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THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case **193/17**

In the matter between:

HENRY EMOMOTIMI OKAH Applicant

and

THE STATE Respondent

RESPONDENT'S PRACTICE NOTE

INTERPRETATION OF SECTION 1(4)

1. **NAMES OF PARTIES AND CASE NUMBER:**

   See heading above.

2. **NATURE OF PROCEEDINGS:**

   Two applications for leave to appeal by the applicant relating first to section 1(4) of the terrorism law and second to special entries in terms of section 317 of the CPA.

3. **ISSUES THAT WILL BE ARGUED:**

   That the applicant should not be allowed to argue the issue of section 1(4) because he did not apply for leave to appeal when his argument on the issue was rejected at the trial and when he subsequently abandoned all arguments on the issue before the SCA. Alternatively if leave to appeal is granted the applicant's crimes do not fall within the exclusion clause of section 1(4) both on a reading of the provision and upon consideration of the relevant principles of international law.

   With regard to the special entries the applicant should be deemed to have abandoned this issue because it is not addressed in the heads of argument filed by the applicant's counsel. In the event of leave to appeal being granted it is argued that argument should be limited to the record and grounds as stated in the application and leave to appeal refused.

4. **PORTIONS OF RECORD THAT MUST BE READ:**

   Indicated in separate document.

5. **ESTIMATE OF DURATION OF ORAL ARGUMENT:**

   15 minutes.

6. **SUMMARY OF ARGUMENT:**

   Section 1(4):

   - The applicant did not apply for leave to appeal when his argument was rejected.

- The applicant abandoned argument when before the SCA.
- The National Executive has not been cited or afforded an opportunity to respond therefore the constitutionality of the provision cannot be argued.
- Section 1(4) only applies to liberation movements fighting colonialism or foreign aggression. The applicant's crimes were secular and motivated by dissatisfaction with policies of the post-colonial government. There is no basis in international law for extending the provision so as to include the applicant's conduct.

Special entries:

- No submissions have been made by applicant's counsel and consequently this issue has been abandoned.
- In the event of the issue being argued then there is no basis on the record for finding that any irregularities took place which would justify setting aside the proceedings.

7. LIST OF AUTHORITIES ON WHICH PARTICULAR RELIANCE WILL BE PLACED DURING ORAL ARGUMENT:

Listed as part of respondent's submissions.

DATED at **PRETORIA** on this 10th day of November 2017.

RC MACADAM
RESPONDENT'S COUNSEL

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THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case **193/17**

In the matter between:

HENRY EMOMOTIMI OKAH Applicant

and

THE STATE Respondent

RESPONDENT'S SUBMISSIONS

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THE ESSENCE OF THIS APPEAL

1. The applicant, Mr Henry Okah, was convicted in the Johannesburg High Court in 2012 on thirteen counts under the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 (the terrorism law). Twelve of the charges arose from his responsibility for two car bombings on 15 March 2010 and 1 October 2010 in the Nigerian cities of Warri and Abuja, both bombings amounting to indiscriminate attacks on civilians. It is in respect of these charges that this application for leave to appeal lies. It essentially amounts to a cross-appeal by the applicant to the application by the state in case number **315/16** where the state challenges the setting aside of four convictions relating to the Warri bombing by the Supreme Court of Appeal (SCA). The thirteenth charge was set aside by the SCA and is irrelevant to the two sets of applications for leave to appeal due to be heard by this Court on 28 November 2017. The factual circumstances relating to the twelve charges have been fully described in the state's heads of argument in case number **315/16** and, in the interest of prolixity, are not repeated in these submissions.

2. On 24 July 2017 the applicant filed an application for leave to appeal and condonation in person in which he sought to appeal the interpretation given by the trial court to section 1(4) of the terrorism law. In essence this provision excludes certain conduct from the definition of terrorist activity and consequently would provide a defence to a charge of terrorism under section 2 of the terrorism law.

3. Thereafter on 27 July 2017, through the attorneys MC Menamin Van Huyssteen & Botes, the applicant filed a further application for leave to appeal and condonation to

appeal the decision of the SCA not to grant him leave to appeal in respect of three special entries formulated in terms of section 317 of the Criminal Procedure Act 51 of 1977 (the CPA) in respect of which the trial court had refused to grant him leave to appeal.

4. The applications are opposed by the state.

IN LIMINE

5. This Court's Directive of 27 September 2017 required the applicant to file a record and heads of argument by 20 October 2017. The attorney of record confirmed acting on the advice of counsel. What has been filed are not only heads of argument by counsel but two sets of documents authored by the applicant himself. ("*Background information*" and "*Respondent's Replying Affidavit*") What emerges from the heads submitted by counsel is that the appeal is mainly confined to the correct interpretation of section 1(4) and consequently it must be inferred that the appeal in respect of the special entries in terms of section 317 of the CPA has been abandoned. It also appears that the parties have been incorrectly cited in the heads. The State is the respondent and Mr Okah is the applicant. The three Ministers are not parties to the appeal. The reason why they are not is explained in the State's application for leave to appeal under case number **315/16**.[1] It is therefore respectfully submitted that the two documents submitted by the applicant cannot be considered for the purpose of this appeal. Insofar as the counsel's heads contain an alternative submission that section

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[1] Para 8-11 of the Founding Affidavit in case number **315/16**

1(4) is unconstitutional it is submitted that this Court cannot entertain any argument as to the constitutionality of section 1(4) for the reasons stated hereunder.

6. The two documents authored by the applicant raise considerable issues falling outside the ambit of the submissions of his counsel.

6.1. In the document "*Background information*" it is submitted that section 1(4) is unconstitutional [2] despite no substantial argument on this point being made by counsel. Any challenge to constitutional invalidity would require the citing of the National Executive which has not been done contrary to the claims of the applicant's attorney in the "*Respondent's Explanatory Affidavit*". The National Executive should also have been provided with a proper opportunity to defend the challenge and the issue of constitutionality should have been argued in the earlier appeal processes. This would be a bar to constitutionality being raised either by counsel or by the applicant himself.

6.2. In the same document the applicant makes numerous allegations regarding the special entries which do not form part of the application of 27 July 2017 and are not supported by the record filed. *Inter alia* he accuses the prosecutor of misleading the court, colluding with the Nigerian Government and denying the applicant access to witnesses in Nigeria.[3] He also accuses the court of having an unhealthy association with the Nigerian Government resulting in the court being exposed to "*unsubstantiated, untested*

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2 "*Background information*" para 29 pages 14-17 and para 33.7 page 21

3 "*Background information*" para 59.11 pages 51-52

information".[4] He accuses the prosecutor of fabricating evidence at his bail application [5] and of compiling the statements of key witnesses.[6]

6.3. Insofar as the document "*Respondent's Replying Affidavit*" is concerned Rule 19 of this Court does not permit a reply to the respondent's answer and on that ground alone the document should not be considered. In this document the applicant makes further submissions regarding section 1(4). He also proceeds to make a number of serious allegations while purporting to deal with the special entries. These claims are not supported by the record and were never included in his application. They in the main consist of unwarranted attacks on the integrity of the prosecutor, the then National Director of Public Prosecutions who authorised the prosecution of the applicant and the trial court.

6.4. In order to assist the Court the respondent has compiled a Chronology of key events and has also identified the portions of the record which require reading. (In the light of the heads of argument submitted by the applicant substantial portions of the voluminous records are irrelevant.) Finally documents not forming part of the record or difficult to locate within the record are attached to these heads for easy reference.

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4 "*Background information*" para 52 page 55

5 "*Background information*" para 53 page 55

6 "*Background information*" para 54-56 pages 55-56

THE INTERPRETATION OF SECTION 1(4) OF THE TERRORISM LAW

7. The applicant seeks an interpretation which would remove his conduct from the definition of terrorist activity. In this regard he submits that the reference to "people" in the section should be interpreted as including a sector of the population as opposed to the entire population of a state. He also argues that the phrase "*occupation or aggression or domination by alien or foreign forces*" should apply to a government oppressing a section of its own population and thereby alienating itself from it. Finally he seeks to reinforce these arguments by drawing comparisons to the resistance to apartheid in South Africa.

8. It is respectfully submitted that this Court should not grant the applicant leave to appeal on this ground for the following reasons:

   8.1. The applicant did not testify or lead other evidence on this issue at his trial.

   8.2. He did not apply for leave to appeal on this issue when the trial court rejected his argument. A copy of the judgment "*Application for Leave to Appeal*" is attached hereto as it does not form part of the record.

   8.3. He abandoned all arguments on this issue when the SCA finally heard his appeal.

   8.4. As will be demonstrated hereinunder there is no merit at all in his attack on the interpretation of the provision given by the trial court.

