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

COMMISSION REPORT: 17 JUNE 2006

INTRODUCTION

This report is interim in that it encompasses investigation by the Commission up until, and including, 15 June 2006. The Commission has been prevented from carrying out its terms of reference in full due to the circumstances set out in Part F below. The report is divided into nine parts. Part A highlights the background to the Oil-For-Food Programme in Iraq ("the Programme"). Part B is a summary of a Report on Programme Manipulation by the Independent Inquiry Committee ("the IIC Report" or "the report") which was commissioned by the United Nations ("the UN"). Part C contains certain inferences which the IIC Report as well as documentation provided to the Commission by the IIC and the Departments of Minerals and Energy ("the DME") and Foreign Affairs ("the DFA") can sustain. Part D deals with a request to extend the Commission's terms of reference.

Possible recommendations by the Commission based solely on documentation analysed to date are included in Part E. Part F deals with limitations which have been placed on the execution of the Commission's terms of reference by circumstances which have arisen since its appointment. Part G is an illustrative analysis of certain documentation relating to three companies and two individuals in support of inferences drawn in Parts A to F. Part H deals with certain information, regarding the Iraqis surcharge requirements during the Programme, which is within the possession of the DME. Part I focuses on the role of the Permanent Mission of South Africa to the UN ("the Mission") in monitoring illicit activities by South African participants in the Programme. The aim of the conclusion of the report is to address certain requests to the President and also to identify outstanding areas of investigation which are required by the Commission's terms of reference ("the terms of reference"), before a final report can be submitted. Documents referred to in this report, in the form of two addenda, will be submitted in due course[1]. For convenience certain **observations by and comments of the Commission, as well as information introduced *en passant* by the Commission are printed in bold**[2]. Significant words and phrases have been underlined by the Commission for emphasis.

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1 Addendum One will contain copies of those documents relied upon and identified in the footnotes in Part G. Addendum Two will contain documents identified in the index to that file, which documents have been relied upon in the remaining part of this report and which are not necessarily identified in the text or footnotes, such as indictments by the United States Attorney which have not been cited in full.

2 Part E is devoted in its entirety to statements made by the Commission and bold print is not relied on.

PART A

BACKGROUND TO THE OIL-FOR-FOOD-PROGRAMME

[1.] On 6 August 1990 the United Nations Security Council ("the Council") adopted Resolution 661, which imposed comprehensive economic sanctions on Iraq following that country's invasion of Kuwait. The Council acted under Chapter VII of the Charter of the United Nations ("the Charter"), more particularly Articles 39 and 41 thereof, which together authorise the Council to determine the existence of any threat to peace, breach of the peace, or act of aggression, and to decide on measures, not involving the use of armed force, to be employed to give effect to its decisions. Article 41 authorises the Council to call upon members of the UN to apply such measures, including complete or partial interruption of economic relations. In terms of Article 25 members are bound to accept and carry out such decisions of the Council in accordance with the Charter.

[2.] Resolution 661 imposed the following obligations on member states.

2.1 A prohibition was placed on the import into the territory of the state of all commodities and products originating in Iraq (or Kuwait) or exported from there.

2.2. States were bound to prevent any activities by their nationals or in their territories which would promote or were calculated to promote the export or trans-shipment of any commodities or products from Iraq.

2.3. Significantly (for the purposes of this report), states were prohibited from making available to the Government of Iraq, or to any commercial or industrial or public utility undertaking in Iraq, any funds or any other financial or economic resources. Furthermore, states were bound to prevent their nationals and any persons within their territories from making available to that Government or to any such undertaking, any such funds or resources and from remitting any other funds to persons or bodies within Iraq, except payment exclusively for medical or humanitarian purposes and, in humanitarian circumstances, foodstuffs.

[3.] Resolution 661 also established a Committee of the Council ("the 661 Committee") consisting of all its members, to examine reports on the progress of implementation of the resolution and to seek further information from all states regarding action taken by them to implement the resolution.

[4.] Between 10 and 17 March 1991 a mission despatched by the Secretary-General of the UN to assess humanitarian needs arising in Iraq reported that "the Iraqi people may soon face a further imminent catastrophe, which could include epidemic and famine, if massive life supporting needs are

not rapidly met"[3]. A humanitarian tragedy did result[4]. **This situation raised a contradiction between the fundamental purpose of the UN, contained in article 1(1) of the Charter viz. the maintenance of international peace and security and the reaffirmation contained in the preamble to the Charter, of the faith of the Peoples of the United Nations in fundamental human rights and the dignity and worth of the human person.**

[5.] The comprehensive economic sanctions remained in place for six years until they were partially lifted by the adoption of Resolution 986 (1995) which effectively established the Programme in Iraq. Acting under Chapter VII the Council aimed to lift economic sanctions in part as a temporary measure to provide for the humanitarian needs of the Iraqi people until Iraq had fulfilled other relevant Council resolutions. This temporary measure had endured for 5 years before the illicit activities under investigation took place. By that time the extent of Saddam Hussein's remaining military capacity was in dispute. The officially approved assistance being rendered had, by that time, gone beyond what is strictly speaking regarded as humanitarian. It included infrastructure rehabilitation and activities in twenty four sectors, *inter alia*, electricity, agriculture, irrigation, education, transport and telecommunications. The Office of the Iraq Programme ("the OIP"), on behalf of the Secretariat of

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3 See UN Office of the Iraq Programme Information Document which makes reference to S/22366, par 37. (Document "1" in Addendum Two).

4 It is described in the IIC Report of 7 September 2005 (Management of Oil-For-Food Programme Vol 1-Chapter 1 pp 79 to 81.).

the UN[5], was responsible for the overall management and coordination of the UN humanitarian activities. Nine UN agencies were responsible for implementing the Programme in the three Northern Governates.

[6.] In the preamble to Resolution 986 the Council expressed its concern for the serious nutritional and health situation of the Iraqi population, as well as its conviction of the need for a temporary measure to provide for their humanitarian needs until the fulfilment of previous Council resolutions, notably Resolution 687 (1991) of 3 April 1991.

[7.] This resolution effectively allowed the Council to take further action with regard to prohibitions in Resolution 661 until the Council had been satisfied that Iraq had unconditionally accepted the destruction, removal or rendering harmless, under international supervision, of all its chemical and biological weapons, all its stocks of agents and all its research development, support and manufacturing facilities related thereto as well as all its ballistic missiles with a range greater than 150 kilometres. Furthermore, Iraq was required to give unconditional undertakings in this regard and in regard to the development of nuclear weapons.

[8.] The Iraq disarmament file has still not been closed because both the International Atomic Energy Agency ("the IAEA") and United Nations Monitoring, Verification and Inspection Commission ("the UNMOVIC") are

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5 In terms of Article 7 of the Charter, the Secretariat is one of the principal organs of the UN; the others being the Council, the General Assembly, the Economic and Social Council, a Trusteeship Council and the International Court of Justice.

not in a position to return to Iraq under current political circumstances. UN weapon sanctions are therefore still in place. However, from the update report of the IAEA to the Council on 27 January 2003, and the report of the CIA-led Iraq Survey Group (generally referred to as the Deulfer Report), dated March 2005, it appears that during the period of the Programme sanctions were being directed at Saddam Hussein's strategic intent and lack of co-operation rather than his actual military capabilities.

[9.] Resolution 986 reaffirmed the commitment of all member states to the sovereignty and territorial integrity of Iraq.

[10.] The provisions of Resolution 986 came to be the rules of the Programme. Between December 1996 and December 2002 the Council adopted a series of resolutions that reauthorized the Programme for 13 phases of operation, with each one enduring for approximately 180 days.

[11.] The Programme, which was confirmed in a Memorandum of Understanding ("the MOU") concluded between the UN and the Government of Iraq on 20 May 1996, was set out in Resolution 986.

11.1 States were permitted to import petroleum and petroleum products originating in Iraq, and to carry out financial and other essential transactions directly related thereto.

11.2 Iraq could sell up to US $ 1 billion of crude oil every ninety days for the purposes set out in the resolution (viz. the supply of humanitarian needs to the Iraqi people) and subject to the conditions spelt out in the resolution[6]. The first oil under the Programme was exported on 10 December 1996. For the first three "six month phases" the Council set a ceiling of two billion dollars on oil exports in each phase. For Phases 4 and 5 the ceiling was raised to US $ 5, 2 billion but the low price of oil and the state of Iraq's oil industry put that out of reach. In Phase 6, the Council, by way of Resolution 1266 (1999), addressed the earlier shortfalls and permitted Iraq to export an additional US $ 3 billion worth of oil. Council Resolution 1284 (1999) removed the ceiling on Iraqi oil exports.

11.3 Procedures for purchases of oil and humanitarian goods were established. The State Oil Marketing Organisation of Iraq ("SOMO") and the UN Oil Overseers ("the Oil Overseers") would agree from time to time on an official selling price of crude oil ("the OSP") which was fixed for a time period. The selling price of humanitarian goods was agreed between tendering companies and a ministry of the Government of Iraq. The contracts required the approval of the 661 Committee.

11.4 States were bound to take any steps that were necessary under their domestic legal systems to assure that petroleum and petroleum products subject to Resolution 986 would be immune from legal proceedings, "and

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6 See paragraph 1 of Resolution 986.

to ensure the proceeds of the sale (of petroleum were) not diverted from the purposes laid down in this resolution"[7].

Resolution 1538 (2004)

[12.] During 2004 Resolution 1538 was adopted by the Council to endorse the appointment of a high level inquiry, the Independent Inquiry Committee ("the IIC"), to investigate the administration and management of the Programme in Iraq. This resolution affirmed that any illicit activity by UN officials, personnel and agents, as well as contractors, including entities that had entered into contracts under the Programme were unacceptable. The Council called upon the Coalition Provisional Authority, Iraq, and all other member states, including their national regulatory authorities, to co-operate fully with the enquiry by all appropriate means. The IIC started its investigation in April 2004. It consisted of three members assisted by the staff of the UN. The IIC was chaired by Paul Volcker, a former United States Federal Reserve Chairman. The two other committee members were Richard Goldstone (a former South African Judge) and Mark Pieth (a Swiss Professor of Law).

[13.] The mandate of the IIC was expressed as follows:

> "The independent inquiry shall collect and examine information relating to the administration and management of the Oil-for-Food

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[7] See paragraph 14 of Resolution 986.

Programme, including allegations of fraud and corruption on the part of United Nations officials, personnel and agents, as well as contractors, including entities that have entered into contracts with the United Nations or with Iraq under the Programme:

(a) To determine whether the procedures established by the Organization, including the Security Council and the Security Council Committee established by Resolution 661 (1990) concerning the Situation between Iraq and Kuwait (hereinafter referred to as the '661 Committee') for the processing and approval of contracts under the Programme, and the monitoring of the sale and delivery of petroleum and petroleum products and the purchase and delivery of humanitarian goods, were violated, bearing in mind the respective roles of United Nations officials, personnel and agents, as well as entities that have entered into contracts with the United Nations or with Iraq under the Programme;

(b) To determine whether any United Nations officials, personnel, agents or contractors engaged in any illicit or corrupt activities in the carrying out of their respective roles in relation to the Programme, including, for example, bribery in relation to oil sales, abuses in regard to surcharges on oil sales and illicit payments in regard to purchases of humanitarian goods;

(c) To determine whether the accounts of the Programme were in order and were maintained in accordance with the relevant Financial Regulations and Rules of the United Nations".

[14.] On 27 October 2005, the IIC Report was released. This was accompanied by a set of eight comprehensive tables identifying contractors under the Programme and other actors of significance to Programme transactions, such as non-contractual beneficiaries of Iraqi oil allocations and parties that financed oil transactions[8]. The tables are referred to below according to the number given to them by the IIC. Certain allegedly South African companies and individuals were listed in the tables as having partaken in illicit activities relating to oil or humanitarian goods transactions under the Programme. **In the narrative the report identified certain role players who were allegedly South African nationals and were alleged to be political beneficiaries.**

[15.] **The report amounts to the documentation of a fact finding exercise which the IIC undertook. The IIC is not an organ of the UN. No legal consequences can be attached to its findings. Nor are the findings the subject of a binding Council resolution under Chapter VII.** In a press release the Secretary-General of the UN "called on Member States to take action against illegal practices by companies under their

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8 The tables are accessible on the IIC's website at http://www.iic-offp.org.

jurisdiction and to prevent recurrences". He also hoped that "national authorities will take steps to prevent the recurrence of such practices in the future, and that they will take action, where appropriate against companies falling within their jurisdiction"[9]. **This Commission was apparently appointed by the President pursuant to the Secretary-General's expectation[10]. The approach of the Commission to the interpretation of its mandate and the recommendations which it is required to make in due course is infused with the spirit of his request.**

Defining illicit activities under the Programme

[16.] The IIC defined illicit activities with reference to the rules and procedures governing transactions as provided for by Resolutions 661 and 986.

Procedures established for oil purchases

[17.] The state concerned had to submit an application, endorsed by the Government of Iraq for each proposed purchase of Iraqi petroleum, to the 661 Committee. In order to ensure the transparency of each transaction and its conformity with the other provisions of Resolution 986, each application had to include details of the purchase price at fair market value, the export route, and the opening of a letter of credit, payable to an

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9 Press release available at http://www.iic-offp.org/story27oct05.htm.

10 See *Gazette* No. 28528 of 17 February 2006.

escrow account to be established by the Secretary-General of the UN ("the UN Escrow Account"), for the purpose of any financial or other transaction carried out in terms of the resolution[11]. Payment of the full amount of each purchase of Iraqi petroleum had to be made directly by the purchaser in the state concerned into this account[12].

[18.] Iraq was at liberty to choose the purchasers of its oil. Iraq chose to contract with countries holding pro Iraq views or those which would support removal of sanctions. **The report viewed Iraq's decision to contract with countries holding pro Iraq views (which implicitly included states genuinely concerned with the effect of sanctions on the civilian population of Iraq) as "political manipulation". In the view of this Commission, it remained the sovereign right of Iraq, which was reinforced by paragraph 1(a) of Resolution 986, to choose purchasers of oil under the Programme regardless of their views on Iraq.**

[19.] **Procedures for the purchase of humanitarian goods**

19.1 Funds in the escrow account had to be used to meet the humanitarian needs of the Iraqi population and for the purpose of financing exports to Iraq of medicine, health supplies, foodstuffs, and materials and supplies for essential civilian needs[13].

