THE COMMISSION
OF INQUIRY INTO THE OIL-FOR-FOOD PROGRAMME
IN IRAQ

COMMISSION REPORT: 30 SEPTEMBER 2006

ERRORS IN COMMISSION REPORT: 30 SEPTEMBER 2006

Please note that the following errors in the initial Commission Report, delivered to the President on 6 November 2006, have been corrected in the manner set out below: -

	Page reference	Paragraph or footnote	Line(s)	Manner of correction
1	14	[1.]	2	By deletion of the hyphen and its substitution with a comma.
2	15	[6.]	1 to 2	By deletion of the words "*Security Council Sanctions Committee ("the 661 Committee")*", and their substitution with the words "*661 Committee*".
3	21	7.5	5	By the deletion of the last word *viz.* "*seller*", and its substitution with the word "*sellers*".
4	23	[12.]	1	By the deletion of the word "*material*".
5	23	[12.]	2	By the deletion of the word "*for*" and its substitution with the word "*to*".
6	23	Fn 19	2	By renumbering "*Document No. 2*" as "*Document No.3*".
7	27	[25.]	4	By the deletion of the last word in the first sentence *viz.* "*there*" and its substitution with the word "*therein*".

	Page reference	Paragraph or footnote	Line(s)	Manner of correction
8	32	Fn 26		By the addition, before the words "*Section 85*", of the word "*Compare*".
9	35	Fn 35		By citing the case of "*Minister of Home Affairs v Fourie: Lesbian and Gay Equality Project v Minister of Home Affairs*" in small print instead of large.
10	42	[26.]	5	By the deletion of the word "*preventive*"
11	47	[38.]	4 to 5	By the addition, after the word "*deal*", of the word "*with*".
12	48	[42.]	1	By the insertion of a comma after the word "*made*".
13	48	[42.]	3	By the deletion of the existing comma.
14	53	[14.]	3 and 5	By the deletion of the existing commas, as well as by the insertion of a comma, between the words "*that*" and "*whether*" on line 3.
15	56	Fn 48 and 49		By the deletion of page references 1 to 6 in both footnotes.
16	57	[24.]	4	By the deletion of the words "*Bay Oil*" and its substitution with the word "*Koch*".
17	67	[58.]	12 to 14	By deleting the clause which appears after the colon, and its substitution with the following: "*that is, explaining how he proceeded to negotiate more oil contracts after Mocoh had already incurred an obligation to pay surcharges*".

	Page reference	Paragraph or footnote	Line(s)	Manner of correction
18	68	[60.]	16 (4^{th} line from the end of [60.])	By the deletion of the word "*Imvume*" and its substitution with the word "*Mocoh*".
19	77	[8.]	2	By the deletion, between the word "*Iraq*" and the words "*the supplier*", of the word "*by*", and its substitution with the word "*from*".
20	85	[9.]	2	By the deletion of the words "*relate to*" and their substitution with the words "*deal with*".
21	87	[18.]	4	By the insertion of an apostrophe before the last letter of the word "*Pumps*", i.e. the word "*Pumps*" is substituted.
22	88	[21.]	2	By the insertion of a comma after the name "*Bruggeman*".
23	89	[25.]	3	By the insertion of the word "*also*" after the word "*it*".
24	91	[28.]	1	By the deletion of the words "*the letter*", and their substitution with the word "*it*".
25	102	[60.]	1	By the insertion of an apostrophe before the last letter of the word "*Commissions*", i.e. the word "*Commission's*" is substituted.
26	102	[60.]	1	By the addition of the letter **d** to the last word "*acknowledge*", i.e. the word "*acknowledged*" is substituted.
27	104	[66.]	10 (i.e. the 2^{nd} last line of the par.)	By the deletion of the word "*whether*" and its substitution with the word "*that*".

	Page reference	Paragraph or footnote	Line(s)	Manner of correction
28	105	[70.]	2	By the insertion of a comma after the bracket.
29	108	[5.]	2	By the insertion of the word "*former*" before the words "*Divisional Managing Director*"
30	108	[5.]	3	By the insertion of the word "*former*" before the words "*General Manager Business Development*".
31	111	[15.]	2	By the deletion of the abbreviation "*No.*" and its substitution with the word "*Number*".
32	111	[15.]	4 to 6	By the deletion of the last sentence and its substitution with the following sentence: "*Even before the formal imposition of ASSF, the Iraqi Ministry of Health demanded a bribe before it would contract with Reyrolle*".
33	114	[27.]	6 (i.e. the last line of the par.)	By the deletion of the word "*concluded*" and its substitution with the word "*determined*".
34	115	[30.]	5	By the deletion of the numerals "*11*" and their substitution with the numerals "*12*".
35	117	[35.]	1	By the deletion of the word "*was*".

	Page reference	Paragraph or footnote	Line(s)	Manner of correction
36	119	[42.]	6	By the deletion of the second and third sentences and their substitution with the following: "*The application to ship goods to Iraq was submitted by the Mission on 7 December 2000, and approved by the OIP on 13 February 2001. The goods included various transformers, a Cutler Hammer, 1600 Amp Busbar Trunking, an ABB, Powertech Dry type stepdown fan, a medium voltage switchboard, Busways 16000 and 5000 Amp Ratings, and a complete High Voltage Substation*".
37	120	Fn 133		By the deletion of the numerals "*105*" and their substitution with the numerals "*106*".
38	126	[15.]	1	By the deletion before the word "*summons*" of the word "*the*" and its substitution with "*a*".
39	132	[4.]	5	By the substitution of the word "*possible*" with the word "*possibly*".
40	136	Intro par.	2	By the deletion of the word "*First*", and by its substitution with the word "*Firstly*".
41	141	Intro par.	5	By the deletion of the word "*first*".
42	142	Omni Oil 2)	2	By the substitution of the word "*is*", with the word "*was*".
43	146	Falcon 2 (c)	1	By the deletion of the comma, after the reference "*Euro 21, 780*".

The Commission regrets any inconvenience caused by the need to effect the above amendments.

4 December 2006

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INTRODUCTION

[1.] This report encompasses the investigation by the Commission up until, and including, 30 September 2006. It elaborates upon and should be read together with the Commission Report, dated 17 June 2006 ("*the June Report*").

[2.] In the June Report the Commission set out certain allegations made by the Independent Inquiry Committee ("*the IIC*"), and analysed these with reference to documentation, relating to the following subjects of the Commission's investigation *viz.*:

2.1 Contracts involving purchases of oil by Montega Trading (Pty) Ltd ("*Montega*"), Imvume Management (Pty) Ltd ("*Imvume*") and Omni Oil ("*Omni*");

2.2 the non-contractual beneficiaries of the these contracts *viz.* Mr. Sandi Majali ("*Majali*") and Mr Shaker Al-Khafaji ("*Al-Khafaji*")[1]; and

2.3 the sale of humanitarian goods by Falcon Trading Group Limited ("*Falcon*").

[3.] Without the exercise of its unchallenged powers to summons and question the necessary witnesses, *viz.* Majali, Ivor Ichikowitz

[1] In the documentation, the first name of Al-Khafaji is Shakir. This spelling is used below.

("*Ichikowitz*"), George Poole ("*Poole*"), Riaz Jawoodeen ("*Jawoodeen*") and Mr Rodney Hemphill ("*Hemphill*"), or the input of Mr Kgalema Motlanthe ("*Motlanthe*")[2], the Commission will remain unable to investigate and establish, with any evidential certainty, whether the four entities and two persons aforementioned paid or offered to pay surcharges or kickbacks[3].

