IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case no: CCT 48/2010

In the matter between:

GLENISTER, HUGH	Applicant
and	
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
THE MINISTER OF SAFETY AND SECURITY	Second Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third Respondent
THE ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Fourth Respondent
THE HEAD OF THE DIRECTORATE OF SPECIAL OPERATIONS	Fifth Respondent
THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	Sixth Respondent
and	
THE HELEN SUZMAN FOUNDATION	*Amicus Curiae*

WRITTEN SUBMISSIONS ON BEHALF OF THE HELEN SUZMAN FOUNDATION AS *AMICUS CURIAE*

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THE *AMICUS CURIAE*

1. The Helen Suzman Foundation ("**HSF**") is a non-governmental organisation whose objectives are:

> "*to defend the values that underpin our liberal constitutional democracy and to promote respect for human rights*."

2. HSF's objectives are closely aligned with the fundamental principles of democracy and constitutionalism to be decided by this Court. This Court admitted HSF as *amicus curiae* in a letter dated 16 August 2010.

PART I – INTERPRETATION OF THE BILL OF RIGHTS

A – The role of international law in this Application

3. Broadly speaking, international agreements only become binding on the Republic in international law after they have been approved by resolution by both the National Assembly and the National Council of Provinces.[1] In addition to such ratification, before international agreements become incorporated into domestic law, and are directly applicable at a domestic level, it is necessary that they are enacted into law by national legislation.[2]

4. International law also has a direct impact on the interpretation and meaning of the Bill of Rights. Section 39(1)(b) of the Constitution of the Republic of South Africa, 1996 ("**the Constitution**") provides that, "*[w]hen interpreting*

[1] Section 231(2) of the Constitution. Cf section 231(3) of the Constitution.
[2] Section 231(4) of the Constitution.

the Bill of Rights, a court, tribunal or forum … must consider international law" (emphasis added). The term "*international law*" has been afforded a broad meaning by the Constitutional Court, and covers binding as well as non-binding international instruments.[3] In evaluating the impact of international law on constitutional interpretation, we submit that this Court should give greater weight to international law instruments which bind the Republic internationally and domestically, particularly those instruments which were ratified and/or incorporated by the democratic Parliament after 1994.

5. In determining whether the National Prosecuting Authority Amendment Act, 2008 and the South African Police Service Amendment Act, 2008 (collectively "**the Amendment Acts**") are consistent with the Bill of Rights, this Court is obliged to consider the Republic's international law obligations; more specifically, it must consider those international instruments which require the Republic to establish mechanisms to prevent and combat corruption and organised crime. Where certain measures have been recognised, internationally, as being fundamental to the effective realisation of the objectives of an international instrument, due regard must be had to

[3] *S v Makwanyane* 1995 (3) SA 391 (CC) at paras [413]-[414].

such measures in determining whether the State has complied with its domestic – constitutional – obligations relating to these objectives.[4]

B – The interpretative injunction in section 39(1)(a) of the Constitution

6. Section 39(1)(a) of the Constitution provides that the Bill of Rights must also be interpreted so as to "*promote the values that underlie an open and democratic society based on human dignity, equality and freedom*".

PART II – THE STATE'S CONSTITUTIONAL DUTIES

A – The State's positive obligation to respect, protect, promote and fulfil the rights in the Bill of Rights

7. Section 7(2) of the Constitution provides that, "*[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights*". Section 8(1) of the Constitution, moreover, provides that, "*[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state*." Thus, the executive, when exercising power; the legislature, when enacting legislation, and the judiciary when interpreting legislation, are required to act so as to give effect to their obligations under section 7(2) of the Constitution.[5]

8. Section 7(2) obliges the State not only to respect, but also to "*protect, promote and fulfil*" the rights in the Bill of Rights. The Constitutional Court

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[4] *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* 2007 (4) BCLR 339 (CC) at paras [104] – [112] and [114].
[5] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) at paras [47] and [69].

has recognised that section 7(2), in addition to imposing a negative obligation on the State "*not [to] act in a manner which would infringe or restrict [a] right*"[6] in the Bill of Rights, prescribes for the State, in appropriate circumstances, a *positive obligation* to take deliberate, reasonable measures to give effect to *all* these fundamental rights.

9. The measures that are required under section 7(2) must be viewed through the lens of the founding constitutional values of dignity, equality and the rule of law. The positive duties imposed on the State should not be restrictively construed: a broader and more generous interpretation would be the one that accords with the injunction of s 39(1)(a) of the Constitution.[7]

10. This court emphasised the importance of positive duties imposed on the State under the Constitution in *De Lange v Smuts* when it said that:

> "*In a constitutional democratic state, which ours now certainly is, and under the rule of law … citizens as well as non-citizens are entitled to rely upon the state for the protection and enforcement of their rights. The state therefore assumes the obligation of assisting such persons to enforce their rights*".[8]

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[6] *Loc cit.*
[7] This reading would be consistent with section 41(1)(b) of the Constitution read with section 87 and item 1 of schedule 2 of the Constitution. In this regard, see *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA); *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA); *Minister of Safety and Security v Carmichele*, *ibid*; *Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA)).
[8] *De Lange v Smuts NO* 1998 (3) SA 785 (CC) at para [31].

11. It went on to hold in *Carmichele v Minister of Safety and Security* that:

> "*In some circumstances there would also be a positive component which obliges the state and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection.*"[9]

12. In *City of Cape Town v Rudolph*[10] the Court gave content to the duty to "*protect*" in s 7(2) with reference to the principles enunciated in international human rights law as follows:

> "*From what is set out above it is apparent that the State is as a matter of general constitutional principle under a duty, 'to put in place laws and to take appropriate action to protect individuals and groups against a violation of their rights by other private parties so as to fulfil its obligation to 'protect' the right.*"[11]

13. In *Mohamed v President of the Republic of South Africa*[12] this Court again emphasised the positive duties imposed on the State under the Constitution. In reiterating the statement in *Makwanyane* that the State's commitment to a society founded on the recognition of human rights "*must be demonstrated by the state in everything that it does*",[13] this Court founded its reasoning on, *inter alia*, "*the positive obligation that [the Constitution] imposes on the state to protect, promote and fulfil the rights in the Bill of Rights*".[14] This Court's jurisprudence confirms that this positive obligation applies in respect

[9] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) at para [44].
[10] *City of Cape Town v Rudolph* 2004 (5) SA 39 (C).
[11] *Ibid*, at page 75.
[12] *Mohamed v President of the RSA* 2001 (3) SA 893 (CC).
[13] *Ibid*, at para [48].
[14] *Supra* note 12, at paras [58] and [60].

of both socio-economic rights,[15] and the civil and political rights which are protected under the Bill of Rights, such as the rights to equality, dignity, life, freedom and security of the person.[16]

B - The State's obligation not to infringe the rights in the Bill of Rights

14. In addition to its positive obligation, the executive and the legislature are also obliged to refrain from taking any measures which unjustifiably infringe any rights in the Bill of Rights. The rights which may be adversely implicated by the Amendment Acts include equality, human dignity, freedom and security of the person, administrative justice and socio-economic rights.

