

Case Comment: The Reach of South Africa's Anti-Terrorism Law

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By: James Hendry

The Constitutional Court of South Africa ensured that a permanent resident could be tried and convicted of terrorist activity under domestic law for bombings he had orchestrated in his country of citizenship, Nigeria, by rejecting a narrow interpretation of South African anti-terrorism legislation, while rejecting his reliance on the "armed struggle" exception to its definition of terrorism.

On February 23, 2018, the Constitutional Court of South Africa heard an appeal from a conviction on terrorism charges in *State v. Okah*.[1] The appeal involved 13 counts of terrorism under South Africa's *Protection of Constitutional Democracy against Terrorist and Related Activities Act* (Act).[2] The Court had to deal with the question of the extraterritorial effect of the Act because the appeals arose from a trial in South Africa for terrorist acts that took place in Nigeria. In interpreting the Act, the Court considered South Africa's obligations under treaty law and international comity, as well as indirectly, the application of international humanitarian law.

Facts

Okah is a Nigerian national and permanent resident of South Africa. He was the leader of the Movement for the Emancipation of the Niger Delta (MEND) which claimed that Nigeria's government together with the oil companies were taking money from the Niger Delta at the expense of its

inhabitants. Okah had been granted amnesty in Nigeria in 2009 for offences of arms dealing and treason.

In South Africa, he was charged with six counts under the Act arising from two car bombings orchestrated in Warri, Nigeria on March 15, 2010 in connection with a meeting of Niger Delta stakeholders and various dignitaries, killing one and maiming many. A further six counts arose from two car bombings in Abuja, Nigeria on October 1, 2010, close to where Nigeria's president and dignitaries were celebrating the country's independence, orchestrated while he had been in South Africa, killing eight and maiming many.

The lower courts

The South African High Court (HC) convicted him on all counts under the Act based on proof that he masterminded and financed both bombings. It rejected his argument about irregularities at his trial: that he was intimidated by a Nigerian official at his trial, that he had been denied consular access[3] and that the court refused process for obtaining evidence from Nigerian witnesses.[4] The HC also rejected his exemption from the Act under s. 1(4) because he had accepted amnesty making further armed struggle illegitimate and because he had failed to provide a basis for invoking it.[5] Section 1(4) reads:

Notwithstanding any provision of this Act or any other law, any act committed during a struggle waged by peoples, including any action during an armed struggle, in the exercise or furtherance of their legitimate right to national liberation, self-determination and independence against colonialism, or occupation or aggression or domination by alien or foreign forces, in accordance with the principles of international law, especially international humanitarian law, including the purposes and principles of the Charter of the United Nations and the Declaration on 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…

The Supreme Court of Appeal (SCA) allowed Okah's appeal of four of the Warri charges, except the charges related to financing terrorism. The SCA narrowly interpreted the provision of the Act dealing with the extra-territorial jurisdiction of the South African courts over terrorism committed outside South Africa. Section 15(1) reads: "[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 …" The SCA held that jurisdiction was extended only to charges of financing terrorism abroad because of its narrow interpretation of "specified offence", which, in its view, referred to provisions of the Act dealing with financing terrorism.[6] Okah was in Nigeria at the time of the orchestration of the Warri bombings and so the SCA entered acquittals on the four Warri bombing charges, but not the financing charges, and reduced his sentence accordingly.

The State appealed the acquittals because of the SCA's narrow interpretation of the Act and Okah appealed the irregularities in his trial and the refusal of the s. 1(4) exemption.

Constitutional Court

The interpretative issue turned on the first few words of the definition of “specified offence”:

“specified offence’, with reference to section 4, 14 (in so far as it relates to section 4), and 23, means—

(a) the offence of terrorism referred to in section 2, an offence associated or connected with terrorist activities referred to in section 3, a Convention offence, or an offence referred to in section 13 or 14 (in so far as it relates to the aforementioned sections); or

(b) any activity outside the Republic which constitutes an offence under the law of another state and which would have constituted an offence referred to in paragraph (a), had that activity taken place in the Republic.

Sections 4 and 23 deal with financing issues. However, Cameron J, writing for the unanimous Court, reasoned that the SCA went off the rails by interpreting “with reference to” as a limiting phrase: limiting extraterritorial coverage to the financing activities referred to. Cameron J expressed his concern with lack of grammatical concern of the SCA, the poor drafting of the Act and the absurdity of the sole focus on financing. Cameron J focused on the reference in the definition of “specified offence” to the broad definition of “terrorist activity”, at the core of the legislation. Cameron J’s broad interpretation of “specified offence” was required by the overall purpose of the Act, both in substance and jurisdiction, and it undermined the SCA’s acquittal of Okah on the four charges unrelated to financing connected to the Warri bombings.

The broad purpose of the legislation also compelled an interpretation of s. 15(1) as conferring extra-territorial jurisdiction. Parliament’s intention, found in the title to the Act and the definition of “terrorist activity”, was to create legislation to give effect to international instruments binding South Africa[7] aimed at combating terrorism, in or outside the country, with judicial jurisdiction accordingly. The international instruments create a general duty to combat terrorism, a specific duty to try perpetrators wherever they had engaged in terrorism, or to extradite them. Section 233 of the Constitution requires the courts to interpret the law according to international law.[8] Cameron J found a clear duty to try or extradite Okah, a duty recognized only by the Court’s broad definition of the Act.

International comity

Cameron J considered whether the SCA had narrowly interpreted s. 15(1) because of concerns about international comity, a point argued by Okah: the traditional limitation of jurisdiction to try offences committed within a State’s territory. He implied there was no infringement of sovereignty of another state where the crime has an international dimension, noting that both South Africa and Nigeria were parties to the Terrorist Bombing Convention.