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11 See paragraph 1(a) of Resolution 986.
12 See paragraph 1(b) of Resolution 986.
13 See paragraph 8(a) of Resolution 986.

19.2 The following conditions were imposed.

(a) Each export of goods had to be at the request of the Government of Iraq.

(b) The Iraqi Government had to guarantee equitable distribution, thereof to its population on the basis of a plan submitted to and approved by the Secretary-General of the UN.

(c) The Secretary-General had to receive authenticated confirmation that the exported goods had arrived in Iraq.

PART B

SUMMARY OF IIC REPORT ON PROGRAMME MANIPULATION (OCTOBER 2005) AND SOURCES OF INFORMATION

[20.] The report included six chapters. For present purposes two are relevant (viz. Oil Transactions and Illicit Payments, and Humanitarian Goods Transactions and Illicit Payments). One is significant (The Escrow Bank – BNP Paribas New York – and Conflicting Interest), particularly in relation to the transactions involved in Part D below.

[21.] Essential features of the IIC Report are repeated below[14].

21.1 The report seeks to illustrate "the manner in which Iraq manipulated the Programme to dispense contracts on the basis of political preference and to derive illicit payments from companies that obtained oil and humanitarian goods contracts".

21.2 Under the Programme Iraq sold US $ 64, 2 billion of oil to 248 companies. Iraq purchased US $ 34, 5 billion of humanitarian goods from 3, 614 companies.

21.3 Oil surcharges were paid in connection with the contracts of 139 companies. Humanitarian kickbacks were paid in connection with the contracts of 2, 253 companies.

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[14] See Summary of the IIC Report: Chapter One, pages 1-8. Portions of the Summary and the actual report are quoted in inverted commas in Part B.

21.4 The tables ("the IIC Tables") released with the report identify whether and, if known by the IIC, how much was paid to the Government of Iraq with respect to particular Programme contracts.

21.5 The principle source of this illicit payment data was information received by the IIC from various ministries of the Government of Iraq, as well as data received from numerous banking institutions and, in some cases, from the company contractors themselves.

21.6 Pursuant to a request which the Commission directed to the IIC on 27 February 2006, the latter provided the Commission with certain material[15]. The provision thereof was made subject to a written undertaking of confidentiality on the part of the Commission. Furthermore, provision was made in accordance with the conditions laid down in a letter, emanating from the UN Office of Legal Affairs, dated 8 March 2006. The material provided included UN contract files, records of Iraqi Ministries, general Iraqi policy documents and additional materials.

21.7 UN contract files include financial and transactional documents relating to purchases under the Programme. These records were prepared and maintained by the UN Treasury and OIP in the normal course of the

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15 Copies of the various letters stating the conditions under which documentation was provided to the Commission are attached to a cover letter, addressed to the Presidency by the Commission, which serves the purpose of submitting this report to the President.

Programme. They were used and relied upon to conduct the regular Programme activities.

21.8 Records of the various Iraqi ministries were obtained by the IIC from the Government of Iraq. They relate to relevant transactions under the Programme. They reflect the levy and payment of kickbacks in connection with humanitarian contracts under the Programme. These records were prepared contemporaneously with the activities recorded. They were maintained as permanent records of the respective ministries, and were used and relied upon to conduct regular activities of the ministries.

21.9 Of particular relevance to this enquiry were the records which were obtained by the IIC from the offices of SOMO. They include internal SOMO documents relating to oil purchases under the Programme. The IIC contends that it established, firstly, that these records were maintained as permanent records of SOMO, and secondly, that they were used and relied upon to conduct the regular activities of SOMO.

21.10 SOMO records include:

(a) A comprehensive set of SOMO allocation lists and contract approval letters related to oil allocations associated with each contract for every entity that participated in the Programme from Phase 1 through Phase 13;

(b) a list of allocations for Phases 1 to 12;

(c) a SOMO Summary Report of February 2004;

(d) a SOMO ledger of paid and levied surcharges; and

(e) a comprehensive set of SOMO bank records associated with surcharge payments, including statements, advices, and Swift messages obtained from SOMO, Jordan National Bank and Fransabank.

21.11 Most of the original documents were in Arabic. The IIC provided the Commission with English translations of certain documents. In other cases the Commission has utilised the services of a sworn translator.

21.12 The Commission has examined bookkeeping records received by the IIC from the Iraqi Ministries as well as from SOMO. They were comprehensively and assiduously produced. The consequences to Iraqi officials of producing anything less, according to every source at the Commission's disposal, were dire. The impressions above were confirmed by auditors of the firm KPMG, who were part of a team mandated by the Interim Iraq Governing Council to undertake a scoping investigation of the Programme. The conclusion of the IIC,

to the effect that Iraqi Government records are reliable, may therefore be accepted until the contrary is shown in respect of any particular document. However, this assumption does not exclude the possibility that the IIC may not have been placed in possession of all the relevant documentation.

21.13 A qualification to the information presented by the IIC in the tables needs to be emphasised viz. "that the identification of a particular company's contract as having been the subject of an illicit payment does not necessarily mean that such 'company as opposed to an agent or secondary purchaser with an interest in the transaction' made, authorised, (or) knew about illicit payment".

21.14 This disclaimer was inevitably brought about by the fact that, during the Programme, a multiplicity of participants began to play a role between the buyers and sellers. Intermediary contractors were introduced into multiparty oil sales. Agents and influential third parties played a significant role between Iraqi Ministries and the sellers of humanitarian goods. Some sellers freely complied with Iraq's kickback policy. Many others made payments to third parties or agents, either unwillingly or in disregard of the purpose of the payments. The precise role of each participant could not be monitored by the UN.

21.15 Information before the Commission indicates that the question, of whether or not surcharges or kickbacks were paid or offered by the South African companies and individuals identified in the Annexure, has to be examined within the context of various conspiracies to make direct payments to the Iraqis. The parties to such conspiracies were the Government of Iraq, on the one hand, and any number of persons who became associated with them in "side agreements", to make illicit payments, on the other. The effect thereof is that a thorough investigation by this Commission may exonerate a contracting company to whom the IIC Tables has attributed responsibility for the payment of a surcharge or a kickback. Conversely, other role players could be implicated. This is elaborated upon below. The methodology employed by the IIC could establish that procedures laid down by the Council and the MOU had been violated. Precise identification of the individual responsible in each and every case was not possible.

Summary of IIC conclusions re oil transactions and illicit payments

[22.] The IIC Tables do not deal with the payment of so-called "port charges" which the Government of Iraq required before cargo ships would be permitted to lift oil from Iraqi ports. Port charges had to be paid directly to the Iraqi authorities. These payments were unauthorised and were concealed from the Programme.

[23.] "At the outset of the Programme, Iraq preferred to sell its oil to companies and individuals from countries that were perceived as 'friendly' to Iraq, and, in particular, if they were permanent members of the Council in a position potentially to ease the restrictions of sanctions. Russian companies received almost one-third of oil sales under the Programme. Through its Ministry of Fuel and Energy, Russia coordinated with Iraq on the allocation of crude oil to Russian companies. French companies were the second largest purchaser of oil under the Programme". Nevertheless, a substantial volume of oil under contract with Russian companies was purchased and financed by companies based in the United States, which ultimately received the lion's share of the oil allocated by Iraq.

[24.] The IIC concluded that the "decision to allow Iraq to choose its buyers empowered Iraq with economic and political leverage to advance its broader interest in overturning the sanctions regime. Iraq selected oil recipients in order to influence foreign policy and international public opinion in its favour".

[25.] **As already stated, Iraq's selection of oil recipients involved a manifestation of its sovereignty which had been reaffirmed by Resolution 986. Under international law no adverse conclusion can be drawn from the existence of international interaction between particular states and the Iraqi regime: should this prove to have been limited to the purchase of oil by such states (and their nationals) in return for support for the removal of economic**

sanctions. States, which had a particular political interest in keeping sanctions in place (such as the USA) retained their sovereign right to legislate accordingly in their domestic law. Prosecutions for lobbying on behalf of the Iraqi Government and against sanctions were effected in this regard under US Federal Law[16]. However, the liberty of Iraq to conduct international economic relations with the nation states it favoured is distinguishable from the collusion of the Iraqi regime with other states, as well as with companies and individuals, in order to facilitate the payment of surcharges and kickbacks to the regime. This was prohibited by Resolutions 661 and 986 and took place at the expense of the civilian population of Iraq.

[26.] Several years into the Programme, the regime realised that it could generate illicit income outside of UN oversight by requiring oil purchasers to pay "surcharges" of generally between 10 to 30 cents per barrel of oil[17]. The surcharge policy commenced in the autumn of 2000, during Phase 8, and lasted till the autumn of 2002, through the middle of Phase 12. Payments were made mostly to Iraqi controlled bank accounts in Jordan and Lebanon, as well as by cash deposits to Iraqi embassies in Moscow and elsewhere. Ultimately the regime derived US $ 228, 800, 000 from surcharge payments.

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16 See USA v Samir A Vincent: USA v Tongsun Park (United States District Court for the Southern District of New York). Vincent was indicted, *inter alia*, for lobbying officials of the US Government and the UN to repeal sanctions against Iraq, while he was receiving directions from the Government of Iraq; without notification to the Attorney General, in violation of Title 18, United States Code, section 951.

17 Reference to "cents", unless otherwise stated, implies the currency of the USA.

[27.] **This was made possible by an evolution in SOMO sales practice. At first it sold directly to end-users (oil refineries) and then via oil traders to end users. During the period under investigation it sold via intermediaries to traders who on-sold to end-users**[18].

[28.] A committee, which included Saddam Hussein, Vice President Taha Yassin Ramadan ("Ramadan") and Deputy Premier Tariq Aziz ("Aziz") set the surcharge amount for each phase. The Ministry of Oil and SOMO were directed to implement it. "The first step taken by SOMO employees was to inform each beneficiary that a surcharge was imposed on each barrel of oil sold under the Programme and was to be collected directly by the Government of Iraq"[19]. SOMO assessed surcharges of between 10 and 30 cents per barrel. Surcharges were levied on each barrel lifted (that is, loaded by a tanker at the port). On 15 December 2000 the Oil Overseers warned traders and companies that such payments were illegal[20].

[29.] Iraq's "political beneficiaries" often used little known intermediary companies to enter into oil contracts for oil allocated to them. The contract holders were not known in the industry. They were small and had limited credit facilities. They usually could not open letters of credit or charter ships on their own account. They sold to an established oil

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18 See Oil Overseers Report for 661 Committee, dated 20 February 2001 (document "2" in Addendum Two).

19 IIC Report, Chapter 2, Page 18, Section C.

20 See the advice of the 661 Committee dated 15 December 2000 (document "3" in Addendum Two).

company or trader. The oil companies and traders paid the intermediary company a premium above the UN's OSP. This premium was used by the intermediary company in turn to pay the beneficiary or another person or entity that was designated to receive those funds.

[30.] **From the documentation available it would be incorrect to state that South Africa was a political beneficiary that used little known intermediary companies. The entity Falcon Trading Group ("Falcon") was not a South African company. It was a front for Shakir Al Khafaji ("Al Khafaji"), an Iraqi national residing in the USA. Al Khafaji was a beneficiary with influence. Montega Trading (Pty) Ltd ("Montega"), which was a South African company, obtained an oil allocation because Al Khafaji had personal influence with the Iraqi regime. The same applies to Omni Oil, another front for Al Khafaji, which processed its oil contracts through the Mission under the guise of being a South African company. In fact no such company was registered in South Africa.**

[31.] **Available documentation suggests that the DME was involved in implementing a policy of Black Economic Empowerment ("BEE"). This is distinguishable from introducing BEE companies into the oil industry for corrupt purposes. However, the economy of introducing any intermediaries into the Programme at all was questionable, because this inevitably inflated prices and drained the Programme of**

funds which were intended to be used to provide Iraqi civilians with humanitarian assistance.

[32.] The layers of individuals or companies which intruded between the allocation and end-user of Iraq's crude oil resulted in transactions in which the UN could not determine from the contracts in question who had actually benefited from or controlled the purchase of oil.

[33.] Consequently many of Iraq's regular customers balked at buying Iraqi oil, but a group of four oil traders began to take a greater role in the market. All four had limited access to direct contracts under the Programme, and used intermediaries to maintain their access to Iraqi crude oil. For present purposes Bay Oil Supply and Trading Limited ("Bay Oil"), and Glencore International AG ("Glencore"), a Swiss company, are significant. Beginning in Phase 9 of the Programme, from December 2000, they purchased crude oil through intermediary entities. The use of SOPAK, a subsidiary of Glencore, was significant in purchases made through South African entities. Oil companies and traders were saddled with higher premiums over the OSP to account for the payment of the surcharges at some stage in the contractual chain.

[34.] While most participants involved in the Iraqi crude oil market admitted to being aware of Iraq's surcharge demands, some conceded to the IIC that they had arranged with oil companies to use a portion of the premium payments to meet the surcharge demands. In the autumn of 2002, after

the 661 Committee had imposed "retroactive pricing", which decreased demand, the Government of Iraq decided to discontinue its surcharge policy.

Summary of IIC conclusions re humanitarian goods transactions and illicit payments

[35.] Iraq's largest source of illicit income from the Programme came from kickbacks paid by companies that the regime had selected to receive contracts for humanitarian goods. This allowed the regime to obtain the direct payment of more than US $ 1, 5 billion. The payments to the regime were disguised and were not reported to the UN by Iraq or the parties with whom Iraq contracted. The kickback policy began in mid 1999, after Iraq attempted or had attempted to recoup costs it incurred to transport goods to inland destinations after their arrival by sea at the port of Umm Qasr, i.e. without seeking UN approval for such compensation from the UN Escrow Account. Iraq required humanitarian contractors to make such payments directly to Iraqi controlled bank accounts or to front companies outside of Iraq, who then forwarded the payments to the regime. By mid 2000 Iraq had instituted a policy of imposing a ten percent kickback requirement generally on all humanitarian contractors. This included goods shipped by land as well as by sea. This policy was in addition to the requirement for inland transport fees.

[36.] An after-sales-service provision was incorporated into contracts to inflate prices, and permitted contractors to recover from the UN Escrow Account

the amount that they had secretly paid to Iraq in the form of kickbacks. Contractors ordinarily made the payments before their goods were permitted to enter Iraq. Many companies simply paid the after-sales-service directly to the regime. Others made payments to third parties or agents, who then paid the regime. Kickbacks were paid in connection with the contracts of more than two thousand two hundred companies in the form of inland transportation fees, after-sales-service fees, or both. The overpayment of the after-sales-service fee out of the UN Escrow Account reduced the proceeds available from oil sales, which were intended to be used to provide assistance to the civilian population of Iraq.