C - Retrogressive measures breach the State's constitutional obligations

15. Flowing from the obligation that rests on the State not to infringe or restrict the rights in the Bill of Rights, and a corollary to the obligation that rests on the State to take positive measures to realise these rights, are the requirements that the State:

15.1 not take any measures that unreasonably or gratuitously diminish the State's capacity to fulfil, promote, protect or respect these rights;

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[15] See *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at paras [11] – [14]; *Government of the Republic of South Africa and Others v Grootboom* 2001 (1) SA 46 (CC) at paras [19] – [20] and paras [26] – [47]; *Minister of Health v Treatment Action Campaign and Others* No 2 2002 (5) SA 721 (CC) at paras [23] – [73] and paras [82] – [95]; *Khosa v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development* (6) BCLR 569 (CC) at paras [40] – [67].

[16] *Carmichele, supra* note 9, para [44]; *S v Baloyi (Minister of Justice and Another Intervening*) 2002 (2) SA 425 (CC) at para [11].

15.2 is precluded from taking any measures unreasonably or gratuitously which are less effective in promoting, protecting or fulfilling these rights than measures which the State took in the past; or

15.3 not take any measures unreasonably or gratuitously that inhibit the ability of the holders of these rights to enjoy and realise these rights.

16. The Committee on Economic, Social and Cultural Rights ("**the CESCR**") has stated that there is a "*strong presumption of impermissibility of any retrogressive measures taken in relation … [to any] … rights enunciated in the Covenant.*"[17]

17. The Constitutional Court has, in a number of decisions, affirmed the underlying rationale in the extract quoted above. In *Government of the Republic of South Africa v Grootboom*,[18] Yacoob J held that it:

> "*is in harmony with the context in which the phrase is used in our Constitution and there is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived*."[19]

18. The jurisprudence on these issues by the African Commission on Human and Peoples' Rights ("**the Commission**"), established under the African Charter on Human and Peoples' Rights is not dissimilar. Article 1 reads:

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[17] International Covenant on Economic, Social and Cultural Rights, General Comment 3, para [9].
[18] *Grootboom*, *supra* note 15 .
[19] *Ibid*, para [45]. See, also, *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) at paras [138] – [144]; *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) at para [32].

> "*The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative and other measures to give effect to them*."

19. In *Union de Jeunes Avocats v Chad* the Commission discussed the obligation in Article 1 and held as follows:[20]

> "*if a state neglects to ensure the rights in the African Charter this can constitute a violation, even if the State or its agents are not the immediate cause of the violation*".

20. It is thus clear that the State is not permitted to take measures unreasonably and gratuitously that have the effect of diminishing already achieved goals.

21. There is no reason in principle why the prohibition on retrogressive measures should not apply, with even greater force, to civil and political rights, in view of the nature of these rights and the requirements of section 7(2) of the Constitution.

PART III – THE STATE'S OBLIGATION TO CREATE AND MAINTAIN A VIABLE AND INDEPENDENT BODY TO DEAL WITH CORRUPTION AND ORGANISED CRIME

22. State conduct which does not ensure adequate independence or resources on the part of the body (or bodies) tasked with combatting corruption and organised crime facilitates and promotes corruption and organised crime.

[20] African Human Rights Law Reports (2000) pages 66 – 69.

The facilitation and promotion of corruption and organised crime, in turn, infringe on the rights in the Bill of Rights and the State's duty to respect, protect, promote and fulfil these rights.

A – The link between corruption / organised crime and human rights violations

23. It is indisputable that corruption and organised crime can have a profoundly negative impact on the values underlying the Constitution, the rights entrenched in the Bill of Rights, and the democratic institutions of South Africa. The preamble to the Promotion and Combating of Corrupt Activities Act, 12 of 2004 ("**PRECCA**") states:

> "*[whereas] corruption and related corrupt activities undermine [] rights, endanger the stability and security of societies, undermine the institutions and values of democracy and ethical values and morality, jeopardise sustainable development, the rule of law and the credibility of governments, and provide a breeding ground for organised crime*".

24. In *S v Shaik*,[21] this Court held that corruption is "*antithetical to the founding values of our constitutional order*".[22] Similarly, in *South African Association of Personal Injury Lawyers v Heath*,[23] this Court held that:

> "*[c]orruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine*

[21] *S v Shaik* 2008 (2) SA 208 (CC).
[22] *Ibid*, at para [72].
[23] *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC).

the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state" (emphasis added).[24]

25. In *S v Shaik*,[25] the Supreme Court of Appeal held that:

"*The seriousness of the offence of corruption cannot be over-emphasised. It offends against the rule of law and the principles of good governance. It lowers the moral tone of a nation and negatively affects development and the promotion of human rights. As a country we have travelled a long and tortuous road to achieve democracy. Corruption threatens our constitutional order. We must make every effort to ensure that with its putrefying effects is halted. Courts must send out an unequivocal message that will not be tolerated and that punishment will be appropriately severe* (emphasis added)."[26]

B – The deleterious impact of corruption and organised crime on the rights in the Bill of Rights

26. The World Bank, in its "*Report on Governance and Development*" (1992), stated that:

"*It is generally agreed that corruption threatens economic growth, social development, the consolidation of democracy, and the national morale. Corruption hinders economic efficiency, diverts resources from*

[24] *Ibid*, at para [4].
[25] *S v Shaik* 2007 (1) SA 240 (SCA).
[26] *Ibid*, at para [319]. See also *S v Sadler* 2000 (1) SACR 331 (SCA) at para [13]; *S v Kwatsha* 2004 (2) SACR 564 (E) at page 569; and *S v Salado* 2003 (1) SACR 324 (SCA) at para [3].

the poor to the rich, increases the cost of running businesses, distorts public expenditures and deters foreign investors. It also erodes the constituency for development programmes and humanitarian relief."[27]

27. This articulates the indisputable fact that corruption and organised crime have an almost immeasurable impact upon the capacity of the State to give effect to all human rights.

28. Moreover, the rule of law has a number of components which are adversely affected by corruption, including, *inter alia*, the principle of equality before the law and the principle of legality.[28] In the public sphere the exemption of persons from the operation of the law as a result of their status, wealth, power, position or connections in society and the personal gain that they can offer a public official, clearly distorts the principle of equality before the law.

29. The former Minister for the Public Service, Geraldine Fraser-Moleketi, made the point as follows:

"*corruption is fundamentally undemocratic and undermines the legitimacy and credibility of democratically elected governments, responsible and accountable public officials … corruption is systemic and its effects*

[27] World Bank, "*Report on Governance and Development*" (1992).
[28] On these fundamental principles, see Currie and De Waal, *The Bill of Rights Handbook* 5th Ed, Juta & Co, 2005 at pages [10] – [11]; *Fedsure Life Assurance Ltd v the Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 (CC); *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191 (CC); *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC); *Pharmaceutical Manufacturers Association of South Africa (Assoc Inc in terms of Section 21) and another in re: the Ex Parte Application of: The President of the Republic of SA and others* 2000 (2) SA 674 (CC) at paras [79] and [89].

undermine and distort the value systems of all societies and their peoples."[29]

30. Relevant international instruments all cite the threat that corruption and organised crime pose to, *inter alia*, democracy, the rule of law, human rights and the stability of societies in general, as the rationale behind their formulation.

