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Submission Relating to:

- (a) South African Police Service Amendment Bill, 30 of 2008, and
(b) National Prosecuting Authority Amendment Bill, 23 of 2008**

To: Portfolio Committees on Safety and Security and on Justice and Constitutional Development, respectively

From: Prince Mashele (Head: Crime Justice & Politics Programme),
Hennie Van Vuuren (Head: Corruption & Governance Programme), and
Charles Goredema (Head: Organised Crime & Money Laundering Programme)
On behalf of the Institute for Security Studies. We request permission to make a verbal presentation to parliament on the contents of this submission.

Date: 28 July 2008

1. INTRODUCTION

1. The Institute for Security Studies (ISS) is an African non-governmental policy research institute. Our work is aimed at contributing to a stable and peaceful Africa characterised by sustainable development, human rights, the rule of law, democracy and collaborative security. We hope to realize this strategic vision by undertaking applied research, training and capacity building; working collaboratively with other stakeholders; facilitating and supporting policy formulation; monitoring trends and policy implementation; collecting, interpreting and disseminating information; and networking on national, regional and international levels (www.issafrica.org).

2. The threat posed by organised crime and corruption to the livelihoods of the poor, to the strength of public and private institutions and to democracy in general cannot be over-emphasised. As an organisation working towards the enhancement of the human security of Africans, in particular, and that of humanity in general, we have a responsibility to contribute to the strengthening of institutions and mechanisms that combat organised crime and corruption.

3. Hereunder, we make a case for why it is vitally important for South Africa to remain vigilant against organised crime and corruption. Given the centrality of money laundering to organised crime, we also devote parts of our submission to reflect on critical issues in this regard.

4. Importantly, the ISS is convinced that the country stands to benefit from an existing wealth of international experience and best practices in strengthening law enforcement agencies that deal with organised crime and corruption.

5. At the outset, we would like to place on record that we share the view expressed by Judge Sisi Khampepe in her report that “the rationale for locating the DSO under the NDPP and the Minister for Justice and Constitutional Development in 2002 still pertains.”¹ We, therefore, advise that the Directorate of Special Operations (DSO) be retained within the National Prosecuting Authority (NPA).

6. However, we recognise that there is draft legislation under consideration by parliament. For this reason, our submission reflects on and makes specific recommendations in respect of the contents of the draft *National Prosecuting Authority Amendment Bill of 2008* and the *South African Police Service Amendment Bill of 2008*.

¹ Khampepe Commission of Inquiry into the Mandate and Location of the Directorate of Special Operation (“the DSO”), Final Report, 2006, par. 47.2.

2. AN INDEPENDENT MECHANISM AGAINST ORGANISED CRIME AND CORRUPTION

7. South Africa has signed and ratified the two most important international agreements aimed at tackling corruption, viz., the *United Nations Convention Against Corruption* (2003) and the *African Union Convention on Preventing and Combating Corruption* (2003). Indeed, the country played a leading role internationally and amongst its African peers in drafting these important legal instruments and in promoting the ratification thereof.

8. The level of international commitment to both Conventions is reflected in the number of countries that have signed and ratified the Conventions with the aim of harmonising national legislation accordingly. This is evident in the fact that the *United Nations Convention Against Corruption*, which entered into force in December 2005, has 119 States Parties and 21 signatories.

9. Furthermore, the *African Union Convention on Preventing and Combating Corruption* that entered into force in August 2006 has 26 States Parties and 15 signatories.

10. The support for the Conventions (African States were amongst the first to ratify the UN Convention) has demonstrated a high level of political commitment to the principles included in the Conventions, additionally evidenced by the speed of ratification.

11. One of the key elements of both Conventions, reflecting international good practice, is the establishment of specialised agencies to fight corruption. However, experience has shown that such agencies are only successful where they are shielded from Executive intrusion, which can compromise efforts to tackle high-level corruption in business, government and civil society. Both Conventions, therefore, argue for a measure of ‘independence’, which should allow such institutions to perform their duties without fear or favour and in accordance with domestic law.

