had to section 2 of the Constitution.
- 76 Regard being had to the foregoing, it is submitted that it can be deduced that the respondent's acts, were committed during an armed struggle, within the purview of section 1 (4) of the Act. Alternatively, the Niger-Delta conflict is not a mere "protest" about the alleged wrongful application of funds derived from oil extraction in that region, as suggested by the trial court. It is much bigger than that.
- 77 It also follows from the foregoing that to the extent that the Niger-Delta armed conflict amounts to "activities of armed forces during an armed conflict" within the purview of Article 19 (2) of the International Convention for the Suppression of Terrorist Bombings, the said activities are not governed by the said convention; regard being had to the said article.

The said armed struggle is being prosecuted in accordance with the principles of international law, especially International Humanitarian Law, including the purposes and principles of the Charter of the UN and the Declaration on the

Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the said Charter

78 It is submitted that at all material times hereto the respondent and/or MEND was engaged in an armed conflict with the Nigerian Government. To this extent the respondent's activities amounted to an armed conflict, "not of an international character."

79 It is also submitted that the said armed struggle is being prosecuted in accordance with the principles of international law in that it 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.

80 In this regard, this Honourable Court is referred to the following:

80.1 Jeffrey Haverty's analysis report in relation to the bombings in Abuja on **01 October 2010** in paragraph 22 of his affidavit (Exhibit GG at pp 91-176, Record);⁴⁰

⁴⁰ See Vol 18, pp 14-15, paras 20-21.

80.2 a summary of a state's case *vide* section 144 (3) (a) of the CPA.⁴¹

81 Regard being had to the foregoing, it is submitted that in paragraph 39 (f) of the impugned judgment, the trial court misdirected itself when it *inter-alia* held that the summary of admissions boils down to the fact that the bombings comply with the definition of terrorism and terrorist activities in the Act.

82 In the premise, it is submitted that, the decision of the trial court when interpreting the Act, did not prefer an interpretation that is consistent with the international law over an interpretation that is inconsistent with international law; *contra* section 233 of the Constitution.

The grant of amnesty to members of MEND did not delegitimise MEND's armed struggle post-amnesty period

⁴¹ See Vol 18, at pp 23-77, paras 45; 54; 56; 59-60; 133 and 193 – 195; 204 – 205; 239; 249; and 267.

83 In this regard, this Honourable Court is referred to a KP News, newspaper article dated 16 September 2009, i.e. "*MEND gives 30 days' grace to Yar'Adua*", the said article, which the trial court took into consideration.⁴²

84 It is submitted that to the extent that neither section 1 (4) or (5) of the Act nor Article 20.2 of the African Charter, alludes any amnesty, amnesty is irrelevant to the determination whether the MEND's armed struggle is legitimate or not.

85 In the premise, it is submitted that the trial court was incorrect in paragraph 91 of its judgment in concluding that there is no reason to rebel or protest against the Nigerian Government's conduct, simply because amnesty was granted to the respondent in 2009. Or that for those who accepted amnesty in 2009, the necessity for rebelling against the Nigerian government has on Orubebe's evidence alone completely dissipated.

86 Put otherwise, regard being had to the foregoing customary international law and foreign law, it is submitted that the trial court erred in paragraph 8 that subsequent to the grant of amnesty by the government of Nigeria to those who had engaged in the struggle for the socio-economic liberation of the Niger-Delta region; and subsequent to the respondent accepting the terms of such

⁴² See Vol 18, pp 20-44, paras 37; 48; 87-88; 117- *Record*.

amnesty for himself, no further armed struggle was legitimate. Amnesty is not a magic wand.

- 87 What is relevant is *inter-alia* that despite the hype that amnesty has completely dissipated the necessity of rebelling against the Nigerian Government, the failure of the Nigerian Government to comply with the SERAP and the ANISO Judgment evinces otherwise.

CONCLUSION

- 88 It is clear from the foregoing:

88.1 that notwithstanding the provisions of Act 33 of 2004; or any other law, the offences for which the respondent is convicted, amount to acts committed during a struggle waged by the Niger-Delta peoples during an armed struggle, in the exercise or furtherance of their legitimate right to at least self-determination against the aggressive occupation or domination of an alien government;

88.2 that notwithstanding the unfortunate high civilian casualties in the two bombings, at all material times hereto, MEND's armed struggle has

always been prosecuted in accordance with the principles of the relevant international laws;

88.3 that the said armed struggle is not motivated by political, philosophical; ideological, racial, ethnic, religious or any similar motive; as contemplated in section 1 (5) of Act 33 of 2004; and

88.4 to the extent that the trial court's conviction of the respondent derogates from the general principles of international law, in particular the principles of international humanitarian law, as well as the African Charter, same is inconsistent with our Constitution and therefore null and void.

89 Alternatively, it is respectfully submitted that this Honourable Court should find that the Court a quo did not have the jurisdiction to try the respondent on all charges and alternative thereof and that the convictions on those counts falls to be set aside.

90 Further alternatively, it is respectfully submitted that the Honourable Court will find that the definition of "terrorism" and sections 1 (4) and 15 of Act 33 of 2004 Terrorism Act are unconstitutional and invalid.⁴³

WHEREFORE the respondent prays that:

- (a) the late revival of the section 1 (4) of Act 33 of 2004 issue be condoned;
- (b) he be granted leave to appeal;
- (c) his appeal be upheld and his conviction and sentencing in the South Gauteng High Court, Johannesburg under case number SS94/2011 be set aside and replaced with the following orders:

"

1. *the appellants' late application for leave to appeal is condoned;*
2. *the appellants' leave to appeal is granted;*

⁴³ It should be noted that the respondent still relies on his supplementary heads of argument by GC Muller SC, dated 31 March 2016.

3. *the appellants' appeal is dismissed;*
4. *the respondent's application for leave to cross-appeal is granted;*
5. *the respondent's late revival of section 1 (4) of Act 33 of 2004, is condoned;*
6. *the respondent's cross appeal is upheld; and the respondent is acquitted.*
7. *The applicants are directed to pay the costs of the respondent, such costs to include costs consequent upon the employment of two counsel."*

Adv Nxumalo

APS NXUMALO

PM MAHLATSI

CHAMBERS

JOHANNESBURG

08 NOVEMBER 2017