31. The foreword to the United Nations Convention against Corruption ("**the UN Corruption Convention**")[30] states that:

> "*[c]orruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish.*"

32. The United Nations General Assembly's general resolution to the UN Convention captures the General Assembly's concern:

> "*about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the*

[29] Fraser-Moleketi, Géraldine. "*Statement by Ms. Géraldine Fraser-Moleketi, Minister for the Public Service and Administration, Republic of South Africa*", High-Level meeting: the OECD Anti-Bribery Convention – Its Impacts and Its Achievements. Rome, 21 November 2007, http://www.oecd.org/dataoecd/12/47/39867375.pdf, page 4.
[30] The UN Corruption Convention was adopted by Resolution A/RES/58/4 of 31 October 2003, at the fifty-eighth session of the General Assembly of the United Nations, and came into force on 14 December 2005. South Africa became a party to the UN Corruption Convention by ratification on 22 November 2004.

institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law".[31]

33. The preamble to the Organisation for Economic Co-operation and Development ("**OECD**") Convention on Combating Bribery of Foreign Public Officials to International Business Transactions ("**the OECD Convention**")[32] states that:

"*bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions*".

34. The preamble to the African Union Convention on Preventing and Combating Corruption ("**the AU Convention**")[33] refers to the parties':

"*[concern] about the negative effects of corruption and impunity on the political, economic, social and cultural stability of African States and its devastating effects on the economic and social development of the African peoples*".

35. Article 2 to the AU Convention sets out the following objective to:

"*[p]romote socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights*."

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[31] Resolution of the UN General Assembly, A/RES/60/207, 22 December 2005; and the preamble to the UN Corruption Convention.

[32] The OECD Convention on Combating Bribery of Foreign Public Officials in International Business entered into force on 15 February 1999, and South Africa became a party to it by accession on 19 June 2007. South Africa is one of seven non–OECD ember countries that are party to the Convention.

[33] The African Union Convention on Preventing and Combating Corruption was signed on 11 July 2003. South Africa ratified the Convention on 11 November 2005, and it entered into force on 5 August 2006.

36. The preamble to the AU Convention also "*[acknowledges] that corruption undermines accountability and transparency in the management of public affairs as well as socio-economic development on the continent*".

37. The preamble to the Southern African Development Community Protocol against Corruption ("**the SADC Corruption Protocol**"),[34] refers to "*the adverse and destabilising effects of corruption throughout the world on the culture, economic, social and political foundations of society*", and acknowledges that, "*corruption undermines good governance which includes the principles of accountability and transparency*".

38. We now turn to a brief outline of the obviously ruinous impact of corruption and organised crime on certain of the fundamental rights enshrined in the Bill of Rights.

The rights to equality and dignity

39. Under section 9(1) of the Constitution, everyone has the right to equality before the law and the right to equal protection and benefit of the law. The test for a violation of section 9(1) in *Harksen v Lane NO*,[35] reads as follows:

> "*Does the challenged law or conduct differentiate between people or categories of people? If so, does the differentiation bear a rational*

[34] The South African Development Community Protocol against Corruption was signed by the Heads of State of all 14 SADC member states on 14 August 2001. South Africa ratified the Protocol on 15 May 2003 and it entered into force on 6 July 2005.
[35] 1998 (1) SA 300 (CC) at para [53].

connection to a legitimate government purpose? If it does not, then there is a violation of s[ection] 9(1)."

40. Under section 9, what matters is the effect of State conduct.[36] State conduct which, in effect, promotes or facilitates corruption differentiates between people on the basis of their status, wealth power, position or connections in society and the personal gain that they can offer a public official (collectively, "**the impugned bases**"). The impugned bases can in no way be seen as rational or legitimate. As such, state conduct or legislation that facilitates corruption or organised crime constitutes a clear violation of section 9(1) of the Constitution.

41. In any event, differentiation on one or more of the impugned bases goes to the core of the adversely affected person's dignity. It is thus an analogous ground within the meaning of section 9(3) of the Constitution, giving rise to discrimination. It is inconceivable how discrimination on one or more of the impugned bases can ever be fair.

42. In view of the centrality of the right to dignity to the equality analysis and to almost every other right in the Bill of Rights, measures which facilitate or promote corruption work an infringement on the right to dignity. A person's self-worth is substantially diminished if he or she is preferred over another person on an arbitrary or unfair basis.

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[36] See, for example, *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) at para [90].

The right to just administrative action; and socio-economic rights

43. Section 33(1) of the Constitution provides that "*[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair*."

44. State conduct which facilitates or promotes corruption or bribery is fundamentally incompatible with an administrative law regime based on lawful, reasonable and procedurally fair administrative conduct. By way of example, a person who lawfully seeks to participate in public tender processes (which form the basis of most government procurement and are thus fundamental to service delivery) is adversely affected by state conduct which facilitates or promotes bribery and corruption within those processes. Bribery and corruption, by their nature, violate the core principles of just administrative action.

45. In this light, the ability of the State to fulfil its socio-economic obligations under sections 26, 27 and 28 of the Constitution will be adversely affected, constituting infringements of the correlative rights of prospective beneficiaries. Service delivery in respect of socio-economic rights is self-evidently undermined where the vehicle through which delivery takes place is tainted by corruption and organised crime.[37]

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[37] Goudie, Andrew W and Stasavage, David. "*Corruption: The Issues*", January 1997. OECD Development Centre, Working Paper No 122,, http://ideas.repec.org/p/oec/devaaa/122-en.html, at page 41. See, also, Fraser-Moleketi, Geraldine. Boone, Rob. "*Country Assessment Report – South Africa*". United Nations Office on Drugs and Crime and South African Department of Public Service Administration. April 2003, http://www.info.gov.za/view/DownloadFileAction?id=70185, page 131; Lash, N., *Corruption and Economic*

46. According to the former Minister of Social Welfare, Zola Skweyiya, in 2004 alone social grant fraud cost government approximately R 2 billion, and as much as R 10 billion may have been lost to corruption between 1994 and 2004.[38]

47. This extraordinary waste of resources not only undermines the capacity of the State to give effect to its socio-economic obligations, but it fundamentally diminishes the quality of lives of millions of South Africans.

The right to freedom and security of the person

48. Section 12(1) states that "*[e]veryone has the right to freedom and security of the person, which includes the right … to be free from all forms of violence from either public or private sources*". Section 12(2) states that "*[e]veryone has the right to bodily and psychological integrity*".

49. It is axiomatic that organised crime is often associated with forms of physical and psychological violence. In these circumstances, any measure which facilitates or promotes organised crime breaches the right to freedom and security of the person.

Development, Loyola University, Chicago, 2003, http://www.u4.no/pdf/?file=/document/literature/lash2003-corruption-and-economic-development.pdf, page 5; and Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 2000, http://www.un.org/events/10thcongress/2088b.html.

