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FROM: MICHAEL DONEN

TO: THE DIRECTOR GENERAL FOR THE PRESIDENCY

ATT: MR VUSI MAVIMBELA

FAX: 012-323 9512

RE: COMMISSION OF ENQUIRY INTO THE OIL FOR FOOD PROGRAMME IN IRAQ

Attached please find my comment on certain misconceptions that have been created by recent media reports, with reference to the true content of the Commission's reports.

Kind regards

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28 August 2009

THE DIRECTOR GENERAL
FOR THE PRESIDENCY:
REPUBLIC OF SOUTH AFRICA

Mr Vusi Mavimbela

Fax No.: 012 -323 9512

RE: COMMISSION OF ENQUIRY INTO THE OIL FOR FOOD PROGRAMME IN IRAQ ("the Commission")

1. Thank you for your response (dated 24 August 2009) to my letter of 11 August 2009.

2. It is apparent from media reports that the Sunday Times has obtained access to certain information contained in the report of the Commission, dated 30 September 2006 ("the September report"). This information has been relied upon to create certain misconceptions, in the minds of the public, about the findings of the Commission.

3. In the circumstances I am constrained to draw the most glaring misconceptions to your attention.

4. The principal focus of the Sunday Times coverage, on 23 August 2009, was on contracts involving purchases of oil. Certain allegations had been made in that regard in the report of the Independent Inquiry Committee, appointed by the United Nations ("the IIC report") and released on 27 October 2005. For present purposes the most serious of these (reflected in both the text of the IIC report and the tables annexed thereto) suggested that impropriety had occurred on the part

of the Secretary-General of the African National Congress (as he then was), as well as the Government of South Africa.

5. The inferences to be drawn from the IIC report, and certain additional documentation provided to the Commission by the IIC, were dealt with in Part C of the Commission report, dated 17 June 2006 ("the June report"). The Commission's terms of reference required it, *inter alia*, to establish the correctness or otherwise of the "*findings*" made by the IIC in regard to certain persons and companies who were alleged to be South African.

6. What the author of the Sunday Times article (and the source of the leak) seemed to be ignorant of, was that the Honourable Deputy President and Minister of Human Settlements were exculpated in the June report in so far as their personal involvement in illicit activities was concerned. These conclusions were neither altered nor varied in the September report.

7. The involvement of these two eminent persons in the further investigation of the Commission was necessary in order to fill material gaps in the evidence before the Commission.

8. The June report materially disposed of the alleged illicit activities relating to purchases of oil by Montega Trading (Pty) Ltd, Invume Management (Pty) Ltd, Omni Oil, and the non-contractual beneficiaries of these contracts viz. Mr Sandi Majali and Mr Shaker Al-Khafaji.[1]

9. The media appear to be ignorant of the content of the June report, which was comprehensive in relation to the lastmentioned activities.[2]

10. The three persons "named" by the Sunday Times, viz. the Honourable Deputy President Kgalema Motlanthe, The Honourable Minister of Human Settlement Tokio Sexwale, and the Director General of the Department of Minerals and Energy, Advocate Sandile Nogxina were not the subjects of the Commission's

[1] See paragraph 2 of the September report.
[2] The June report was 111 pages long and contained 201 paragraphs.

15. In the circumstances the three persons allegedly "*named*" in the Commission's reports had already been named as a matter of public record.

16. The subjects of the Commission's terms of reference in regard to oil surcharges were Mr Majali, Montega and Imvume, Mr Al-Khafaji and Omni Oil, Mr Hacking and Mocoh.

17. The content of the June report expressly exonerated Mr Mothlanthe of any liability in relation to the payment of oil surcharges. (In this regard please see paragraphs 170 at pages 95 to 96 thereof and paragraph 185 at page 102 thereof).

18. The necessity for addressing "*the case against Motlanthe,*" is set out in paragraphs 127 and 128 of the June report. The case was raised gratuitously by the IIC. The mandate of the IIC did not require it to go so far as to make out a case against the ANC. Nevertheless, in their report, (the IIC Commissioners, of whom Mr Justice Richard Goldstone was one) saw fit to publish an unambiguous innuendo directed against the Secretary General, and by inference the Government of South Africa. This gratuitous attack, via the text of the IIC report and annotations in the relevant tables annexed thereto, was regarded by the Commission as a matter of public concern.[7] The charges were therefore touched upon and disposed of in the course of making findings involving Mr Majali, Montega and Imvume. The Commission rejected the proposition that South Africa was a political beneficiary of the Iraqi's surcharge and kickback policy. (See, *inter alia*, June report paragraphs 30 and 31, paragraphs 45 and 46, as well as paragraphs 181 to 187.)

19. Mr Sexwale was exonerated from liability as a participant in illicit activities, upon proper examination of the June report read with the September report. Under the heading "**Part D, Hacking and Mocoh**" (at page 50 paragraph 5), of the latter, it was reiterated that participation in the program by South African entities was characterised by "*compelling indications of exploitation by foreign entrepreneurs.*"

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[7] Coercive powers were vested in the Commission by the Commissions Act. The *raison dêtre* for vesting such powers is that the investigation involves a matter of public concern. See **President of the RSA v South African Rugby Football Union 2000 (1) SA 1 (CC), para 175 at 78 G to 79 A/B.**

In the case of Mocoh, the documentary evidence, Mr Sexwale's response and an absence of mission records, all pointed in this direction.[8]

20. It was observed that Hacking, who authorised the surcharge payments made by Mocoh, was a British resident. He did not appear to have a South African identity number. Mocoh was registered as a company in South Africa, and was required to be registered with the South African mission in New York as a participant in the UN program.[9] It was apparent that neither Mocoh nor Hacking were registered at the UN through the Republic of South Africa. This contradicted table 2 of the IIC report.

21. The conclusion drawn in the September report was that Hacking attempted to exploit the South African nationality of Mocoh, as Al-Khafaji was shown to have done with Omni Oil in the June report. However, Hacking had bypassed the South African mission whereas Al-Khafaji had exploited it. From the version of Mr Sexwale it was apparent that Hacking was able to obtain oil allocations on the strength of Mr Sexwale's profile.[10]

22. Within the context of **Part C** of the September report it is also quite apparent that Advocate Nogxina made a valuable contribution to the Commission's work. In particular he identified the need for one particular recommendation made by the Commission: to the effect that the National Executive should impose a coherent transparent regulatory regime which operates within the domestic legal system (and the public service). This should not only achieve the purpose of sanctions proper, but also provide for the humanitarian and economic activity authorised by Security Council resolution.[11] On a proper reading of the September report no blame whatsoever could be attached to the Director General. His personal involvement as a participant in illicit activities was so remote as to not even warrant any consideration of his culpability or otherwise.

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[8] In the June report see paragraph 45 pages 34 to 35.
[9] See September report paragraph 26 at page 57.
[10] September report paragraph 29 at page 58.
[11] See Part C of the September report paragraphs 1 to 25.

23. I trust that the above synopsis will be of some assistance to the Presidency should it be necessary to analyse the correctness of media reports in relation to the findings made by the Commission.

Yours sincerely

MICHAEL DONEN SC