The Escrow Bank and Conflicting Interest

[37.] In 1996, the Secretary-General selected Banque Nationale de Paris S.A. ("BNP"), a French banking corporation, to serve as the escrow bank under the Programme. The agreement between the bank and the UN provided that the provisions of Resolution 986 and the MOU were "essential and fundamental terms and conditions". The agreement required BNP to confirm all letters of credit issued by other banks under the Programme: but it also allowed BNP, its branches, subsidiaries and affiliates to issue letters of credit on behalf of private oil purchasers. Ultimately such banks issued approximately three out of every four letters of credit that financed oil purchases. BNP Paribas (Suisse) S.A. Geneva ("BNP Paribas") was significant in this regard.

PART C

INFERENCES TO BE DRAWN FROM THE IIC REPORT AND ADDITIONAL DOCUMENTATION

[39.] This Commission was appointed in terms of section 84(2)(*f*) of the Constitution of the Republic of South Africa, 1996 ("the Constitution"), to conduct an investigation into the alleged illicit activities of certain South African companies or individuals relating to the Programme. Its terms of reference were published in a Schedule in *Gazette* No. 28528 on 17 February 2006. The companies and individuals, as well as the alleged illicit activities were set out in an annexure to the Schedule ("the Annexure"). For convenience companies and individuals identified are referred to generally as alleged offenders and their names are cited in an abbreviated form.

[40.] As a first step in the Commission's investigation it was required (by the term of reference numbered I(ii)), to access and analyse all evidence and information obtained and assessed by the IIC, which related to alleged offenders and "which may assist in this investigation". The Commission obtained a plethora of information from the IIC by 18 March 2006. More information is still being accessed. The circumstances under which access was obtained were described in an interim report, dated 31 March 2006 ("the interim report"). Since 18 March 2006 the Commission has been analysing documentation and other information received from the IIC and other sources. All of this evidence and information has not been

surcharges which would have accrued against Imvume from its Crude Oil Contract No. M/11/72, dated 27 March 2002.

(b) Majali/Imvume made an advance surcharge payment of US $ 60, 000 (probably in respect of the Imvume Contract referred to in subparagraph (a) above).

(c) Majali's need to pay surcharges, concomitantly with the execution of Imvume contracts, was probably known to the management of the South African Strategic Fuel Fund ("the SFF"), who might have become associated in this illicit activity by concluding a contract to purchase Basrah Light Crude Oil ("Basrah LCO") from the Iraqis, via Imvume and its financier (Glencore/SOPAK). **A direct relationship between state institutions (SOMO on behalf of Iraq and the SFF on behalf of South Africa), would have circumvented the involvement of the South African state in the payment of oil surcharges altogether (if necessary by a simple refusal on the part of the SFF to pay oil surcharges).**

(d) The Secretary-General of the African National Congress ("the ANC"), Mr Kgalema Motlanthe ("Motlanthe"), probably knew of the conspiracy referred to in (a) above and might have become associated in it in some manner, as is illustrated by and inferred

analysed due to existing time constraints. Proper analysis by the Commission is required to establish whether or not the conclusions in the IIC Report are justified in regard to the alleged offenders and the circumstances under which their alleged illicit activities were carried out.

[41.] Based only on information provided by the IIC, which is substantially hearsay, and without questioning relevant witnesses orally, the inferences drawn under paragraphs [42] and [44] are reasonably sustainable. Similar conclusions were drawn and suggestions made, either explicitly or implicitly, in the IIC Report. The Commission is bound by its terms of reference to test the correctness of these findings. It has intended to do so from the outset by exercising the powers given to it in terms of the Commissions Act, 1947 (Act No. 8 of 1947) ("the Commissions Act"), and the Regulations made by the President thereunder[21]. However, it has been prevented from doing so by the circumstances set out in Part F below.

Inferences arising from IIC documentation (presently before the Commission)

Inferences regarding Majali/Montega/Imvume

[42.] (a) Mr Sandi Majali ("Majali") conspired with the Iraqis to pay their existing claims for oil surcharges against Montega as well as other

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21 Regulations published in *Gazette* No. 28528 of 17 February 2006.

from Majali's letter ("the proposal letter") to the Oil Minister in the IIC's Report[22].

(e) The Mission, in the person of at least two South African officials (viz. Andries Dormehl ("Dormehl") and Simon Cardy ("Cardy")), was likely to have been aware of the exposure of Majali, Montega and Imvume to the peremptory requirement of paying surcharges. **If so, this could have attracted liability to the Republic of South Africa under international law. This would have arisen from a breach of Article 25 (read with Article 41) of the Charter; that is, as a result of a failure on the part of South Africa to comply with directions contained in Resolutions 661 and 986 which imposed and regulated economic sanctions.**

A further inference (arising from non IIC documentation)

[43.] Based on further documentation, which was provided to the Commission by the Minister of Minerals and Energy on 26 April 2006, a further conclusion arises. That is, on 7 August 2001, when she signed the approval of an official (technical) visit to Iraq by DME officials from 10 to 14 September 2001, the Minister of Minerals and Energy at the time, Ms P Mlambo-Ngcuka, was aware of the surcharges being imposed by the Iraqis on BEE Groups, and that this issue needed to be addressed by officials of the department for which she was responsible.

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22 See Chapter 2 of the IIC Report on p 113.

Inferences regarding Mocoh (South Africa)

[44.] (a) Mr Tokyo Sexwale ("Sexwale") and Mr Michael Hacking ("Hacking") were co-shareholders in Mocoh.

(b) Sexwale personally was the non-contractual beneficiary of 5, 8 million barrels of oil which were allotted to him during Phases 6, 7, 8 and 13 which apparently were never lifted. The allotment during Phase 8, of one million barrels, was effected on the basis that the country receiving the allotment was Italy.

(c) Mocoh concluded six contracts. It was allocated 10, 800, 000 barrels. It lifted 8, 592, 627 barrels with a contract value of US $ 185, 598,266.

(d) In respect of Contract No. M/08/54 ("the First Mocoh Contract"), which was concluded during Phase 8, a total of 946, 313 barrels were lifted. A surcharge of US $ 94, 631 was levied and paid. (The First Mocoh Contract is the only Mocoh Contract which is not in the possession of the Commission).

(e) In respect of Contract No. M/09/40 ("the Second Mocoh Contract"), 1, 917, 957 barrels were lifted. A surcharge in the amount of US $ 479, 489 was levied and US $ 480, 068 was paid (leaving a surplus of US $ 579).

(f) All the surcharges were paid through Hacking who acted in person by either making the payments or giving authority to others to do so on behalf of Mocoh.

(g) Knowledge of both the surcharges levied (which was a well known demand of the Iraqis) as well as of the payments can be attributed to Sexwale who was Hacking's co-director.

(h) The Mission was probably aware of this situation, with similar consequences to those in paragraph [42](e) above.

Foreign exploitation of South Africa

[45.] Documents provided by the IIC, as well as Mission records provided by the DFA, reveal a systematic exploitation of South Africa's favoured nation status with Iraq during the Programme by a coterie of entrepreneurs and international oil traders such as Glencore and Bay Oil. Most of these were foreigners. The entities, Omni Oil and Falcon, illustrate this phenomenon. Both misrepresented to the Mission that they were South African companies in order to facilitate their participation in the Programme. Neither was a South African company. The prime mover behind these two entities was Al Khafaji. He conspired with a South African, Mr Rodney Hemphill ("Hemphill") to exploit the Mission. Hacking, who authorised the surcharge

payments made by Mocoh is a British resident. He does not appear to have a South African identity number.

[46.] The foreign nationality of Al Khafaji and Hacking and the lack of registration in South Africa of Omni Oil and Falcon would seem to dispose of the allegation that these allegedly South African companies and individuals took part in illicit activities. However, the question remains as to whether or not they used persons "within (South African) territory" who made funds or resources available to the Government of Iraq, an activity which was targeted by Resolution 661.

[47.] International law allocates corporate entities to states for purposes of diplomatic protection, usually by the state under the laws of which it is incorporated[23]. The consequence of misrepresenting the nationality of Omni Oil and Falcon to the Mission was that potential prejudice to the Republic of South Africa was likely to result. Induced by the representation that an applicant company was registered in South Africa the Mission would, in all likelihood, have endorsed the *bona fides* of a contractor. The contractor would then have become admitted to the Programme on the basis that the company was a South African national. South Africa was bound to prevent its nationals and persons within its territory from providing

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23 See the BARCELONA TRACTION CASE: Case Concerning the Barcelona Traction, Light and Power Company Limited (Second Phase) Belgium v Spain ICJ Reports 1970 [Paragraph 70].

finance to the Iraqi Government. The obligation arose under the Charter which is a treaty. As a result of their admission to the Programme through the South African Mission, the illicit activities of Al Khafaji, Omni Oil and Falcon were attributed in some measure to South Africa. However, South Africa had no jurisdiction over these foreign entities, because they were controlled by foreign nationals residing beyond South Africa's borders.

[48.] The Republic is bound by the Charter, an international agreement, which was binding on the Republic when the Constitution took effect[24]. However, the Charter can only become law within the Republic ("domestic law") when it is enacted into law by national legislation[25]. No legislation currently exists in South Africa which incorporates Council resolutions, made under Chapter VII of the Charter, into domestic law. The provisions of Resolutions 661 and 986 therefore have no legal effect on individual persons, legal or natural, in our domestic law. More importantly, by virtue of the principle that a crime cannot be committed unless it already exists in our law[26], individuals who associated themselves with or made payments to Iraq contrary to the provisions of Resolutions 661 and 986, did not commit offences in South Africa by doing so. Nor do such activities attract criminal liability under international law to individual perpetrators i.e. to legal or natural persons.

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24 See section 231(5) of the Constitution.
25 See section 231(4) of the Constitution.
26 The *nullum crimen sine lege* principle.

PART D

REQUEST FOR EXTENSION OF TERMS OF REFERENCE

[49.] Lexoil is a South African registered company. It is not a subject of the Commission's investigation. A company search reveals that Lexoil was registered on 23 August 2000. Its physical address is Suite 402, West Tower Sandton Square, 3 Maude Street, Sandton. Mr Barry David Aaron ("Aaron"), an attorney, with the same business address was appointed as a director on 30 July 2003. The only other director is Mr Kevin Gordon Morgan who was appointed on the same date.

[50.] On 17 January 2001 the Oil Overseers informed Dormehl, at the Mission, that Lexoil had been registered as a national oil purchaser which was authorised to communicate with the Oil Overseers in respect of oil sales under Resolution 986. This notice had been preceded by a note directed by the Mission to the OIP on 17 January 2001 requesting the registration of a South African company wishing to purchase oil from Iraq under the provisions of Resolution 986. The company named was Lexoil, and the contact person named was Aaron. He later became Majali's attorney as well as a director of Lexoil.

[51.] On 18 January 2001 Cardy informed Aaron (Lexoil) by letter that United Technical Engineering Systems had been registered as an oil purchaser. On 19 January 2001 Aaron directed a letter to Cardy, pointing out that

Lexoil should have been registered ("Aarons letter of 19 January"). Aaron requested a replacement letter. The details of Lexoil which appear on this letter suggest that by 19 January 2001 Majali had become associated with Lexoil and that knowledge of Iraq's surcharge policy may be attributed to Lexoil.

[52.] Lexoil concluded Contract No. M/11/124 ("the Lexoil Contract") with SOMO, for the sale of one million barrels of Kirkuk, on 8 May 2002 during Phase 11. The Lexoil Contract was signed by Mazen Hassen Saleh ("Saleh") on behalf of Lexoil and was valid until 29 May 2002. Lexoil's application to the Oil Overseers for approval of this contract was apparently also signed by Saleh. He used the South African address above. This was recorded as the place of registration of Omni Oil. Saleh was the contact person, but the contact details (telephone, facsimile and e-mail), were those of Aaron.

[53.] At present there is no evidence to suggest that Saleh was a director of the South African registered company or that he was duly authorised to contract on behalf of Lexoil. A letter directed by Aaron to Mr Dumisani S Kumalo, the Ambassador at the Mission ("Ambassador Kumalo"), on 7 April 2003, confirmed that the only contract "which we executed in respect of the *oil for food* Program (was) Contract No. M/11/124, a *primary* contract allocated to us.". In this letter Aaron spoke about "our representatives in Jordan". He directed a copy of the letter to Saleh, "LEXOIL-JORDAN". **The probabilities suggest that a lifting of the**

corporate veil would reveal that Lexoil is a front company owned and controlled from Jordan.

[54.] The Iraqi Oil Minister approved the Lexoil Contract on 11 May 2002. A request for approval from SOMO included a common clause numbered eleven ("the standard surcharge clause") which provided as follows: "Recovery amount payable within (30) days after shipment loading". This contract was processed under the auspices of the Mission. Ultimately the contract was extended beyond the period during which SOMO chose to impose its surcharge policy. No surcharges were paid.

[55.] On 11 September 2002 BNP Paribas issued a letter of credit to the Escrow Bank, BNP Paribas New York in favour of the UN by order of Lexoil care of Aaron's business address above pursuant to the Lexoil Contract. The transparency of the financial arrangements was compromised as a result of the circumstances referred to in Paragraph [38.] above.

[56.] Three requests for consecutive extensions of the contract were made to the Oil Overseers by Saleh, on 20 June, 31 July and 10 September 2002. Appearing at the foot of the page bearing the Lexoil letterhead, on which Saleh made each request, was an express reference to Lexshell 74, Property Holdings (Pty) Limited, Executive BD Aaron, Registration number 97/16624/07 ("Lexshell"). Aaron's letter of 19 January 2001also contained

Lexshell's details at the foot of the page. The executives were described there as BD Aaron, S Majali and P Lange.