[38] Van Vuuren, Hennie. *National Integrity Systems – Transparency International Country Study Report (Final Draft): South Africa 2005*. March 2005. Transparency International. 13 August 2010. http://www.transparency.org/content/download/4106/25546/file/draft_s_africa_18.03.05.pdf. pages 19 and 21.

C – Combatting of corruption requires an independent body

50. To ensure that the rights in the Bill of Rights are respected, protected, promoted, fulfilled and not infringed, the State bears an obligation to ensure that a viable and independent body is established and maintained to deal with corruption and organised crime. The independence of this body is an essential feature of its ability to fulfil its mandate effectively.

51. This is apparent from a cursory reading of the relevant international instruments on the issue.[39] The Republic has signed and ratified six international agreements relating to corruption and organised crime:

51.1 the UN Corruption Convention;

51.2 the AU Convention;

51.3 the OECD Convention;

51.4 the United Nations Convention against Transnational Organised Crime ("**the UN Organised Crime Convention**");[40]

51.5 the SADC Corruption Protocol; and

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[39] See, also, *Impact of corruption on the human rights based approach to development.* United Nations Development Programme, Oslo Governance Centre, The Democratic Governance Fellowship Programme. September 2004, http://www.undp.org/oslocentre/docs05/Thusitha_final.pdf, at page 23.

[40] The UN Organised Crime Convention was adopted by resolution A/RES/55/25 of 15 November 2000 at the fifty-fifth session of the General Assembly of the United Nations and came into force on 29 September 2003. South Africa became a party on 20 February 2004.

51.6 the Southern African Development Community Protocol on Combating Illicit Drugs ("**SADC Drugs Protocol**").[41]

52. In 2004, Parliament enacted PRECCA, giving effect to UN Corruption Convention and the SADC Corruption Protocol.[42] It also appears that PRECCA covers South Africa's obligations under the OECD Convention.[43]

53. **UN Corruption Convention**

53.1 Article 6(1)(a) of the UN Corruption Convention imposes an obligation on each state party to guarantee the existence of a body or bodies tasked with the prevention of corruption. Moreover, Article 6(2) provides that:

> "*[e]ach State Party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their function effectively and free from undue influence. The necessary material resources and specialised staff, as well as the training that such staff may require to carry out in their functions, should be provided*" (emphasis added).[44]

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[41] The SADC Drugs Protocol was adopted on 24 August 1996 and entered into force on 20 March 1999. South Africa is a signatory to the SADC Drugs Protocol and has ratified the Protocol.
[42] See Preamble to PRECCA.
[43] OECD (2008) "*Specialised anti-corruption institutions. Review of models*" Paris: OECD, http://www.oecd.org/dataoecd/7/4/39971975.pdf, at page 6. Whilst PRECCA is silent on the creation of a specific institution to combat corruption, it nonetheless confers certain investigation powers on the NPA in terms of sections 22, 23 and 27 of the NPA Act.
[44] See, also, article 36 of the UN Corruption Convention.

54. **The AU Convention**

54.1 Article 5 of the AU Convention provides that state parties undertake to "*[e]stablish, maintain and strengthen independent national anti-corruption authorities and agencies*".

54.2 Article 20(4) of the AU Convention reinforces the importance of independence in more direct terms: "*The national authorities or agencies shall be allowed the necessary independence and autonomy, to be able to carry out their duties effectively.*"

55. **The OECD Convention**

55.1 In 2008, the OECD undertook a review of the models of the various specialised anti-corruption institutions internationally. The OECD report "*Specialised anti-corruption institutions. Review of models*" (2008) ("**the OECD Report**") identified the main criteria for effective anti-corruption agencies to be independence, specialisation, adequate training and resources.[45]

55.2 The OECD Report defined independence as follows:

> "*Independence primarily means that the anti-corruption bodies should be shielded from undue political interference. To this end, genuine political will to fight corruption is the key prerequisite.*

[45] The OECD drew these criteria from the provisions of UN Corruption Convention as well as the Council of Europe Criminal Law Convention on Corruption.

Such political will must be embedded in a comprehensive anti-corruption strategy. The level of independence can vary according to specific needs and conditions. Experience suggests that it is the structural and operational autonomy that is important, along with a clear legal basis and mandate for a special body, department or unit. This is particularly important for law enforcement bodies. Transparent procedures for appointment and removal of the director together with proper human resources management and internal controls are important elements to prevent undue interference" (emphases added).[46]

55.3 The OECD Report also found that:

"*one of the prominent and mandatory features of specialised institutions is not full independence but rather an adequate level of structural and operational autonomy secured through institutional and legal mechanisms aimed at preventing undue political interference as well as promoting pre-emptive obedience. In short, independence, first of all entails de-politicisation of anti-corruption institutions. The adequate level of independence or autonomy depends on the type and mandate of an anti-corruption institution. Institutions in charge of investigation and prosecution of corruption normally require a higher level of independence than those in charge with preventive functions*" (emphases added).[47]

"*The question of independence of the law enforcement bodies that are institutionally placed within existing structures in the form of specialised departments or units requires special attention. Police and other investigative bodies are in most countries highly*

[46] The OECD Report, at page 6.
[47] *Ibid*, at page 18.

centralised, hierarchical structures reporting at the final level to the Minister of Interior or Justice. Similarly, but to a lesser extent, this is true for prosecutors in systems where the prosecution service is part of the government and not the judiciary. In such systems the risks of undue interference is substantially higher when an individual investigator or prosecutor lacks autonomous decision-making powers in handling cases, and where the law grants his/her superior or the chief prosecutor substantive discretion to interfere in a particular case. Accordingly, the independence of such bodies requires careful consideration in order to limit the possibility of individuals' abusing the chain of command and hierarchical structure, either to discredit the confidentiality of investigations or to interfere in the crucial operational decisions such as commencement, continuation and termination of criminal investigations and prosecutions. There are many ways to address this risk. For instance, special anti-corruption departments or units within the police or the prosecution service can be subject to separate hierarchical rules and appointment procedures; police officers working on corruption cases, though institutionally placed within the police, should in individual cases report only and directly to the competent prosecutor" (emphases added).[48]

56. **UN Organized Crime Convention**

56.1 The UN Organized Crime Convention also requires state parties to establish anti-corruption institutions which are sufficiently independent to perform their tasks. Article 9(2) provides that:

[48] *Ibid*, at page 17.

"*[e]ach state party shall take measures to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions*".

57. **The Southern African Development Community Protocols**

57.1 South Africa is a member state of the Southern African Development Community ("**the SADC**"). The SADC has adopted two Protocols which are of relevance to the prevention and combating of corruption and organised crime.

The SADC Drugs Protocol

57.2 Under Article 8(1) member states are required to institute appropriate and effective measures to curb corruption. Under Article 8(2) these measures include the following:

"*a) establishment of adequately resourced anti-corruption agencies or units that are:*

(i) independent from undue intervention, through appointment and recruiting mechanisms that guarantee the designation of persons of high professional quality and integrity;

(ii) free to initiate and conduct investigations".