   8.5. This Court has already held that it would be inappropriate to entertain an appeal on a constitutional matter where the applicant failed to raise it before the SCA.[7]

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[7] Lane and Fey NNO v Dabelstein and Others 2001(2)SA 1187(CC); S v Bierman 2002(5)SA 243(CC)

9. In the event of this Court however allowing the applicant to argue the issue it is respectfully submitted that a mere reading of section 1(4) of the terrorism law in the light of the facts of the case demonstrates that the applicant's conduct does not fall within the ambit of the exclusion.

10. Section 1(4) reads as follows:

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

11. The provision therefore only applies in two situations namely:

    11.1. a struggle for national liberation, self-determination and independence from colonialism; or

    11.2. occupation, aggression or domination by the forces of a foreign State.

12. The applicant never pleaded as a defence the fact that his conduct fell within the ambit of section 1(4).[8] His defence as put to the State witnesses was that he was not involved in the two bombing incidents and was not a militant. He did not testify at all or call any other witnesses regarding the issue. His reliance on the exclusion clause can only be gleaned from what was said by the State witnesses and what was raised in oral and written argument by his counsel.

13. A key witness called by the State was Minister Orubebe, the Minister responsible for the Niger Delta Affairs (the conflict area). He testified that the occupants of this area were discriminated against in that, although the country's wealth came from the oil from this region, the inhabitants never benefited. This led to militant action by the inhabitants under the umbrella of MEND. The applicant was a key role-player in this organisation. The witness was appointed to negotiate with the militants to end the violence. The militants had three conditions; namely an amnesty process for them, the release of the applicant from prison and, finally, the fast-tracking of development in the Niger Delta.[9]

14. The witness also confirmed that the current president of Nigeria came from the Niger Delta.[10] In respect of the Warri bombings he indicated that there was a post-amnesty dialogue meeting at the Government House Annex hosted by the Vanguard Newspaper and attended by the Governors of various States.[11] In respect of the Abuja bombings he confirmed that the Nigerian Government's 50th Independence Celebrations took place at Eagle Square. The celebrations were attended by several

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8 Record Volume 1 page 8 line 13
9 Record Volume 1 pages 19-24 and 32-33
10 Record Volume 1 page 38
11 Record Volume 1 pages 51-52

African Heads of State as well as a representative from the South African Government.[12] Eagle Square is an official ceremonial centre for government activities.[13]

15. He also confirmed that at the time of the two bombings the militant leaders were working with government and that it was only a break-away group linked to the applicant which was still causing disturbances in the Niger Delta.[14] This break-away group was described as a small one.[15]

16. Partick Oyambevwe Origho, a secretary in a governor's office, testified more specifically concerning the Warri bombings. He indicated that the purpose of the meeting was to provide training for the militants and to address disarmaments and amnesty procedures.[16] The meeting was attended not only by governors but also by members of the community and multilateral agencies.[17] The explosions took place on a main expressway outside the premises [18] and this was where the victims were.[19]

17. Another State witness Selekaye Victor Ben testified that he was involved in the original MEND militant activities. In this regard he indicated that MEND was involved in attacking military installations and oil installations. Many of the activities related to blowing up pipelines and oil facilities and kidnapping ex-patriots.[20] He also indicated

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12 Record Volume 1 page 53
13 Record Volume 1 page 54
14 Record Volume 1 page 104 lines 12-15
15 Record Volume 1 page 151 lines 22-25
16 Record Volume 13 page 184 line 22 to page 185 line 10
17 Record Volume 13 page 187 line 1 to page 188 line 10
18 Record Volume 13 page 190 lines 5-10
19 Record Volume 13 page 190 lines 10-20
20 Record Volume 3 page 268 line 20 to page 269 line 5

that MEND published a document calling for oil companies to leave.[21] It later emerged that the ex-patriots were the foreign nationals working on the oil fields which were being attacked.[22] He confirmed that the ex-patriots were abducted so that they could be used to deter an aerial attack by the Nigerian army.[23] Significantly he confirmed that as a result of the amnesty process there was no need for the struggle to continue and in fact it ceased.[24] In respect of the Warri bombings he indicated that this was not in the interest of the Niger Delta people because the people who had been originally involved in the fighting were attending the meeting.[25] In respect of the Abuja bombings he stated that all the major stake-holders in the Niger Delta including the former militants condemned this bombing.[26]

18. Mr X testified that he was instructed by the applicant to organise the Warri bombing. He indicated that the motive for the bombing was that the applicant was not happy about the militants accepting the amnesty.[27] He indicated that the applicant had instructed him to detonate two bombs with a 10-minute interval between the two blasts. The vehicles were parked in the road so as to disrupt the meeting which was being held.[28]

19. In respect of the Abuja bombings Mr Y testified that the applicant wished to embarrass the Nigerian Government when celebrating its 50th Independence Anniversary.[29]

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21 Record Volume 3 page 270 lines 21-23
22 Record Volume 3 page 277 lines 7-19
23 Record Volume 3 page 277 lines 12-21
24 Record Volume 3 page 304 lines 4-18
25 Record Volume 3 page 304 lines 18-24
26 Record Volume 3 page 353 line 21 to page 354 line 3
27 Record Volume 9 page 1125 lines 11-12
28 Record Volume 9 page 1141 lines 4-25
29 Record Volume 10 page 1289 line 20 to page 1290 line 3

20. Mr Abubaker, the head of the Nigerian investigation, also confirmed that after the amnesty "*every militant, general surrendered their arms, including gumboots*".[30] He indicated that these people were undergoing training to be reintegrated into society.[31] The applicant however set up camps and people commenced attacking a joint taskforce that was keeping security in the region.[32]

21. In oral argument the applicant's counsel indicated that MEND had been involved in an armed struggle which related to self-determination.[33] In his written submission he alleged that Minister Orubebe had confirmed that MEND was a militant group engaged in "*an armed struggle for self-determination with the government*".[34] It was however never Orubebe's evidence that the dispute related to self-determination. His evidence referred to above demonstrates that it was limited solely to the failure of government to allow the population of the Niger to benefit from the proceeds of oil extraction.

22. It is respectfully submitted that the arguments now advanced constitute an elaborate smokescreen to draw attention away from the fact that the applicant was not involved in a struggle against colonialism or occupation by a foreign State. The crux of the matter is that a state of militancy arose within a section of the Nigerian population because of the post-colonial Nigerian Government's policy of oil extraction to the detriment of the section of the population where the oil was located. This state of militancy however had largely dissipated in 2009 with the adoption of an amnesty process for the militants and the fast-tracking of development in the affected region. The applicant, being dissatisfied with the amnesty process, instructed the bombing of

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30 Record Volume 5 page 756 lines 10-13
31 Record Volume 5 page 750 lines 20-25
32 Record Volume 5 page 756 lines 14-19
33 Record Volume 15 page 1835 line 20 to page 1838 line 10
34 Record Volume 17 Heads of Argument (Acussed) [sic] par 283

civilian targets using indiscriminate weapons. In respect of the Warri bombings this was to disrupt the amnesty process and, in respect of the Abuja bombings, to disrupt the independence from colonialism celebrations.

23. Insofar as it may in addition be necessary to address the respective international law principles relevant to the provision it is submitted that an analysis thereof would lead to the same conclusion.

24. As is confirmed in the Preamble to the terrorism law the Act was passed, *inter alia*, to give effect to:

    24.1. United Nations Security Council Resolution (UNSCR) 1373/2001. This Resolution was issued in terms of Chapter VII of the Charter of the United Nations (UN) and is therefore binding on all Member States;

    24.2. the Convention for the Prevention and Combating of Terrorism, adopted by the Organisation of African Unity (AU Convention); and

    24.3. the UN Conventions listed in the Preamble.

25. Section 2 of the terrorism law creates the crime of terrorism which is committed by engaging in terrorist activity. Terrorist activity is defined in section 1 and specifies various violent activities causing death, serious injury to persons and substantial damage or destruction of property.

26. Section 1(4) was enacted to implement the AU Convention and not UNSCR 1373 or the UN Conventions.[35] The latter instruments do not contain any such exclusion.

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[35] Dugard *International Law: A South African Perspective* 4th ed 167-168

27. The Preamble to the AU Convention reaffirms "*the legitimate right of peoples for self-determination and independence pursuant to the principles of international law and the provisions of the Charters of the Organization of African United Nations as well as the African Charter of Human and People's Rights*".

28. The Charter of the AU commits itself to defending the sovereignty, territorial integrity and independence of all Member States and therefore calls for the eradication of all forms of colonialism from Africa.[36] The Charter also emphasises safeguarding hard-won independence and sovereignty and territorial integrity of its States.[37]

29. The African Charter on Human and Peoples Rights recognises the right of colonized or oppressed people to free themselves from the bonds of domination by resorting to any means recognized by the international community.[38] In this regard all people have the right to assistance from the AU States in their liberation struggle against foreign domination.[39]

30. Consequently Article 3.1 of the AU Convention 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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36 Article II of the Charter of the Organization of African Unity

37 Preamble of the Charter of the Organization of African Unity

38 Article 20.2 of the African Charter on Human and Peoples Rights

39 Article 20.3 of the African Charter on Human and Peoples Rights

31. In the African context "*colonialism*" has only one meaning, namely the practice of Western countries conquering portions of Africa and treating those areas as extensions of their own territories. This practice essentially removed the right to self-determination from the local populations so colonised.