[57.] **By 19 January 2001, when Majali's name appeared on the correspondence of Lexoil in its dealings with the Mission, Majali had already visited Iraq with Al Khafaji and Hemphill, and he had signed a contract with SOMO (on behalf of Montega). He had been informed by Iraqi officials that the Iraqis required surcharge payments on any barrels of oil that would be lifted. Knowledge of the Iraqi's surcharge requirement on the part of Lexoil, when it applied to the Mission for registration and when it concluded the Lexoil Contract, may be attributed to the company because of Majali's apparent directorship at those times.**

[58.] Table 3 of the IIC Summary of Oil Sales by Non-Contractual Beneficiaries reflects that the beneficiary of this contract was Mr Bessam Mashhur Haditha ("Haditha"). His "country" was Jordan and one million barrels were allocated. That is, the Lexoil Contract, was facilitated under the auspices of a Mission Country viz. South Africa for the benefit of a Jordanian. Haditha was also the non-contractual beneficiary of Contract No. M/10/66, for two million barrels. The Mission Country for that contract was Turkey. The contracting company was Delta Petroleum Products Trading Company. By the time that the Lexoil Contract was concluded Delta had already concluded ten oil contracts in the first 10 phases of the Programme. They paid surcharges in respect of the last three contracts.

This included the contract, during Phase 10, for which Haditha was the non-contractual beneficiary. It is likely that he was well aware of the surcharge requirement when Lexoil contracted for his benefit under the auspices of the Mission during Phase 11. Lexoil became Haditha's South African face, after he changed the Mission through which he obtained his benefit of Iraqi oil.

[59.] The Commission accordingly recommends the extension of its terms of reference so as to provide for resolution of the issues described in paragraph [198] below.

PART E

PROPOSED RECOMMENDATIONS BASED ON DOCUMENTATION ALONE

[60.] The Commission is investigating the following possible recommendations.

60.1 In dealing with Council resolutions such as Resolution 661, which impose economic sanctions, whether national legislation should be enacted to incorporate the provisions of Chapter VII of the Charter into domestic law to such extent as is necessary to create liability for the individual. Such legislation would prohibit South African nationals both in South Africa and abroad, as well as any person within the territory of South Africa, from committing any "listed activity" in violation of the provisions of Council resolutions passed under Chapter VII, after such activity has been listed by the Executive in the *Gazette*. Criminal sanctions for persons (legal or natural) who commit a listed activity, would be legislated for.

60.2 In dealing with Council resolutions such as Resolution 986, that partially lift and/or ameliorate economic sanctions, whether a further legislative prohibition should be created. This would prohibit South African companies and individuals and any person within South Africa who may become involved in UN sanctions programmes, from executing contracts without a licence. Such licensing could be introduced and administrated

by the Treasury, the DFA and/or the State departments which are relevant to the particular activity[27].

60.3 Whether directives should be issued to the DFA, to the effect that in the future, UN regulated exemptions from the imposition of economic sanctions under Chapter VII, which are processed by the Mission, should be thoroughly scrutinised and refused whenever the participants and/or beneficiaries are not South African nationals.

60.4 Whether the National Prosecuting Authority should be requested to investigate the perpetration of crimes of fraud on the Mission (and the Republic) as a result of the activities of Hemphill, Majali, Al Khafaji and Haditha, in the circumstances described in this report.

60.5 Whether provision should be made by the Department of Finance to put exchange control regulations into place, spontaneously and in line with Chapter VII resolutions, as soon as such resolutions are passed in the future, in order to prohibit the provision of finance to states under economic sanction.

60.6 Whether similar provision should be made to control the import into and export from South Africa of goods affected by such sanctions and/or the

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27 The indictment S1 05 (Cr. 59 DC), in the US District Court, Southern District of New York, refers to US federal law, which is directed at the mischief under investigation and which could serve as a useful reference.

transhipment thereof via the territory of South Africa, or through the use of South African flag vessels.

PART F

LIMITATIONS ON THE COMMISSION

[61.] Its terms of reference required the Commission to report to the President within three months of 17 February 2006, or with the consent of the President, as soon as possible thereafter. The term numbered 3 authorises the terms of reference to be added to, varied or amended from time to time. The term numbered 5 provides that the Commission is subject to, and should be conducted in terms of the provisions of the Commissions Act, as well as the regulations made with reference to the Commission.

[62.] On 31 May 2006 (i.e. some 15 days after the original date for a final report had passed) the Commission had its first formal written notification[28] that the President had consented to an extension of the original final date for a report i.e. till 17 June 2006 ("the one month extension"). No further extension has been consented to. An informal notification, in the form of a text message, was forwarded to the Chairperson via cellular telephone on 22 May 2006. It repeated a message which had been directed by the Deputy Minister for Justice and Constitutional Development to the Director-General of that Department on the same day. The present report with the limitations described herein is an attempt to meet the deadline of

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28 From the Department for Justice and Constitutional Development.

17 June 2006. The further circumstances limiting the execution of the terms of reference are described hereunder.

[63.] During a telephonic conversation with Advocate Majunku Gumbi, on or about Tuesday 21 May 2006, the Chairperson was informed that the deadline of 17 June 2006 was a "holding operation". It was coupled to a request made to the Chairperson, on 6 May 2006 by Advocate Vilakazi, on behalf of the President; namely to postpone *sine die* the oral hearing of relevant witnesses who were under summons to appear and testify before the Commission from 8 to 16 May 2006. The postponement was requested in order to allow the President to obtain legal advice on the merits of an application brought by Hemphill in the Pretoria High Court, challenging the constitutional validity of the Commission's powers to question witnesses in terms of the relevant regulations ("the High Court application").

[64.] On or about Friday 2 June 2006, Advocate Gumbi informed the Chairperson telephonically that Senior Counsel had advised that there was no merit in the constitutional challenge. On 6 June 2006 Advocate Gumbi directed a copy of a letter to the Commission. The original letter had been directed, on behalf of the President, to the attorneys representing Hemphill. The attorneys were informed of Senior Counsel's conclusion, as well as of the willingness on the part of the Chairperson to clarify issues of concern to Hemphill, because the Commission wished to proceed with its work. Hemphill's attorney was requested to advise

whether Hemphill wished to proceed with the High Court application. No reply has been forthcoming. The Commission is aware that Hemphill had sold his house and that he was out of the country at that time. His attorneys have undertaken to revert to the Commission by Friday, 23 June 2006.

[65.] Should the one month extension constitute a final deadline for the Commission's report the Commission will in effect have been denied the opportunity of using both the powers that were challenged as well as the powers which were not challenged; that is, it will have been disabled. The first consequence is that the Commission will have been prevented from carrying out the mandate, prescribed by the terms of reference, which requires it to analyse information before the IIC, particularly by comparing it with information which the Commission should be able to obtain from other sources.

[66.] Secondly, the late notice of the one month extension and the limited duration of the extension have made it practically impossible for the Commission to exercise the powers which it is bound to exercise in terms of Regulation 5 read with sections 3 and 4 of the Commissions Act i.e. to summons witnesses for oral examination at public hearings. In the absence of such oral examinations the Commission would have no alternative other than to simply accept the inferences drawn by the IIC in relation (at least) to Montega, Imvume and Mocoh i.e. three companies

which the Commission is required to investigate in order to assess the correctness of the IIC findings.

[67.] Thirdly, should this report come to be the "final report", persons implicated by the IIC and this report will not have been afforded a proper opportunity to rebut allegations made by the IIC and the conclusions reached in this report. The necessity of this process arises by implication from the terms of reference, particularly the fourth paragraph of the preamble. All of those affected and with whom the Commission has had dealings so far have indicated some degree of willingness to cooperate in such a process. Majali and Imvume have insisted that the Commission should hear their version of events before it prepares a final report.

[68.] Attorneys Werksmans, acting for Sexwale, undertook to answer certain written questions put to Sexwale in a letter from the Commission. In accordance with this undertaking a reply was received by the Commission on 15 June 2006 at 12h54. Similarly, the State Attorney, Pretoria, acting on behalf of the Director-General of the DME, Advocate Sandile Nogxina ("the Director-General" or "Nogxina"), has undertaken to provide an affidavit which will be deposed to by the Director-General in answer to questions directed to him in writing. This may well dispose of the conclusions and issues raised in paragraph [43.] above. The Director-General is unlikely to comply with his undertaking before 17 June 2006. At this stage Commissioner Chauke is attempting to negotiate a similar arrangement with Motlanthe, who apparently may now be legally

represented. Commissioner Moleko has been attempting to liaise with the Serious Fraud Office ("the Office") in London in order to clarify the role of Hacking. According to newspaper reports the Office and HM Revenue and Customs are investigating whether or not Glaxo Smith Kline PLC (which took over Glaxo Wellcome SA) contravened British law in supplying goods to Iraq. None of this information could be analysed or find its way into a final report by 17 June 2006.

[69.] An interim report on progress of the Commission (pursuant to the term numbered 4) was prepared on 31 March 2006 and was delivered to the President via the office of his Director-General on 4 April 2006. Therein the Commission dealt with material factors which suggested that a comprehensive final report would require the tenure of the Commission to endure beyond three months. In the final paragraph the Chairperson concluded that there was little prospect that the Commission could provide a final report before the end of July 2006.

[70.] In a request, dated 26 April 2006 and delivered to the Presidency on 2 May 2006, the Commission proposed 31 August 2006 as a realistic final reporting date. It was stated in paragraph 13 of the request that the hearings relating to oil surcharges would effectively take up the last part of the three month period described in the terms of reference. Because of time constraints any hearing relating to the payment of kickbacks arising from humanitarian goods transactions would have had to be carried out after the three month reporting period had expired.

[71.] As a result of the delays above and a need on the part of the Commission to obtain and analyse more information than it has so far, as well as the need to question necessary witnesses orally (and allow them time for preparation), the Commission will probably require till at least the end of August 2006 to produce a final report.

Necessary witnesses

[72.] The necessary witnesses in relation to oil surcharges are Messrs Sandi Majali (who is expressly referred to in the annexure to the Commission's terms of reference), as well as Ivor Ichikowitz (the broker for Glencore/SOPAK and the active role-player in Montega/Imvume), George Poole (Montega's Attorney), Riaz Jawoodeen (a Member of the Board of Directors of the SFF) and Rodney Hemphill. The supplementary witnesses who could be dealt with on an alternative basis are the Director-General of the DME (Advocate Nogxina) and Messrs Kgalema Motlanthe and Tokyo Sexwale. Thereafter the Commission would seek to interview Mr Simon Cardy of the Mission and/or another former employee who dealt with the Programme, Mr Andries Dormehl.

[73.] Within the present time constraints no analysis at all could be made of the evidence and information relating to three of the companies listed in the Annexure, which allegedly paid kickbacks viz. Ape Pumps, Glaxo Wellcome SA and Reyrolle Limited. Mocoh is not dealt with below because the reply prepared for Mr Sexwale by his attorneys may alter any

conclusions drawn (particularly in the light of compelling indications of exploitation by foreign entrepreneurs described above).

[74.] The basis on which the President is authorised to make a proclamation establishing a Commission of Inquiry which involves the provisions of the Commissions Act, is that the matter under enquiry is one of public concern[29]. In this case public concern relates to the payment of oil surcharges and kickbacks on the sale of humanitarian goods, involving South African companies and individuals. Layers of South African individuals seem to be involved in the contractual chains which are associated with the persons and companies identified in the Annexure. In the case of transactions involving humanitarian goods, according to information the Commission received from the IIC, foreign agents were associated with the South African entities. These matters cannot be addressed properly (and lawfully) unless the Commission is afforded a proper opportunity to question (as a minimum) the necessary witnesses above, under section 3 of the Commissions Act, and also to obtain further information from the supplementary witnesses.

Consequence of limitations

[75.] This report is incomplete in so far as the terms of reference are concerned. It is sometimes desultory and has had to be completed

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29 See the SARFU case: President of the Republic of South Africa and others v South African Rugby Football Union and Others, 2000(1) SA 1 CC.

hurriedly. The analysis below is based strictly on hearsay documentary evidence and is limited to Majali, Al Khafaji, Hacking, Montega, Imvume, Omni Oil and Falcon. Contradictions and omissions which appear in the documents remain unresolved by admissible evidence. In so far as the remaining companies referred to in the Annexure are concerned, attorneys for Ape Pumps are willing to assist the Commission but have not done so yet. Due to the period of delay in the delivery of documents requested by the Commission from the DFA ("the DFA documents") as well as the time constraints which arose from the Commission's three month reporting period, the Commission was constrained to act expeditiously and to direct summonses to recipients, whom the Commission had identified by conducting company searches (viz. Reyrolle and Glaxo Wellcome SA). Upon receipt of the DFA documents the ideal recipients were identified. Time constraints have not allowed the Commission to follow this up. Mr George Poole ("Poole") of the attorney's firm Bell, Dewar and Hall, now represents (the former) Glaxo Wellcome SA.

[76.] Finally, because Hemphill had linked the subpoena of documentation tc his legal challenge, the Commission has not been presented with all the documentation which is in the possession of the witnesses previously summonsed. The inferences drawn below may therefore be affected by this documentation when it is ultimately produced.

PART G

ANALYSIS OF CERTAIN DOCUMENTATION RELATING TO FALCON, OMNI OIL, MONTEGA, IMVUME, AL KHAFAJI AND MAJALI

[77.] In this part the inferences drawn and conclusions reached above in relation to two individuals and four entities identified in the Annexure and/or the IIC Tables are supported by reference to certain documents in the Commission's possession. Each section below commences with a summary of the IIC's findings. The entities are then identified and their activities are analysed (sometimes collectively) with reference to the documents. The DFA documents are also referred to. The conditions upon which they were provided to the Commission are set out in a covering letter by the Director-General, Dr A Ntsaluba ("Ntsaluba"), dated 26 April 2006[30].

[78.] As will appear below, Hemphill had good cause to assert the privilege against self-incrimination contained in section 3(4) of the Commissions Act. According to the IIC documentation, at all material times he represented that he was acting on behalf of three South African companies listed in the Annexure viz. Falcon Trading Group Limited, Omni Oil and Montega Trading (Pty) Ltd. The first two are not South African companies. A company search has established that the first two entities

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30 A copy of this letter is attached to the letter addressed to the Presidency by the Commission. See footnote 15 *supra*.

are not registered in South Africa. They were fronts, probably for Al Khafaji.

[79.] In passing it is worth nothing that Al Khafaji used Mix Oil Limited, and apparently exploited the State of Cyprus, to establish himself as a non-contractual beneficiary of Crude Oil Contract No. M/08/117, involving the allocation of five million barrels during Phase 8. **Fraud, on Hemphill's part, arises from his role in assisting Al Khafaji to put on a South African face, to pay surcharges and kickbacks, and to compromise South Africa at the UN.**

Falcon Trading Group Limited ("Falcon")

IIC Allegations

[80.] In the Annexure a supplier company is described as Falcon Trading Group Limited. The total number of contracts referred to is 16. Nine of those involved illicit payments. They fell under Phases 9 to 11 of the Programme. Table 8 refers to South Africa as the Mission Country. According to this Table the total after-sales-service fees paid by Falcon amounted to US $ 2, 627, 830. However, a lesser amount was levied viz. US $ 2, 525, 111. Inland transportation fees paid amounted to US $ 14, 063. These findings of the IIC were allegedly based, in whole or in part, on actual data. Falcon did not respond to the IIC's request for an explanation of the aforegoing.