[4.] The relevant terms of reference were therefore executed in an attenuated form. Certain other terms of reference[4], which flow from the conclusion that such payments were in fact made or offered to be paid, may also be affected. Similar limitations apply to the investigation dealt with in the present report, except in relation to Ape Pumps (Pty) Ltd ("*Ape Pumps*").

[5.] This report analyses the allegations made by the IIC in relation to:

5.1 The contracting company, Mocoh Services South Africa (Pty) Ltd ("*Mocoh*"), and its non-contractual beneficiary, Mr Michael Hacking ("*Hacking*"), whom the IIC Report held responsible for three surcharge payments into an account at Jordan National Bank; and

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2 Mr Motlanthe is pertinently identified in the text of the IIC Report, and in the tables annexed thereto, as a witness to the alleged illicit activities of Majali and Imvume. Commissioner Chauke has for some time been addressing proposed input by Mr Motlanthe, in the form of an affidavit. A meeting with Mr Motlanthe's Counsel was arranged. This was prevented by the effluxion of the period within which the Commission was bound to present its final report.

3 For convenience illicit payments in regard to purchases of humanitarian goods (as opposed to surcharges on oil sales) are referred to as kickbacks.

4 Notably the terms of reference 1(i)(b), (c), and (d).

5.2 the supplier companies, Ape Pumps, Glaxo Wellcome SA (South Africa) (Pty) Ltd ("*Glaxo Wellcome*") and Reyrolle Limited ("*Reyrolle*").

[6.] Once again the conclusions that have been drawn in this report, rely almost entirely on a study of documentation, largely hearsay. In the case of Mocoh, a statement directed to the Commission by Mr Tokyo Sexwale ("*Sexwale*"), is examined and analysed with reference to documentation.

[7.] The study in this report gives rise to specific questions which ought to be directed at the witnesses identified. Because of pending litigation in the Pretoria High Court ("*the pending litigation*") and time constraints, this proved to be impossible before 30 September 2006. As will appear below, questions which were directed by the Commission in writing to material witnesses have largely been avoided. It is therefore recommended that the Commission should be permitted to exercise its powers, to summons and question witnesses under the Commissions Act, 1947 (Act 8 of 1947) ("*the Commissions Act*"), subject to the privilege against self-incrimination which is granted to witnesses by section 3 of this act.

[8.] In Part F of the June Report, the Commission described how it had been prevented from carrying out its terms of reference by the pending litigation, as well as by previously imposed time constraints. Since that time, the resources of the Commission have been taxed by exigencies

of the pending litigation and analyses of a plethora of documents. The latter occurred without the benefit of input from the authors of documents: as a result of the inability of the Commission to exercise the aforementioned powers.

[9.] The Commission was established by the President's Minute, signed on 3 February 2006. At its inception the Commission was required to report to the President by 17 May 2006[5]. On 31 May 2006, the Commission was notified of an extension of this period, until 17 June 2006. On 8 August 2006, the date was extended to 30 September 2006, pursuant to a President's Minute. The duration of each extended period, from the time that notice was given to the Commission till it ended, was insufficient to permit the timeous issue of summonses to necessary witnesses in terms of section 3 of the Commissions Act, as well as to conduct hearings in order to receive oral evidence and analyse the relevant evidence.

[10.] From 2 June 2006, the Commission was constrained to negotiate with the lawyers of Hemphill, the applicant in the pending litigation. On 3 August 2006, it became apparent that he had no intention of ever answering questions put to him by the Commission, whether or not the questions and answers were affected by his application. The Commission was then constrained to focus its resources, until 18 August 2006, on the drafting of a comprehensive answering affidavit in

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5 In terms of paragraph 2 of the terms of reference published in a Schedule in the Government *Gazette* No. 28528 on 17 February 2006.

order to assist the Court. These facts and circumstances are set out in Part H[6].

[11.] By agreement with the legal advisors of the President, while the litigation was pending the Commission did not use its coercive powers under the Commissions Act: that is, to summons witnesses in order to examine them under oath and to compel them to provide documentation in their possession[7]. Instead, the Commission engaged in correspondence in order to obtain answers and documentation. This process was time consuming. Witnesses delayed in responding to the Commission's written requests. They produced only what they were inclined to produce, and did so in the form of their choice. Except in the case of one compliant subject, it remains necessary for the Commission to use its statutory powers in order to deliver a comprehensive report to the President, based on a conclusive investigation of IIC allegations against South African companies and individuals.

[12.] The one exception is Ape Pumps, which responded punctiliously to the Commission's summons to produce documentation, in spite of the pending litigation. From the documents produced, the Commission was able to conclude that Ape Pumps paid after-sales-service fees ("*ASSF*") to Iraqi government institutions on two contracts, in the amounts of Euro 67, 894.20, and Euro 3, 122.20, respectively. The

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6 For convenience that part of the answering affidavit which deals with the delay in filing the Commission's answer (*viz.* pages 25 to 34), as well as the annexures thereto are contained in an Addendum to this report. See Document No. 1 in Addendum 3.

7 See section 3 of the Commissions Act.

success of this exercise and the ease with which the Commission's objects were achieved in the investigation of Ape Pumps are testimony to the effectiveness of the residual powers of the Commission which are not subject to the pending litigation.

[13.] The report is divided into 9 parts before the conclusions of the Commission are set out. Part A deals with the period under investigation, as well as the attitudes of the UN and the Iraqi regime towards illicit payments at that time.

[14.] Part B is a statement of the principal exercises which the Commission regards as necessary in order to conclude its mandate according to its terms of reference. In the Commission's view, the implications of the terms of reference are such that further investigation remains necessary. Part B also includes a description of certain techniques of investigation into illicit payments which appeared as a result of the meetings held between Counsel for the IIC and the Commission during March 2006.

[15.] Part C explores further recommendations which have become apparent since the June Report was presented to the President, as well as certain considerations that affect the recommendations made therein. These considerations were precipitated by the useful input of the Department of Minerals and Energy ("*the DME*").

[16.] Part D deals with the investigation of whether or not surcharges arising from two oil contracts, in the amounts of US $ 94, 631 and US $ 480, 068 were paid by Mocoh, as stated in the Commission's terms of reference.

[17.] In Part E, the allegations made by the IIC and its methodology in relation to kickbacks, are set out.

[18.] In Parts F, G and H the Commission analyses certain documentation relating respectively to Ape Pumps, Reyrolle and Glaxo Wellcome; in order to establish whether the kickbacks identified in the Commission's terms of reference were paid by these companies.

[19.] In Part I, the Commission deals with the approach it adopted towards the pending litigation. The Commission requested the Pretoria High Court, as a matter of urgency, to authorise the Commission to exercise powers to summons and question Hemphill and other material witnesses – if necessary without requiring them to answer self incriminating questions. The object of this request has apparently been defeated.

[20.] The Commission's findings up to 30 September 2006, are set out in the conclusion, together with certain recommendations. The President is then formally requested to permit the Commission to file a further report, at least 12 weeks after notice of such permission has been communicated to the Commission. The President is also requested to

authorise the Commission to use unchallenged statutory powers to summons and question witnesses during this period, i.e. subject to the right of each witness to refuse to answer questions on the ground that the answers may incriminate her or him under South African law.