12. According to the *United Nations Convention Against Corruption*, “Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.”²

² Article 36.

13. According to the African Union Convention on Preventing and *Combating Corruption*, States Parties undertake to: “Establish, maintain and strengthen independent national anti-corruption authorities or agencies”³. This is meant to meet the objectives set out in Article 2 including to, “Promote, facilitate and regulate cooperation amongst the State Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption and related offences in Africa.”

14. South Africa does not have one dedicated anti-corruption body or agency, it has instead opted for a co-ordinated multi-agency approach to tackle corruption. One of the strengths of the existing framework is that if agencies do co-operate they can mutually reinforce efforts to tackle corruption. A recommendation of the Public Service Commission has been endorsed by the State that the country should opt for an array of specialised anti-corruption institutions that can be categorised as:

- a. *constitutional and oversight bodies* that have a special mandate in terms of Chapter 9 of the Constitution. These include the Auditor-General, Public Protector, Public Service Commission and the Independent Complaints Directorate;
- b. *criminal justice agencies*, including the South African Police Service, National Prosecuting Authority (including the Directorate of Special Operations and the Asset Forfeiture Unit) and Special Investigations Unit; and
- c. *other stakeholders*, which include the Department of Public Service and Administration, National Intelligence Agency, South African Revenue Service and the cross-sectoral National Anti-Corruption Forum.

15. The Conventions have direct relevance to the debate on the future of the Directorate of Special Operations as they both make mandatory a requirement for the existence of anti-corruption bodies, authorities or agencies (‘institutions’) that are *independent and free from undue influence*. While it is true that South Africa has a number of agencies tasked with combating and preventing corruption as outlined above, the DSO is the only body tasked with investigating (and prosecuting) corruption and organised crime for the purpose of criminal prosecution that is guaranteed a measure of independence by the Constitution. According to the Constitution of the Republic of South Africa (1996), “National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.”⁴ This therefore also provides a degree of protection to the Directorate of Special Operations from executive interference.

16. Parliament should consider all possible implications of a decision to dissolve the DSO. In terms of South Africa’s international commitments, such a decision could be interpreted as an attempt to renege on the country’s commitment to the two (UN and AU) Anti-Corruption Conventions. This would negatively impact on South Africa’s

³ Article 5(3).

⁴ Section 179 (4).

international standing as one of the countries that provide leadership regarding the implementation of the Conventions.

17. In Africa, many countries carefully observe developments in leading states such as South Africa and Nigeria to learn important lessons regarding the fight against high-level corruption in both the public and private sectors. While some politicians have argued that the Bills before parliament seek to strengthen South Africa's capacity to deal with organized crime and corruption, the subtext is not lost in countries across the continent where political manipulation of high-level corruption investigations is common cause.

18. The creation of the DSO provided for a mechanism to deal with specialised crimes as well as institutionalised corruption that manifested in the South African society. It was, therefore, necessary to ensure that the DSO is protected from political interference, which would make the investigation of high-level corruption impossible. High-level corruption is also one of the greatest threats to democracy as power is increasingly accumulated in the hands of the few at the expense of the majority. There is little to suggest that fourteen years into democracy corrupt networks have been dismantled.

3. MONEY LAUNDERING

19. Given the centrality of money laundering to organised crime and corruption, it is critical to build and enhance South Africa's capacity to implement its obligations with regard to detecting, investigating and prosecuting money laundering. In this regard, the work that South Africa has done over the years should be recalled, including the establishment of the Commercial Crime Unit (CCU) within the South African Police Service (SAPS) in the mid-1990s. It soon became clear that the work of the CCU needed to be complemented by other agencies, including the DSO, the South African Revenue Service (SARS), the Asset Forfeiture Unit and the intelligence apparatus.