[101.] As stated above no company described as Omni Oil South Africa (Pty) Limited is registered in South Africa. In paragraph 26 of his affidavit in the High Court application Hemphill stated that he was not a director of a company bearing that name, but that he was a sole director of a company known as Omni Energy (Pty) Ltd. A company search has revealed that this company commenced its business on 6 March 2003, i.e. at approximately the same time as the Programme envisaged by the UN was halted by armed conflict.

Illustrative documentation

[102.] Documentation in possession of the Commission shows the following. On 19 February 2001 Hemphill, purporting to be the director of "Omni Oil South Africa (PBVI) Ltd Inc, Omni Oil South Africa (Pty) Ltd, 117 Eleventh Street Parkmore Sandton, 3rd floor Wolverton Place, Market Square, St Peter Port Guernsey, GY1 W 11 IB" (and sharing contact details with Falcon), directed a letter to Dormehl at the Mission[40]. Under a heading "UN registration for Iraq Oil Purchase", Hemphill requested, the Mission, as matter of urgency, to have the above company registered with the UN authority for oil purchases from Iraq in respect of the Iraq Oil sales under Resolution 986. **The usual procedure would have been for Dormehl to forward "the registration of South African Company" to purchase oil to "Ms Flora Eugene – Oil Overseers Office OIP."**

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40 See document "13" in Addendum One.

[103.] **Under a misapprehension, viz. that Hemphill was representing a South African registered company**[41], the Mission directed a request to the Oil Overseers' office on 20 February 2001 in which the Mission requested "the registration of a South African Company" wishing to purchase oil from Iraq under the provisions of United Nations Security Council 986[42]. The details of the company are set out above. The contact person was Hemphill.

[104.] On 27 February 2001 the Mission informed Hemphill that Omni Oil had been registered for the Programme[43]. This Mission letter followed a notice from the Oil Overseers to the Mission on 26 February 2001, informing the latter "that Omni Oil South Africa (Pty) Ltd had been registered as a National Oil purchaser ... (and was) authorized to communicate with the United Nations Oil Overseers in respect of the Iraq Oil sales under Resolution 986".

[105.] On 3 May 2001 the Mission submitted a contract, between "Omni Oil South Africa Ltd" and SOMO, for approval to the 661 Committee. This appears to be Contract No. M/09/109. No barrels were allocated.

[106.] The Commission is in possession of three letters of confirmation, directed by the Acting General Manager of SOMO, Ali Rajab Hassan ("Hassan") to the Oil Minister. They relate respectively to three subsequent contracts

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41 See the Mission briefing referred to in the previous section (document "14" in Addendum One).
42 See document "15" in Addendum One.
43 See document "16" in Addendum One.

concluded by Omni Oil viz. contract numbers M/10/24 ("the Omni Contract"), M/11/96 and M/12/90[44]. They were approved respectively by the Oil Minister on 22/7/2001, 5/2/2002 and 17/9/2002[45]. The last-mentioned contract was extended by agreement so that it probably fell outside of the period during which the Iraqis were able to levy surcharges.

[107.] The first two contracts mentioned each contain surcharge clauses. Contract No. M/11/96 contains the standard surcharge clause. **The standard surcharge clause also appears in the approval of the Montega Contract[46] (No. M/09/06), which was signed by Majali on 21 December 2000 in Iraq. At that time Al Khafaji, Hemphill and Majali were visiting Iraq and seeking out allocations as joint venture partners.**

[108.] **The Omni Contract provides for the payment of an "advance surcharge" of the kind that is attributed to Imvume by the IIC Report.** The clause provides the following: "Recovery amount: The Company has paid 10% of recovery amount in advance, (60) sixty thousand US $ Dollar, the remaining balance (90%) of the amount will be paid within (30) days after shipment loading". **The sum of this advance, on an allocation of two million barrels of Basrah LCO under the Omni Contract, is identical to the advance that Imvume is alleged to have paid towards the First Imvume Contract on an equal number of barrels, albeit that**

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44 See documents "17" to "19" in Addendum One.
45 See documents "20" to "22" in Addendum One.
46 See paragraph 113 *infra*.

the latter contract contained the standard surcharge clause. The payment of a US $ 60, 000 advance by Imvume was therefore unexceptional in the circumstances surrounding execution of this contract. These circumstances are elaborated upon further below.

[109.] The Omni Contract followed an application which had been signed by Hemphill in his capacity as a director. The purchasing entity was described by Hemphill as "Omni Oil Co (South Africa)", with the place of registration being South Africa. On 27 July 2001 the 661 Committee gave notice to the "Omni Oil Co" that this contract had been approved[47]. The contract was signed by Hemphill purporting to be the Managing Director of "Omni Oil Co (South Africa)" on 22 July 2001[48]. The contract is referred to in Table 3 as an Omni Oil contract (Mission Country South Africa) for which a surcharge was paid. Al Khafaji, Mr Shaker, Country Iraq (Living Abroad) is described as the Non-Contractual Beneficiary and the President of the Association of Solidarity with the Iraqi people.

[110.] On 25 February 2002 the 661 Committee informed "Omni Oil Co South Africa" (for the attention of Mr. Hemphill), that Contract No. M/11/96, concluded between "SOMO and Omni Oil Co" for the sale of 1, 500, 000 barrels of Basrah LCO, had been approved[49]. The application form which had requested approval on behalf of "Omni Oil SA" (with the Parkmore address and contact details), was signed by Hemphill in his capacity as

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47 See document "23" in Addendum One.
48 See document "24" in Addendum One.
49 See document "25" in Addendum One.

director. On 20 February 2002 the Mission had submitted this contract "between Omni Oil South Africa (Ltd)" and SOMO to the OIP for approval by the 661 Committee[50]. On 26 February 2002 the Mission informed Hemphill that the contract had been approved[51].

[111.] On 17 September 2002 (during Phase 12) Hemphill, in his capacity as the managing director of "Omni Oil Co (South Africa)" with the Parkmore address and the shared Falcon telephone number, signed Contract No. M/12/90[52] after completing and signing an application for approval of this contract on behalf of Omni Oil SA Ltd[53].

[112.] On 26 January 2001 Al Khafaji directed a letter to Majali which he sent by facsimile from the Falcon Group[54]. The letterhead and logo identified a corporation, Omni Oil Incorporated, of 16910 West 10 Mile Road, Southfield, Michigan 48075, USA. **An inference arises that Omni Oil was in fact incorporated in the USA, but that Hemphill failed to disclose this to the Mission. However, an investigation by the Commission, via the Information Resource Centre at the US Embassy, Pretoria and the database of the US Securities and Exchanges Commission which is made available on the internet, has established that a US company, Omni Oil and Gas Inc. was formed in early 2004 and has offices in Dallas (Texas) and Denver (Colorado).**

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50 See document "26" in Addendum One.
51 See document "27" in Addendum One.
52 See document "28" in Addendum One.
53 See document "29" in Addendum One.
54 See document "30" in Addendum One.

Neither Al Khafaji nor Hemphill are members of the board or the executive management team. Omni Oil Incorporated could not be traced in the state of Michigan via available internet sources.

Montega Trading (Pty) Ltd ("Montega"), Imvume Management (Pty) Ltd ("Imvume") and Majali

IIC allegations

[113.] Table 1 contains the following information about Montega. It was a private company. The Mission country was South Africa. One contract was concluded ("the Montega Contract"). The non-contractual beneficiary was Majali. Two million barrels were allocated of which 1, 858, 530 barrels were lifted. The contract value was US $ 45, 502, 470. The surcharges levied amounted to US $ 464, 633. This amount ("Montega's debt") remained outstanding. Table 2 reveals that the relevant contract number was M/09/06.

[114.] A letter of approval of the Montega Contract ("the Montega letter of approval")[55], signed by the Oil Minister on 1 January 2001 records the following, *inter alia*, that-

(a) Mr Sandi Majali was the advisor of the President of the Republic of South Africa;

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55 The Montega letter of approval appears at page 106 of the IIC Report.

(b) a recovery amount was payable within one month after shipment loading; and

(c) the details of the contract signed between Montega and SOMO, on 21 December 2000, and contained in the Montega letter of approval, were based on the instructions of the Oil Minister given on that day.

[115.] According to Table 3 Majali was also the non-contractual beneficiary of two other contracts concluded by Imvume Management: firstly, Contract No. M/11/72 ("the First Imvume Contract") for the purchase of 2 million barrels which were not lifted, and secondly, Contract No. M/12/78 ("the Second Imvume Contract") for the purchase of 4 million barrels. Table 1 reflects that the value of the latter was US $ 100, 709, 660 and that Imvume lifted 4, 001, 505 barrels. Table 3 reflects that 4, 002, 000 barrels were lifted. Tables 1 and 2 reflect that no surcharges were levied on or paid by Imvume. This conclusion is contradicted by the letters of approval, dated 30 March 2002 and 28 July 2002, which required the "Amount(s) of surcharge: to be paid within 30 days after delivery". Notes on the SOMO Allocation Records relating to the First Imvume Contract record an, "Instruction referring to (a) letter from Kgalema Motlanthe, Secretary-General of the ANC".

[116.] According to the Ministry of Oil an "advance" surcharge payment of US $ 60, 000 was deposited at the Central Bank of Iraq on 20 May 2002.

According to the SOMO records the payment was made in connection with the First Imvume Contract. **While an advance surcharge payment had allegedly been made in respect of the First Imvume Contract, Montega's debt remained unsatisfied.**

The case against Majali

[117.] Evidentially, the text of the IIC Report places an onus on Majali (and Imvume), to rebut admissions signed by Majali. On 17 October 2005 Aaron, addressed a letter ("Majali's response") to Susan M Ringler (Counsel for the IIC), challenging the fairness of the IIC investigation and responding to a summary of a proposed IIC Report relating to the conduct of Montega and Imvume[56].

[118.] In Majali's response he denied being aware of the surcharge arrangement in respect of Montega at the time (during Phase 9), when he, Al Khafaji and Hemphill had initially discussed the terms of the Montega allocation with SOMO. Majali alleged that he only became aware of the surcharge requirement after the Montega cargo had been lifted and that he had no intention at all of paying the surcharges. Although Imvume had received an allocation of two million barrels in Phase 11 Majali had made it clear to SOMO that no surcharge would be paid. SOMO may well have levied a surcharge but this was never part of the contractual arrangement with Majali. **The last allegation does accord with the IIC Tables. However,**

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56 Majali's response appears at pages 230 to 236 of the IIC Report.

the documentation identified and displayed in the text establishes a case against Majali. Imvume and Majali denied having paid any amount in respect of any surcharge and in particular an advance payment of US $ 60, 000.

[119.] In relation to his alleged ties to the ANC, Majali admitted that he had a long standing and close relationship with the membership. He also admitted that the ANC had promoted the business activities of Imvume with the authorities of the former Iraqi Government, but that this was done in the "course of, legitimate, above board political support and promotion of Imvume as an emerging Black Economic Empowerment resources trading company in the restructuring of the South African oil and fuel industry".

[120.] Despite his denials it was incumbent upon Majali to explain a written undertaking as well as a written proposal to pay surcharges which Majali had made to SOMO and to the Minister of Oil respectively. In both documents he acknowledged indebtedness above his signature. (The last-mentioned document is referred to below as the "proposal letter".). Both the undertaking and the proposal letter were written and signed on the letterhead of Imvume. They constitute the foundation of the IIC's case against Majali.

[121.] In his undated undertaking, which was directed to the Acting Executive Director-General of SOMO, Mr Ali R Hassan ("Hassan") Majali stated the following-

> "I SANDI MAJALI REPRESENTATIVE OF IMVUME MANAGEMENT UNDERTAKE TO PERFORM ALL MY OBLIGATIONS ACCORDING TO SOMO REQUIREMENTS REGARDING RETURN MONEY (I.E US DOLLARS 0,30 PER BARREL FOR US DESTINATION OR (US DOLLARS 0,25) FOR FAR EAST DESTINATION FOR THE QUANTITY OF 2 MILLION BARRELS OF BASRAH LIGHT CRUDE OIL GRADE TO BE LIFTED WITHIN 30 DAYS OF BILL OF LADING"

(In their report the IIC remarks that these surcharge rates were the same as those imposed during the majority of the surcharge phases[57].). The signatory of the proposal letter also appears to be the signatory of the undertaking. During Majali's interview[58] with IIC representatives ("Majali's interview") Aaron acknowledged, with reference to Majali, that the signature on the proposal letter "is probably your signature...".

[122.] The proposal letter suggests at the outset that Aziz, Majali and Motlanthe had met on 10 May 2002 during the Baghdad conference, and that they had discussed the First Imvume Contract. The stated purpose of the letter was "to request a rescheduling of the payment contract due to yourselves, the history of which is common cause". The proposal letter also states that on 6 March 2002 "we proposed to settle the outstanding amounts of

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57 See page 111 of the IIC Report.
58 See paragraph 141 *infra*.

US $ 464, 000 in two equal instalments of US $ 232, 000 from the proceeds of two liftings that were negotiated in favour of Imvume under Crude Oil Contract No. M/11/72 dated 27/03/2002" (i.e. from the proceeds of the First Imvume Contract). Majali later explained to the IIC's representatives that the content of the proposal letter and the associated repayment agreement had in fact been traversed by a discussion which he was involved in[59]. He also denied that Motlanthe was present.

[123.] Besides making a settlement proposal to SOMO on 6 March 2002, Imvume also concluded a supply contract with the SFF ("the SFF/Imvume supply agreement"). Mr Malibongwe Mandela ("Mr M Mandela") represented Imvume and Dr Renosi Mokate ("Mokate"), the Chief Executive Officer represented the SFF[60]. This agreement recorded that Imvume had tendered to sell four million barrels of Basrah LCO to the SFF, and that the SFF had later decided to select Imvume as a tenderer to supply two million barrels.

[124.] **The proposal letter may have been written in the second half of May or in early June, as the letter suggests that a submission had been made for (future) lifting on 6 June 2002 and that the repayment contained in the proposal was to be scheduled for 15 July 2002.** The proposal letter also stated that a second instalment would require a further

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59 See page 53 of transcript of Majali interview (document "31" in Addendum One).