[21.] Such permission and authority would allow the Commission to complete its investigation. In this twelve week period, the Commission would seek to obtain the input of witnesses to the alleged activities of Glaxo Wellcome and Reyrolle, as well as material cooperation from certain witnesses referred to in this report.

[22.] Meanwhile, it is respectfully suggested that any adverse findings made against subjects of the Commission's enquiry in this report and the June Report, should be presented to the subjects in question for their comment before the findings are made public. This process would not only allow the Commission to benefit from the direct personal knowledge of each subject, but it would also prevent adverse, possibly mistaken findings, from being made without the application of the *audi alteram partem* rule.

[23.] Without the application of the just administrative action provisions referred to in section 33 of the Constitution of the Republic of South Africa, 1996, the adverse findings may prove to be unfair and unconstitutional. The procedure proposed is also consonant with the terms of reference. These imply that the IIC made findings without

reference to all but two of the South African companies and individuals identified in the Annexure to the Schedule[8].

[24.] The subjects of the Commission's enquiry against whom adverse findings are made include Majali, Al-Khafaji, Hacking, Montega, Imvume, Mocoh, Omni, Ape Pumps and Falcon. Of these Al-Khafaji and Hacking reside beyond the jurisdiction of the Commission. Omni and Falcon are entities that appear to be controlled by Al-Khafaji.

[25.] The Commission has made the following adverse findings against Majali and the remaining companies, all of whom are South African *viz.*:

25.1 Majali, representing Imvume, probably offered to pay oil surcharges owed by Montega, in a total amount of US $ 464, 000;

25.2 it is not improbable that an advance surcharge of US $ 60, 000 was paid for and on behalf of Imvume;

25.3 Hacking made two surcharge payments in Swiss Francs for and on behalf of Mocoh in the amounts of CHF 424, 995 and CHF 550, 630, respectively;

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[8] See the fourth paragraph of the preamble and paragraph [67.] of the June Report.

25.4 Ape Pumps paid kickbacks in the amounts of Euro 67, 894.20 and Euro 3, 123.

[26.] Documents referred to in this report, in the form of an addendum (Addendum Three) will be submitted in due course. **Except in Parts C and I, and the conclusion, certain observations by and comments of the Commission, as well as information introduced *en passant* by the Commission are printed in bold.** Significant words and phrases have been underlined by the Commission for emphasis.

PART A

THE PERIOD OF ILLICIT ACTIVITIES AND ATTITUDES AT THE TIME

[1.] With the passage of Resolution 661, the Security Council created a special sanctions committee, the 661 Committee, comprised of all fifteen Council members in order to conduct ongoing oversight of the Iraq sanctions regime. Eventually the 661 Committee was entrusted with "*monitoring the implementation of the sanctions regime in all its aspects*" in conjunction with the "*cooperation of Member States and international organizations*"[9].

[2.] **The period during which illicit activities occurred was relatively brief. The tragic effects of economic sanctions were catastrophic. The contradictions within the "*smart sanctions*" created by Resolution 986 were confusing. For many UN member states, humanitarian considerations and economics seemed to take precedence over the strict application of international obligations. Corporations acted accordingly.**

[3.] Resolution 986 was adopted in April 1995. Oil exports from Iraq did not begin until December 1996. The first humanitarian goods did not arrive in that country until March 1997. The Programme was just under

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9 See IIC Report Management of the Oil-For-Food Programme: Volume II – Chapter 1, page 17 of 259.

three years old when the Iraqi regime openly began to demand illicit payments from its customers[10].

[4.] The Oil Overseers[11] expressed their concerns in this regard to the Secretariat of the UN[12] and to the Security Council. Little action was taken. The central conclusion of the IIC was that a failure in UN oversight and management had occurred.

[5.] **No doubt the *insouciance* of the Security Council had a trickle down effect on corporate participants in the Programme and their states of nationality. Certainly, the escrow bank (BNP), which was in a position to have first hand knowledge, did not recognise or carry out its responsibility to inform the UN of illicit activity[13]. Permanent Missions to the UN contributed to the approval of participation by their national companies in the Programme. They also took no action.**

[6.] The sale of crude oil had to be monitored and approved by the 661 Committee. However, the Iraqi Ministry of Oil and its marketing arm, the State Oil Marketing Organisation ("*SOMO*") were given "*significant*

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10 See IIC press release, dated 27 October 2005, on www.iic-offp.org.

11 The 661 Committee's rules provided for it to select at least four independent experts in the international oil trade to act as overseers of oil transactions, to assist the 661 Committee with its obligation to ensure that Iraq sold oil only at fair market value and to examine contracts in order to ensure that they complied with the Programme and did not contain attempts of fraud or deception.

12 The UN Secretariat comprises of the Secretary-General and such staff as the organisation may require.

13 As to the appointment and functions of the escrow bank, see the June Report, paragraphs [37.] and [38.] at pages 27 to 28. Banque Nationale de Paris S.A was appointed in 1996 by the Secretary-General to serve as the escrow bank under the Programme. Proceeds of the sale of Iraqi oil were required to be placed with the escrow bank and were to be used strictly to provide for the humanitarian needs of the civilian population of Iraq through the Programme.

leeway" in choosing their customers and the amount of oil to be sold to each one. In the early autumn of 2000, the Government of Iraq ordered that surcharges be imposed on every barrel of oil sold under the Programme. The scheme was implemented by the Ministry of Oil and SOMO. It lasted for over two years from the middle of Phase 8 through the middle of Phase 12.

[6.] The SOMO database maintained a running tally of surcharges collected – organised by beneficiary and by contracting company. This source of evidence was dealt with in the June Report. Most surcharges were paid through deposits to designated SOMO bank accounts in Jordan and Lebanon, usually to Fransabank in Lebanon and the Jordan National Bank.

[7.] The largest source of illicit income under the Programme accrued to Iraq from "*kickbacks*" paid on behalf of companies that it had selected to receive contracts for humanitarian goods. The kickback policy began in mid 1999 with an unauthorised attempt to collect Iraq's costs for transporting goods to inland destinations after their arrival by sea at the port of Umm Quasr. It was easy to impose inland transportation fees ("*ITF*") that far exceeded actual transportation costs.

[8.] During mid 2000, Iraq instituted a broad policy of imposing a general ten-percent kickback requirement on all humanitarian contractors in addition to the requirement for contractors to pay ITF. ASSF were incorporated into contracts. The contract prices were inflated

accordingly. Contractors were able to pay kickbacks to the Iraqis secretly and to recover the amount paid from the escrow account.

[9.] According to the IIC Report, the relevant period for the investigation of surcharges commenced in mid 2000. Inferences that kickbacks were paid as a result of Iraqi policy can only be drawn from mid 2000. The cut off period for the payment of kickbacks in the IIC Tables is 1 July 2003. Documentation relating to the activities of Reyrolle shows that the Iraqi Ministry of Health was demanding bribes from potential contractors during late 1999.

[10.] The IIC found that many companies were not prepared to openly pay kickbacks. Instead they would make payments to third parties or agents without examining or admitting to the likely purpose of these payments. Ape Pumps and Reyrolle documentation supports this conclusion. The IIC calculated that more than two thousand two hundred companies worldwide paid kickbacks to Iraq in the form of ITF or ASSF or both.