20. Current demands emanating from the incidence and complexity of money laundering cases in South Africa suggest that what is required is the strengthening, rather than weakening of the agencies mandated to detect, investigate and prosecute money laundering.

21. The contribution made by the DSO in confronting complex economic crimes and money laundering is recognised and admired on the African continent. This is reflected in the esteem in which the DSO is held in countries such as Nigeria, Zambia, Kenya, Botswana and Mauritius. Our view is that integrating the DSO into the SAPS is more likely to have a weakening rather than consolidating impact.

22. A corresponding institution, set up within the Economic and Financial Crimes Commission of Nigeria (EFCC) has been just as successful as the DSO. In Zambia, a task force to investigate grand corruption and money laundering might soon be elevated to a

formal agency with a similar mandate and resources as the DSO. This has been precipitated by the fact that clarity of mandate, lines of accountability and resources are critical to building capacity to investigate money laundering. Initiatives to consolidate investigation capacity outside the police continue in Botswana, Kenya and Mauritius.

23. The trend in the region shows the validity of the argument that it is not sufficient to leave it to the police to perform this important role. Specialised agencies to investigate money laundering are also important in constructing the foundation for the work of financial intelligence units such as the Financial Intelligence Centre (FIC). This is particularly the case with administrative financial intelligence units like the FIC, which do not undertake investigations.

24. Even though there is no breakdown of references from the FIC to investigating agencies to indicate the proportion of cases directed to the DSO for investigation, it is clear that the DSO handles the more complex and trans-national investigations. The CCU also investigates money laundering, but tends to be confined to offences committed within South Africa's borders.

25. A phenomenon that has been detected since the turn of the century is the use of offshore corporate vehicles to transfer profits, accumulate fictitious costs and thereby minimise or evade tax. Both SARS and the DSO are aware of insidious, multi-dimensional forms of money laundering through fraudulent trading transactions involving South African individuals and business concerns. The use of companies resident offshore is intended to, and often does, obscure transfers that are questionable or illegal. The interests involved typically affect as many countries as the offshore corporate vehicles are doing business in.

26. Specialised investigation capacity is required to track these complex money-laundering transactions that are concealed in apparently lawful trade. Therefore, we would like to submit that incorporating the DSO into the SAPS would neutralise an agency with the potential to get to the bottom of these transactions, and to identify the participants in them.

27. A multi-national response to trans-national money laundering is in the best interests of countries that are determined to respond effectively to money laundering that is concealed in legitimate international transactions. Within each country, at the very least, a multi-disciplinary approach is required.

4. THE NATIONAL PROSECUTING AUTHORITY AMENDMENT BILL

28. Since the main purpose of the *National Prosecuting Amendment Bill* is to “repeal the provisions relating to the Directorate of Special Operations”⁵ from the *National*

⁵ National Prosecuting Authority Amendment Bill, 2008.

Prosecuting Authority Act (Act No. 32 of 1998), reflecting on the contents of the NPA Amendment Bill would have no material value in case parliament decides to retain the DSO within the NPA. Therefore, this submission is more concerned with the *South African Police Services Amendment Bill* since its contents would be of primary importance should parliament decide to integrate the DSO into the SAPS.

5. THE SOUTH AFRICAN POLICE SERVICE AMENDMENT BILL

29. The purpose of the *South African Police Service Amendment Bill*, among others, includes amending “the *South African Police Service Act*, 1995, in order to “... enhance the capacity of the South African Police Service in relation to organized and serious crime by establishing a Directorate of Priority Crime Investigation ...” The ISS has seriously considered all initiatives aimed at enhancing the capacity of the state to fight organized crime. The comments and recommendations made below should be interpreted in that context.

5.1 Prosecution-led approach

30. As Judge Khampepe has found, “the use of multidisciplinary structures, meaning, the use of prosecutors, intelligence operatives/analysts as well as investigators in a team effort is common in foreign jurisdictions.”⁶ We believe that, notwithstanding contestations, the employment of a prosecution-led approach by the DSO mainly explains the impressive success rate that the DSO has been able to achieve. We envisage room for prosecutors to make a contribution to the work of the Directorate of Priority Crime Investigation.