32. The reference to interventions by foreign forces obviously caters for the situation where one State invades another State without colonising it. A classic example would be the invasion of France by Germany in 1940 (i.e. aggression) and occupation until liberated by the Allied Forces in 1944 (i.e. occupation or domination by a foreign force). The foreign forces referred to in the Article must therefore be interpreted as being those belonging to States not being members of the AU.

33. The wording of section 1(4) of the terrorism law is not identical to Article 3. It is however respectfully submitted that in essence both provisions address the same issue namely colonialism and foreign aggression.

34. Section 1(4) refers to national liberation, international humanitarian law (IHL), the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States (the Friendly Relations Declaration) and the UN Charter. The reference to the latter three international instruments identifies the relevant principles of international law referred to in Article 3.1 of the AU Convention. The reference to national liberation clearly talks to all the citizens of a State obtaining freedom from oppression. The South African Constitution makes several references to

national matters which are ones that affect the whole country and not only a portion thereof. [40]

35. The UN Charter imposes certain obligations on Member States relating to non-self-governing territories under their control. [41]

36. The Friendly Relations Declaration has several provisions addressing the issue of colonialism: [42]

    36.1. It requires "*a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned*".

    36.2. It specifies that the "*subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter*".

    36.3. It places a duty on every State "*to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence*".

37. Section 1(4) of the terrorism law refers to alien as well as foreign forces. It is respectfully submitted that there is no difference between these two terms and the insertion of a second term does not in any way alter the impact of the provision. The term "*alien*" was obviously derived from the reference to "*alien subjugation*" in the Friendly Relations Declaration *supra*. Therein the term is linked to colonialism.

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40 Sections 46 *et seq* of the Constitution of the Republic of South Africa, 1996, referring to the National Assembly, sections 60 *et seq* of the Constitution referring to the National Council of Provinces and sections 83 *et seq* of the Constitution referring to the National Executive. These must be contrasted with other provisions referring to provincial or municipal structures.

41 Article XI of the UN Charter

42 Under the heading "*The principle of equal rights and self-determination of peoples*" of the Friendly Relations Declaration

38. It is therefore respectfully submitted that section 1(4) of the terrorism law only applies to resistance to foreign State actions as identified in the provision.

39. It is accepted that the liberation movement exclusion does not apply to internal strife within a State:

> "*The right of self-determination was recognized for colonial and foreign dominated peoples. However, it was never universally recognized in public international law for other peoples established in a state, who desired internal self-determination without the consent of the state itself. Therefore, a right to secession without the State's consent was not recognized in public international law either. Terrorism can thus be a crime in public international law if the right of self-determination is transgressed by terrorist acts, and no recognition for the changes in the territory has been approved by the state.*" [43]

40. Section 231(4) of the South African Constitution provides that an international agreement becomes law in South Africa when it is enacted by National legislation. In the instance case this was done when the terrorism law entered into effect. Section 233 of the Constitution provides that when interpreting legislation the Court must favour any reasonable interpretation that is consistent with international law over any alternative interpretation that is inconsistent therewith.

41. It is therefore respectfully submitted that the interpretation sought by the applicant is inconsistent with the relevant international law which limits the liberation movement

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[43] Jori Duursma *"Definition of Terrorism and Self-Determination"* 20 December 2008 at 7 at http://hir.harvard.edu

exclusion solely to colonialism and the specified acts of foreign State intervention. The adoption of the applicant's interpretation would place the country in breach of its international obligations owed to the AU.

42. Although the AU Convention excludes a liberation movement directed against colonialism or foreign occupation from the definition of terrorism, it nevertheless:[44]

42.1. rejects "*all forms of terrorism irrespective of their motivations*";

42.2. expresses deep concern over the "*phenomenon of terrorism and the dangers it poses to the stability and security of States*";

42.3. finds "*that terrorism constitutes a serious violation of human rights and, in particular, the rights to physical integrity, life, freedom and security, and impedes socio-economic development through destabilization of States*"; and

42.4. concludes that "*terrorism cannot be justified under any circumstances and, consequently, should be combated in all its forms and manifestations, including those in which States are involved directly or indirectly, without regard to its origin, causes and objectives*".

43. On 8 July 2004 the AU adopted the Protocol to the OAU Convention on the Prevention and Combating of Terrorism (AU Protocol). Nowhere in the Protocol did the AU revisit the liberation movement exclusion. On the contrary the Protocol declared a determination to "*combat terrorism in all its forms and manifestations and any support thereto in Africa*" and in this regard stated that "*acts of terrorism cannot be justified under any circumstances*".[45]

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44 Preamble of the AU Convention

45 Preamble of the AU Protocol

44. At the Ordinary Session of the AU from 30 June to 1 July 2011 the AU adopted the African Model Anti-Terrorism Law (AU Model Law). The liberation movement exclusion clause retained its original wording. The Model Law also excluded acts covered by IHL committed during the course of armed conflict.[46]

45. As indicated above the terrorism law also implemented UNSCRs and the UN Conventions, none of which exempt liberation movements from the definition of terrorism or other proscribed acts.

46. The UNSCRs require the combating of all forms of terrorism:

46.1. UNSCR 1373 (2001) reaffirmed "*the need to combat by all means ... threats to international peace and security caused by terrorist acts*".

46.2. UNSCR 1624 (2005) reaffirmed "*the imperative to combat terrorism in all its forms and manifestations by all means*" and condemned "*in the strongest terms all acts of terrorism irrespective of their motivation, whenever and by whomsoever committed, as one of the most serious threats to peace and security*".

46.3. Such sentiments have been repeated in more recent Resolutions such as UNSCR 2170 (2014) and UNSCR 2253 (2015).

47. The UN Conventions imposing obligations to criminalise specified conduct also require that such offences not be classified as political offences which would be a bar to extradition or rendering mutual legal assistance. By way of example reference is made to Article 11 of the International Convention for the Suppression of Terrorist Bombings (1997) (the Bombing Convention).

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[46] Sections 4 (x1)(b) and (c) of the AU Model Law

48. The exclusion provided for in section 1(4) of POCDATARA must be regarded as a limitation on the obligation to treat terrorism as a serious crime irrespective of the motivation of the perpetrators. As such it must be interpreted strictly in terms of the relevant international instruments and so as not to contradict or undermine the other international obligations imposed on States. For the applicant to successfully invoke the provisions of section 1(4) he would have had to have proved that his actions were against colonialism or a foreign State occupying Nigeria. If his actions took the form of an armed conflict he would have had to satisfy the requirements of IHL set out above.

49. The reference to IHL in section 1(4) is due to the fact that a liberation movement may take the form of an armed conflict. "*International humanitarian law is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. International humanitarian law is also known as the law of war or the law of armed conflict ... International humanitarian law applies only to armed conflict; it does not cover internal tensions or disturbances such as isolated acts of violence. The law applies only once a conflict has begun, and then equally to all sides regardless of who started the fighting.*" [47]

50. IHL is implemented in South Africa through the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (the ICC Act) and the Implementation of the Geneva Conventions Act 8 of 2012 (the Geneva Act). The ICC Act criminalises

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[47] International Committee of the Red Cross (ICRC) "*What is International Humanitarian Law?*" at https://www.icrc.org

war crimes as set out in Part 3 of Schedule 1 of the Act. The Geneva Act criminalises the Geneva Conventions and Additional Protocols.

51. IHL only applies to armed conflicts and only once such a conflict has commenced. It applies equally to all sides of the conflict regardless of who started the fighting. It therefore relates only to *jus in bello* and not *jus ad bellum*. These principles have been succinctly set out by the Final Report of the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia. [48] A party to an armed conflict cannot avoid the consequences of IHL on the basis that it had a just cause in taking up arms.

52. IHL distinguishes between international and non-international armed conflicts. International armed conflicts must involve at least two States and fall within the ambit of the four Geneva Conventions and Additional Protocol I. In terms of Article 1.4 of Additional Protocol I armed conflicts relating to colonial domination, alien occupation and racist regimes are deemed to be international armed conflicts, thereby confirming that the alien occupation is by another State.

53. The activities involving the applicant (assuming that they amount to an armed conflict) would be classified as a non-international armed conflict. These are restricted to the territory of a single State and involve either regular armed forces, fighting groups or armed dissidents. These activities are regulated by Article 3 common to the four Geneva Conventions as well as Additional Protocol II. In terms of Article 1.2 of this Protocol isolated and sporadic acts of violence do not constitute armed conflicts.