PART B

THE COMMISSION'S PRINCIPAL TERMS OF REFERENCE, THEIR OBJECT AND IMPLICATIONS FOR THIS INVESTIGATION

[1.] **This part of the report deals firstly with the object of the Commission's terms of reference. Thereafter the principal terms of reference are stated. The observations and comments of the Commission are printed in bold.**

[2.] The object of the Commission's terms of reference is to advise the Government of South Africa on the appropriate action or steps to be taken in relation to the alleged involvement of any identified South African company or individual in illicit activities alleged by the IIC[14], and the adoption of any preventative measures to avoid any such future illicit activities. The proposal of measures aimed at preventing sanction busting in the future by companies or persons falling under South African jurisdiction is pertinently expressed in the term of reference numbered 1(i) (e).

[3.] To achieve these objectives the Commission must investigate and determine whether surcharges on oil sales and kickbacks were in fact paid, or offered to be paid, by identified South African companies or individuals as set out in the Annexure to the Schedule which specifies the Commission's terms of reference ("*the Annexure*").

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14 In the final report of the IIC, published on 27 October 2005.

[4.] In relation to proof of illicit payments the documentation in possession of the Commission suffers from evidential inadequacy.

[5.] Offers to make illicit payments can be established from official documents. During the period of the Programme official applications and contracts were processed by the South African Permanent Mission to the UN ("*the Mission*") and the UN's Office for Iraq Programme ("*OIP*") which administered the Programme. During 2003 certain illicit payments (in the form of ASSF), were removed from the sale prices of humanitarian goods by formal written amendment of the original contracts. These amendments tend to prove that originally the payment of kickbacks was agreed to by the Iraqis and the contractors in question. The amendments do not prove that the kickbacks were paid, but suggest the contrary. Evidentially they constitute proof of attempts by contractors to make illicit payments. The amendments were executed officially and were made available to the Commission by the IIC (e.g. the amendment signed by Hemphill and identified in the June Report[15]).

[6.] However, most of the documentary evidence of illicit activities was unofficial. This could best be sourced from the companies and individuals under investigation i.e. through the exercise of the

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15 See paragraph [90.], page 59 of the June Report.

Commission's powers (or the spectre of the exercise of such powers). These powers were rendered nugatory in circumstances described elsewhere in this report.

[7.] The following documentary evidence was regarded as material by the IIC and was requested by the Commission (or sought in other ways), from the four subjects who are alleged in the Annexure to have paid kickbacks in the form of ASSF or ITF.

7.1 Side agreements in terms whereof the seller would agree to pay ASSF and/or ITF directly to an Iraqi government department or state controlled institution. (Five side agreements identified in the June Report[16] illustrate this phenomenon in the case of Falcon.)

7.2 Tenders submitted by companies for the supply of humanitarian goods that differed in price by approximately ten percent from the selling price approved by the UN (i.e. by the amount of ASSF).

7.3 Agreements concluded by contractors with agents who were located outside of South Africa. These agents dealt directly with the Iraqis (often to the exclusion of the seller), in presenting the tenders, inflating selling prices to include ASSF and ITF (in addition to agent's commissions), and in

16 See footnote 31 at page 57 of the June Report.

facilitating payment of kickbacks directly to Iraqi bank accounts. These agency agreements were sometimes characterised by the absence of a proper term specifying the agent's commission or a basis for calculation of this commission.

7.4 Guarantees by the sellers or their banks, to the effect that kickbacks would be paid.

7.5 Letters of credit issued by the bank of the seller in favour of the relevant purchaser, usually an Iraqi government department or institution. (The legitimate letters of credit contemplated by the Programme were intended to be issued by the escrow bank in favour of the sellers).

7.6 Bank documentation indicating that illegitimate guarantees or letters of credit referred to above were given effect to.

7.7 Bank records of the sellers which indicate the payment of inflated commissions to agents.

7.8 Documentation indicating that after-sales-service fees were paid together with the principal contract price: but well before after sales service either became necessary or desirable.

[8.] **The abovementioned documentation ought to be obtained from the subjects of investigation by way of summons, in terms of section 3 of the Commissions Act.**

[9]. **In order for the Commission to become properly informed of the facts, so as to enable it to determine the involvement of companies or individuals and recommend preventative measures and systems, it is essential for the Commission to interview officials of the Mission who were involved in the Programme. They are Mr Andries Dormehl ("*Dormehl*"), Mr Simon Cardy ("*Cardy*") and Mr Fadl Nacerodien ("*Nacerodien*"). The Commission has had to speculate about illicit activities with reference only to documents. The content of these documents suggest that Cardy (and Dormehl) were intimately involved in the processing and execution of every contract under investigation by the Commission, except for the Mocoh contracts. Since the June Report was delivered, similar considerations have arisen in relation to officials at the South African Mission in Jordan (particularly Mr S Du Plessis), who were involved in facilitating humanitarian contracts[17].**

[10.] **The Department of Foreign Affairs ("*the DFA*") was informed of the nature and scope of the proposed interviews[18]. The DFA did commit itself to cooperation in this regard by 30 September 2006.**

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17 See the section on Reyrolle below.

18 See the letters exchanged between the Commission and the Department, Document No. 2 in Addendum 3.

[11.] **While the documentation analysed in the June Report suggests that Majali/Montega/Imvume offered to pay the surcharges levied on Montega Contract No. M/09/06, and/or paid an advance of US $ 60, 000 on the First Imvume Contract (as outlined in the Annexure), Majali disputes these conclusions. For the purposes of making the initial factual findings required by the terms of reference, these issues will not be disposed of until after Majali, Ichikowitz, Poole, Jawoodeen (and possibly Hemphill), have provided the Commission with material information.**

[12.] **Motlanthe, similarly, appears to be privy to information which is material to the resolution of these issues. The Commission has therefore been constrained to seek his assistance. The information in question relates to Imvume/Majali's attempt to pay oil surcharges owed by Montega, from the proceeds of two Imvume contracts that were concluded as a result of Motlanthe's alleged support. Allegedly Motlanthe attended a meeting held on 10 May 2002, between Majali and Iraq's Deputy Prime Minister, Mr Tariq Aziz ("*Aziz*")[19], where settlement of the aforementioned surcharge debts was proposed. The questions which require an answer from Motlanthe, as well as the relevant document which**

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19 See the IIC Report on Programme Manipulation: Chapter Two: Oil Transactions and Illicit Payments, page 113 of 623: Document No. 3 in Addendum 3. See too IIC Table 3, page 30 of 60 (Document No. 3 in Addendum 3.), which suggests that the instruction to award Imvume, Contract No. M/11/72 involved a letter from Kgalema Motlanthe, Secretary General of the ANC. See too the June Report, paragraph [127.] at page 76, that deals with a letter addressed to Aziz by Motlanthe. The Commission has sought to obtain a copy of this letter from the Embassy of Iraq via the Department of Foreign Affairs. A copy of the Commission's request is Document No. 4 in Addendum 3. The DFA has not replied to the Commission's request for assistance.

he may possess, have been identified in correspondence with Motlanthe's attorney[20].

[13.] In the June Report, the Commission concluded that Omni and Falcon were neither companies nor South African. Difficulties of jurisdiction and admissibility of evidence arise in the investigation of Omni, Al-Khafaji and Falcon. These would be overcome by the oral testimony of Hemphill.

[14.] The position in regard to the investigation of Mocoh, Reyrolle and Glaxo Wellcome is dealt with further below. Glaxo Wellcome has avoided the attention of the Commission, both as a result of the pending litigation and the effluxion of time.