5.2 Secondment of staff from other government departments and institutions

31. Given the above-stated importance of a multidisciplinary approach in fighting organised crime and corruption, the ISS welcomes the room created in the Bill for the secondment of officials from “any other Government department or institution, to serve in the Directorate of Priority Crime Investigation.”⁷ Our interpretation of this provision is that prosecutors could also be seconded in specific instances to strengthen the capacity of the Directorate.

32. In our view, the Bill omits to refer to the development of a Secondment policy/framework. If not expressly stated in legislation that such a policy/framework shall

⁶ Khampepe Commission of Inquiry into the Mandate and Location of the Directorate of Special Operation (“the DSO”), Final Report, 2006, p.127.

⁷ Section 16A (2) (g).

be developed, no department or government official(s) would be held responsible should officials from other government departments or institutions not be seconded, as provided for in the current Bill. Since such secondment will have to be done by other departments, we would expect the Bill to expressly state the department that should participate in the formulation of such a policy/framework in order for the departments not to escape their legislative mandate.

33. Given our stated opinion in respect of the inclusion of prosecutors in the work of the Directorate of Priority Crime Investigation, the ISS recommends that the Department of Justice and Constitutional Development – with specific reference to the National Prosecuting Authority – be among the departments mandated to develop and participate in the implementation of a policy/framework to guide the secondment of staff to the Directorate of Priority Crime Investigation.

5.3 Corruption

34. Evidence of organised criminals (operating from outside or within the State) seeking to or indeed corrupting government officials and/or individuals who hold positions of authority such as politicians abound. Unfortunately, the *South African Police Service Amendment Bill* makes no specific mention of corruption as a special crime that should be part of the Directorate of Special Crime Investigation’s mandate. In this regard, our view is that the Bill should specify that the Directorate of Priority Crime Investigation shall investigate “Organised Crime and Corruption”.

35. The presumption of innocence until proven guilty notwithstanding, the indictment of National Police Commissioner, Jackie Selebi, points to the need to put in place legislative safeguards against the possible involvement of senior leaders within the SAPS in corrupt activities; particularly the kind of corruption that has a connection to organised crime.

36. The location of the DSO outside the SAPS has proved to be an important safeguard against the possible manipulation of internal processes by those in leadership positions within the SAPS. Had the DSO not indicted the National Commissioner, there is no evidence that the SAPS would have done so. The lessons arising from this specific case are indeed instructive. Therefore, we recommend that the Bill should include a Section that spells out specifically how the Directorate of Priority Crime Investigation shall deal with cases of corruption involving members of the SAPS, especially those in higher positions. It follows that such investigations into corruption within the SAPS can only be effective if they are protected from political interference within the SAPS and external environment. This would require an element of institutional independence that is not guaranteed in any manner by the Draft Bill.

5.4 Powers of the National Commissioner

37. We believe that the circumstances surrounding Commissioner Selebi present an opportunity for South Africa to strengthen its counter-organised crime and corruption mechanisms. In our opinion, care should be exercised not to allow the personality of the Commissioner to cloud issues, but rather pay attention to existing institutional gaps.

38. One of the important lessons that should be learnt from the case involving Commissioner Selebi is the power to investigate organised crime and corruption should not be concentrated in the hands of the SAPS National Commissioner. Our reading of the *South African Police Service Amendment Bill*, in its current form, is that it does not avoid this undesirable situation. For instance, we do not believe that it is prudent to confer the authority to appoint the Head of the Directorate for Priority Crime Investigation on the National Commissioner (as per Section 16A (a)). Rather, we think that vesting this authority in the Minister of Safety and Security would provide the necessary safeguard against possible manipulation of the Directorate by the National Commissioner. In order to further guard against any political manipulation of the process, we also believe that the Minister of Safety and Security should be required to consult and be obliged by law to consider recommendations made by the Minister of Justice, the National Director of Public Prosecutions and Parliament before appointing the Head of the Directorate for Priority Crime Investigation.