The SADC Corruption Protocol

57.3 Under Article 4(g) state parties must, "*adopt measures which will create, maintain and strengthen … [i]nstitutions responsible for implementing mechanisms for preventing, detecting, punishing and eradicating corruption*."

58. The Twenty Guiding Principles of the Council of Europe[49]

58.1 On 6 November 1997, the Council of Europe adopted the Twenty Guiding Principles for the Fight against Corruption, outlining the requirements of independence and freedom from undue influence which are now reflected in international law.

58.2 By way of example, Principle 3 requires that States:

> "*ensure that those in charge of the prevention, investigation, prosecution and adjudication of corruption offences enjoy the independence and autonomy appropriate to their functions, are free from improper influence and have effective means for gathering evidence, protecting the persons who help the authorities in combating corruption and preserving the confidentiality of investigations*".

[49] http://www.coe.int/t/dghl/monitoring/greco/documents/Resolution%2897%2924_EN.pdf

IV – CORE REQUIREMENTS FOR INDEPENDENCE

59. From the international instruments above, it is patent that whilst the measures to be adopted by a member state may depend on the "*fundamental principles of a member state's legal system*", there are certain core characteristics that must accompany any body tasked with combatting corruption and organised crime. The body must:

59.1 have the powers to initiate its own investigation;

59.2 allow investigators and prosecutors autonomous decision-making powers in handling cases;

59.3 not be subject to undue influence from any of the branches of government or any third party; and

59.4 have structural and operational autonomy.[50]

60. This Court in *De Lange v Smuts*[51] unanimously approved the following three "*essential conditions of independence*":

60.1 security of tenure, which embodies the essential requirement that the decision-maker be removable only for just cause;

60.2 a basic degree of financial security free from arbitrary interference by the Executive in a manner that could affect independence; and

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[50] Hussman et al, "*Institutional arrangements for corruption prevention: Considerations for the implementation of the United Nations Convention against Corruption Article 6*", Anti Corruption Resource Centre, 2009, at page 12..
[51] *De Lange*, *supra* note 8

60.3 institutional independence with respect to matters that relate directly to the exercise of the body's functions.[52]

61. This Court also approved of the following statement by the Supreme Court of Canada in *R v Valente*:[53]

> '*The word "independent" in s 11 (d) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly the Executive branch of government, that rests on objective conditions or guarantees.*'[54]

62. Whilst these essentials of independence related to the independence of the judiciary, it is submitted that a comparable level of independence is necessary for those bodies which are tasked with combatting corruption and organised crime.[55] The OECD expresses this point in the following terms:

> "*In contrast with other illegal acts, in public corruption cases at least one perpetrator comes from the ranks of persons holding a public function; the higher the function, the more power the person exercises over other institutions. The level of required independence of a given anti-corruption institution is therefore closely linked with the level of corruption, good governance, rule of law and strength of existing state institutions in a given country. Prosecution of street corruption*

[52] *Ibid*, at para [70]; ..
[53] .*R v Valente* (1985) 24 DLR (4th) 161 (SCC), cited *ibid*, at para. [71].
[54] *De Lange*, *supra* note 8, at para [71].
[55] Further submission by the Political Information and Monitoring Service of the Institute for Democracy in South Africa on the NPA Amendment Bill [B23 – 2008] and the SAPS Amendment Bill [B30 – 2008], http://sega.co.za/ScorpDocs/IDASASupplementaryDSO_DPIC.pdf, at para [10].

(corruption of rather low level public officials, for instance traffic police officers, with little or no political influence) does not normally require an institution additionally shielded from undue outside political influence. On the other hand, tackling corruption of high-level officials (capable of distorting the proper administration of justice) or systemic corruption in a country with deficits in good governance and comparatively weak law enforcement and financial control institutions is destined to fail if efforts are not backed by a sufficiently strong and independent anti-corruption institution" (emphases added).[56]

63. The above statement correctly emphasises that the requirement of strictly defined independence becomes all the more acute in circumstances where there is systemic corruption and organised crime (as there is in the Republic),[57] or where there are comparatively weak or corrupt law enforcement institutions (which, after all, was one of the key rationales for the formation of the DSO).[58]

V – DOES STATE CONDUCT IN ENACTING THE AMENDMENT ACTS MATERIALLY DETRACT FROM THE CORE REQUIREMENTS OF INDEPENDENCE?

64. In determining whether the Amendment Acts uphold these core requirements of independence, and whether the State has taken retrogressive measures, it is pivotal to contrast the position prior to the enactment of the Amendment Acts to the position after the enactment.

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[56] The OECD Report, at page 17.
[57] The Khampepe Commission of Inquiry into the Mandate and Location of the Directorate of Special Operations (Final Report, February 2006) ("**the Khampepe Report**"), page 335 of the Court Record. .
[58] *Loc cit.*

65. The table below presents some of the key changes in responsibility and accountability which have a direct bearing on independence of the DSO and the DPCI.

	DSO (unless otherwise stated, all legislative references in this column are to the National Prosecuting Authority Act, 1998 ("the NPA Act") prior to the Amendment Acts)	DPCI (unless otherwise stated, all legislative references in this column are to the South African Police Service Act, 1995 ("the SAPS Act") after the implementation of the Amendment Acts)
Location	Under section 7(1)(a), the DSO was established in the Office of the National Director of Public Prosecutions ("**NDPP**"), and fell within the structure of the National Prosecuting Authority ("**the NPA**") under the NPA Act. Under section 179(4) of the Constitution, the NPA must	Under section 17C(1), the DPCI was established as a Division of the South African Police Service ("**SAPS**"), and falls within the structures of the SAPS under the SAPS Act.

	"*exercises its functions without fear, favour or prejudice*".[59]	
Headship of the NPA and the SAPS	Under section 179(1)(a) the NDPP is the head of the NPA. The NDPP is appointed by the President and, under section 12(1), the NDPP "*shall hold office for a non-renewable term of 10 years*".	Under section 207(1) of the Constitution, the National Commissioner is appointed to "*control and manage the police service*". Under section 7(1)(a) the National Commissioner is appointed for a period of 5 years "*or such shorter period as may be determined at the time of his or her appointment by the President*".
Headship of the DSO and the DPCI	Under section 7(3)(a), the DSO was headed by a Deputy NDPP.	Under section 17C(2)(a), the DPCI is headed by a Deputy National Commissioner of the SAPS.
Appointment of Head	Under section 7(3)(a), the Head of the DSO was assigned from	Under section 17C(2)(a), the Head of the DPCI is appointed by the Minister

[59] See *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) at para [146] for the a discussion in the constitutional guarantee of independence that this affords the NPA.

	the ranks of Deputy NDPPs by the NDPP.	of Police, in concurrence with Cabinet.
Appointment of staff	a) Under section 19A(1), the NDPP appointed special investigators contemplated in section 7(4)(a)(iiA); b) Under section 13(1)(aA), the President of the Republic appointed the Investigating Directors, after consultation with the Minister of Justice and the NDPP; c) Under section 7(4)(a)(v), the Head of the DSO appointed all other officials of the DSO.	a) Under section 17C(2)(b), all persons are appointed by the National Commissioner on the recommendation of the Head of the DPCI; b) Under section 17C(2)(c), the National Commissioner appoints all "*legal officers*" in the DPCI.
Determination of functions	Under section 7(1), the DSO's mandate was to investigate all activities committed in an organised fashion; and any other offences designated by the	Under section 17D(1), the DPCI investigates national priority offences which in the opinion of the Head of the DPCI "*need to be addressed*" by the DPCI; and any other priority offences referred to the DPCI by the