60 See document "32" in Addendum One.

allocation of two million barrels "in terms of which we would commit to settle the outstanding balance by 15 August 2002".

[125.] This request for further allocation was probably related to the fact that, on 21 May 2002, Mr M Mandela signed a letter on behalf of Imvume (directed to Mokate at the SFF), confirming that Imvume had agreed to sell a further cargo of two million barrels of Basrah LCO to the SFF[61]. The sale was concluded under the terms and conditions that were contained in the original SFF/Imvume supply agreement dated 6 March 2002. **Significantly Imvume is alleged to have paid an advance surcharge towards the First Imvume Contract on the previous day within a day of a need developing, on their part, to receive the allocation of a further allotment of two million barrels in order to meet the extended requirement of this supply agreement.**

[126.] A translation of a note signed by the Director of SOMO and stamped by the Oil Ministry on 19 June 2002 states "Add amount of 2 million barrels (to") facilitate payment of dues in instalments – for the upcoming visit of Mr. Tareq Aziz to South Africa". Another translated note signed on 21 June 2002 states the following:

> "In accordance with the above instructions and conversation with the Minister on 20/6/2002, (illegible) (2) allocated for phase 11 + (2) allocated for phase 12 + (2) additional amount = 6 million barrels... for necessary action and arrangement for payment in instalments of

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61 See document "33" in Addendum One.

the surcharge amount according to the above agreement (Signed 21/6)".

The case against Motlanthe

[127.] On 7 March 2002, 20 days before the First Imvume Contract was concluded, the Ambassador of Iraq to South Africa, Zahir Mohammad Ahmad Al-Omar ("Ambassador Al-Omar"), directed a letter to Aziz ("the Ambassador's letter")[62]. The subject was another letter which had been addressed to Aziz by Motlanthe which Ambassador Al-Omar annexed to his own letter. (The content of Motlanthe's letter remains unknown.). The Ambassador's letter was stamped by the Oil Ministry on 7 March 2002. A handwritten note on this letter, by the director of SOMO, recorded that the permission of the Vice President of the Republic had been obtained for the allocation of two million barrels. Another handwritten note, signed on 7 March 2002, recorded that the amount had been requested by Majali.

[128.] ***Inter alia*, the content of the proposal letter and the Ambassador's letter constitute the substantial basis on which a case against Motlanthe was raised in the text of the IIC Report. The mandate of the IIC did not require it to go so far as to make out a case against the ANC. Nevertheless, the IIC Report casts an unambiguous innuendo on Motlanthe. It suggests further that a case for**

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62 See document "34", which is a translation of the Ambassador Al-Omar's letter, in Addendum One.

responsibility on the part of South Africa might exist. In the circumstances the findings of political manipulation in Chapter 2 of the IIC Report[63] have not been ignored in this report.

[129.] From the documents referred to above it appears that, at the same time as Majali claims to have met with representatives of SOMO (i.e. on 6 March 2002), in order to negotiate an oil allocation for Imvume during Phase 11, he was also faced with the hurdle of settling Montega's debt, which remained outstanding from Phase 9. He apparently agreed to pay. Majali bound Imvume to settle Montega's debt in order to acquire the oil which was necessary to fulfil the SFF/Imvume supply contract. The SFF was therefore drawn into the conspiracy between Majali and the Iraqi Oil Minister. This had the effect of subverting Resolutions 661 and 986.

[130.] The documentation leaves one in no doubt that Majali seriously and deliberately undertook to pay the surcharge owed by Montega from the proceeds of Imvume sales to the SFF. Between March and June 2002 he conspired with the Iraqis to pay these surcharges. Majali/Imvume probably paid the advance surcharge of US $ 60, 000 on the First Imvume Contract as a token of good faith so as to secure the allotment of an extra two million barrels to meet the further requirements of the SFF. The issue of further surcharges payable in respect of Imvume contracts would inevitably have arisen in any

63 See pages 103 to 114 of the IIC Report.

negotiations with the Oil Ministry, as soon as the settlement of Montega's debt from the proceeds of allocations to Imvume was proposed.

[131.] Imvume would have committed an offence under South African domestic law viz. fraud on the SFF (or upon the State), if, when the SFF/Imvume supply agreement was signed by Mr M Mandela, Dr Mokate was not informed that Majali was simultaneously attempting to pay outstanding surcharges from the proceeds of the oil allocation which Imvume would pass on from SOMO to the SFF. The relationship between the DME and the SFF was described as "that of a Principal and an Agent" by the Director-General of the DME, Advocate Nogxina, in reply to a series of questions posed by the Mail and Guardian newspaper[64]. He went on to say, "it is the responsibility of the Ministry to manage Strategic Stocks and Strategic Fuel Fund manages the Strategic Stocks on behalf of the Ministry on an Agency basis".

[132.] Attorney Aaron, acting on behalf (of Majali and Imvume), has asserted their right to be interviewed before the Commission issues a report: because the allegations made by the IIC, which the Commission has been called upon to investigate and report on, are allegedly damaging the reputations of his clients and adversely impact upon their business dealings. As will appear below, Motlanthe, who is at least a material

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64 See document "35" in Addendum One.

witness to the payment of surcharges by Majali/Imvume, may have a complete answer to allegations of his own complicity therein, which are suggested in the IIC Report.

Company History of Montega

[133.] Montega epitomises the intermediary companies which, according to the IIC Report, the Iraqis relied on to facilitate surcharge payments. A company search revealed that Montega was registered and commenced business on 8 August 2000. Its main function is described as being "wholesale and retail trade – repair motor vehicles". One director, who was appointed on 8 August 2000 was Ms Fiona Mc Murray, a UK national. The other, Hemphill, was apparently appointed as a director on 5 September 2000. Majali is not reflected as a director.

[134.] During January 2002 auditors DeLoitte and Touche Corporate Finance ("the auditors"), performed a limited financial due diligence review of Imvume[65], apparently to satisfy tender criteria of the SFF. Their sources of information included Majali ("Imvume Chairman"), Ivor Ichikowitz ("Ichikowitz"), Poole and Ricci Schwab ("Schwab"). Ichikowitz appears to have been Majali's mentor. In answer to an interrogatory from the IIC[66], Ichikowitz alleged that he was an independent operator who had no direct affiliation with SOPAK/Glencore. However, he had worked with SOPAK

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65 See document "36" in Addendum One.

66 See document "37" in Addendum One.

for several years, identifying and introducing them to business opportunities in South Africa, including the contracts with Montega and Imvume. He eventually represented Imvume in its correspondence with the SFF. Poole and Schwab were members of the attorneys firm Bell, Dewar and Hall, who were the attorneys for Hemphill in the first instance, later acted for both Hemphill and Majali, and ultimately (in Hemphill's view) in the interests of Majali alone. The auditors reviewed the "supply agreements" of Montega for the 2001 financial year, which Imvume placed reliance on to win the tender with the SFF. In fact Montega was only involved in one supply agreement, the Montega Contract.

[135.] During an initial interview (on 23 January 2002), the auditors were informed that Montega was owned by three shareholders, namely, Hemphill, Majali and Al Khafaji. They were further informed that Montega was used to secure the allocation of one contract "at a time when Imvume was still being conceptualized". SOPAK allegedly acted "as an arms length counter party to the transaction". The auditors perused certain documents at the offices of the abovementioned attorneys, but the shareholding in Montega was never proved by the documents. Nowhere in the documentation was the alleged shareholding or even the registration number of Montega mentioned. Majali is referred to as a director of the company. He had signed the Montega Contract with SOMO in the capacity of director.

[136.] The auditors' report noted that in the tender documents submitted to the SFF by Imvume, Imvume stated that Montega was a subsidiary of Imvume. No evidence was seen to support this statement. In fact, Imvume was only incorporated on 12 February 2001, "at which time the Montega transaction was already complete".

Other illustrative documentation

[137.] On 24 November 2000, in a letter[67] signed by Hemphill, as "director, Montega Trading (Pty) Ltd" (having the shared contact details with Falcon and Omni Oil), the Mission was requested to register Montega for the trade in and distribution of Iraqi Oil in terms of Resolution 661. Dormehl was requested to "please note that we will be travelling to Iraq over the latter half of next week". The "we" referred to were made up of Hemphill, Majali and Al Khafaji.

[138.] On 21 December 2000 the Mission requested the OIP to register Montega. On the same day the 661 Committee informed Dormehl that the Oil Overseers had registered Montega as a national oil purchaser, which was authorised to communicate with the Oil Overseers in terms of Resolution 986.

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67 See document "38" in Addendum One.

[139.] On 23 December 2000, Hemphill directed a letter to Dormehl[68] to which he attached the Montega Contract "as signed between ourselves and the State Oil Marketing Organization on the 21st instant .....".

[140.] The 661 Committee informed Montega (Majali) on 2 January 2001 that their contract had been approved. **It is worth noting that both of Montega's aforementioned letters referred to Hemphill and Majali as directors. The third joint venture partner, Al Khafaji, was not mentioned. Counsel for the IIC regard it as significant that the Mission applied for Montega's registration at the UN on the same date as the Montega Contract was concluded by Majali in Iraq. By this time Iraqi officials had probably made Majali and Hemphill aware of the surcharge requirement.**

[141.] The Commission is in possession of a confidential transcript[69] of a meeting ("Majali's interview"), which was held at the offices of Barry Aaron and Associates on 30 June 2005[70]. The interview was attended by two representatives of the IIC as well as by Majali and Aaron (who was Majali's attorney at the time) and by Aaron's Secretary. In explanation of what had taken place in Baghdad on or about 21 December 2000, Majali stated that he, Hemphill and Al Khafaji had all been involved in

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68 See document "39" in Addendum One.

69 See document "40" in Addendum One. Copies of the transcript and additional documents were handed over to the Commission by Aaron on 8 May 2006 (the date on which the Commission's public hearings were to commence). A condition of confidentiality which Majali/Imvume attached to the handing over of the transcript is set out in paragraph 4.3 of Aaron's letter to the Chairperson on 7 June 2006. A copy of the letter is attached to the letter addressed to the Presidency which accompanies this report. See footnote 15 *supra*.

discussions with representatives of SOMO in Baghdad. The Montega contract was in the process of being negotiated and the surcharge issue was discussed "informally"[71]. **Upon a proper interpretation of Majali's statements, as they appear in the transcript, Majali contradicted his response to the IIC which appears in the IIC Report.**

[142.] **The irresistible inference which arises from the documents is that during or about 21 December 2000 the Oil Minister or his representative held discussions with Majali, Al Khafaji and Hemphill. Majali informed the Iraqis that he was an advisor to the President and they informed him that Montega would receive an allocation, but that it would have to pay a surcharge. Majali and Hemphill neglected to disclose the last-mentioned requirement to the Mission.**

[143.] **During Majali's interview he averred that it was made very clear to SOMO that Montega was not in a position to pay the required surcharges. This seems unlikely. The suggestion contradicts the detail of the Montega Contract, which was exchanged between the Executive Director of SOMO and the Oil Minister within days of the meeting with Majali, Hemphill and Al Khafaji; namely that the standard surcharge clause applied[72].**

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71 See transcript of Majali interview pages 16/17.

72 See IIC Report p 106.

[144.] Majali also contends that he had made it clear to Ambassador Al Omar that he would not trade unless the UN approved payment of the (Montega) surcharge. This proposition would have struck at the very heart of the prohibitions contained in Resolutions 661 and 986 which were aimed at denying financial access to the Iraqi regime and its institutions. As a businessman Majali would have known better than to make the suggestion alleged.

[145.] The rationale relied on by Majali to exculpate himself was that Montega could not trade profitably if it had to pay the surcharge. He claims to have made this clear to the Iraqi's during December 2000. The argument should fail for four reasons. Firstly, because Majali nevertheless (and almost certainly) signed an undertaking to pay the recovery amount which arose from the Montega Contract[73]. Secondly, because he made a written admission that he was liable to do so, which he then coupled to a written proposal to pay the surcharge in two instalments[74]. What is most significant about the proposal letter is that it lacks any suggestion whatsoever that Majali had ever been unwilling to pay surcharges, or indeed that he entertained the reservations which he expressed in his interview with members of the IIC. Thirdly, Al Khafaji and Hemphill, who had no qualms about making the surcharge payment in respect of the Omni Contract, were both Majali's venture partners in Montega.

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73 See IIC Report p 111.

74 See IIC Report p 113.

[146.] **Another ground for rejecting Majali's denial arises from instructions that must have been given to Poole by Majali and/or Hemphill, and which appear in a memorandum written by Poole, dated 19 March 2001, ("the Poole report")[75]. On 2 April 2001 Schwab sent the Poole report to Hemphill under cover of a letter. The report was headed, "On the Montega Crude Oil Transaction". The salient aspects of the transaction were set out therein. Parts of paragraph 4 of this memorandum are illuminating. They are quoted below.**

[147.] After Montega and SOMO had concluded a contract on 21 December 2000 (so the memorandum states):

> "4. Montega resold the oil to SOPAK SA of Rue St Pierre 18, Ch-1701 Fryburg, Switzerland on 16 January 2001. Written conformation of this contract was telexed by SOPAK to Montega on 17 January 2001.
>
> In terms of this contract-
>
> 4.1 ...
>
> 4.2 In terms of clause 7 the price was to be equal to the selling price approved by the UN (OSP) for the month of lifting plus $0.30 per barrel, and the United Nations pricing formula for applicable destination was to apply.

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75 See document "41" in Addendum One.

4.3 In terms of clause 8 the buyer was to establish a letter of credit on behalf of the seller in favour of the United Nations at least ten days prior to loading date. This letter of credit was to be for the basic price payable to the United Nations. The remaining US $ 0. 30 per barrel was to be paid directly to SOMO within 30 days of the bill of lading date".

[148.] **Such payments to SOMO were prohibited by Resolutions 661 and 986. As an attorney Poole must have known this. As contemplated by paragraph 4.3 of the Poole report, SOPAK's principal, Glencore established the necessary letter of credit. As between SOMO and Montega it is probable that Montega was bound to pay 25 cents surcharge to the Iraqis out of the 30 cents owed to Montega by SOPAK/Glencore. This reflects the nature of the performance that SOMO did claim from Montega.**

[149.] Paragraph 11 of the Montega letter of approval, dated 26 December 2001, made it clear that the surcharge in question had to be paid to SOMO within one month of delivery. The surcharge amount of US $ 464, 000 which Majali undertook to settle "in two equal instalments of US $ 232, 000 from the proceeds of the two liftings of the First Imvume Contract, dated 27/03/2002", related to the surcharge owing on the number of barrels actually lifted by Montega viz. 1, 858, 530. The amount of surcharge levied by SOMO (US $ 464, 633) and admitted by Majali amounts to 25 cents a barrel on 1, 858, 532 barrels.