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[48] Para 30-34 of the Final Report of the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia

54. In order to qualify as an armed conflict: [49]

> *"First, the hostilities must reach a minimum level of intensity. This may be the case, for example, when the hostilities are of a collective character or when the government is obliged to use military force against the insurgents, instead of mere police forces.*
>
> *Second, non-governmental groups involved in the conflict must be considered as "parties to the conflict", meaning that they possess organized armed forces. This means for example that these forces have to be under a certain command structure and have the capacity to sustain military operations."*

Leading international law expert Kittichaisaree indicated that an armed conflict must be "*distinguished from mere civil unrest or terrorist activities*".[50]

55. The existence of an armed conflict is not a bar to the crime of terrorism. Article 4.2(d) of Additional Protocol II prohibits all acts of terrorism during the course of an armed conflict. Articles 4.2(a), (b) and (c) also prohibit violence to life in particular murder, as well as collective punishments and the taking of hostages all of which could amount to terrorism. Article 33(1) of the Fourth Geneva Convention prohibits "*all measures [...] of terrorism' against civilians*".[51]

56. Leading international law expert, Antonio Cassese, indicates that attacks on civilians and other protected persons in the course of an armed conflict aimed at spreading

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49 ICRC *"How is the Term "Armed Conflict" Defined in International Humanitarian Law?"* March 2008 at 3 at https://www.icrc.org

50 Kriangsak Kittichaisaree *International Criminal Law* (2009 reprinted edition) at 131

51 Antonio Cassese *International Criminal Law* 2nd ed at 171

terror may amount to war crimes.[52] Quoting the 2004 British Manual he concludes by stating that violent action "*can also be directed against a civilian object even if it is empty (for instance, a square, a private building, a theatre), as long as the goal pursued in taking such action is that of terrorizing the population… the rule prohibiting terror attacks 'would apply, for instance, to car bombs installed in busy shopping streets, even if no civilians are killed or injured by them, their object being to create panic among the population …*"[53]

57. In terms of Parts 3(e)(i) and (xii) of Schedule 1 of the ICC Act intentionally directing attacks on a civilian population and destroying property where such destruction is not imperatively demanded by the necessities of the conflict constitute war crimes. Article 13 of Additional Protocol II to the Geneva Conventions requires the protection of the civilian population during the course of armed conflict. Article 13.1 requires that civilians be protected from the dangers arising from military operations. Article 13.2 requires that the civilian population not be the object of an attack and prohibits acts which spread terror amongst the civilian population. Article 15 prohibits attacks on installations even if they are military objectives if attacks thereon may cause the release of dangerous forces. Civilians are any persons who do not directly participate in hostilities. Property not connected with military objectives is similarly protected. [54]

58. Article 2.1(b) of the International Convention for the Suppression of the Financing of Terrorism (one of the UN Conventions implemented by the terrorism law) is applicable in situations of armed conflict where the intention is to intimidate a population or to compel a government to do or refrain from doing any act.

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52 Antonio Cassese *International Criminal Law* 2nd ed at 173

53 Antonio Cassese *International Criminal Law* 2nd ed at 174

54 Kriangsak Kittichaisaree *International Criminal Law* (2009 reprinted edition) at 139-142

59. State practice has established as a norm of customary international law that the use of human shields in armed conflicts is prohibited.[55] Article 13.1 of Additional Protocol II requires that the civilian population receive general protection against the dangers arising from military operations which would also prevent civilians being used as shields. The same obligation requires that warnings be given to the civilian population when attacking a military target.

60. The prohibition in IHL against attacks on civilian persons and properties requires that attacks be limited to military objectives: [56]

> "35. *... In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.*
>
> 36. *Where objects are concerned, the definition has two elements: (a) their nature, location, purpose or use must make an effective contribution to military action, and (b) their total or partial destruction, capture or neutralization must offer a definite military advantage in the circumstances ruling at the time.*"

61. IHL prohibits indiscriminate attacks which are not directed at specific military objectives:[57]

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55 ICRC "*Rule 97. Human Shields*" at https://www.icrc.org

56 Para 35-36 of the Final Report of the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia

57 Article 51.4 of Additional Protocol I

"Indiscriminate attacks are prohibited. Indiscriminate attacks are:

(a) those which are not directed at a specific military objective;

(b) those which employ a method or means of combat which cannot be directed at a specific military objective; or

(c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction."

62. Although prior to the amnesty of 2009 there would appear to have been largescale militancy there was no evidence placed before the court to demonstrate that this militancy amounted to a non-international armed conflict as defined in IHL as opposed to sporadic acts of violence or terrorism which would not. The Amnesty Proclamation which formed part of the admissions made by the applicant refers to elements of the Niger Delta populace having resorted to unlawful means of agitation for the development of the region including militancy and nowhere is the term "*armed conflict*" used. (Due to the fact that this document has not been given a page number it is attached to these heads for easy reference.) Assuming that it did constitute an armed conflict, the blowing up of pipelines, oilfields and kidnapping their executives in order for them to be used as human shields would all constitute war crimes on the principles of IHL set out above.

63. It is clear however that this general militancy ceased upon the amnesty-process being implemented. Attacks on the joint taskforce without proper elaboration would not amount to more than acts of terrorism or sporadic violence. Although the witness Mr

Ohikhuare refers to a small quantity of military weapons being found in a camp [58] this would not *per se* constitute proof of an armed conflict. There is no evidence therefore that the Warri and Abuja bombings took place during an armed conflict. The objects of the Warri bombings were components of the civil government of Nigeria, former militants, members of the public and, in the case of the Abuja bombing, also foreign dignatories. Even if an armed conflict had prevailed these could not be regarded as military targets and attacks on civilians and civilian properties constitute war crimes in terms of the IHL principles outlined above. The loading of explosives into cars and parking them in public places to detonate at strategic intervals would constitute a prohibited indiscriminate attack even if there was a military target. As outlined above in order to qualify for the status of a lawful combatant the armed or dissident group must have a command structure and the capability to carry out military operations. The manner in which the two sets of bombings were executed cannot remotely be classified as a military operation but simply a pure criminal act perpetrated by individuals sharing a common purpose. Both bombings were executed by individuals disguised as civilians and civilian cars were used.

64. The submissions in the applicant's heads in no way gainsay this. It is irrelevant whether or not he was the leader of MEND. The undisputable evidence is that he ordered the bombings in question. The lengthy reference to the judgment relating to oil issues is wholly irrelevant as this state of affairs cannot constitute a defence to the charges relating to the bombings. The reference to a 1999 attack by the Nigerian army on a village is also totally irrelevant as firstly this incident took place during the pre-amnesty period and secondly cannot constitute a defence to the charges. The lengthy dissertation entitled "*A Brief Historical Overview of the Conflict in the Niger-*

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58 Record Volume 11 page 835 lines 5-9

Delta" insofar as the facts stated therein were not before the trial court is also irrelevant.

65. The manner in which the bombings were carried out correspond closely with attacks on civilian targets by the organisation Islamic State designated by the UN as a terrorist organisation. In UN Security Council Report S/2016/92, dated 29 January 2016, the Secretary-General labelled those attacks as terrorism:

> "*The terrorist attacks carried out in the final months of 2015 demonstrate that it*" (i.e. Islamic State) "*is capable of committing attacks on civilian targets outside the territories under its control. The extent of its reach was notably demonstrated by the suicide bombings in Beirut on 12 November 2015, the coordinated attacks in Paris on 13 November 2015 and the attacks in Jakarta by an ISIL affiliate on 14 January 2016, which closely resembled the Paris attacks.*"

66. The international community has consistently condemned terrorism in the strongest possible terms:

66.1. "*Terrorism strikes at the very heart of everything the United Nations stands for. It presents a global threat to democracy, the rule of law, human rights and stability. Globalization brings home to us the importance of a truly concerted international effort to combat terrorism in all its forms and manifestations.*" – Kofi Annan, the former Secretary-General of the United Nations.[59]

66.2. "*Reaffirming that terrorism in all forms and manifestations constitutes one of the most serious threats to peace and security and that any acts of terrorism*

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[59] UN Office on Drugs and Crime (UNODC) *Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols* 2003 at page 3 in para 5

are criminal and unjustifiable regardless of their motivations, whenever, wherever, and by whomsoever committed … aimed at causing the deaths of innocent civilians and other victims, destruction of property, and greatly undermining stability,

Recognizing that terrorism poses a threat to international peace and security …"[60]

66.3. "*Noting also that terrorist attacks by means of explosives or other lethal devices have become increasingly widespread … Considering that the occurrence of such acts is a matter of grave concern to the international community as a whole*".[61]

67. It is consequently important to distinguish the crime of terrorism from other criminal activity. The terrorism law does this by requiring a political or other motive in addition to the intent to, *inter alia*, intimidate government or a section of the civilian population.[62] The Canadian terrorism law has a similar motive requirement and the Supreme Court of Canada has already found that the motive requirement is constitutional.[63]

68. Obviously the corollary of requiring a political motive is that such motive cannot constitute a defence to the crime. This is why in section 1(5) of the terrorism law no form of political or other motive can constitute a defence. The exclusion of political and other motives as a defence to terrorism is also a requirement of the international instruments referred to above.