The “armed struggle” exemption from “terrorist activity”

The Court then rejected Okah’s attempt to rely on the exemption in s. 1(4) of the Act. Cameron J identified three elements that Okah would have to prove to succeed: (a) a struggle waged by peoples,

(b) to further a legitimate right against colonialism or against alien aggression or occupation (c) in accordance with international law. Okah had not led the evidence to prove MEND was engaged in a fight for a people's rights or that his government (Nigeria) or foreign oil corporations were alien forces or that serious environmental degradation could be the basis for a legitimate right to liberation.[9] Cameron J held that it was not necessary to deal with these questions in any event. This was because Okah's actions breached international humanitarian law.[10] Cameron J noted that international humanitarian law applies in international or non-international armed conflicts, but that the First Additional Protocol to the Geneva Conventions included armed conflicts against colonialism and alien occupation for self-determination in the definition of international armed conflicts and so conformance with international humanitarian law would be required where the first two elements he identified earlier were met.[11] Cameron J described some of the breaches: Okah had failed to distinguish between military and civilian targets and objects , the bombings targeted civilians and were used indiscriminately. The evidence showed the cars were "crammed" with explosives, the second explosion was timed to follow the first in each case so that the crowd that gathered at the first explosion site would be hit by the second to maximize death and injury and the intention was cruel and deadly.[12]

A similar problem arose in a case before the Supreme Court of Canada in *R v. Khawaja*[13] where the accused had provided support, funds, designed a remote bomb arming device and recruited another individual to facilitate transfers of money to terrorists outside Canada, went to a small arms training camp in Pakistan and proposed to UK terrorists that they send a suicide mission to Israel. He was charged and convicted on charges under the terrorism provisions of the *Criminal Code*.[14]His reliance on the "armed conflict" provision in the Code, similar to the exemption in issue in *Okah*, failed for the same reasons: there was no "air of reality" to his belief that the terrorists he supported intended to comply with international law or that he cared if they did. Rather the evidence showed his "adulation" for mass atrocity, that he made detonators, espoused violent jihadist ideology, and provided other support for his terrorist connections. The Supreme Court noted that the Geneva Conventions, on which the armed conflict exception is modeled,[15] prohibit spreading terror in civilian populations, considered war crimes.[16]

Trial irregularities

Okah argued that there was an irregularity in respect of his trial because he was not informed of nor provided with consular access under the Terrorist Bombings Convention. Cameron J held that the fact he was a permanent resident of South Africa did not deprive him of his right to Nigerian consular services. The High Court found that he was denied, but that no unfairness in his trial resulted. Cameron J agreed and held that the matter did not have to be remitted to the High Court for a new trial, but that the matter could be decided by the Constitutional Court. He decided that there was no failure of justice. In fact, the "blunt reality" was that Okah did not approach the consular representative present at the trial presumably because he would have faced the death penalty in Nigeria.

Conclusion

By taking a broadly purposive approach to interpreting the Act, the Constitutional Court ensured that the bombings that were the subject matter of the convictions sustained by the Court were made within the scope of the Act as domestic criminal law and within the jurisdiction of South African courts. This brought the charges under South African criminal law and procedure. While the procedural issues raised by the irregularities identified by Okah did complicate the process, the complications were relatively easily resolved under domestic law, within the setting of transnational law.

The failure of Okah to comply with international humanitarian law and the lack of proof of the other elements of the exemption to the Act enabled the Court to find that the somewhat more relaxed conditions applicable to combatants in armed conflicts under international humanitarian law did not apply.[17] Though the aims of MEND seemed to be aimed more at equality for the people of the Niger Delta than an exercise of a right to self-determination or liberation which were clearly being pursued by methods and means antithetical to the rules of international humanitarian law, Okah was still trying to draw the case into the subjective dichotomy of the distinction between one person's freedom fighter and another's terrorist. In addition to the procedural difficulties in the way Okah raised the exemption issue, the Constitutional Court was clear on its view of this phenomenological conundrum in the definition of terrorism: Okah was clearly a terrorist. It seems that Canada and South Africa are synchronized in their approach to these issues.

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References

1. [2018] ZACC 3.
2. Act 33 of 2004.

3. Para. 10 referring to Article 7(3) of the *International Convention for the Suppression of Terrorist Bombings* (Terrorist Bombings Convention).

4. Para. 10 referring to section 2(1) of the *International Co-operation in Criminal Matters Act*, Act 75 of 1996.

5. Para. 9 summarizing the High Court's reasons at para. 8, *S v Okah*, [2013] ZAGPJHC 6,"…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."

6. Paras. 13 and 14.

7. Para. 36, footnote 64 including *International Convention for the Suppression of Terrorist Bombing*, G.A. Res. 164, U.N. GAOR, 52nd Sess., Supp. No. 49, at 389, U.N. Doc. A/52/49 (1998), *entered into force* May 23, 2001 (Terrorist Bombing Convention).

8. "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

9. Paras. 46-47.

10. Paras. 48, 50, 52.

11. Id. in footnote 71 to the reasons for judgment: Article 1(4) of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977* to which both Nigeria and South Africa are parties.

12. Paras. 49-51.

13. 2012 SCC 69. I want to thank Dr. Joseph Rikhof for his suggestion of the comparison here.

14. RSC 1985, c. C-46.

15. Note 12, art. 51 deals with terrorism in civilian populations.

16. *Khawaja*, para. 102.

17. See Ben Saul, "Defending 'Terrorism': Justifications and Excuses for Terrorism in International Criminal Law" [2006] *AUYrBkIntLaw* 7; (2006) 25 *Australian Year Book of International Law* 177.