[150.] When regard is had to the passive role of Montega in the execution of the contract it concluded, the retention of 5 cents on two million barrels was a reasonable profit for merely obtaining the contract and processing it through the Mission.

[151.] The Poole report also records that Montega made numerous attempts, (without success) to obtain a signed agreement from SOPAK. Eventually Montega did receive a document headed "Agency Agreement" which was signed, on 29 January 2001, by Hemphill (on behalf Montega)[76]. This agreement appears to have been a sham.

Sham agreements

[152.] **Adverse inferences may be drawn against Montega, Imvume, SOPAK and Glencore as a result of documentation which they generated and which is transparently calculated to misrepresent the facts and circumstances which existed at the time. The agency agreement between Montega and SOPAK was one of these.**

[153.] Glencore, in the execution of the Montega Contract, arranged the shipping, paid the insurance and saw fit to redirect the cargo of oil that was lifted to a destination (Singapore) other than the ones contemplated by Montega's agreement with SOMO. This resulted in an extra cost to

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76 See document "42" in Addendum One.

Montega of Euro 8, 523, 218. 58, which became due to SOMO in accordance with the pricing formula which should have been applied to the Montega contract[77]. The redirection by Glencore/Sopak violated an actual pricing formula which had been agreed to between Montega and SOMO and was approved by the UN.

[154.] **The circumstances surrounding the "Agency Agreement" between SOPAK and Montega, which was only concluded two days before the lifting of oil and a month after Montega had contracted to purchase oil from SOMO, render the material terms of this contract incomprehensible.**

[155.] Clause 2 deals with services that SOPAK wished to receive from Montega in relation to the Montega Contract viz. advice and assistance with regard to this oil transaction. It states that in the event of problems arising from the execution of transactions "covered by present agreement it is agreed between the parties that Montega would assist SOPAK in solving any operational, shipping, demurrage, supply and or administrative problems.". **There can be no dispute that one reason for the involvement of Glencore/SOPAK was that Montega lacked any experience whatsoever in the very areas where the Agency Agreement bound Montega to provide expertise. In the Majali interview Majali confirmed that Montega/Imvume were on a learning curve at this time**

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77 See UN Treasury letter to the Vice President of BNP Paribas dated 2 March 2001 (document "43" in Addendum One).

and were prepared to "take the knocks" imposed on them by Glencore for that reason.

[156.] **Montega purchased from SOMO as a principal and resold to SOPAK/Glencore. In no sense was Montega the agent of SOPAK. The irresistible inference is that a confusion of contractual arrangements was intended by Glencore/SOPAK to disguise the underlying reality viz. that Montega was being exposed to the payment of surcharges in a side agreement with SOMO.**

[157.] In support of the last submission it is relevant that Article 5 of the Agency Agreement provided that SOPAK would pay Montega a commission of 30 cents per barrel, which is consistent with the inference that Montega was bound to pay SOMO the 25 cents per barrel surcharge.

[158.] That this was a convenient business arrangement for Glencore is apparent from the way it manipulated subsequent events. The oil was lifted between 29 January and 2 February 2001. The ship carrying Montega's oil was diverted to the Far East (by Glencore or SOPAK). Montega's indebtedness to SOMO increased. On 27 February 2001 (i.e. 25 days after loading had been completed), SOPAK sent a telefax to Montega confirming that the final destination of the cargo was the USA Gulf Coast. On the basis of this destination the underlying Montega/SOMO UN approved sale had provided for a substantial discount. On 28 February 2001 (according to the Poole report) Montega

conveyed the information received from SOPAK to SOMO. SOMO discovered the truth. On 1 March 2001 they informed Montega that the oil had been diverted to Singapore.

[159.] Montega's misrepresentation gave rise to a claim by SOMO for the price differential. This seriously affected the standing and reputation of Montega with SOMO and the UN, as well as Montega's profit. This irregularity was of major concern to the Oil Overseers. Not only did it damage the income of the UN Escrow Account, but it appeared to set a precedent[78]. The Oil Overseers referred the issue to the 661 Committee where the United States representative queried the approval of any further contracts involving Montega[79]. By 8 May 2001 the 661 Committee had become familiar with Glencore's predilection for the diversion of contractually agreed destinations. The Swiss authorities were then requested to investigate another Glencore diversion i.e. a lift of Kirkuk from the USA to Croatia.

[160.] **Glencore, which had been an international oil trader before the Programme commenced, simply continued to trade under the Programme, but at arms length. It did so by exploiting a makeshift company, with no assets or experience, but endowed with a politically acceptable nationality. Glencore's relationship with Montega was such that the latter had to bear the brunt of Iraq's**

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78 See Oil Overseers letter, dated 15 March 2001, to the 661 Committee (document "44" in Addendum One).

79 See summary record of 216th meeting of the 661 Committee held on 5 April 2001 (document "45" in Addendum One).

surcharge demands as well any risk of contractual breach (and price increase) caused by Glencore in responding to the demands of its own market. SOPAK merely served to distance Glencore from these illicit activities.

[161.] **Glencore's predilection for deception is demonstrated further by a draft letter of credit which it directed to the BNP as well as by the terms of a contract which was signed by Mr M Mandela on 5 April 2002 on behalf of Imvume[80] ("the Imvume/Glencore agreement").**

[162.] As stated above, the two million barrels of oil purchased by Montega were to be resold to Glencore, which provided the letter of credit for the sole Montega Contract. In dealing with the Escrow Bank Glencore insisted that its name should be concealed from disclosure to third parties. At page 107 of the IIC Report, there appears an apparent draft letter of credit, directed by Glencore to BNP on 19 January 2001, requesting the issue of a letter of credit in favour of the UN on behalf of Montega and guaranteeing all the obligations of Montega, subject to the following additional request-

> "HOWEVER, PLEASE NOTE GLENCORE AG'S NAME MUST NOT APPEAR ON ANY CORRESPONDENCE YOU SEND TO THIRD PARTIES".

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[80] See document "46" in Addendum One.

[163.] **Though Imvume was the purchaser from SOMO under the First Imvume Contract, *ex facie* the Imvume/Glencore agreement Imvume was the buyer of two million barrels of Basrah LCO from Glencore.** Paragraph 6 of the contract provided that the price would be equal to the OSP formula approved by SOMO and the UN for the period of lifting plus a premium of US 46 cents (per barrel). Reference to the 46 cents appears to be deleted on the document. No explanation exists as to why Glencore would have had to sell the oil to Imvume, when Imvume had already purchased it from SOMO.

[164.] **Based on the documentation before the Commission, the explanations given by Majali do not bear scrutiny. Substantially, however, the documentation in question amounts to hearsay and the statements therein have not been tested against oral evidence. In order to exercise its duty to analyse IIC information, the Commission should be placed in the position to question relevant persons in order to establish precisely; (a) who, if anybody, was involved in the apparent conspiracy to pay surcharges owed by Montega to the Iraqis; and (b) whether, in fact, Majali and Imvume were involved in the payment of US $ 60, 000 advance on the First Imvume Contract. The necessary witnesses therefore include Ichikowitz, Poole, employees at the SFF (particularly Jawoodeen) and the DME (particularly Nogxina), as well as Motlanthe. Apparently during September 2001, the last three were involved in discussions with the**

Iraqis. One issue was the payment of surcharges which the Iraqis required from BEE companies such as Montega and Imvume.

Imvume Management (Pty) Ltd ("Imvume")

[165.] A company search revealed that the enterprise Imvume Management was registered and started business on 12 February 2001. Majali, who was appointed on 22 May 2001, is one of the directors.

Illustrative Documentation

[166.] On 6 September 2001 the Mission (Cardy) informed Mr Lawrence Venkile (another director of Imvume), that the company had been registered with the OIP as a national purchaser of Iraqi Crude Oil. This followed the Mission's receipt of registration from the Oil Overseers on the previous day[81].

[167.] On 1 February 2002 Majali signed a draft SFF/Imvume (supply) agreement[82] which provided for a selling price equal to the OSP plus a premium of 48 cents net per barrel. That is, had the SFF elected to accept these terms they would have had to pay 48 cents more than they ought to have done under a direct purchase from Iraq/SOMO[83]. The

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81 See document "47" in Addendum One.

82 See document "48" in Addendum One.

83 During the 216th closed meeting of the 661 Committee, held on 5 April 2001 the Oil Overseer, Mr Tellings was asked by the US representative on the Committee what the normal consequence would have been if the company which had diverted oil (Montega) had come from a different

SFF/Imvume Contract, which was eventually concluded on 6 March 2002, also provided for a premium of 48 cents. Clause 17.1 noted that the tender price was quoted on dated Brent less US $ 2.28. Both parties then acknowledged that there was no OSP currently available for South African destination. Therefore the price was calculated in US dollars F.O.B. Mina-Al-Bakr and would be "equal to the OSP formula when approved by SOMO and the United Nations for South Africa for the period of lifting... plus a premium of US dollars 0.48 per net bbl". **It seems that Clause 17.1 obfuscated the price differential between what the SFF ought to have been paying (viz. the OSP) and what it agreed to pay. For reasons which appear below the aforementioned acknowledgement was probably unnecessary because an existing OSP could have been applied to this contract.**

[168.] On 8 March 2002 M Goodfellow of Glencore wrote to Mokate: "Undertaking on behalf of Glencore to assist Imvume to fulfil its obligations in terms of the SFF/Imvume supply agreement of 6 March 2002"[84]. The multiple transactions (i.e. SOMO/Imvume/SFF) were to be backed by the finance of Glencore which directed a confirmation of the transaction "concluded between our two companies on 6 March 2002" to Imvume. The confirmation was signed by Mr M Mandela on 5 April 2002[85]. The relevant terms thereof for present purposes were that Glencore (extraordinarily) was reflected as the "Seller" and Imvume as the "Buyer".

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country. Tellings replied: "... the major oil exporting countries usually dealt directly with the end-users, so intermediaries such as Montega Trading were not involved".

84 See document "49" in Addendum One.

85 See document "50" in Addendum One.

In terms of Clause 7 Glencore would "invoice" the SFF directly on behalf of and in the name of Imvume. It appears that during June, Majali's attorneys, Bell, Dewar and Hall drafted an agreement which was never signed[86], but which was more consistent with reality viz. the assignment of Imvume's rights to Glencore.

[169.] The First Imvume Contract was concluded on 27 March 2002. Two million barrels were allocated. As stated above, Table 3 suggests that a letter from Motlanthe played some role in this allocation, and a handwritten note on the Ambassador's letter to Aziz (to which a letter from Motlanthe was annexed), stated that the director of SOMO had obtained the permission of (Vice President) Ramadan and of Aziz for the allocation of these two million barrels of oil. **Motlanthe is therefore a material witness to the conspiracy between Majali/Imvume and the Oil Minister which has been referred to above. Motlanthe has been requested to furnish the Commission with a copy of the aforementioned letter or to disclose its content.**

[170.] The Commission has established that the letter from Motlanthe may be exculpatory. Steven Miller, an Assistant United States Attorney for the Southern District of New York, has informed the Chairperson that he conducted an interview with Hemphill in Switzerland during May 2005. Hemphill revealed that he had helped Motlanthe to settle a letter, probably the one in question. In that letter Motlanthe had requested the Iraqi

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86 See document "51" in Addendum One.

authorities not to impose oil surcharges. The apparent response of Motlanthe, upon first being informed of the surcharge levy, was one of indignation. The suggestion is that the South African political delegation, of which Motlanthe was a member, had visited Iraq in order to assist it in removing oppressive sanctions. Therefore Motlanthe believed they should not have been compromised by an illicit levy. The Commission has agreed to use this information on the understanding that a "proffer agreement" between the US Attorney and Hemphill will not be violated[87].

[171.] The letter approving the First Imvume Contract, which was directed by Hassan to the Oil Minister on 30 March 2002[88], recorded that an agreement had been reached between Ramadan and Aziz. It also referred to the Minister's note on the letter of the Ambassador. The approval not only states that the amount of surcharge had to be paid within 30 days after delivery, but also that the delivery period was "before 29/05/2002". An approval in similar terms exists in relation to the Second Imvume Contract for the four million barrels. This was concluded on 27 July 2002, with a delivery period "before 25/11/2002". An application for approval of the second Imvume Contract was signed by Mr M Mandela for Imvume and was approved by the Oil Overseers on 7 August 2002[89].

[172.] **It is quite apparent that during May 2002 Majali had to juggle Montega's debt with the constraints of the further surcharges**

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87 A copy of the proffer agreement is attached to the letter addressed to the Presidency which accompanies this report. See footnote 15 *supra*.

88 See document "52" in Addendum One.

89 See document "53" in Addendum One.

required by SOMO in respect of the First Imvume Contract and the time periods laid down for delivery by both SOMO and the SFF. It is therefore likely that he would have been prepared to make an advance surcharge payment on Imvume's First Contract on 20 May 2002; that is on the day before Imvume's supply agreement with the SFF was expanded from two million to four million barrels.

[173.] On 6 June 2002 Imvume nominated a vessel, SEBU/SUB, to load the First Imvume Contract during the periods 25 to 30 June 2002[90]. On 8 June 2002 SOMO directed an urgent letter, signed by Hassan, putting Imvume and Majali to terms to fulfil Montega's obligations as specified "in your letter presented in Baghdad on 5 March 2002"[91], failing which SOMO stated, "your memorandum of Vessel SEBU/SUB to load 2, 000, 000 BBL of Basrah Light Crude Oil during June 2002" would not be accepted. SOMO later agreed to extend the validity of this contract up to 31 July 2002, but Hassan added; "All other terms and conditions remain unchanged".

[174.] Ultimately, the four million barrels allocated to Imvume were sourced from two Russian companies, Slavneft and Machinoimport. These companies purchased four million barrels of Iraqi oil, under Contract No. M/11/103 ("the Slavneft Contract") and Contract No. M/11/79 ("the Machinoimport Contract")[92]. Glencore bought this oil for shipping to South Africa. It

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90 See document "54" in Addendum One.
91 See document "55" in Addendum One.
92 See documents "56" and "57" in Addendum One.

appears from Tables 2 and 5 that surcharges were levied and paid on the Machinoimport Contract. SOMO records show that a total of US $ 1, 097, 413 in surcharges were levied on the Slavneft Contract, but that no levies were paid. The SOMO ledger records this as outstanding.