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60 Preamble to UNSCR 2253 (2015)

61 Preamble to the Bombing Convention

62 Section 1 (par (c) of the definition of terrorist activity) of the terrorism law

63 R. v. Khawaja, 2012 SCC 69, [2012] 3 S.C.R. 555

69. His conduct therefore meets all the requirements necessary for a conviction on a charge of terrorism in respect of both sets of bombings. As indicated above the liberation movement exclusion is not a requirement of the UNSCRs or UN Conventions. Even if section 1(4) applied (which is not conceded) it would not be a bar to his prosecution and conviction on all the other charges relating to the two sets of bombings. These are all serious crimes in their own right and were all taken together for the purpose of sentence by the trial court.

70. Finally in passing it serves only to point out that because *jus ad bellum* is not a consideration it is of little assistance to the applicant to refer to the struggle against apartheid. In respect of this latter issue it serves only to point out that persons who committed human rights abuses during the course of the struggle were obliged to apply for amnesty. This Court was only prepared to find that the amnesty-process was constitutional on the basis that it was a once-off event necessary to transform the apartheid regime into a constitutional democracy.[64] Although the inhabitants of the Niger Delta originally had valid grievances against their government these grievances fell away with the election of a President from that region, the implementation of an amnesty-process and fast-tracking of development for the region. The applicant's crimes were aimed at disrupting those processes.

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[64] Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others 1996(4)SA 671(CC)

SPECIAL ENTRIES IN TERMS OF SECTION 317 OF THE CPA

71. It is the respondent's submission that the application on these grounds has been abandoned. In the event however of this Court deciding that these grounds should be argued it is submitted that such argument be limited to the application and record. The applicant alleges that the proceedings before the trial court were irregular on three separate and distinct grounds, namely:

    71.1. "*Mr. Clifford Osagie, a member of the Nigerian State Security Services, sat directly across from witnesses, who were participants in the acts for which the Applicant was tried, during their testimony*";

    71.2. "*The Applicant had not been warned of his rights in terms of Article 7(3)(a), (b) and (c) of the International Convention for the Suppression of Terrorist Bombings*"; and

    71.3. "*The learned Judge should have, in the interests of justice, issued a letter of request to obtain the Defense's evidence from witnesses in Nigeria*".

72. In evaluating these issues it is important to note that our law is to the effect that irregularities do not lead necessarily to a failure of justice.[65]

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[65] National Director of Public Prosecutions v King 2010(2)SACR 146(SCA) in para 4 and the cases quoted in footnote 13

"Mr. Clifford Osagie, a member of the Nigerian State Security Services, sat directly across from witnesses, who were participants in the acts for which the Applicant was tried, during their testimony"

73. Mr Osagie was during the course of the trial an admitted barrister licenced to practise law in Nigeria and employed by the State Security Department as a prosecutor. The State Security Department prosecutes its own cases and consequently he was also an employee of such Department.[66]

74. Mr Osagie held a watching brief due to the fact that prosecutions had also been instituted in Nigeria against certain of the applicant's accomplices.

75. When the prosecutor called Mr Abubaker to the stand he requested Mr Osagie to sit next to him in order to assist him. The prosecutor referred to Mr Osagie as Barrister Osagie.[67] The circumstances under which Mr Osagie was introduced to the court did not require the prosecutor to give a breakdown of all his duties within the Nigerian Government.

76. There can be no question of such conduct constituting an irregularity let alone one which would vitiate the entire proceedings.

77. The raising of this issue constitutes a disguised attempt to have the unsworn statements of Obi Nwabueze and Charles Tombra Okah admitted as being true and then, on the basis thereof, to draw the inference that the Nigerian State witnesses who

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66 Petition to SCA (Replying Affidavit Osagie dated 25 February 2013 pages 43 to 85 and the documentation attached thereto)

67 Record Volume 4 page 552 lines 20-25

implicated the applicant were similarly subjected to the same undue influence and torture and as a consequence falsely implicated the applicant in the commission of the offences.[68] These two statements were both dated 30 January 2013 after the verdict had been handed down on 21 January 2013. Consequently the veracity of the allegations contained therein was never tested nor did the State have an opportunity to rebut them.

78. The proper approach should have been for the applicant, on the basis of the two statements, to bring an application to lead further evidence on appeal. The procedure to have been followed is set out in section 316(5) of the CPA. Under cover of an affidavit the applicant was required to have demonstrated why the evidence was not led at the trial, that the evidence was truthful and would have a material outcome on the verdict.

79. It is therefore respectfully submitted that there is no merit in this complaint.

"The Applicant had not been warned of his rights in terms of Article 7(3)(a), (b) and (c) of the International Convention for the Suppression of Terrorist Bombings":

80. Article 7(3) of the Bombing Convention requires that a foreign accused be informed of his right to receive a visit by a representative of his government in the country where he is being prosecuted.

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68 Petition to SCA (unsworn statements of Obi Nwabueze and Charles Tombra Okah)

81. The trial court accepted that these rights were not explained to the applicant. This was due to a *bona fide* omission. In this regard it is noteworthy that no reference is made to this obligation in the terrorism law.

82. This is the third application on this ground by the applicant. In none of the applications has it ever been demonstrated how his constitutional right to a fair trial was infringed to the extent that it would render the trial unfair.

83. The sole ground upon which the applicant relies is his claim that, had his rights been explained, "*another solution could have been found*".[69]

84. As is the case with his previous unsuccessful applications what this other solution is, is not explained. It has to however be assumed that what the applicant contemplated would have been the discontinuation of the South African trial. This in turn would require it to be accepted that the Nigerian Government was oblivious of the arrest and prosecution of the applicant in South Africa and had it so known it would have intervened in the process.

85. There is no possible basis for reaching this conclusion based on the failure to explain the applicant's right to a consular visit.

86. It was the undisputed evidence of Mr JR Heenen,[70] an immigration officer in the employ of the Department of Home Affairs, that the applicant and his wife were granted permanent residency status on 13 March 2007. At the same time the

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69 Second Application for Leave to Appeal (Para 18.3 of his Founding Affidavit on page 13)

70 Record Volume 18 (Para 291 of the trial court's judgment)

applicant applied to operate a business in South Africa. This was approximately three years before the Warri bombings. Only due to the applicant not relinquishing his Nigerian citizenship does he fall within the ambit of Article 7(3).

87. The purpose of facilitating a consular visit is to enable the accused's country to be appraised of his arrest so that that country may take such action as it deems necessary. This could result in consular assistance being rendered. In South African law a State is not compelled to in fact render consular assistance but only to rationally consider such a request.[71]

88. In the instant case although a consular visit was not arranged the Nigerian Government was fully aware of the arrest and prosecution of the applicant in South Africa.

89. As indicated above the first State witness was the Minister Orubebe, a person who was well acquainted with the applicant whom he regarded as his friend.[72] Other Nigerian Government officials also testified including the witnesses Abubaker and Origho.

90. When the defence closed its case the prosecutor placed on record the receipt of certain communications from the Nigerian Government:[73]

    90.1. The first document was a letter from the Solicitor-General of the Nigerian Government dated 30 November 2012 thanking the prosecutor and his team

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71 Kaunda and Others v President of the Republic of South Africa and Others 2005(4)SA 235(CC); Van Zyl and Others v Government of the Republic of South Africa and Others 2008(3)SA 294(SCA)

72 Record Volume 1 page 113 lines 1-14

73 Record Volume 15 page 1734 lines 9-25

for the manner in which the trial of the applicant was being handled and requesting the applicant to use mutual legal assistance legislation in order to secure witnesses from Nigeria.

90.2. The second document is a letter dated 26 November 2012 from the High Commission of the Nigerian Government in South Africa addressed to the attorney of the applicant again dealing with the issue of mutual legal assistance.

90.3. The third document is a letter dated 27 November 2012 from the applicant's attorney to the High Commissioner in reply.

(Due to these documents not being numbered in the record they are attached to these heads for easy reference.)

91. The above documents unequivocally demonstrate firstly that the Nigerian Government was fully aware of the prosecution in South Africa and supported it and secondly that the applicant's legal representatives were in communication with the Nigerian High Commission and therefore could have at any stage requested an intervention.

92. The admissions forming part of EXH GG[74] include a letter from the Attorney-General of Nigeria dated 8 February 2011 confirming that the Nigerian Government did not intend requesting extradition. (There is no page reference number to the document and it is therefore attached to these heads for easy reference.)

93. As indicated above several Nigerian Government officials testified in the trial as did a number of private Nigerian citizens. There is no reason why the applicant could not

[74] Record Volume 19

have approached any of these government officials including a cabinet minister to intervene in the process had he so desired.

94. The applicant's version as put to the State witnesses was that he was the victim of a conspiracy by the Nigerian Government to falsely implicate him.[75] Similar claims are made in the papers filed before this Court under the guise of heads of argument. It is hardly likely on this version that the Nigerian Government would not favour his prosecution.