[15.] By virtue of the conclusion that the payment of surcharges and kickbacks were not illegal in South African law it is apparent that the Commission may legitimately rely on the powers to summons and question witnesses, which are vested by the Commissions Act, subject to the privilege against self-incrimination. The exercise of this power would enable the Commission to reach evidentially sound conclusions.

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20 On 15 September 2006, Mr S Hockey of the attorney's firm, E Moosa, Waglay and Petersen (who represent Motlanthe), undertook to revert to the Commission as soon as they received instruction from their client. Mr Hockey duly reverted and proposed a meeting with Motlanthe's Counsel, Advocate Seth Nthai. This meeting could not take place before 30 September 2006. Correspondence exchanged between the Commission and Motlanthe as well as his representatives, forms Document No. 5 in Addendum 3.

[16.] The investigation, proposed action and recommendations to remedy conduct outlined in the terms of reference, appear to relate to two classes of conduct *viz.* offences on the one hand and illegal activity which contravenes any other South African law on the other[21].

[17.] **Because of time constraints, the Commission has not yet investigated each and every source of existing legal regulation, not amounting to an offence, which may have been violated by the payment of surcharges or kickbacks.**

[18.] **Before the Commission can advise on preventative measures in the future, it becomes necessary to establish and analyse all the material facts related to past "*illicit activities*": i.e. whether or not the conclusion is reached that a particular subject of this investigation participated in or contributed to an illicit activity illegally or in bad faith. As stated in the June Report, the illicit activities under investigation involved a multiplicity of participants between the actual buyers and sellers who concluded the contracts listed in the Commission's terms of reference. Some of the participants may have acted in good faith[22].**

[19.] As a "*first step*" in the investigation, all evidence and information obtained and assessed by the IIC which related to payments by South African companies or individuals, had to be accessed and analysed.

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21 See the term of reference numbered 1 (i) (c).

22 See June Report, paragraphs 21.13, 21.14 and 21.15.

The relevant payments are identified in the IIC Tables that accompany the IIC Report and are repeated in the Annexure.

[20.] **An analysis of certain documentation provided to it by the IIC has been carried out by the Commission. However, the IIC has refused to furnish the Commission with certain evidence e.g. copies of recordings and transcripts of statements made by South African individuals such as Majali and Hemphill. The IIC may have also failed to provide the Commission with further information contemplated by the abovementioned "*first step*".**

[21.] **Also relevant to the investigation were the records of Alia Transport ("*Alia*"), an agent of the Iraqi regime. This agency collected illicit payments due by contractors under the guise of being a legitimate carrier of humanitarian goods. Some of Alia's records were provided to the Commission by the IIC. As will appear below, when conclusions are sought to be drawn in relation to Glaxo and Falcon, *lacunae* in the Alia records become apparent.**

[22.] **Some conclusions reached by the Commission on the basis of information provided to it by the IIC, differ from those reached by the IIC in the IIC Tables. Resolving this conflict is complicated, because the IIC has effectively been dissolved. The Commission would therefore seek to debate the major differences with Mr Brian Mich ("*Mich*"), Counsel for the IIC. He retains both the**

necessary authority to debate the differences, as well as any data that may have given rise to them.

[23.] Should the Commission conclude that surcharges or illicit payments were in fact paid or offered to be paid by the listed companies or individuals, the Commission is bound to report and to make recommendations as to whether or not such conduct falls within the jurisdiction of a South African court: and if so, whether any conduct as outlined in the Annexure amounts to the commission of an offence which may be tried by a South African court. Furthermore, whether there is sufficient and admissible evidence to provide a reasonable prospect of success in any prosecution which may follow. In the case of the commission of an offence, or other illegal, illicit or irregular activity action or steps to be taken, must be proposed.

[24.] Finally, any further proposed actions or steps to be taken to prevent sanction busting in the future by companies or persons falling under South African jurisdiction, are required to be investigated and reported on, and recommendations made.

[25.] **In the June Report[23], the Commission concluded that certain payments of surcharges (by Mocoh and Omni) and the offer to make payments of surcharges (by Majali/Montega/Imvume), were supported by the documentation analysed therein. Similarly, the Commission concluded that Falcon had agreed to pay ASSF and**

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23 See paragraph [48.] at page 36 of the June Report.

ITF. A further conclusion reached was that these payments did not constitute offences which may be tried by a South African court. The primary reason for this conclusion was that no legislation currently exists in South Africa that binds individuals to obey Security Council resolutions made under Chapter VII of the UN Charter.

[26.] In spite of this conclusion, the course of "*the conduct*" of certain companies or individuals outlined in the Annexure (as well as the documented conduct of Hemphill), could fall within the jurisdiction of a South African court, and may be tried: in that it is shown to have been associated with and part of other activity that was unlawful.

[27.] The conduct in question involved the conclusion of identified contracts by individuals on behalf of identified entities. Contracts arose after applications to participate in the Programme, and each contract had been approved by the 661 Committee established by the Security Council. The applications and contracts were processed through the Mission. The process involved making representations to the Mission and the UN to the effect that the applicant entity was a South African company.

[28.] Hemphill misled the Mission and the OIP into believing that Omni and Falcon were South African companies.

[29.] Every contractor recorded acknowledgement of the fact that Resolutions 661 and 986, as well as the Memorandum of Understanding between the UN and Iraq ("*the MOU*"), were applicable to the transactions subject to approval by the UN. Applicants can be deemed to have been aware that UN sanctions prohibited direct payments to the Iraqis and that this principle underlay the Programme and bound South Africa.

[30.] Proof of the offence of fraud would require evidence that the representors such as Majali/Montega/Imvume (and Hemphill on behalf of Omni and Falcon):

a) knew that the surcharges and kickbacks listed in the Annexure would have to be paid at the time when they relied on the Mission to deal with the UN in facilitating their contracts;

b) nevertheless represented to the Mission that they intended to comply with the MOU, as well as the provisions of Resolutions 661 and 986; and

c) intended to make illicit payments to the Iraqis.

[31.] The relevant documentation which the Mission processed seems to contain acknowledgements by subjects of this enquiry, to the effect that Resolutions 661 and 986 and the MOU were applicable.

[32.] **Majali/Imvume may have perpetrated another fraud on the Republic of South Africa, i.e. by knowingly selling oil tainted by surcharges to a state controlled institution *viz.* the Strategic Fuel Fund ("*the SFF*"), without making the necessary material disclosure that the oil sales in question involved the payment of surcharges. The SFF fell under the auspices of the DME which was bound to uphold Security Council resolutions. The Republic of South Africa therefore suffered prejudice or potential prejudice as a result of this non-disclosure.**

[33.] **To the extent that the conduct referred to in the previous five paragraphs is not specifically outlined in the Annexure, it is so closely connected thereto that, in view of the Commission, it stands to be dealt with under the term of reference which requires the Commission to propose further action or steps to be taken to prevent companies or persons falling under South African jurisdiction from getting involved in future illegal, illicit or irregular international activities, or to propose the establishment of systems and mechanisms, so as to ensure that such companies and persons do not, in future, contravene binding UN resolutions[24]. As will appear below, the leadership role of the DME may have to be addressed in this regard.**

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[24] See the term of reference numbered 1(i) (e).