39. Whilst the ISS does not necessarily object to the National Commissioner receiving reports on the work of the Directorate for Priority Crime Investigation, we think making the Head of the Directorate directly accountable to parliament would exert a greater sense of national responsibility on the Directorate. In our view, this should be stated clearly in the law in order to avoid ambiguity.

5.5 Ministerial Coordinating Forum

40. Given the problems identified by Judge Khampepe in respect of the work of the Ministerial Coordinating Committee (MCC), established in terms of Section 31 of the National Prosecuting Authority Act, (1998), it is important to tighten legislation in order to avert the recurrence of the problems that bedeviled the MCC.

41. The forum envisaged in Section 16A (13) of the *South African Police Service Amendment Bill* should be defined specifically as a “Ministerial Coordinating Forum”. This would ensure that there is clarity regarding the level of authority at which the Forum is established. Furthermore, the legislation should also specify the Ministries that are to form part of this Forum in order to make the participation of such ministries mandatory. A provision should also be made to oblige the Ministries concerned to jointly develop and implement guidelines that are meant to regulate the affairs of the Ministerial Coordinating Forum.

42. In order to avoid the lack of coordination an operational level, we believe that the recommendation made by Judge Khampepe to “... establish a sub-committee with relevant individuals[/government officials] at the appropriate levels of authority who are able to deal with the day-to-day issues that [would] arise ...” should be acted upon. It is important for provision to be made in the Bill for the creation of such a sub-committee in order to avoid consideration of such a structure optional. The sub-committee should also be mandated to develop and implement guidelines that regulate its activities. The Ministerial Coordinating Forum should approve the guidelines.

6. RECOMMENDATIONS

43. Considering the foregoing, the ISS recommends that the Directorate of Special Operations should be retained within the National Prosecuting Authority.
44. However, should parliament decide to incorporate the DSO into the SAPS, we would recommend that:
- a. The Directorate of Priority Crime Investigation should specifically be mandated to investigate “Organised Crime and Corruption”;
 - b. Parliament should reconsider the exclusion of prosecutors, as per the provisions of the *South African Police Service Amendment Bill*;
 - c. A Section should be added in the *South African Police Service Amendment Bill* to specify how the Directorate of Priority Crime Investigation shall deal with cases of corruption involving members of the SAPS, especially those in higher positions;
 - d. The authority to appoint the Head of the Directorate for Priority Crime Investigation should be vested in the Minister of Safety and Security, in consultation with the Minister of Justice, National Director of the NPA and Parliament, in order to prevent the possible manipulation of the Directorate of Priority Crime Investigation by the National Commissioner of the SAPS;
 - e. A provision should be made to ensure that the Head of the Directorate accounts directly to parliament in order to ensure a sense of national responsibility on the part of the Directorate of Priority Crime Investigation; and
 - f. A provision should be made to establish a Ministerial Coordinating Forum and a Coordinating Committee of Government Officials to strengthen political and operational aspects relating to the work of the Directorate of Priority Crime Investigation.

7. CONCLUSION

45. The ISS would like to request parliament to carefully consider the adverse implications that might arise from a decision to dissolve the DSO. It should be recalled that, under apartheid, the state was effectively ‘captured’ by corrupt elites within government and the business sector that perpetuated injustice for their narrow purposes. This ugly past should spur our nation to act in a manner that ensures the strengthening of independent and accountable institutions poised to prevent the recurrence of the repugnant practices that typified the apartheid regime.

46. Should parliament decide to integrate the DSO into the South African Police Service, we have herein made specific recommendations in order to ensure that the proposed Directorate of Priority Crime Investigation continues the fight against corruption and organised crime spear-headed by the DSO. We hope that parliament will consider our recommendations in a positive light.



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