95. His application four years after his conviction is not supported by any affidavit from the Nigerian Government.

96. His rights in terms of section 35 of the South African Constitution were fully respected during his prosecution and at all times he was represented by attorney and counsel of his own choice.

97. There is therefore no basis for concluding that he suffered any prejudice as a result of non-compliance with the relevant provisions of the Convention.

98. In the circumstances it is therefore respectfully submitted that this omission does not constitute an irregularity which would justify the setting aside of the proceedings.

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75 Record Volume 5 page 755 lines 10-13

***"The learned Judge should have, in the interests of justice, issued a letter of request to obtain the Defence's evidence from witnesses in Nigeria"*:**

99. The customary international law norms of sovereignty and comity require that the hearing of evidence in a foreign State takes place with the consent of the foreign State where the evidence is located.[76] Consequently the International Co-operation in Criminal Matters Act 75 of 1996 (ICCMA) was enacted *inter alia* in order to enable evidence to be obtained from abroad for the purpose of local prosecutions.

100. Section 2(1) of ICCMA makes provision for a request to be made to a foreign State while a trial is in progress which request must be made by the presiding officer. Section 3 makes provision for an interrogation in the foreign State. Section 31 permits the use of forms of obtaining mutual legal assistance not specified in this Act. A practice has evolved where either the evidence in the foreign country is heard via a video-linkage to the court in South Africa or by the South African court traveling to the foreign country and hearing the evidence there.

101. The record reflects that on 20 November 2012 the applicant's counsel confirmed that he was bringing an application in terms of ICCMA for certain defence witnesses located in Nigeria. On the following day however counsel placed on record that, having had regard to the relevant provisions and not having certainty as to being able to secure the witnesses, he had elected to abandon the application. He then obtained a postponement to 3 December 2012 in order to have witnesses testify in South Africa. On 21 November 2012 the court handed down a brief judgment confirming that the

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76 R v Hape, 2007 SCC 26; [2007] 2 SCR 292

applicant had abandoned the request to hear evidence in Nigeria citing a lack of cooperation from the side of the Nigerian Government.[77]

102. On 3 December 2012 counsel for the applicant placed on record that he was unable to secure the presence of the witnesses and elected to close his case. He blamed the Nigerian Government in this regard.[78] The prosecutor however placed on record receipt of the documents referred to in para 84 *supra*.[79] It is clear that the Nigerian Government had rejected the allegations of obstruction and had pointed out that the applicant was required to make a request in terms of the Treaty between South Africa and Nigeria as well as section 2(1) of ICCMA. At the time of the trial the Treaty in question had not been brought into effect in South Africa which is still the current position.[80] The obligation to comply with section 2(1) of ICCMA was in fact correct. The response of the applicant's attorney to having been given the correct legal advice was to again confirm not to use the testimony of the said witnesses.

103. The decision not to call the witnesses was that of the counsel of the applicant after he had been fully appraised of the relevant legal provisions and had been assured by the Nigerian Government that it would cooperate.

104. It is trite that if a party elects to close its case without calling witnesses it will be only in exceptional circumstances that a court will itself *mero motu* call such witnesses. In terms of section 186 of the CPA a court will only do so "*if the evidence of such witness appears to the court essential to the just decision of the case*". Due to the fact that the

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77 Record Volume 14 pages 1613 *et seq*

78 Record Volume 15 page 1733

79 Record Volume 15 page 1734 line 4 to page 1735 line 26

80 "*Extradition and Mutual Legal Assistance in criminal matters treaties*" at http://www.justice.gov.za/ilr/mla.html

witnesses sought to be called were located in Nigeria section 186 would have to be read in conjunction with section 2(1) of ICCMA.

105. The following factors cumulatively demonstrate that the applicant has not established that the witnesses' testimony was essential to the just determination of the case:

105.1. The applicant made admissions in terms of section 220 of the CPA comprising almost seven hundred pages. The upshot of these admissions was summarised by the trial court in the judgment.[81] In essence the applicant admitted that he was the leader of MEND, a supplier of arms and military equipment to it, and that the two sets of bombings were carried out by MEND.

105.2. The cross-examination of the witnesses implicating the applicant was found by the trial court to be ineffectual.[82]

105.3. The applicant, who was after all the best person to explain his involvement in COUNTS 1-12, did not testify.

105.4. Although it was put to the State witnesses that the applicant was the victim of a corrupt conspiracy by the Nigerian Government to implicate him, he now seeks a ruling that his conduct falls within the ambit of section 1(4) of POCDATARA. It would be a prerequisite for this defence to succeed that the applicant did in fact engage in terrorist activity.

106. It is therefore respectfully submitted that the trial court did not commit any irregularity by failing *mero motu* to call defence witnesses after the applicant had elected not to do so.

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81 Record Volume 18 pages 20-21 para 39

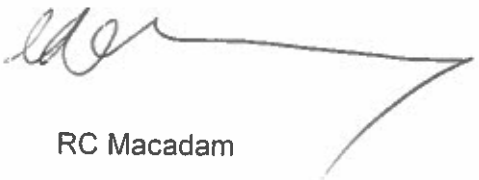
82 Record Volume 18 pages 51-52 para 142-143

PRAYER

107. It is respectfully submitted that there is no merit at all in the applicant's applications for leave to appeal for the reasons set out above.

108. Consequently it is respectfully submitted that this Court should refuse to grant the applicant leave to appeal alternatively that the appeals should be dismissed.

109. This would have the effect of the twelve convictions relating to the two sets of bombings standing as would the original sentence of 24 years' imprisonment.



RC Macadam

Respondent's counsel

Priority Crimes Litigation Unit
National Prosecuting Authority
Pretoria
9 November 2017

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THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case **193/17**

In the matter between:

HENRY EMOMOTIMI OKAH Applicant

and

THE STATE Respondent

RESPONDENT'S CHRONOLOGY

	DATE	EVENT
1.	2 October 2010	Arrest of Applicant in South Africa
2.	1 October 2012	Commencement of Prosecution of Applicant in High Court. Applicant pleads not guilty without tendering any plea explanation
3.	3 December 2012	Closure of Defence Case

4.	7 December 2012	Closing argument: Applicant's counsel raises interpretation of section 1(4) only in argument
5.	21 January 2013	Judgment on conviction, applicant's interpretation of section 1(4) rejected
6.	7 February 2013	Application for special entries in terms of section 317 of CPA
7.	20 March 2013	Court refuses to make special entries as requested
8.	26 March 2013	Sentence
9.	3 May 2013	Applicant petitions SCA on appeal for special entries
10.	23 October 2013	Applicant files application for leave to appeal only on issues of jurisdiction, duplication of convictions and count 13
11.	28 November 2013	Court grants leave to appeal only on issue of jurisdiction and count 13
12.	On unknown date in 2013	SCA refuses applications for leave to appeal
13.	19 May 2014	Applicant's counsel files heads of argument alleging that applicant's conduct fell within ambit of section 1(4) but alleging other provisions of terrorism law unconstitutional
14.	26 November 2014	SCA postpones hearing of appeal in order for National Executive to be joined

15.	31 March 2016	New Counsel for applicant submits fresh heads of argument now alleging section 1(4) and other provisions of terrorism law are unconstitutional
16.	24 August 2016	Appeal heard before SCA: Applicant's counsel abandons all constitutional challenges
17.	3 October 2016	SCA hands down judgment setting aside four convictions for lack of jurisdiction and count 13
18.	15 December 2016	Respondent files for leave to appeal to Constitutional Court solely on issue of jurisdiction
19.	8 February 2017	Directive issued by Constitutional Court calling on State to file heads of argument on 22 March 2017 and applicant on 5 April 2017
20.	30 June 2017	Applicant's heads of argument filed on
21.	24 July 2017	Applicant files application for leave to appeal challenging trial court's interpretation of section1(4)
22.	27 July 2017	Applicant files application for leave to appeal on special entries
23.	1 August 2017	Appeal postponed to 28 November for hearing
24.	27 September 2017	Constitutional Court issues directives:

		• Applicant to file heads of argument and record on 20 October 2017 • Respondent to file on 27 October 2017
25.	5 November 2017	Respondent receives electronic heads of argument and other documents
26.	6 November 2017	Respondent receives copy of record
27.	9 November 2017	Respondent receives further documentation from applicant's attorney

THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case **193/17**

In the matter between:

HENRY EMOMOTIMI OKAH Applicant

and

THE STATE Respondent

PORTIONS OF RECORD REQUIRING TO BE READ

INTERPRETATION OF SECTION 1(4)

1. Application for leave to appeal by applicant filed on 24 July 2017

2. Respondent's answer (para 10-32)

3. Judgment "*Application for leave to appeal*"

4. Submissions of applicant's counsel before SCA (filed as annexures RCM3 and RCM 4 in "*Applicant's Affidavit Opposing Respondent's Request to raise a New Matter*" filed in case number **315/16**)