PART C

SUPPLEMENTARY RECOMMENDATIONS ARISING FROM INVESTIGATION AFTER JUNE REPORT

[1.] In Part D of the June Report[25], the Commission raised six possible recommendations. Those recommendations are now endorsed, amplified, and commented upon in the light of further investigation as well as the input made by the DME. The Commission is indebted to the DME and particularly to Advocate Sandile Nogxina, the Director-General of the DME ("*Advocate Nogxina*"), for their contribution.

[2.] In the June Report the Commission made two distinctions:

2.1 Firstly, between sanctions proper and the ameliorated sanctions imposed under the Programme; and

2.2 secondly, between criminal measures and regulatory measures intended to prevent sanction busting.

[3.] Sanctions proper had to be enforced by South Africa in terms of the provisions of Resolution 661. A primary purpose of this resolution was to impose an obligation on member states, including South Africa, their nationals and persons within their territories from making funds available to the Iraqi Government and its institutions. Responsibility

25 See paragraph [60.] of the June Report.

rested upon the states to control the individual. No legal obligation rested upon the individual.

[4.] Ameliorated sanctions were determined by Resolution 986 and the MOU. Their object was to provide for the humanitarian needs of the Iraqi people, and still achieve the aforementioned primary purpose. Two mischiefs appeared. The first, which is the one under investigation, was the corruption of contractors (and UN officials). The second was the effect of this corruption on the aforementioned obligation of member states.

REGULATION BY THE STATE

[5.] It is the responsibility of the National Executive to impose a coherent transparent regulatory regime which operates within the domestic legal system[26]. This regime should not only achieve the purpose of sanctions proper, but also provide for the humanitarian and economic activity authorised by Security Council resolution.

[6.] Though the Republic, as a member of the UN, is bound under international law to prevent sanction busting[27] perpetrated from within its territory, the duty of prevention may not inevitably extend to unqualified criminalisation thereof. What is required is a system which

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26 Compare Section 85 of the Constitution particularly subsections (2) (b), (c) and (d).

27 South Africa ratified the United Nations Convention Against Corruption on 22 November 2004, and is therefore also bound, on an international plane, to prevent corruption.

will be effective in preventing sanction busting, including direct payments to a regime under sanction.

[7.] Criminalisation, which is intended to deter potential offenders and impose retribution on proven offenders, would not constitute a preventative measure if it did not prove to be preventive in effect, or could not be implemented for other reasons. Practical regulation by the public administration with unambiguous direction from the National Executive is the primary recommendation of the Commission. This should prevent recurrences of illicit activities. The criminalisation of listed activities[28] is likely to play a small but meaningful role in the prevention of recurrences.

[8.] The state's obligations under international law may be met by convincing state departments, and state owned institutions and corporations, that a legal duty to prevent sanction busting rests upon South Africa, and by promulgating suitable regulations which officials employed by such departments would be bound to implement. The regulations should be aimed not only at preventing sanction busting, but also at the effective administration of any programme which ameliorates hardship inflicted upon foreign civilians by economic sanctions.

[9.] It is apparent from the affidavit of Advocate Nogxina that, during September 2001, the DME did not act with an overriding appreciation

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28 In the manner suggested, in sub paragraph 60.1 of the June Report.

that state departments were bound by international law to prevent the payment of surcharges by South African companies. The dominant consideration reflected in Advocate Nogxina's memorandum to the Minister[29], in relation to Iraqi surcharge demands at the time, appears to have been that surcharges created an economic barrier for South African companies wishing to enter the international oil market.

[10.] What was highlighted in the affidavit of Advocate Nogxina was the tragic effect of sanctions on Iraqi civilians and the consequential policy considerations for South Africa during the Programme. These factors legitimately affected the approach of the DME at the time. They were and remain relevant. However, the importance of international law, as law, also requires emphasis by the state. The individual within South Africa is entitled to unambiguous direction from both the law and the administration in regard to her or his legal duties.

[11.] Any domestic measures which are taken in order to comply with Chapter VII Resolutions will remain subject to the Constitution, its values and the principle of legality.

[12.] The content of Advocate Nogxina's affidavit vividly illustrates that at any particular time the implementation of economic sanctions might appear to conflict with the values enshrined in the Bill of Rights[30]. This

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29 The purpose and content of the memorandum, dated 7 September 2001, are set out in paragraph [188] of the June Report, at page 103.

30 However, by virtue of the provisions of Section 36 of the Constitution (and subject to what is set out in the Table of Non-Derogable Rights), rights in the Bill of Rights, may be limited. Furthermore, Section 233 of the Constitution provides that every court, when interpreting any legislation, must prefer any reasonable interpretation of the

could arise, firstly, because of the political nature of international legal obligation which is generated *via* the Security Council as currently constituted. Secondly, and not unrelated to the first reason, is the fact that at any particular time and given the harm caused to civilians in the state under sanction, a particular Security Council resolution may contradict the commitment of the Peoples of the United Nations to fundamental human rights. It may also tend to negate conditions under which justice and respect for obligations arising from sources of international law, such as the Charter, can be maintained. These assumptions, contained in its preamble, underlie the Charter and South Africa's membership of the United Nations. In such circumstances it could be argued that members of the UN are not bound to carry out a decision of the Security Council because it is not "*in accordance with the Charter*" as required by Article 25 thereof.

[13.] Similar contradictions in international law have pertinently been raised by Sachs J in a judgement of the Constitutional Court. "*What was regarded as (international) law just yesterday is condemned as unjust today. When the Universal Declaration was adopted, colonialism and racial discrimination were seen as natural phenomena embodied in the laws of the so-called civilised nations and blessed by as many religious leaders as they were denounced*"[31].

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legislation that is consistent with international law. International sanctions under Chapter VII of the UN Charter may arguably constitute a justified restriction on the rights set out in Chapter 2. As to the protection of human rights violations beyond the borders of South Africa, see Kaunda and Others v President of the Republic of South Africa, 2005(4) SA 235 CC.

31 Per SACHS J in Minister of Home Affairs v Fourie: Lesbian and Gay Equality Project v Minister of Home Affairs 2006(I) SA 524 CC at paragraph [102.] page 546.

[14.] Nevertheless, whatever perception of Resolutions 661 and 986 may have existed within member states of the UN, it remained the obligation of members to prevent their nationals and any persons within their territories from making funds or resources available to the government of Iraq[32].

[15.] In the circumstances, it is useful to repeat certain statements made by Advocate Nogxina. He made his statement to the Commission after he had consulted with officials of the DFA. He had also studied various government policy documents on Iraq at the time and the relevant resolutions of the Security Council. He relayed certain information, concerning the humanitarian crisis in Iraq and South Africa's policy at the time, to the Commission.

"*12. **Sanctions and humanitarian crisis***

12.1 Sanctions created a humanitarian crisis in Iraq. During 2000, the birth mortality rates in Iraq were amongst the highest in the world. In fact birth weight affected at least 23% of all births. Chronic malnutrition affected every fourth child under five years of age. Only 41% of the population had access to clean water. 83% of all schools needed substantial repair.

12.2 Sanctions also had negatively impacted on the Iraq extended family system. There was an increase in single parent family,

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32 See Clause 4 of Resolution 661 (1990).

divorces, and families were forced to sell their homes and furniture and other possessions to put food on the table resulting in homelessness. Prostitution was also reported (a phenomenon unknown in Iraq).

13. ***International outcry***

As a result of various reports of the humanitarian crisis in Iraq, national and international outcry about sanctions grew. South Africa also added its voice. As a result of the mobilisation by many countries, the Security Council adopted resolution 208 of 2000 which mandated it to explore every avenue to alleviate the sufferings of the population, who were after all not the intended targets of sanctions.