	President.	National Commissioner, subject to any policy guidelines issued by the Ministerial Committee contemplated in section 17I(1). The Ministerial Committee comprises various Ministers.
Accountability	Under the NPA Act, the Head of the DSO was accountable to the NDPP. Under section 179 of the Constitution, the NDPP and the prosecuting authority are independent of executive control. The NDPP is only accountable to Parliament under section 35.	Under the SAPS Act, the Head of the DPCI is accountable to the National Commissioner. Under sections 206 and 207 of the Constitution, the National Commissioner and the SAPS is accountable to the Minister of Police, who determines all policing policy and the National Commissioner must act in accordance with the directions of such Minister. The Ministerial Committee is, moreover, responsible for overseeing the functioning of the DPCI and the Head of the DPCI and the National Commissioner must, on request of the

		Ministerial Committee, provide performance and implementation reports.
Terms and conditions of service	Section 17(1) prescribes a minimum rate of remuneration for the NDPP, the Head of the DSO, Deputy NDPPs and Directors of Public Prosecutions, such rates being determined by reference to the salary of a Judge of the High Court. Under section 19C(1), the terms and conditions of employment of special investigators were determined by the Minister of Justice in consultation with the NDPP and the Minister of Finance.	The conditions of service for all members (including the grading of posts, remuneration and dismissal) are governed by regulations, which are determined by the Minister of Police. Moreover, the President is empowered, under section 8(7), read with section 31(2), to reduce the salary of a member upon receiving a recommendation of a board of inquiry established in terms of section 8.
Dismissal	Under section 12, read with section 14(3), the NDPP, the Head of the DSO and	Under sections 8 and 9, the President may, in the event that he loses "*confidence*" in the National

	Investigating Directors could only be removed by the President and only on grounds of misconduct, continued ill-health, incapacity or no longer being fit and proper to hold the office in question. Any removal must be communicated to Parliament, and Parliament may restore any removed person to office. Special investigators could only be dismissed by the NDPP and their dismissal would have to be procedurally and substantively fair under the Labour Relations Act, 1995.	Commissioner, or if there are allegations of misconduct or incapacity, establish a board of inquiry to investigate the matter. After receiving the board's recommendations, the President may take <u>any action that he deems fit</u>, including removing the National Commissioner from his office. This decision does not have to be reported to Parliament, and Parliament has no oversight functions in this regard. Under section 35, the National Commissioner may "*discharge*" <u>any member</u> of the DPCI from the SAPS if he deems such discharge would "*promote efficiency or economy*" in the SAPS, would otherwise "*be in the interests of*" the SAPS, or because of the "*abolition of his or her post, or*

		the reduction in the numerical strength, reorganisation or the readjustment" of the SAPS.

66. As the above table illustrates, the independence of the unit tasked with combating corruption and organised crime has been materially diminished by the Amendment Acts. The DPCI operates within, is under the control of, and is wholly accountable to executive structures. It does not operate constitutionally or legislatively as an independent organ of the State, but is an arm of the national executive.

67. Section 17B(b)(ii) of SAPS Act rings hollow in the absence of the institutional framework which safeguards the independence of the DPCI. Whilst it continues to operate within the framework of the SAPS, any notion of independence in the sense contemplated in both domestic and international law is plainly lacking.

68. Contrarily, the DSO had almost complete institutional independence. As the DSO was also institutionally equipped with effective investigative, prosecutorial and analytical capacities, the core characteristics of independence were preserved in all stages of the process of combatting of corruption and organised crime.

69. The Amendment Acts plainly constitute retrogressive measures which materially detract from the core requirements of independence under the relevant international instruments and which facilitate and promote corruption and organised crime, thereby:

69.1 breaching the State's duties under section 7(2) of the Constitution; and

69.2 infringing a panoply of fundamental rights.[60]

PART VI – JUSTIFICATION

70. Should the Court find that there has been infringement of fundamental rights by the State, the State is required to establish that such infringement is nevertheless constitutional under section 36(1) of the Constitution. The State may also argue that the measures which it took in fulfilment of its duties under section 7(2) of the Constitution were reasonable.

71. In HSF's view, the State has not demonstrated that the introduction of the Amendment Acts is justifiable or that the measures in question are reasonable.

[60] See. also. OECD South Africa Phase 2 report on the Application of the Convention on Combating bribery of foreign public officials in International business transactions and the 2009 recommendations for further combating bribery of foreign public officials in international business transactions. http://www.oecd.org/dataoecd/8/39/45670609.pdf, at pages 35 – 42.

A – The breach of the section 7(2) obligation

72. In the context of the obligation under section 7(2) of the Constitution to take positive measures, this Court has adopted a reasonableness standard.[61] O'Regan J, in *Metrorail*, held that for the measures adopted to be reasonable, the measures must "*fall within the range of possible conduct that a reasonable decision-maker in the circumstances would have adopted*."[62]

73. Although we agree with this standard, where the State elects to adopt retrogressive measures, we submit that this Court should proceed on the presumption that the measures are unreasonable, and at the very least should closely scrutinise the justifiability of those measures.

74. This would be consistent with the commentary of the CESCR:

> "*any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources*."[63]

75. Reasonableness will always depend on the circumstances of the particular case, taking into account the following factors:

> "*the nature of the duty, the social and economic context in which it arises, the range of factors that are relevant to the performance of the duty, the extent to which the duty is closely related to the core*

[61] See *Grootboom*, *supra* note 15; *Soobramoney*, *supra* note 15 ; and *Treatment Action Campaign*, *supra* note 15.
[62] *Metrorail*, *supra* note 5, at para [86].
[63] International Covenant on Economic, Social and Cultural Rights, General Comment 3, para [9].

> *activities of the duty-bearer – the closer they are, the greater the obligation on the duty-bearer, and the extent of any threat to fundamental rights should the duty not be met as well as the intensity of any harm that may result. The more grave is the threat to fundamental rights, the greater is the responsibility on the duty-bearer.*"[64]

76. Whilst this Court has warned against an unrestrained and unfocussed review of decisions by other branches of government,[65] it has also recognised that:

> "*[t]his does not mean however that where the decision is one which* will not reasonably result in the achievement of the goal*, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision*" (emphases added).[66]

77. Where the Court is considering the reasonableness of the measures taken by the State, that these measures are retrogressive in nature must necessarily weigh against any finding of reasonableness.