5. Witness Orubebe (Record Volume 1 pages 19-24; 32-33; 38; 51-54; 104 and 151)

6. Witness Origho (Record Volume 13 pages 184; 187 and 190)

7. Witness Ben (Record Volume 3 pages 268; 270; 277; 304 and 353-354)

8. Witness X (Record Volume 9 pages 1125 and 1141)

9. Witness Y (Record Volume 10 pages 1289 to 1290)

10. Witness Abubaker (Record Volume 5 pages 750 and 756)

11. Oral argument applicant's counsel (Record Volume 15 pages 1835 and 1838; Record Volume 17 Heads of Argument (Acussed) [sic] par 283)

12. Judgment "*Conviction*" (Record Volume 18 para 8 and 49-61)

SPECIAL ENTRIES

13. Application for leave to appeal filed on 27 July 2017 including previous applications to SCA and trial court

14. Respondent's Answer para 33-62 and annexures SKA1 and SKA3

15. Prosecutor calling witness Abubaker (Record Volume 4 page 552)

16. Summary evidence witness Heenen (Record Volume 18 (Para 291 of the trial court's judgment))

17. Witness Orubebe (Record Volume 1 page 113)

18. Communications from Nigerian Government (Record Volume 15 page 1734)

19. Letter from Attorney-General of Nigeria (Record Volume 19)

20. Witness Abubaker (Record Volume 5 page 755)

21. Addresses calling defence witnesses (Record Volume 14 pages 1613 et seq; Record Volume 15 page 1733; and Record Volume 15 pages 1734-1735)

THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case **193/17**

In the matter between:

HENRY EMOMOTIMI OKAH Applicant

and

THE STATE Respondent

DOCUMENTS ANNEXED TO RESPONDENT'S SUBMISSIONS

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1. Judgment "*Application for leave to appeal*" (Referred to in para 8.2 of Respondent's Submissions) (Pages 1-4)

2. Amnesty Proclamation (Referred to in para 62 of Respondent's Submissions) (Pages 5-6)

3. Communications from Nigerian Government (Referred to in para 90 of Respondent's Submissions) (Pages 7-11)

4. Letter from Attorney-General of Nigeria (Referred to in para 92 of Respondent's Submissions) (Page 12)

IN THE SOUTH GAUTENG HIGH COURT

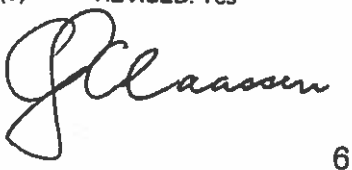
JOHANNESBURG

CASE NO: SS94/11

DATE: 28/11/2013

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: Yes



SIGNATURE 6 December 2013 DATE

In the matter between

HENRY EMOMOTIMI OKAH Applicant

and

THE STATE Respondent

JUDGMENT
(Application for Leave to Appeal)

C. J. CLAASSEN J:

[1] This is an application for leave to appeal certain aspects only of the judgment and sentence handed down earlier this year. The main contention by the applicant affects the jurisdictional entitlement of this court to charge the applicant with acts of terrorism that were committed beyond the borders of South Africa, namely in Nigeria. It therefore affects the proper construction of the jurisdictional reach of Act 33 of 2004 ("the Act").

[2] I am of the view that this case, being the very first prosecution under the aforesaid Act, should be granted the jurisprudential oversight of the Supreme Court of Appeal, as the proper scope, understanding and application of the Act and its terms, have local and international implications. The notice of application, specifically frame this aspect in 5.1, as follows:

> "Granting the applicant leave to appeal to the Supreme Court of Appeal against the finding that the court had jurisdiction to hear counts 1 to 12".

[3] Resolving this issue would amount to a legal argument only. It would appear to me that the parties could in fact agree to formulate this issue in a stated case without having to burden the Supreme Court of Appeal with the enormous record which was generated in this case.

[4] The second ground of appeal is against the convictions on counts 3, 4, 5, 6, 7, and 8 on the basis that they constituted duplication of charges. I am of the view that there is no substance in this argument and that there are no reasonable prospect of another court finding that these charges are duplicated. The application for leave to appeal on this second ground is therefore refused.

[5] The third ground is leveled against the conviction on count 13 only. Count 13 can be separated from the other counts as it relates to a contravention of Section 14(a) of the Act. The applicant was found guilty of threatening to engage in terrorist activity against South African business interests in Nigeria. These threats were made in the presence

of Colonel Zeeman.

[6] Mr Marais, on behalf of the applicant, argued strenuously that another court could come to a different finding on the evidence which in his submission lacked any indication as to the response of the applicant, him not having known the contents of EXHIBIT L.

[7] I am of the view that there does exist reasonable prospects of another court coming to a different finding on the conviction of count 13. I am therefore of the view that leave to appeal should be granted against the conviction on count 13.

[8] In conclusion I therefore make the following order:

1. Leave is granted to the Supreme Court of Appeal against this court's finding that it had jurisdiction in terms of Act 33 of 2004 to hear and adjudicate counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12.
2. The application for leave to appeal the convictions on the merits of counts 3 to 8, based on an alleged duplication of charges, is dismissed.
3. Leave is granted to the Supreme Court of Appeal against the conviction only on count 13.

DATED THE 6th DAY OF December 2013 AT JOHANNESBURG

C. J. CLAASSEN
JUDGE OF THE HIGH COURT

Counsel for the Applicant: Adv J. P. Marais instructed by McMenamin, Van Huyssteen & Botes Attorneys

Counsel for the Respondent: Adv S. K. Abrahams instructed by the Director of Public Prosecutions

The application for leave to appeal was heard on 28 November 2013

[illegible] 1991 "Annexure B" Exhibit 5

AMNESTY PROCLAMATION

Pursuant to Section 175 of the

Constitution of the Federal Republic of Nigeria

Whereas the Government of the Federal Republic of Nigeria acknowledges that the challenges of the Niger Delta arose mainly from the inadequacies of previous attempts at meeting the yearnings and aspiration of the people, and have set in motion machinery for the sustainable development of the Niger Delta States;

Whereas certain elements of the Niger Delta populace have resorted to unlawful means of agitation for the development of the region including militancy thereby threatening peace, security, order and good governance and jeopardising the economy of the nation;

Whereas the Government realises that many of the militants are able-bodied youths whose energies could be harnessed for the development of the Niger Delta and the nation at large;

Whereas the Government desires that all persons who have directly or indirectly participated in militancy in the Niger Delta should return to respect constituted authority; and

Whereas many persons who had so engaged in militancy now desire to apply for and obtain amnesty and pardon.

NOW THEREFORE, I, Umaru Musa Yarâ€™Adua, President of the Federal Republic of Nigeria, after due consultation with the council of States and in exercise of the powers conferred upon me by the provisions of Section 175 of the Constitution of the Federal Republic of Nigeria, make the following proclamation:

Filed CAS 27/10/2010 P491 "Amaesare B" 6
Exhibit

I hereby grant amnesty and unconditional pardon to all persons who have directly or indirectly participated in the commission of offences associated with militant activities in the Niger Delta;

The pardon shall take effect upon the surrender and handing over of all equipment, weapons, arms and ammunition and execution of the renunciation of Militancy Forms specified in the schedule hereto, by the affected persons at the nearest collection centre established for the purpose of Government in each of the Niger Delta States;

The unconditional pardon granted pursuant to this proclamation shall extend to all persons presently being prosecuted for offences associated with militant activities; and

This proclamation shall cease to have effect from Sunday, 4th October 2009.

MADE UNDER MY HAND THIS _____25TH_____DAY OF _____JUNE_____ 2009.

UMARU MUSA YARâ€™ADUA

Note No. 289/2012

The High Commission of the Federal Republic of Nigeria, presents its compliments to Mamatela and Majang Attorneys and herewith acknowledges receipt of a communication from the latter dated 20 November 2012, titled "*Request for Assistance: Subpoena to be served on Nigerian Witnesses*" in reference to the matter of *S v Henry Emomotimi Okah,* which was received by the Office for the Consulate General of Nigeria during the afternoon of 21 November 2012 and in which communication the accused requests the Federal Government of Nigeria to assist him in the serving of subpoenas on seven witnesses the accused intends calling and who are all alleged to be resident in Nigeria.

The High Commission of the Federal Republic of Nigeria wishes to respond herein to the aforementioned communication.

The High Commission of the Federal Republic of Nigeria hereby records that it has been present at the criminal trial proceedings in the matter of *S v Henry Emomotimi Okah* since the commencement thereof on 1 October 2012.

The High Commission of the Federal Republic of Nigeria further records that it was present during proceedings on 21 November 2012 when the accused abandoned his application in which he sought an order to take evidence on commission in Nigeria and instead successfully obtained an order whereby his trial was adjourned finally to 3 December 2012 for him to secure the attendance of his witnesses from Nigeria.