[175.] On 11 February 2002, the 661 Committee approved the Slavneft Contract. Two million barrels of Basrah LCO were allocated *ex* Mina-Al-Bakr. The pricing formula for the destination Europe and/or US markets was applied. On 14 March 2002 Slavneft requested the Oil Overseers to approve the lifting, during April 2002, of two million barrels of Basrah LCO *ex* Al-Bakr for destination South Africa. The approval of a pricing formula viz. 50 percent of the Far East price formula and 50 percent of the European price formula, "both applicable for Basrah Light for April 2002", was requested. Approval was granted on 18 March 2002.

[176.] **The approval of this formula at that time demonstrates that the acknowledgement which established the selling price in the SFF/Imvume contract should not have arisen due to a lack of an official pricing formula for Basrah LCO in April 2002. This was when loading was required in terms of the delivery clause 10.2 in the SFF/Imvume Contract.**

[177.] In a telex, dated 22 March 2002, SOMO's head of shipping advised Slavneft that their nomination of the vessel "Utah", to lift their

aforementioned allocation, was acceptable; but only if previous port charges at Al-Bakr (owing since 7 July 2000), were settled[93].

[178.] Previously, on 2 March 2002, when Slavneft had not yet nominated a particular vessel to lift the oil[94], Slavneft was advised that port charges would have to be settled through an agent in Iraq or Jordan prior to the arrival at Al-Bakr of the vessel to be chartered. Slavneft was also requested to ensure that the vessel in question had settled its own port charges for previous voyages to the port.

[179.] A similar telex was directed to Imvume on 25 September 2002, after it had nominated the vessel "TBN" to load two million barrels on 11 October 2002, under the Second Imvume Contract[95]. On 5 October 2002, after it had accepted Imvume's nomination of the vessel "Kristhild", SOMO insisted that this acceptance was conditional upon the outstanding port charges for her old voyages to Al-Bakr (namely, "US $ 32, 668 on 19 October 2001 and US $ 32, 668 on 24 February 2002"), being settled[96].

[180.] **In the above circumstances the lifts of oil by Machinoimport and Slavneft which were destined for the SFF at the instance of Imvume were tainted by illicit surcharges and port charges. Similarly Imvume became associated with the port charges due by the vessel "Kristhild".**

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93 See document "58" in Addendum One.
94 See document "59" in Addendum One.
95 See document "60" in Addendum One.
96 See document "61" in Addendum One.

Political Symbiosis In the IIC Report

[181.] The text of the IIC Report[97] contains a narrative headed "Sandi Majali" and is introduced with the following statement: "One example in the Programme of exploitation of the symbiotic relationship between a country's closely aligned political and business figures and the Government of Iraq, is that of Montega Trading (Pty) Ltd ('Montega Trading') and Imvume Management (Pty) Ltd ('Imvume'). As described below, the principals of these two companies used their relationships with South African leaders to obtain oil allocations under the Programme". **This conclusion cannot be correct in so far as Montega is concerned.**

[182.] The report refers to a visit to Baghdad, in December 2000, by Al Khafaji, Majali and Hemphill in order to meet officials. During the meetings in question, "Mr Majali described himself as an adviser to both the ANC and President Mbeki". The report further stated that, "after several days of meetings Mr Majali was allocated 2 million barrels of oil.". In the Majali interview Aaron acknowledged that Majali was inclined to overstate his connection.

[183.] **The evidence before the Commission indicates that Al Khafaji's influence was used to introduce Majali to the Iraqi authorities and precipitated the Montega Contract.** The joint venture between Al

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97 Chapter 2, section D p 103.

Khafaji, Hemphill and Majali obtained an allocation for Montega on 21 December 2000. On 26 January 2001 Al Khafaji, who had been contacted by SOMO, directed a facsimile to Majali[98]. Therein Al Khafaji stated that he had been informed by SOMO that "there is available for us up to eight million barrels of Kirkuk". The letter suggests further that its author would be in Bagdad on the following Monday when he would be in a possession to follow up with SOMO, "if there is any interest". This letter suggests that Al Khafaji and not Majali took the lead in dealing with SOMO. Furthermore Majali informed the IIC that, after the execution of the Montega contract, which had been obtained through the influence of Al Khafaji, a dispute arose between the joint venture partners which threatened the existence of the partnership. Hemphill suggested that Majali would obtain no further contracts without the link to Al Khafaji. Although the conclusion was incorrect it is unlikely that this form of persuasion would have been relied on if Majali's political connections had brought about the sole Montega Contract.

[184.] **During the approximate period when Majali failed to conclude a Phase 10 contract or to lift a Phase 11 contract, Al Khafaji was able to obtain an allocation, to conclude the Omni Contract (M/10/24) and to lift 2, 070, 270 barrels, with a contract value of US $ 38, 550, 168. It seems therefore that Al Khafaji was the more powerful political force in the Programme at that time.**

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98 See document "30" in Addendum One.

[185.] In his interview with IIC investigators, Majali informed the IIC as follows. "The Secretary-General of the ANC never ever got involved in commercial discussion in Iraq ... Motlanthe has was never ever got involved in the commercial discussion in Iraq, but all what they did was giving a verbal sub (*sic*) political support ..."[99]. From this and from the documents referred to above one may infer that Motlanthe was instrumental in the allocation of the First Imvume Contract.

[186.] The IIC Report records that prior to the renewal of his oil contracts in phases 11 and 12 Majali was very involved in strengthening ties between South Africa and Iraq. "In September 2001, as chairperson of both the SAIFA and the South African Business Council for transformation ('SABCETT'), Majali led a South African delegation to Baghdad. This included officials from the SA Strategic Fuel Fund Association and SA Dept of Minerals and Energy". **The Director-General of the DME at the time, Nogxina, has previously denied that Majali led the delegation.**

[187.] **The Commission's terms of reference do not require further investigation of political symbiosis. It is therefore not pursued, but remains subject to the observations made above. However, the discussions and outcome of the visit of South African officials to Baghdad, during September 2001, is material to the issues which the terms of reference require this Commission to explore.**

PART H

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99 See transcript of Majali interview, pages 64 and 71.

Information within the possession of the Department of Minerals and Energy

[188.] On 7 September 2001 Nogxina informed the Minister and Deputy Minister of the DME of a proposed official (technical) visit to Iraq by Minerals and Energy officials from 10 to 14 September 2001. He requested the Minister's approval for departmental officials to be part of the visiting team to Iraq. The justification was set out in his written request[100] under a heading "Deliberations", which is quoted *verbatim*-

> "6. There is room for expansion for more trade by South Africa under the 'Oil for Food' (UN) programme and to the present total of US $ 70 Million was been calculated. It is recommended that the right political atmosphere between Iraq and South Africa be created in order to win more business.
>
> 7. A surcharge imposed by the Iraq's on their Oil Allocation makes it difficult for South African companies, especially Black Economic Empowerment Groups to break into the market. This is one of the issues that needs to be addressed by both parties.
>
> 8. Future Trade Relations in the Oil Sector will be discussed in order to diversify South Africa's Crude Oil supply.".

[189.] The visit by the Director-General, as well as Aayanda Nkulhu (Director of Ministerial Services and the Minister's Chief of Staff) and Thabo Mafoko

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100 See document "62" in Addendum One.

(International Liaison of the DME), was duly recommended. On 11 April 2006 and 3 May 2006 the Commission wrote to the DME requesting, *inter alia*, all records kept by the DME relating to the meetings held during this visit. The Commission expected to be provided with a report dealing with the issue raised in paragraph 7 of the Director-General's request which he should, as a matter of course, have prepared and given to the Minister on his return from Iraq. These relevant documents have not been forthcoming. Accordingly the Commission is constrained to rely on the Director-General's memory of events.

[190.] **The question of what the officials and delegates to Iraq were told about Iraqi surcharge requirements and in particular the obligation of South African companies to pay them is fundamental to the present enquiry and needs to be elaborated upon.**

PART I

The role of the Mission in monitoring illicit activities

[191.] In answer to a written question posed by the Commission, the Director-General of the DFA, Dr A Ntsaluba, said the following:

> "In general it is noted that both the Mission and the desk saw their respective roles more as serving as a conduit ('post office') between the South African companies and the United Nations and facilitator of the process, than as an active participant in the processes"[101].

[192.] In an urgent briefing, dated 14 May 2001, Nacerodien and Cardy ("the authors") alerted Ambassador Kumalo to illicit activities in the Programme and inadequacy in the screening process at the Mission. The briefing was headed "SA Contracts with (the) Iraq Oil-for-food Programme". *Inter alia*, the authors made the following points-

192.1 South African contracts with Iraq could be classified into two broad groups.

192.2 With reference to the first group, viz. oil contracts, the Mission had received copies of complete applications and contracts from three

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101 A copy of the letter is annexed to the letter addressed to the Presidency which accompanies this report. See footnote 15 *supra*.

companies, which it had forwarded to the OIP for approval. The 661 Committee had approved the contracts of Montega Trading and Metalcor. The Omni Oil Contract, "which had only recently been submitted", had not been approved at that stage.

192.3 The companies involved in oil transactions were "acting as intermediaries rather than 'end users' of the oil (i.e. refineries)". Save for Metalcor, all but one of the companies were small, newly registered and had no track record in the oil industry. It was doubtful whether they had sufficient available capital or proven credit worthiness to purchase oil from Iraq. Nevertheless large quantities of oil of between two to four million barrels, at Euro 35 per barrel, were involved. Save for Metalcor there was no evidence to suggest that the oil was intended for use in South Africa. Copies of relevant pages from the Omni Oil Contract and the Montega Contract were attached to the briefing.

192.4 Omni Oil and Montega were both "registered to the same person", Hemphill, who owned "a third SA registered company (Falcon Trading) that supplies non South African goods to Iraq and (had) ties with some of the other SA companies (e.g. Arbortek)".

192.5 Allegations were being made that the Iraqi Government was imposing "an illegal surcharge on each barrel of oil sold. The money (was) allegedly being paid directly into an Iraqi bank account over which the UN had no control".

192.6 There existed an "increasing complexity of the typical contractual chain between SOMO ... and the end user".

192.7 Due to the number of "intermediaries" involved, the UN no longer had accurate records of who was actually purchasing the oil.

192.8 A diversion of oil to destinations other than those authorised by the 661 Committee was taking place, with the result that the Programme was losing money because the oil price differed according to the market it was intended for.

[193.] Their recommendation is significant viz.

"In light of the role of the Mission as the official 'authority' that registers and follows up on the contracts of South African companies in terms of the oil-for-food programme, it is urgent to ensure that the credentials of companies applying for registration with the OIP be looked at more carefully. In line with the intended 'name and shame' policy that the 661 Committee may adopt, it is important that the Government not be seen to be supportive of illegal trade with Iraq. The desk may therefore have to consider ways of screening companies in terms of the criteria for registration mentioned above".

[194.] The proposed new criteria were:

(a) "Proven credit worthiness and evidence of available capital;

(b) Evidence that the company had previous experience in the oil industry;

(c) Evidence of membership of international/national oil/petroleum organisations;

(d) Evidence from national authorities of the company's date of registration;

(e) A brief description of the company's activities and their involvement in the petroleum sector."

[195.] Significantly the authors regarded the South African companies that were registered as oil purchasers with the OIP at the time as appearing to match the profile of "intermediaries'", which the USA and UK were seeking to target through the 661 Committee.

[196.] **Had the recommendation above been acted upon at the time, many of the illicit activities, which are now under investigation would probably have been prevented and South Africa's international obligations would not have been compromised.**

Conclusion

[197.] In view of the contentions made in Part D above, the Commission recommends the extension of its terms of reference to deal with the following questions:

197.1 Firstly, whether or not Majali was involved in a conspiracy with Lexoil to pay surcharges?

197.2 Secondly, whether or not the representatives of Omni Oil, Lexoil and Falcon perpetrated fraud upon the Mission when they-

(a) represented the national identity of these entities to the Mission; and

(b) failed to disclose to the Mission that these entities would conclude side-agreements with the Iraqis, to pay surcharges and kickbacks, over and above the official contracts processed under the direction of the UN.

[198.] In view of the above the Commission respectfully requests the opportunity to complete the execution of its terms of reference:

(a) firstly, in order to commence the investigation of Reyrolle, Glaxo Wellcome SA and Ape Pumps;

(b) secondly, to reissue summonses for the delivery of relevant outstanding documentation;

(c) thirdly, to allow Secretary-General Motlanthe and the Director-General of the Department of Minerals and Energy to deliver replies to the written questions which have been posed to them by the Commission;

(d) fourthly, to allow the Commission to consider a reply to questions that were posed to Mr Tokyo Sexwale by the Commission, in relation to the alleged payment of surcharges by Mocoh, which reply was received by the Commission on 15 June 2006, when this report was already being finalised;

(e) fifthly, to question the necessary witnesses, including Mr Rodney Hemphill, who are able to clarify whether or not a surcharge was paid in respect of Imvume by or on behalf of Mr Sandi Majali and/or whether an attempt was made to pay surcharges due by Montega;

(f) sixthly, to interview Messrs Andries Dormehl and Simon Cardy in regard to the information mentioned above and further information which may arise; and

(g) seventhly, to prepare and formulate more thorough recommendations which would help to prevent a recurrence of illicit activities on the part of individuals in the future, in accordance with the request of the Secretary-General of the United Nations.

[199.] The consent of the President to the aforegoing request will enable the Commission to carry out its terms of reference and provide the Commission with the opportunity to submit a comprehensive and final report to the President.

[200.] Attorneys representing Mr Rodney Hemphill undertook to revert to the Commission by Friday, 23 June 2006, regarding his attitude towards the litigation and/or towards assisting the Commission to carry out its terms of reference. They now require an extension till Monday, 3 July 2006 in order to consult with Senior Counsel.

[201.] Should resolution of Hemphill's application be achieved, the Commission would seek to conduct a hearing within a month thereof and to present a final report to the President shortly thereafter. The consent of the President to an extension of the date for the Commission's final report, to a date ten weeks after such extension has been formally communicated to the Commission, is requested accordingly.

Michael Donen, SC
(Chairperson)

Adv Andrew Chauke
(Member)

Snr Supt. Lucy Moleko
(Member)