14. *Humanitarian flight*

The South African government decided to send a humanitarian flight to Iraq. The Department of Foreign Affairs was the lead to department in organising this flight." (***sic***)

[16.] Advocate Nogxina also endorsed certain findings that had been made in a report by the Office of the Public Protector[33] on 29 July 2005,

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33 The Office of the Public Protector investigated a complaint made by the Freedom Front in connection with an advance payment of R 15 million that was made by Petro SA to Imvume in December 2003. This related to a contract for procurement of oil condensate.

pursuant to the input of Advocate Nogxina. These findings are quoted in part below:

"*18.2.1 The Public Protector reported as follows:*

> *"During the period 10 to 14 June 2001, the former Minister of Public Enterprises, Mr J Radebe, led a follow-up humanitarian flight to Iraq, accompanied by the Deputy Minister of Foreign Affairs, government officials and a business delegation. The purpose of this visit was to provide assistance to the people of Iraq in the light of the catastrophic humanitarian situation that prevailed as a result of the imposition of sanctions and to explore trade relations under the UN Iraq Oil For Food Programme;*

18.2.2 It was against the background as set out above that he approached the Minister of Minerals and Energy to approve a visit to Iraq by himself, Mr A Nkuhlu (Director: Ministerial Services), and Mr T Mafoko (of the International Liaison section) for the period 10 to 14 September 2001."

"*19.1 "South Africa's foreign policy towards Iraq in 2001 provided for the strengthening of trade relations between the two countries, including trade in the oil industry;*

19.2 ...

19.3 *The visit by the Director General of Minerals and Energy and officials of the department and the SFF to Iraq, in September 2001, related directly to the Government's expressed commitment to improve trade relations with Iraq. The then Minister of Minerals and energy was properly informed of the intention of the visit and she approved it accordingly;*"

[17.] Advocate Nogxina dealt with the purpose of his visit to Iraq as follows:

"*20. I must emphasise that my visit to Iraq, first was informed by the government policy on Iraq and secondly, it will be seen from a number of the institutions referred to above, that I head the DME which contributes significantly in the economy of this country. Furthermore, the DME has been in the forefront in promoting black empowerment. Indeed it is the first department to legislate on black empowerment.*"

[18.] The affidavit of Advocate Nogxina was solicited by the Commission with a view to exploring his justification to the Minister for the visit to Iraq by officials of the DME during September 2001. This justification included the imposition of oil surcharges on "*Black Economic Empowerment Groups*" which had to be addressed. (For convenience these groups are referred to below as BEE companies.)

[19.] The records of the DME, as well as the affidavit of Advocate Nogxina are characterised by a singular lack of clear reference to the legal issue created for South Africa by the imposition of oil surcharges on its nationals, or to how this problem was being addressed by the DME[34].

[20.] Following an aborted visit to Iraq[35] during September 2001, one would have expected concern to be expressed and recorded, to the effect that South Africa was being exposed to potential violations of Resolutions 661 and 986 as a result of the imposition of surcharges on BEE companies that were receiving allocations of oil. Certainly, by 14 May 2001, Cardy and Nacerodien, officials at the Mission in New York, had become alarmed and had reported to Ambassador Kumalo "*that the Government should not be seen to be supportive of illegal trade with Iraq*"[36].

[21.] The DME delegation had met informally with the Iraqi Deputy Minister of Oil. No minutes were kept. The Deputy Minister had informed the delegation that the Government to Government Oil For Food Programme deadline had passed.

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34 See Document No. 6 in Addendum 3, which is made up of correspondence between the Commission and the DME. The Commission sought to obtain any documentation in the possession of the DME, related to the imposition of surcharges that was created before, during and after the September visit.

35 The DME delegation arrived in Baghdad on 11 September 2001. Iraqi government officials were "*inundated with other activities following the 9/11 events*".

36 See June Report, paragraphs 192.5 to [193.] at pages 106 to 107.

[22.] The DME was therefore rendered unable to regulate and control the import of oil and exclude the payment of surcharges by concluding a government to government contract[37].

[23.] In the circumstances, it must have seemed inevitable that South African BEE companies would be allocated barrels of oil, that surcharges would be levied by SOMO on the barrels lifted, and that the contracting BEE companies would be bound to pay the surcharges.

[24.] According to the IIC Report, the Iraqis tolerated no exclusions from their surcharge policy. The largest proportion of oil allocated to contractors under the Programme went to Russian corporations. Russia, as a permanent member of the Security Council, was powerfully placed to assist Iraq, *inter alia*, by supporting the lifting of sanctions. Russian nationals were not excused from surcharge demands. There is no evidence to suggest that, during or about September 2001, BEE companies were better placed than Russian corporations were to avoid the payment of surcharges.

[25.] The effect of administrative *insouciance*, in relation to international obligations such as those imposed by Resolutions 661 and 986 on South Africa, ought to be addressed by the National Executive in the future in relation to similar resolutions.

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37 See June Report, paragraph 42 (c) at page 31.

[26.] On 6 March 2002, Imvume contracted with the Strategic Fuel Fund ("*the SFF*") to supply oil that would be allocated to Imvume by the Iraqis. Proceeds of the sale by Imvume to the SFF were, in all likelihood, calculated to have been used to pay surcharges owed by Montega[38]. These circumstances suggest that measures should be taken to prevent relevant material non-disclosure by contractors with the state in the future.

[27.] During the operation of economic sanctions, contractors with the state or with state institutions should be required:

a) to disclose whether any commodity or goods, intended to be supplied to the state or a state institution, emanate from a country under sanction; and if so,

b) to warrant that the supplier has complied with all relevant Security Council resolutions, UN agreements and memoranda of understanding that may be applicable to the acquisition of the commodity in question.

[28.] Similarly, where commodities or goods are supplied to a regime under sanction, the South African Government department licencing

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38 See the case against Majali: June Report, paragraphs [117.] to 126.] at pages 71 to 76.

participation in the UN Programme[39] should require an undertaking that no bribes have been paid or stand to be paid to the regime by the contractor.

SPECIFIC REGULATION SUGGESTED AFTER ANALYSIS OF DOCUMENTATION PROVIDED BY APE PUMPS

[29.] The only insight which the Commission has enjoyed into the precise *modus operandi* employed by contractors in the payment of ASSF arises from the punctilious provision of documentation by Ape Pumps in response to the Commission's summons. This is dealt with in Part E below. The supplementary recommendations which follow are necessary to curb the provision of funding:-

a) by banks in South Africa to states under sanction, or to the Government departments of such states and the institutions they control; and

b) to the foreign agents of contractors who pay kickbacks, either directly or indirectly, to a regime under sanction.

[30.] Firstly, it is recommended[40] that banking legislation and/or regulation should be created which spontaneously prohibits the provision of guarantees and the making of direct payments to governments under

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39 As to such licencing, see June Report, paragraph 60.2, page 42.

40 In amplification of sub-paragraph 60.5 of the June Report.

sanction (and government controlled institutions), as soon as they are placed under such economic sanction by Security Council resolutions.

[31.] Secondly, where UN managed programmes exist for the amelioration of economic sanctions, banks should be required to ensure that international payments to agents and/or foreign institutions, in respect of transactions affected by such programmes, are authorised by Security Council resolution. To this end, the Reserve Bank, in overseeing payments of foreign currency, should be required to certify international financial transactions with reference to such resolutions and authentic written agency agreements which expressly provide for the payment of commissions, as well as legitimate formulae for calculation of amounts payable.