The reasons advanced by the Respondents

78. The reasons that have been provided by the State for the decision to disband the DSO and, in its stead, incorporate the DPCI within the institutional framework of the SAPS, appears from the Respondents' heads of argument

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[64] *Metrorail*, *supra* note 5, at para [88].
[65] See, for example, *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at para [48].
[66] *Loc cit*.

and the Second and Third Respondents' answering affidavits. The Respondents' arguments may be summarised as follows:

78.1 There was a "*lack of adequate control over the DSO's activities*", which allegedly "*gave cause for serious concerns*". In this regard the Respondents refer to the Khampepe Report where concern is raised about complaints that "*some of the members of the DSO have not been vetted by the NIA*", and that there was "*alleged abuse by the DSO with regard to the manner in which it publicises its work in the media*".[67]

78.2 It is alleged by the Respondents that the "*report as a whole makes it plain that the DSO was not able to perform its statutory mandate … without engaging in intelligence gathering*", and thereafter the Respondents cite the Khampepe Report as evidence that the activities of the DSO "*go [ ] beyond the ambit of its information gathering mandate set out in s 7 of the NPA Act*".[68]

78.3 Issues regarding political oversight and financial accounting are summarised by the Respondents in the following terms:

> '*Confusion about political responsibility for its activities, uncertainty about financial governance, its operation outside the*

[67] Para 67 of the Respondents' heads of argument; and para 17 of the Second Respondent's answering affidavit, at page 2011 of the Court Record.
[68] Para 68 of the Respondents' heads of argument; and para [26] of the Second Respondent's answering affidavit, at pages 2014 – 2015 of the Court Record.

overall policing structures, and the fact that it acted "as a law unto itself" could not be overlooked and allowed to continue."[69]

78.4 The Second Respondent, in its answering affidavit, cites certain statements by the predecessors of the Second and Third Respondents relating to alleged co-ordination difficulties and "*tensions*" that existed between the SAPS and the DSO. These statements go on to suggest that there was a need for "*an audit of all our specialised units to enable us to restructure our elite units in such a way that our capacity to fight crime is improved*".[70]

78.5 The Second Respondent also argued that the purpose of the Amendment Acts was to "*provide a framework within which substantial improvements in the fights against crime can be implemented*",[71] and that the Amendment Acts "*provide for a legitimate government purpose of aligning, capacitating and enhancing the primary law enforcement agencies that deal with high impact organised crime, in a rational way*".[72]

HSF's responses to these reasons

79. HSF acknowledges that there were certain structural and operational concerns relating to the DSO prior to the Amendment Acts. These concerns,

[69] Para 76 of the Respondents' heads of argument.
[70] Para 31 of the Second Respondent's answering affidavit, at pages 2016 – 2017 of the Court Record.
[71] Para 40 of the Second Respondent's answering affidavit, at page 2026 of the Court Record.
[72] Para 41 of the Second Respondent's answering affidavit, at page 2026 of the Court Record; and paras 14 – 18 of the Third Respondent's answering affidavit, at pages 2075 – 2081 of the Court Record.

however, were hardly "*intractable*"[73] in nature, as suggested by the Respondents, and it is misleading to suggest that it was "*not possible to retain the DSO within the NPA and simultaneously give effect to the remaining recommendations of the Khampepe Commission*".[74]

80. Regarding the allegations that the DSO had acted outside of its mandate in section 7 of the NPA Act, Justice Khampepe suggested that "*it would be useful to confine the activities of the DSO to information gathering as the legislation directs*", which will "*ensure that the DSO not only operates within the limits of the law but is obliged to interface with the intelligence agencies in the discharge of its mandate*".[75] Thus, what was recognised by Justice Khampepe was that whilst the DSO may have exceeded its mandate, the solution was not to dismantle the entire legislative framework thereby working a constitutional breach, but properly to regulate the operations of the DSO to ensure that it did not act unlawfully in the future.

81. Regarding the concerns relating to political oversight, Justice Khampepe suggested that the President exercise his powers under section 97(b) of the Constitution, and transfer the political oversight of the DSO to the Minister of Police.[76] The Respondents dismiss this suggestion out of hand, arguing that:

[73] Para 79 of the Respondents' heads of argument.
[74] Para 21 of the Second Respondent's answering affidavit, at page 2012 of the Court Record.
[75] Para 24.19 of the Khampepe Report, at page 380 of the Court Record.
[76] Para 47.5 of the Khampepe Report, at page 416 of the Court Record.

> "*[o]nce the provisions of the NPA Act, in particularly [sic] s 7, are scrutinised however, and the constitutional constraints in s 209 (1) are considered, it is evident that no proclamation under s 97 (b) can resolve the problems identified in the Commission's report*".[77]

82. This objection, however, proceeds from a fallacious and fictitious premise, namely, that the Khampepe Report suggested that the DSO continue exercising intelligence-gathering functions. It is apparent from the Khampepe Report, however, that this was never contemplated. Whilst such intelligence may, on occasion, be necessary for the DSO to perform its functions effectively, Justice Khampepe found that this could be done by the DSO "*interface[ing] with the intelligence agencies in the discharge of its mandate*".[78]

83. Moreover, and implicitly conceded by the Third Respondent in its answering affidavit,[79] the suggestion by the Respondents that section 209 of the Constitution prevents an amendment of the NPA Act so as to allow the DSO to perform intelligence-gathering functions is simply incorrect in law.

84. The issue relating to which person is responsible for the financial accountability of the DSO is similarly without merit. Under section 36(3A) of the NPA Act, the CEO of the DSO was vested with financial accountability for the DSO, whereas the Director-General of the Department

[77] Para 79 of the Respondents' heads of argument.
[78] Para 24.19 of the Khampepe Report, at page 380 of the Court Record.
[79] Para 26 of the Third Respondent's answering affidavit, at page 2083 of the Court Record.

of Justice was financially accountable for the remainder of the NPA. Section 36(3A) illustrates the extent to which the legislature deemed necessary to insulate the DSO from interference by the National Executive.

85. Even if the legislature now considered the DSO's financial independence undesirable, it could have simply deleted section 36(3A) of the NPA Act. To suggest that it was necessary to disband the DSO – through vast legislative amendments – is disingenuous.

86. The alleged abuses of the media by the DSO and the co-ordination difficulties and tensions between the SAPS and the DSO could have been remedied through the successful invocation and operation of the Multidisciplinary and Vetting Structure, as was in fact suggested by the SAPS and the DSO in submissions to Justice Khampepe.[80] Once again, there was an entirely plausible and reasonable alternative to the drastic – and retrogressive – measures ultimately taken.

87. Moreover, and obviously, there is nothing to say that the same "*abuses*" would not be committed by the DPCI; or that the same tensions between units within the SAPS would not arise under the new institutional regime. The location of the DPCI under the SAPS does not somehow cure it of these alleged problems.

[80] See paras 16.5 – 16.16 of the Khampepe Report, at pages 359 – 360 of the Court Record.

88. Regardless of whether the purpose of the Amendment Acts was legitimate and was directed towards improvements in the fights against crime, where the practical effect of the measures is in fact detrimental to the fight against (corruption and organised) crime, the motive itself will not save the measures from unconstitutionality. This is a perfect illustration of the rationale underlying the statement by O'Regan J that where the policy choice that is taken is "*not reasonably supported on the facts*" it will fail the reasonableness standard of review. The examination of international law above makes abundantly clear that the Amendment Acts are structurally inferior to the prior regime and undermine South Africa's ability to meet the democratic imperative of combatting organised crime and corruption.