The High Commission of the Federal Republic of Nigeria wishes to further record that it has been advised that the correct legal process the accused needs to follow is to obtain an order in the form of a letter of request for assistance, which should list the assistance sought, from the trial Court, namely, from His Lordship, Mr Justice CJ Claasen, in terms of Section 2(1) of the International Cooperation in Criminal Matters Act, No 75 of 1996, a law of the Republic of South Africa, and whereby the letter is directed to the Competent Legal Authority of the Federal Republic of Nigeria.

The High Commission of the Federal Republic of Nigeria wishes to advise that the Attorney General of the Federation and Minister of Justice, who is the Chief Legal Officer of the Federal Republic of Nigeria and the Competent Legal Authority, is the designated legal authority in the Federal Republic of Nigeria to whom a letter for request for assistance should be addressed once issued by the trial Court in South Africa.

The High Commission of the Federal Republic of Nigeria hereby advises that Messrs Charles Okah, Obi Nwabueze and Mr Alexander Davour are persons who are presently detained in the facilities of the Nigerian Prison, Kuje, Abuja, subject to Nigerian Federal Court detention orders. Messrs Okah and Nwabueze are awaiting trial detainees after bail had been refused to them. Mr Davour is a convicted felon and is serving a sentence.

To secure the attendance of Messrs Charles Okah, Obi Nwabueze and Mr Alexander Davour as witnesses in the matter of *S v Henry Emomotimi Okah*, a formal application will have to be lodged with the Nigerian Federal Court.

The High Commission of the Federal Republic of Nigeria confirms that Mr Nonsu Nwosu is in the custody of the Department of State Security.

The High Commission of the Federal Republic of Nigeria advises that Mr Tonye Timi and Timipre Sylva are private citizens who, if they are voluntary witnesses for the accused, do not require the serving of subpoenas on them to obligate them to testify on behalf of the accused in South Africa.

The High Commission of the Federal Republic of Nigeria, in order to show its utter good faith, has informally forwarded the communication dated 20 November 2012 received from Mamatela and Majang Attorneys, together with the attachments to the Attorney General of the Federation and Minister of Justice. Nevertheless, the High Commission of the Federal Republic of Nigeria re-iterates that an incorrect procedure has been followed by the accused in writing to the Nigerian Consulate General, South Africa.

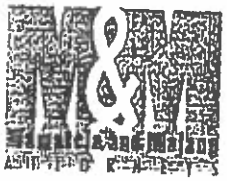
The High Commission of the Federal Republic of Nigeria wishes to enquire from Mamatela and Majang Attorneys what available legal remedies have been taken by the accused in both the Republic of South Africa and the Federal Republic of Nigeria since the commencement of his trial to obtain the testimony of the witnesses in question as the communication dated 20 November 2012 is the first time the accused has approached the Government of the Federal Republic of Nigeria for any assistance in this regard.

The High Commission of the Federal Republic of Nigeria avails itself of this opportunity to renew to Mamatela and Majang Attorneys, the assurances of its highest consideration.

Pretoria, 26th November 2012.

HIGH COMMISSION OF THE FEDERAL REPUBLIC OF NIGERIA · PRETORIA

Mr Tsietsi Majang
Mamatela and Majang Attorneys
Isle of Houghton, Johannesburg
Republic of South Africa



27 November 2012

Attention: High Commissioner
Federal Republic of Nigeria

By fax: 012 342 0718
Pages Incl. this: 1

Our ref: MAJ/OKAH/001/12 **Your ref: 289/2012**

RE: THE STATE V HENRY EMOMOTIMI OKAH
CASE NO. SS94/11

1. We refer to the above matter and acknowledge receipt of your letter dated 22 November 2012 which we received on 26 November 2012.

2. We do not intend to deal with each and every paragraph of your protracted letter and our omission to do so should not be construed as an admission on our client's part. Our client reserves his right to reply at the right time and in the appropriate forum.

3. We record that our client has decided not to use the testimony of Messrs Obi Nwabueze, Charlse Okah, and Alexander Davour in his trial going forward.

4. We trust you find the above in order.

Yours faithfully

pp

MAMATELA AND MAJANG ATTORNEYS
Per: Mr Tsietsi Majang

NIGERIA HIGH COMMISSION
RECEIVED
PRETORIA

Address: Isle of Houghton, cnr Boundary & Carse O' Gowrie road, Old Trafford 2, first floor office 3, Parktown, Johannesburg.
Tel: 011 484 9282/5700 | **Fax:** 011 484 3038
Postnet Suite # 331 Private Bag X30500 Houghton, 2041
Partners: Tsietsi Majang LLB (WITS) :email- majang@m2attorneys.co.za
Mpho Mamatela LLB (WITS) :email- mamatela@m2attorneys.co.za

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SOLICITOR-GENERAL OF THE FEDERATION AND PERMANENT SECRETARY

FEDERAL MINISTRY OF JUSTICE
PLOT 71B,
SHEHU SHAGARI WAY
MAITAMA ABUJA, NIGERIA

P.M.B. No 192
Telegram SOLICITOR
Telephone 09-6720170
Telex:

Ref. No DPPA/MLA/166/11/T.....
Date 30TH November, 2012

The Prosecutor,
Shaun Abrahams
Johannesburg,
South Africa.

RE: REQUEST FOR ASSISTANCE
SERVICE OF SUBPOENA ON NIGERIAN WITNESSES
IN THE MATTER OF STATE VS HENRY OKAH
SOUTH GAUTENG HIGH COURT, SOUTH AFRICA

The Federal Republic of Nigeria wishes to present her compliments to the Republic of South Africa and express her appreciation to you and your entire team regarding the manner in which you have so far handled the trial of the accused person in the above case.

2. I have received an informal letter of request for Mutual Legal Assistance in respect of the above subject dated 20th November, 2012 addressed to the Nigerian Consulate-General in South Africa for the service of Subpoenas on some named witnesses of the accused person, Mr. Henry Okah. (Copies attached for your attention)

3. Attached also are copies of two Nigerian High Commission's Dip-Notes addressed to the Honourable Mr. Justice CJ Claasen, the Judge handling the Henry Okah's case and the Chambers of Mamatela and Majang Attorneys, the defence Counsel in this case respectively.

4. It is instructive to refer your Excellency to the above documents for the following reasons, to wit:

i. It will be appreciated if the comments made in open Court by the Honourable Mr. Justice CJ Claasen to the effect that Nigeria is unwilling to cooperate in this case be withdrawn and the impression rectified for the Court record to reflect the truth of the matter which is that, the Federal Republic of Nigeria has cooperated with the Republic of South Africa in this case and will continue to do so without reservations in the interest of justice.

ii. It will also be appreciated if the Honourable Mr. justice CJ Claasenis informed that the informal request for mutual legal assistance sent to the Nigerian Consulate-General by the Defence Counsel has not met the re quirements fo r execution and urged t o assist the accused person in making a formal request within the provisions of the treaty between the two countries and follow particularly the provisions of Section 2 (1) of the International Cooperation in Criminal Matters Act, No. 75 of 1996, a law of the Republic of South Africa.

5. The Federal Republic of Nigeria avails itself of this opportunity to renew to the Republic of South Africa the assurances of its highest consideration and regards.

6. Accept please, the expression of the warmest regards of the Honourable Attorney-General of the Federation and Minister of Justice ***Mohammed Bello Adoke, SAN, CFR.***

abdullahi ayola

ABDULLAHI AYOLA, *OON*
Solicitor-General of the Federation
and Permanent Secretary, Federal Ministry of Justice
FOR: Honourable Attorney-General of the Federation
and Minister of Justice

ATTORNEY-GENERAL OF THE FEDERATION AND MINISTER OF JUSTICE

PMB 192
Telegrams: Solicitor
Telephone: 09-5235194
Telefax: 09-5235208

Federal Ministry of Justice
Plot 71B
Shehu Shagari Way,
Abuja, FCT
Nigeria

DPP/ADV:035/2008/ 8th February, 2011

The Central Authority of the Republic of South Africa,
The Honourable Director General of Justice
and Constitutional Development,
P.M.B 81Pretoria, 001,
Momentum Centre,
329, Pretoria Street,
c/o Pritorious and Prinsloo Streets
Pretoria.
Republic of South Africa.

Exh "A1"

RE: VISIT OF THE SOUTH AFRICAN INVESTIGATING TEAM TO NIGERIA OVER HENRY OKAH'S TRIAL

The above matter refers please.

2. Further to my discussions with the Investigating and Prosecuting team on the Henry Okah prosecution led by Mr. Anton Ackerman, Head of the National Prosecuting Authority, in Abuja on the 4th of February, 2011, I hereby confirm that the Federal Republic of Nigeria does not intend to request the extradition of Mr. Henry Okah for trial in Nigeria.

3. On behalf of the Federal Government of Nigeria, please accept my appreciation for your co-operation and assistance in this matter so far and be assured of my very high consideration and esteem always.

Mohammed Bello Adoke, SAN
Honourable Attorney-General of the Federation
and Minister of Justice