[32.] The abovementioned banking legislation and/or regulation should contain a further provision: to the effect that any contract/agreement which permits an agent to receive an indeterminate or excessive commission for facilitating the involvement of a South African contractor in a UN sanctions programme should be deemed to involve an illicit payment.

SPECIFIC REGULATION RAISED BY MOCOH/HACKING'S CONDUCT

[33.] It would appear that, like Al-Khafaji, Hacking exploited the favoured status of South Africa, in order to obtain oil allocations. Unlike them he managed to deal directly with the UN. He did not deal with the UN

through the Mission. Ultimately the responsibility for the payment of surcharges for and on behalf of Mocoh was attributed to South Africa, on the basis that the Mission had processed the contracts which had become tainted by the surcharge payments. In the circumstances, and if these conclusions are shown to be correct, it will become necessary to pass legislation requiring any South African company which intends to participate in sanctions programmes of the UN, or which in fact does participate, to do so only under the supervision of an appropriate South African department of state after licencing as above. In the view of the Commission, such legislation would not involve state interference in the so called "*free market*", because UN sanctions programmes are not free. They impose legal obligations on member states to implement regulation.

THE REMEDY FOR CORRUPTION

[34.] The essential mischief which arose under the Programme was the illicit payment of surcharges and kickbacks to the Iraqis. These direct payments to the Iraqi Government and the institutions it controlled violated the express terms of Clause 4 of Resolution 661, as well as the purpose of sanctions *viz.* to weaken Iraq's capacity to wage war. The payments defeated the purpose of Resolution 986 (*viz.* to provide for the humanitarian needs of the Iraqi people), in that they deprived civilians, who had suffered from both war and sanctions, of the proceeds of the escrow account. Instead, the proceeds of oil sales, that were intended for the victims described by Advocate Nogxina,

were corruptly diverted to certain contractors and the regime. The mischief was made possible by corruption on the part of contractors and/or their agents. They acted in a conspiracy with the Iraqi regime.

[35.] With the amendments suggested below, the Prevention and Combating Corrupt Activities Act, 2004 (Act 12 of 2004) ("*the Corruption Act*"), particularly sections 3, to 6, 12 and 13 thereof, could operate to criminalise such corruption in the future.

[36.] The Corruption Act came into operation on 27 April 2004. It therefore cannot be applied to prosecute corrupt activities during the period of the Programme under investigation.

[37.] Section 35 of the Corruption Act vests a South African court with extraterritorial jurisdiction, if the act alleged occurred outside the Republic, and regardless of whether or not the act constitutes an offence at the place of its commission. Jurisdiction exists if the person to be charged –

(a) is a citizen of the Republic;

(b) is ordinarily resident in the Republic;

(c) was arrested in the territory of the Republic, or in its territorial waters or on board a ship or aircraft registered or required to be

registered in the Republic at the time the offence was committed;

(d) is a company, incorporated or registered as such under any law, in the Republic; and

(e) (is) any body of persons, corporate or unincorporated, in the Republic.

[38.] As this act stands, the aforementioned sections seem to apply to corruption on the part of natural and legal persons, but not where this occurs in collusion with sovereign states that are also perpetrators and beneficiaries. An appropriate amendment may be necessary to deal with corruption of the kind that occurred under the Programme.

[39.] Section 3 creates a general offence of corruption relating to the acts of "*any person*". Section 4 creates an offence in respect of corrupt activities relating to public officers for the benefit of the public officer or any other person. Section 5 creates offences in respect of corrupt activities relating to foreign public officials. Official is defined essentially with reference to a natural person in employment. Section 5 criminalises a person in relation to a benefit for a foreign public official or another person. Section 6 creates offences in respect of corrupt activities relating to agents for the benefit of another person. Section 12 creates an offence in respect of corrupt activities relating to contracts involving persons. Section 13, similarly creates offences in

respect of corrupt activities relating to procurement and withdrawal of tenders.

[40.] Person is not defined in the definition section of the Corruption Act. The meaning excludes sovereign states, not least of all, because a state cannot be prosecuted under South African domestic law. A presumption against criminalising corrupt activities in collusion with state perpetrators may be applied when these sections are interpreted by a court. Therefore, the Commission recommends that an amendment to the Corruption Act should be effected so as to make provision for conviction on a charge of corruption when a sovereign state is found to be a beneficiary in the application of sections 3 to 6, 12 and 13.

[41.] The adoption of an additional Protocol to the UN Convention Against Corruption, that would make provision for the criminalising of corrupt activities by sovereign states and trial by international tribunal, could appropriately be lobbied for while South Africa is a non-permanent member of the Security Council.

[42.] Further recommendations, over and above those already made, may still be required after the full and proper investigation described elsewhere in this report has taken place.

PART D

HACKING AND MOCOH

[1.] The relevant IIC findings in Tables 1 to 5 as well as certain inferences to be drawn against Mocoh and Hacking from IIC documentation were set out in the June Report[41]. The Commission is in possession of IIC documents relating to five contracts concluded between Mocoh and SOMO. Hacking represented Mocoh in the conclusion of every one of them. Hacking is resident in the United Kingdom.

[2.] Within the Commission's jurisdiction, the material witness, in relation to both Hacking and Mocoh, is Sexwale. A written statement ("*Sexwale's response*") was presented to the Commission on his behalf by his legal representatives, Werksmans Attorneys ("*Werksmans*"). It was received on 15 June 2006, while the June Report was being finalised. This statement was a response to written questions which had been directed to Sexwale by the Commission on 24 May 2006.

[3.] At all times Sexwale has publicly expressed a willingness to assist in the investigation of illicit activities. On 25 March 2004, he wrote to the Secretary-General of the UN, Kofi Annan on the letterhead of Mvelaphanda Holdings (Pty) Ltd ("*Mvelaphanda*")[42]. He stated, *inter alia*, the following: "*As your office is aware our company Mocoh Services (South Africa) has, till recently traded Basrah Light Oil from*

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41 See paragraph [44.] of the June Report.
42 See Document No. 7 in Addendum 3.

Iraq under the auspices of the United Nations Special Committee as set out in Resolution 661 – Oil For Food Programme". Sexwale also stated that, "*For the record our company is more than willing to assist the United Nations should it be required*". In his response, Sexwale indicates that the IIC did not request a response to the allegations made against his company by the IIC.

[4.] The Commission considers Sexwale's response to suffer from evidential and probative deficiency. His response was neither made under oath nor signed by him. However, it does reveal errors in the IIC Tables. These are dealt with further below.

[5.] For purposes of the June Report, the Commission remarked that participation in the Programme by South African entities was characterised by "*compelling indications of exploitation by foreign entrepreneurs..*". **In the case of Mocoh, the documentary evidence, Sexwale's response and an absence of Mission records, point in this direction.**

[6.] In the circumstances the Commission sought to interview Hacking. Following a lengthy telephonic conversation, on 30 August 2006, between the Chairperson and Hacking's solicitor in London, Mr David Corker ("*Corker*") of the firm Corker Binning, the Commission directed an e-mail to Corker on 5 September 2006. Therein a telephonic request for a consultation with Hacking, either in South Africa or in the United Kingdom, was repeated. Corker replied via e-mail, stating that