89. The reasons provided by the Respondent do not withstand closer scrutiny; and they selectively cite parts of the Khampepe Report, which, if read in its entirety, simply does not justify the actions of the legislature in disbanding the DSO. This much is clear from the following statement by Justice Khampepe:

> "*Until such time as there is cogent evidence that the mandate of the Legislature (to create a specialised instrument with limited investigative capacity to prosecute serious criminal or unlawful conduct committed in an organised fashion) is demonstrably fulfilled, I hold the view that it is*

inconceivable that the Legislature will see it fit to repeal the provisions of the NPA Act that relate to the activities and location of the DSO."[81]

90. Whilst the Respondents are correct in their submission that the "*conceptualisation, design and formulation of such enactments and the organisational, financial and political ramifications thereof involve a range of policy choices and decisions over a broad front*",[82] where the policy choice that is taken is "*not reasonable in the light of the reasons given for it*" or is objectively unreasonable,[83] we submit that the Court should not hesitate to strike down the impugned measures.

91. In the absence of proper, cogent and coherent reasons, the fact that the dissolution of the DSO and the simultaneous incorporation of the DPCI are policy laden is not enough to warrant this Court refraining from declaring the Amendment Acts unconstitutional. All decisions of the legislature are imbued with policy: that is simply an incident of government. And state conduct and law which unjustifiably infringes rights falls to be struck down: that is simply an incident of the Constitution.

B – Justification under section 36(1)

92. Once it is established that a law limits a constitutional right, the State is then required to establish that the limitation is reasonable and justifiable in an

[81] Para 47.1 of the Khampepe Report,, at page 415 of the Court Record.
[82] Para 56 of the Respondents' heads of argument; see also para 5.2 and 42 of the Second Respondent's answering affidavit, at pages 326 and 405 – 406 of the Court Record; and paras 10 and 19 of the Third Respondent's answering affidavit, at pages 2075 and 2081 of the Court Record.
[83] *Supra* note 65.

open and democratic society based on freedom, dignity and equality, taking into account the factors contained in section 36(1) of the Constitution, which include:

> "*(a) the nature of the right;*
> *(b) the importance of the purpose of the limitation;*
> *(c) the nature and extent of the limitation;*
> *(d) the relation between the limitation and its purpose; and*
> *(e) less restrictive means to achieve the purpose*".

93. As discussed in Part III above, in this Application the Court is confronted with legislation that infringes multiple rights in the Constitution, including, the rights to equality; dignity; freedom and security of the person; housing; healthcare, food, water and social security; education; and just administrative action.

Nature of the right

94. The importance of the rights in issue in this Application is axiomatic. Considered cumulatively, the nature of the rights infringed is of such single and fundamental importance to a constitutional democracy which is based on the values of freedom, dignity and equality, that their importance cannot be gainsaid[84] or forsaken in legislative whim.

[84] With regard to the rights to equality, dignity and life, see *Makwanyane*, *supra* note 3; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC); for the right to freedom and security of the person, see *Union of Refugee Women*, *supra* note 4, at para [37]; social and economic rights, see the citations in note 15 above; and administrative justice see, *Minister of Finance v Gore* 2007 (1) SA 111 (SCA).

Importance and purpose of the limitation

95. The reasons advanced by the Respondents for the dissolution of the DSO and the incorporation of the DPCI have already been considered above. Whilst the ostensible purpose of the limitation appears to be important – ensuring political and financial oversight of a crime-fighting unit, ensuring national intelligence is not compromised, and ensuring that such bodies do not abuse their powers – even on a cursory reading of the Respondents' heads of argument, the reasons which underlie the Amendment Acts are not supported by the facts or the law.

The nature and extent of the limitation

96. The extent to which these rights may be infringed as a consequence of facilitation of corruption and organised crime was discussed above.

97. It must, further, be noted that whether the diminution of independence of the body tasked with combatting corruption and organised crime is minor or significant, even minimal corruption is anathema to a democratic society and all its hard-won freedoms. As a constitutional democracy which is founded on the values of openness, transparency and accountability, we should not tolerate actions, measures or policies which have structural consequences that create a conducive environment for the spread of corruption and organised crime, and which constitute a failure by the State positively to protect and fulfil the rights in the Bill of Rights.

The relation between the limitation and its purpose

98. HSF acknowledges that the Amendments Acts, ie the limitation, achieved the ostensible purposes that allegedly served as the catalyst for their enactment:

98.1 there is no more DSO to exceed its information-gathering mandate;

98.2 like the DSO, the alleged problems relating to political oversight no longer exist; and

98.3 the Director-General: Justice and the CEO of the DSO no longer have overlapping mandates.

99. That the Amendment Acts achieved their purposes, however, is hardly a factor which should weigh significantly in favour of their constitutionality. The ostensible purposes are clearly of insufficient weight to justify any incursions into the DSO's fundamental structure, let alone a wholesale disbandment of the institution.

100. The real question is whether the Amendment Acts serve the purpose – as required of South Africa under our international law obligations – of maintaining a body sufficiently independent and effective to combat corruption and organised crime. For the reasons given already, they plainly do not.

Less restrictive means to achieve the purpose

101. Whilst it is true that section 36(1)(e) of the Constitution "*does not postulate an unattainable norm of perfection*",[85] and that the standard is ultimately one of reasonableness, where the alternative means are patently less restrictive of a cluster of rights, this must weigh heavily in favour of the unjustifiability of the limitation.

102. It is submitted that this is particularly apposite in this Application. The alternative – less restrictive – measures were presented to the Respondents in the Khampepe Report; they were approved by the Cabinet;[86] and then, for reasons which are without foundation and substance, were abandoned.

C – Conclusions

103. It is thus clear that State conduct in enacting the Amendment Acts constitutes unreasonable, retrogressive measures which breach the State's constitutional duty under section 7(2) and unjustifiably infringe key constitutional rights. The breaches go to the core of the Amendment Acts and they should thus be struck down *in toto*.

[85] *S v Mamabolo (E TV and Others Intervening)* 2001 (3) SA 409 (CC) at para [49].
[86] Para 20 of the Second Respondent's answering affidavit, at page 2012 of the Court Record; para 30 of the Third Respondent's answering affidavit, at page 2084 of the Court Record.

PART VII – REMEDIES

104. HSF submits that the appropriate remedy, upon a finding of constitutional incompatibility of the Amendment Acts, would be:

104.1 a declaration of invalidity of such Acts under section 172(1)(a) of the Constitution;

104.2 coupled with a suspension of the above declaration, under section 172(1)(b)(ii) for a 12 month period to permit the legislature to remedy the constitutional defects.[87]

105. Should Parliament fail to enact legislation giving effect to the order contemplated in paragraph 104.2, the Amendment Acts would cease to have any legal effect.[88]

Counsel for the *amicus curiae*

David N Unterhalter SC

Max du Plessis

Chambers, Sandton and Durban

25 August 2010

[87] *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC); *S v Steyn* 2001 (1) SA 1146 (CC).
[88] Cf *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC).