Democracy entails accountability for the exercise of power (DG McGee, QC, 2002, 9)

The independence of Parliament and its Committees is a matter of principle. The intention of this Committee, supported by the Auditor-General, accepted by Parliament was to include the four bodies namely the Heath Special Investigating Unit, the Auditor-General, the Public Protector, and the Investigating Directorate of Serious Economic Offences. Whether Judge Heath personally was included in the Heath Special Investigating Unit was not at issue (Gerhard W Koornhof MP (UDM), Committee Minutes, SCOPA, 24 January 2001, 4)

The former Minister of Defence Joe Modise presented the White Paper on Defence for the Republic of South Africa to Parliament during May 1996 and it was approved in the same month (White Paper). The White Paper observed that there was “no discernible conventional foreign military threat” to South Africa. It “recognizes that the greatest threats to the South African people are socio-economic problems like poverty, unemployment, poor education, the lack of housing and absence of adequate social services,” hence “the Reconstruction and Development Programme (RDP) policy priority of government to urgently divert and relocate state resources in order to meet basic socio-economic needs, and the consequent pressure and challenge to rationalize the South African National Defence Force (SANDF) and reduce and contain military spending substantially.” The White Paper nonetheless established a policy framework and the main principles of defence. This was to culminate in a Defence Review to elaborate on the policy framework based on the long-term planning of issues such as structure, force design, force levels and armaments (Defence Review). In determining the appropriate size, structure and force design of the SANDF for the twenty first century, the Defence Review will establish the tasks, manner of undertaking these tasks, and the equipment and weaponry required by the SANDF to fulfil these tasks in the future.
Different force design options were developed by the Department of Defence (DoD), which reflected the different permutations of the level of defence, defence structure and cost; four of these options were presented to Cabinet and Parliamentary Defence Committees. The approved option, relevant to the investigation of the Joint Investigation Team (JIT),\(^1\) was subject to the availability of finances and is set out below, viz

<table>
<thead>
<tr>
<th>SANDF FORCE DESIGN</th>
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<tr>
<td><strong>SA Air Force</strong></td>
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<tr>
<td><em>Fighters</em></td>
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<tr>
<td>Light Fighters</td>
<td>16</td>
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<tr>
<td>Medium Fighters</td>
<td>32</td>
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<tr>
<td><em>Helicopters</em></td>
<td></td>
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<tr>
<td>Combat Support Helicopters</td>
<td>12</td>
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<tr>
<td>Maritime Helicopters</td>
<td>5</td>
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<tr>
<td>Transport Helicopters</td>
<td>96</td>
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<tr>
<td><strong>SA Navy</strong></td>
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<tr>
<td>Submarines</td>
<td>4</td>
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<tr>
<td>Corvettes</td>
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Offers for the supply of armaments entailed packages consisting of Naval, Air Force, and Army equipment, hence DoD’s adoption of the “package” approach to the acquisition process as opposed to the individual/off the shelf purchasing equipment type. These offers became known as the Strategic Defence Procurement Packages (SDP), *the Arms Deal* in popular parlance.

The South African Defence Review was approved by Parliament in April 1998 (JIT 2001 1.1.4.4).

Of particular importance is that Cabinet approved the principle of the acquisition of the Strategic Defence Packages on 23 September 1997, on the same date the Ministry of Defence sent Requests For Information (RFIs) to eleven countries for the procurement of the Defence Packages (see JIT 2001 7.1.7, 7.2.1.2). Now, this was *before* the Defence Review, which was to determine the structure, force design, force levels and armaments

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\(^1\) Reference to the *Joint Investigating Team (JIT) Report on the Strategic Defence Procurement Packages (SDP)* of 14 November 2001 I have marked JIT 2001 followed by the paragraph/item number. Their findings will not necessarily be accepted and their interpretations will not always be accounted for or corroborated.
in the Strategic Defence Packages relevant for the South African National Defence Force was approved by Parliament.

During November 1998, the Office of the Auditor-General identified the SDP as a high-risk area from an audit point of view. The Office of the Auditor-General received the Minister of Defence’s (MoD) approval (for an audit) on 28 September 1999 and performed a special review of the procurement process, finalized and signed on 15 September 2000. This Report, Special Review of the Auditor-General of the Selection Process of the Strategic Defence Packages for the Acquisition of Armaments at the Department of Defence [RP 161-2000] was tabled in Parliament on 20 September 2000 and referred to the Portfolio Committee on Defence and SCOPA for consideration and Report. The Report identified concerns relating to aspects of the arms acquisition by the Government, most notably,

(a) “The independence of the role players involved with the procurement of the SDP.

(b) The technical evaluation of the Lead-in-Fighter Trainer (LIFT) during the procurement process.

(c) The adequacy of the performance guarantees pertaining to the National Industrial Participation programme (NIP).

(d) The policy of the Ministry of Defence pertaining to the SDP procurement.

(e) The armaments acquisition policy applied during the SDP procurement.

(f) The negotiation in respect of the Frigates (Corvettes).

(g) The tender procedures followed to award subcontracts.”

The Auditor-General’s Special Review [RP 161-2000] was the subject of hearings and deliberations in SCOPA, which culminated in the 14th Report of the Committee for the
year 2000 presented to Parliament on 30 October 2000. Issues and concerns raised by SCOPA over key aspects of the arms procurement packages include, *inter alia*

**(1) Cost to State**

1.1 Validity of the total cost of the strategic arms packages where there is the possibility of overall cost increasing further over the term of the contracts concerned.

1.2 Full financial and fiscal implications of the purchases relating to the movements within certain major currency markets and the realism of the macro-economic assumptions used in determining the cost to the state of the procurement.

1.3 Suggestion that the price of the Gripen and Hawk procurement was improperly inflated.

**(2) Offsets – Industrial Participation (IP) Projects – Defence Industrial Participation (DIP) and National Industrial Participation (NIP)**

2.1 Verification of a) the make-up of the (total) value of industrial participation programmes - R104 billion represents the nominal value of the offsets transactions; and b) the economic benefit, within the region of R70 billion, flowing from this for the country, and 65 000 new jobs which would be created.

2.2 Purpose of the R104 industrial participation contracts – contribution to economic development or to counter the negative economic and fiscal effects of the arms procurement?

2.3 Uncertainties relating to the enforcement of the R89.4 billion national industrial participation portion of the R104 billion realizable from offset transactions.

2.4 The exceptionally high industrial participation demands on the suppliers and the seemingly low penalties should they default (10% (guarantee) of the contract price in the case of NIPs).

2.5 Viability of the proposed offsets (which defies common business logic).
2.6 An effective monitoring system, and government assertively pursing delivery of the economic benefits of the national industrial participation projects (in light of the mass of evidence of failed and partially fulfilled IP obligations in developing countries).

2.7 Industrial participation contracts and the fact that they do not seem to have been well prepared with clumsy language, missing annexes and incorrect references.

(3) Selection of prime contractors

3.1 Possibilities of improper influence having been exerted in certain of the selections of the prime contractors (resulting from the processes employed).

3.2 Reason for the change of the accepted evaluation method, (only in the case of the LIFT contract), after submission of tenders.

3.3 Presentation to Cabinet of the costed and non-costed options in respect of the LIFT.

(4) Selection of subcontractors

4.1 The role played by influential parties in determining the choice of subcontractors by prime contractors.

4.2 Government having no influence in the appointment of subcontractors.

4.3 The Integrated Management Systems (IMS) of the Corvettes procurement, and the basis for comparisons of the competing products, and

4.4 The basis upon which the risk for the South African product was loaded.

(5) Acquisition policies (Ministry of Defence; ARMSCOR)

5.1 Policies and procedures used in the arms procurement deal concerning their all-round appropriateness and application.
5.2 Apparently weak conflict-of-interest provisions in the ARMSCOR tendering processes followed.

5.3 Too great a concentration of influence (from documentation through to decision-making).

5.4 A thorough post mortem and review of the arms procurement processes.

The Fourteenth Report of SCOPA for year 2000 recommended an independent and expert forensic investigation into key issues, inclusive of the concerns referred to in the Auditor-General’s Special Review, the issues raised by the committee as well as “allegations and assertions which reflected common ground to a significant degree” in other documentation in the possession of SCOPA, as well as the need to prove or disprove, once and for all, allegations which may damage the perception of government. The committee would prepare a brief, which would stipulate particular assertions that ought to be investigated in the full-scale investigation envisaged. In view of the complex and crosscutting nature of the investigation, it was recommended that an exploratory meeting, convened by SCOPA, be held. This would include the Auditor-General, the Health Special Investigating Unit (SIU), the Public Protector, the Investigating Directorate of Serious Economic Offences (IDSEO) and any other appropriate investigative body for the best combination of skills, legal mandates and resources. The chosen investigating body would report on its progress to the committee at regular intervals, as well as at the conclusion of its work. In more fully explaining its investigative brief to the team, SCOPA made it clear it would continue investigations of its own. This Report was adopted by Parliament on 2 November 2000 without debate.

Over fifty substantive allegations and assertions of concern are public knowledge, among these are:

(a) A possible conflict of interest in respect of various persons involved in the overall acquisition process due to directorship, shareholding, relatives, etc (Arms probe threatens top ANC figures: Joe Modise central to multi-pronged probe, in Sunday Independence, 1 December 2000).
(b) A high-ranking official is a shareholder and chairperson of a local subcontractor that is a beneficiary of a prime contractor (Arms probe threatens top ANC figures: Joe Modise central to multi-pronged probe, in Sunday Independence, 1 December 2000).

(c) Various role players in the overall acquisition process hold shares, through nominees, in entities, which benefited from the acquisition (Say it ain’t so Joe, in Mail & Guardian, 15 March 2002; and From arms broker to arms boss, in Mail & Guardian, 1 February 2002).

(d) Persons involved in the overall process (amongst whom high-ranking officials) received various gifts (The missing pieces from the final arms deal report, in Business Day, 22 May 2002).

(e) A certain bidder was overlooked in favour of a prime contractor at a unit price of more than R3 million above the cost of the bidder’s product (Arms deal now it’s R50bn, in Mail & Guardian, 12 April 2001).

(f) An important role player in the acquisition process personally communicated to several bidders that they would have to come to a specific arrangement with two South African subcontractors if their bids were to be successful (Arms deal now it’s R50bn, in Mail & Guardian, 12 April 2001).

(g) The German Submarine Consortium (GSC) came last or second-last in the technical and price evaluations of the submarine bid according to the formal value system and points allocation methodology (Heat rises over arms deal, in Mail & Guardian, 2 June 2000; and Nepotism in R32bn arms deal, in Mail & Guardian, 26 May 2000).

(h) Futuristic Business Solutions (FBS) did not have the capacity and had to subcontract the initial work allocated to them in terms of a contract until the merger with Conlog/Logtek. The making of undue payments (Arms deal now it’s R50bn, in Mail & Guardian, 12 April 2001).

(i) Thirty Government officials directly or indirectly connected with Government’s arms purchases received motor vehicles on discount prices (We’ve helped 30 VIPs get cars, says arms firm, in Cape Times, 8 April 2001).
(j) Possibility of payments/donations to individuals or political groups by tendering companies to either facilitate the winning of contracts or as paybacks for contracts awarded to them - that British Aerospace paid five million Rand to the ANC just before the awarding of arms procurement tenders (Arms deal supplier rejects “bribery” claim, in the Independent Group Newspapers, www.iol.co.za 2 March 2001).

(k) The Minister of Defence J Modise paid for shares in Conlog with a bribe received from a successful prime contractor (Say it ain’t so Joe, in Mail & Guardian, 15 March 2002).

By the end of 2000, the central issues of public and parliamentary concern about government’s arms procurement were dominating South Africa’s media. As S Mfenyana, Secretary of Parliament observes, the adoption by Parliament of SCOPA’s 14th Report on the arms procurement packages, and developments subsequent to its adoption, raised significant procedural and legal issues concerning Parliament’s oversight role, the conduct of relations between Parliament and the Executive and the role and functioning of committees of Parliament (Secretary’s Report: Third Session of the Second Parliament, January to December 2001).

The exploratory meeting, to be convened by SCOPA, with the “appropriate investigative bodies,” was held on 13 November 2000. At this meeting a decision was taken that “the Directorate of Special Operations of the National Prosecuting Authority (DSO), the Offices of the Auditor-General and the Public Protector and the (Heath Special Investigating Unit) HSIU would conduct a joint investigation in order to combine skills, resources and legal mandates.” Subsequent meetings of the agencies were held on 16 November and 1 December 2000 (JIT 2001 1.1.6.3-4). Thereafter, several statements were made in the media, including one by the Chairperson of SCOPA, (having chaired the exploratory meeting), on behalf of the four agencies, to convey their resolution at the meeting “that the four agencies are in unanimity that the HSIU, amongst others, should be involved in the investigation.”

The President was respectfully urged to consider this resolution of the four agencies by issuing a proclamation to that effect. Based on the

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2 Interview with G Woods MP (IFP) Chairperson, SCOPA, July 1999 – March 2002, Member, SCOPA, on Tuesday 9 March 2004, between 10 hr 00 & 12 hr 00, at Room 46, Good Hope Building, Parliament. Cape Town.
support expressed at the meeting of the agencies on 13 November, and amidst debates and arguments amongst politicians, commentators and political parties, about the type of investigation which should be conducted and which agencies should be involved, the Chairperson of SCOPA wrote to President Thabo Mbeki, on 8 December 2000, to “respectfully ask” for a proclamation to enable the Heath Unit to join the probe. In his letter, Gavin Woods wrote that the Auditor-General had written to him on 6 December urging that I seek your signature to such a proclamation.” Woods “respectfully requested” that the President gave the matter urgent attention.

Over time however, the ANC-in-Government, led by the leadership of Parliament, began to question the authority of the Chairperson of SCOPA, raising doubts about aspects of Parliament’s resolution when it approved SCOPA’s 14th Report of 2000. Drawing attention to “relevant details” of the Committee’s 14th Report to Parliament, the Speaker of Parliament, in her press statement, on 27 December 2000, thus implied that the Chairperson of SCOPA acted outside his powers by writing to the State President to encourage him to consider a proclamation for the HSIU to be involved in the probe into the SDP process and that it was not within the power of Parliament to “instruct the Executive” to conduct an investigation or to “subcontract its work” to any of the four agencies. The Speaker raised several questions in the “attention” she drew to “relevant

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3 As MPs agree, at the time of writing the 14th Report, a study was carried out which, inter alia clearly indicated the need for the inclusion of SIU in the arms procurement probe. The Auditor-General, Public Protector and Directorate of Public Prosecutions, in a meeting of the agencies, in Pretoria, on 13 November 2000, also seem to have jointly expressed a similar opinion. The Auditor-General, in his letters to Chairperson Gavin Woods, on 21 November and 6 December 2000, according to Gavin Woods, gave the same impression. In their Reports to the President, on 18 January 2001, advocates Jan Lubbe SC and Frank W Kahn SC were of the opinion that “it is imperative that all the agencies referred to in SCOPA’s 14th Report: the Investigating Directorate: Serious Economic Offences (under the authority of the National Director of Public Prosecutions), the Auditor-General, the Public Protector and the Special Investigating Unit should be involved at the earliest possible stage” of the investigation into the arms procurement packages. Although, it was also their view “that at this stage there is no prima facie evidence in law that any person or persons committed a criminal offence,” they insisted that “the irregularities (of the arms procurement processes) merit further investigation and that it is too early to conclude whether criminal offences will be revealed” hence their advice that investigations should continue (see Reports (A) and (B) from the Director Public Prosecutions Western Cape, Advocate FW Kahn SC, and Advocate J Lubbe SC, to the Minister of Justice and Constitutional Development, PM Maduna, 18 January 2001). Meanwhile Judge WH Heath had already asked the President for a proclamation to carry out an investigation into the arms deal following the Special Review of the Auditor-General. (Any member of the South African public can respectfully write to the President to consider a proclamation for an investigation in respect of serious allegations).
details” of SCOPA’s 14th Report, including, *inter alia* a) the question of eligibility, qualification, for writing to the President for a proclamation for a probe in respect of circumstances of serious public concerns b) whether or not SCOPA did subcontract its work and/or instruct the Executive and c) did the Chairperson of SCOPA actually act in excess of his authority in writing to the State President for a proclamation?

The Speaker, without consulting SCOPA members, themselves fellow Parliamentarians, as to the intent of their Report, adopted an interpretation of the Committee’s 14th Report which, for obvious reasons produced a domino effect, reverberating through every meaningful deliberation around the investigation into Government’s arms procurement packages, leading to a problematic relationship between the Opposition and Government members of SCOPA, if not between Parliament and the Executive (see Committee Minutes, SCOPA, May 2001; *Financial Mail*, 26 January 2001). In the words of the

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4 A rather fruitless search awaits serious parliamentary researchers seeking to uncover similar “attention drawn to relevant details” of any other committee’s report prior to 27 December 2000.

5 The role of the Speaker of Parliament, legislative scholars say, is “not an insignificant one.” The decision on all unresolved disagreements ultimately rests with the Speaker. The Speaker’s decision is final as there is no appeal against this ruling and the matter cannot be raised in Parliament. In his *Parliaments and Majority Rule in Western Europe*, H Döring points to some variation with respect to different parliamentary traditions and some clauses in the standing orders of all parliaments requiring that representatives behave in an orderly manner; however, in certain political situations, the Speaker has had to use considerable power in interpreting this vague norm. H Döring observes only little evidence that would point to the assumption that a Speaker clearly displays some form of political bias, and Speakers, in all Parliaments, within the scope of his study in 1995, have a highly respected and neutral position (Herbert Döring 1995, 204). MPs and the public alike agree, the Speaker could not invoke her “status” as Speaker when she “stepped off her throne into the hurly-burly of contested politics” (*Daily News*, 21 May 2001). That Parliamentarians across political parties and the public alike are witnesses to several interventions of the Speaker on burning issues in favour of the opposition parties, most often, against the will of the majority party, is testament to the respect and dignity unremittingly accorded Speaker F Ginwala. All the same, all minority parties in Parliament were in unity with even some independently minded ANC MPs in the opinion that Madam Speaker had, amidst the hottest parliamentary debate in SA’s short democratic history, “gone to the other side” of the Parliament and Executive relationship divide, in respect of her unilateral (without any legal advice) (*The Star*, 21 May 2001), and restrictive, interpretation of SCOPA’s 14th Report of 2000 to Parliament, in contradiction of legal counsels sought subsequently (see the Independent Group Newspapers www.iol.co.za May 2001; *Business Day* May 2001; *Mail & Guardian* May 2001; *Sunday Times* May 2001; Committee Minutes, SCOPA, 2001 & 2002).

6 In light of the evenhandedness with which Speaker Frene Ginwala painstakingly steered a nascent and “fragile” (Madam Speaker quoted in *The Star* 15 May 2001) Parliament to the enviable height it attained in less than a decade, the events of 27 December and its aftermath are all the more alarming. It should not be forgotten that it only took a few hours for the Speaker (against her party majority in the Rules Committee) to get the erring former Chief Whip of the ANC Tony Yengeni to appear before a full plenary session of Parliament rather than an *ad hoc*
Speaker of Parliament, ‘The Report adopted by the Assembly explicitly (not my emphasis) recommends “an independent and expert forensic investigation” for which the Committee will prepare a brief, and further “an exploratory meeting convened by the Committee” to which the four named and “any other appropriate investigative body” should be invited. The Report does not recommend that any or all of these bodies must be included, nor does it refer to the procedural and constitutional issues that would arise should Parliament wish to involve or instruct either independent or executive agencies or organizations in its inquiries’ (Speaker F Ginwala’s press statement of 27 December, in Committee Minutes, SCOPA, 29 January 2001). However, to the extent that this, as Douglas Gibson MP (DA) puts it, “unnecessarily legalistic” approach to the interpretation of the Report which had given the Government a “convenient excuse” to exclude the HSIU, is valid, the Speaker’s view is exactly as logical an interpretation as the opposite view in which the Committee’s 14th Report of 2000 to Parliament does not recommend, as Bantu Holimisa MP (UDM) argues, the exclusion of any of the four named bodies from the joint investigation it envisaged (see Arms deals and injured innocence, SAIRR www.sairr.org.za 5 February 2001; Forgetfulness breaks out, in Financial Mail, 26 January 2001; Committee Minutes, SCOPA, 28 February 2001). In fact, the ANC’s proposal, according to the Parliamentary Law Advisors (itself, very regretfully, just a summary of the Speaker’s view of the 14th Report, and rammed through SCOPA, on 28 February 2001, as the Committee’s 2nd Report on the arms procurement packages, with only the ANC component of SCOPA voting in support), “inadvertently shows that the 14th Report did indeed call for the Heath Unit’s inclusion” (Amendments to Committee committee (as favored by the ANC majority in the Rules Committee) and to say, “I forthwith resign from Parliament,” an event the ANC had struggled in futility to achieve long before Wednesday 5 March 2003 (see Sowetan, 6 March 2003). For this and other actions, she won the respect of her colleagues in the ANC and beyond. On the other hand, it only took the Speaker’s warning on 29 January 2001 that “SCOPA must consider what information it shares with the institutions comprising the JIT, (as) Parliament cannot fund their investigations, nor can Parliament approach donors without the approval of the National Assembly” for Jeff Doige MP (ANC) to follow suit in warning SCOPA, very improperly, on 14 February 2001, that, “We must be careful about the relationship between SCOPA and other committees… SCOPA is not a super committee” (see Speaker Ginwala’s press statement of 27 December 2000, in Committee Minutes, SCOPA, 29 January 2001; Committee Minutes, SCOPA, 14 February 2001). In line with Rule 208 of the Assembly SCOPA shall regularly meet with other committees as the Committee’s work transverses the work of almost all other committees of Parliament; SCOPA is therefore “the apex committee” – indeed, the super committee of Parliament. Unfortunately, it seems the Speaker’s intervention in this issue, especially her insistence that “in a democracy, the majority’s decision must prevail” had a negative impact on the quality of parliamentary and committee decision-making (see Mail & Guardian, 8 June 2001, Committees’ Minutes: SCOPA, Defence, and Member’s Interests Committee, 2001).
2nd Report, Committee Minutes, SCOPA, 29 May 2001). This was a distinct departure both from the original position of SCOPA on the issue as well as from the Committee’s established proud tradition of nearly a decade of deliberative and consensual decision-making.

Furthermore, in the controversy, which surrounded the arms procurement deal, Parliament was divided, not only between the ANC-in-Government and the opposition parties, but, of immense significance, some majority party MPs aligned with the minority parties in opposing the improper and irregular process through which Government entered into contracts with weapons suppliers. As pressure from the ANC executive and whippery increased on that margin of their parliamentarians who were independently minded in their conviction that a thorough probe into Government’s arms purchases was a matter of proper financial management, and the accountability to Parliament and the public of the Executive, Andrew Feinstein, an ANC senior parliamentarian, resigned from Parliament. Soon the rest of that margin complied with pressure to toe the party line of treating all issues concerned with the arms purchases as an ANC “internal matter.”

The crisscrossing amongst parliamentarians of majority and minority parties on contested issues, which, in Parliaments the world over, is seen as expressing the independent mindedness of parliamentarians, did occur during the debates on the Government arms procurement process, and saw the ANC standing alone while some of its backbenchers united with the Opposition in Parliament.

The Office of the Auditor-General, briefing SCOPA on 7 February 2001 on progress made in the investigation of the defence procurement packages, made reference to the allocation of R3 million to the SIU which was transferred to the other agencies when a proclamation for the SIU’s inclusion was refused. Could the SIU have been budgeted for in a joint investigation it was not to participate in it? According to the Deputy Auditor-General, Terence Nombembe, it was agreed at the planning stage of the joint investigation that the SIU’s capacities were needed (Committee Minutes, SCOPA, 7 February 2001).

7 To get a feeling of the extent to which some ANC MPs saw the proposed expert forensic investigation into the SDP process as both a conscience issue and a matter of accountability by executive to Parliament rather than an ANC-party political matter, see the transcript of SCOPA’s public hearings held on 11 October 2000 for exchanges amongst Gavin Woods (IFP), Laloo Chiba (ANC), Shamin Chippy Shaik (Director of Procurements, DoD), Jayendra Naidoo (Chief Negotiator, Defence Countr-trade Package), Andrew Feinstein (ANC) and Ron Haywood (Chairman, ARMSCOR). This meeting, as the date suggests, took place before the pressure on ANC parliamentarians to toe the party line in every discussion apropos Government arms procurement packages.
Members of SCOPA are in possession of correspondence from JIT through the AG’s Office, i.e., the Secretariat of JIT, which lays out the areas of focus for each of the four Units in a tabular form, thereby removing any doubt over the interpretation of the Committee’s 14th Report as to the involvement of the four units. On the contrary, if the SIU was not to be part of the joint investigation, as the Speaker implied, the reason for this allocation of funds is very hard to explain. It is, of course, public knowledge that the Speaker’s press statement, on 27 December, contained “input from the Executive” reflecting that she was, in this case, “distinctly executive-minded” (Not for the faint-hearted, in Mail & Guardian 30 August 2002).

With reference to the procedural and constitutional issues the Speaker raises, and which must inevitably arise should Parliament decide to involve, or “instruct,” either independent or executive agencies or organizations in its inquiries, what needs to be said is that as Parliament makes, it can unmake, law. And a Parliament striving for transparency and accountability should have passed laws enabling all four agencies, (as intended in SCOPA’s 14th Report) to investigate the Government’s arms procurement packages together, in an ad hoc way. And, for the record, SCOPA only suggested a multi-agency investigation with “the best combination of skills, legal mandates and resources” for the purpose of the investigation, rather than a new institution or agency, with a separate legal persona (see Committee Minutes, SCOPA, 2001; Arms deals and injured innocence, SAIRR www.sairr.org.za 5 February 2001). While, for the Speaker, “Parliament’s authority is (only) persuasive,” as it “cannot instruct the Executive,” JE Owens, on the other hand, draws attention to “parliamentary committees’ capacities to influence their host legislatures and the parties which control them” (see Speaker Frene Ginwala’s press statement, in SCOPA Minutes, 29 January 2001; John Owens, in Longley and Ágh 1997, 183). And for Bernard Crick (1968), “parliamentary control of the executive is a primary condition of effective government.” The issue here is, then, whether a nascent “fragile” Parliament should insist on oversight over the Executive’s single largest expenditure in the country’s democratic history? Does the ANC, sponsor of change for “a better life for all,” and whose “policy and principles espouse anticorruption and proper financial management,” acknowledge accountability for the stewardship of the public purse? (see ANC Manifesto 2004 www.anc.org.za/election/2004/manifesto; Mail & Guardian 1 March 2002; Cape Times 25 February 2002).
According to the Secretary of Parliament, the Speaker’s press statement on 27 December 2000 was “in response to media reports concerning the nature of the resolution that the Assembly had adopted” and in which “she pointed out that through its adoption of the Report, the House had not instructed the President to issue any proclamation regarding the work of the Heath Unit, that the proposal that SCOPA directs this external investigation and that the joint investigating team would report to SCOPA and receive instructions from it, was problematical, in view of the provisions of the Constitution” (Secretary’s Report to Parliament 2001, 24-5). The Speaker denies this. “The Speaker will not act on media reports” (see Arms Deal Review: Briefing by Speaker Ginwala, SCOPA Minutes, 29 January 2001, 2). Be this as it may, given that the Speaker “acted on media reports,” it is contended that the Speaker’s enlightenment of the public was a little hasty. The Speaker was not unaware that SCOPA could not have instructed the Executive via its 14th Report, as there was neither “an instruction to,” nor “any specific action needed by, the Executive” referred to therein (Arms Deal Review: Briefing by Speaker Ginwala, SCOPA Minutes, 29 January 2001, 2). The Committee also may not have

8 For SCOPA to “subcontract” its work to “other agencies” of the Constitution, which are neither financed by SCOPA nor report to it may be *legalistically* abnormal. But both SCOPA and the Joint Committee on Ethics & Members’ Interests were to wait and indeed waited for such “other bodies” (the Joint Investigating Team) to which Parliament could not “subcontract” its responsibility to conclude their work before SCOPA and the Committee on Ethics & Members’ Interests could proceed with their respective investigations on the arms acquisition packages (Committee Minutes, SCOPA, and Joint Committee on Ethics & Members’ Interests, May 2001). As this occurred without the leadership of Parliament noticing it, the question needs to be asked of Speaker Ginwala whether this was an abdication by one body to another agency. In blocking SCOPA’s recommended investigation into the arms deal, which was to be conducted contemporaneously with the joint investigating body’s work, the ANC component of SCOPA argued that SCOPA lacks the expert capacity to do the work (Committee Minutes, SCOPA, 29 May 2001, 14 February 2001). Whereas the European Union funds committees of Parliament including, as the Speaker suggests, “funding for good governance investigators.” Madam Speaker agrees, “research support is available” for SCOPA’s investigation into Government’s arms purchases from “an international forensic agency …” however she asserts that “the offer of research support has not been taken up.” And, although, as the Speaker says, “this investigation by SCOPA is crucial to the future of Parliament so we should be able to allocate resources to assist the Committee’s work” (Committee Minutes, SCOPA, 29 January 2001, 24 January 2001), the ANC members in SCOPA ruled that SCOPA lacks the capacity to conduct the very investigation identified as vital to the oversight by Parliament of the executive’s custody of the public purse. The claims by the ANC members of SCOPA and Speaker F Ginwala of Parliament subcontracting its work to other agencies and of SCOPA lacking resources and the expertise to do the work is both hollow and incoherent. The Chairperson, Parliament’s Committee on Defence, Thandi Rose Modise (ANC) could not imagine another reasonable explanation for why “Committees of Parliament, after a decade into the new democracy and, despite an injection of cash from the European Union,” have had “to beg, borrow and steal to acquire the support they need to do their job properly,” if not because ‘Speaker Ginwala does not want them to be too
intended any improper relationship with the joint investigating body as members of SCOPA had already clarified the Committee’s position on this issue in a press statement long before 27 December 2000. The Committee’s intentions, according to members of SCOPA (the ANC’s component of the Committee being the most insistent at the time, ironically), was to communicate with the joint investigating body on an informal level to ensure that their respective investigations were together leading to comprehensive coverage of the issues of public concern.9

Having led the way by “re-examining” a ratified document of a Parliament, in her own words, “still developing understanding and trying to give effect to the constitutional relationship between the Executive and Legislature,” Madam Speaker, opened a Pandora’s box from which a plethora of attacks were to be launched (Committee Minutes, SCOPA, 29 May 2001). The relationship between the Executive and the Legislature with respect to Parliament’s oversight of Government spending, reached a new low. The ANC members of SCOPA were subsequently berated by the Executive for letting the 14th Report, which called for a joint investigation, pass the Committee and they were instructed to further challenge SCOPA’s intended investigation and discourage any meaningful way forward apropos the joint probe. Thenceforth, ANC members of SCOPA were instructed to “check with their principals” – the ANC Chief Whip and the strong (so as not to) detract further from “her Chamber.” Paradoxically, the Speaker is in any case distinctly executive-minded’ (see Not for the faint-hearted, in Mail & Guardian 30 August 2002). In respect of the arms deal, a chorus of opposition party voices assert, the Speaker’s problem with allocating the resources promised SCOPA for its probe was a ploy for achieving “the one single aim of the Executive on the probe into Government’s arms procurement packages (which was) to marginalize, limit and subdue the investigation.”

9 Although Frene Ginwala denied it, the Parliamentary Law Advisor concurred with the Secretary of Parliament that the Speaker’s press statement of 27 December was a reaction to the “meeting of SCOPA with the investigative bodies, on 13 November 2000, and the press conference (by GG Woods) later that day on behalf of the four units and SCOPA” (Committee Minutes, SCOPA, 29 January 2001). It is our view that rather than SCOPA - “subcontracting its work” or “instructing the executive” - the four agencies, as a body, via its representative, informed the public of its resolution, i.e., what the team had deemed fit to do should the permission it sought for be granted by the President. For the purpose of clarity, after the meeting of the four investigative bodies which was chaired by the Chairperson of SCOPA, G Woods, said it was the deliberative consensus of the Auditor-General, the Investigating Directorate of Serious Economic Offences, the Public Protector, and 8 or nine ANC members of SCOPA present at the meeting that he should announce to the public, on behalf of the four bodies and SCOPA, of their resolution “that the four agencies named in SCOPA’s 14th Report of year 2000 to Parliament have agreed to work together as there is need for the four bodies to be included in the joint investigation into the arms procurement packages.” Gavin Woods said he was accompanied by the aforesaid ANC members present at the meeting of the agencies in Pretoria when he made this public statement, and, to date, this has not been refuted.
respective Executive member – before any decisions on the arms deal or related matters were taken (see Committee Minutes, SCOPA, 29 May 2001; *Is Smith just doing his job?* in *Mail & Guardian* 1 March 2002; *The last rites have been read*, in *Mail & Guardian* 1 March 2002). Senior members of the ANC whippery did not seem to see the issue in terms of parliamentary oversight, but saw the “ANC-in-Government (as) under attack (hence) the imperative that the lines between the ANC component of SCOPA and the ANC leadership be strengthened (so that) the ANC, from the President downwards, could exercise political control.” Everything passing through SCOPA to the plenary of the Assembly must first pass through the ANC caucus, and any leaks would be probed (*Sunday Times* 4 February 2001). The ANC component of SCOPA was to deal with the arms procurement packages as an internal party issue, rather than a public parliamentary matter.

In their press statement, *Background Notes on the Strategic Defence Procurement Packages for the Press Statement issued by the Ministers of Defence, Finance, Public Enterprises and Trade and Industry*, on 12 January 2001, the Ministers of Defence, Finance, Public Enterprises and Trade and Industry, cast serious aspersions on SCOPA’s 14th Report, approved by Parliament without debate, let alone dissent. According to them, it was full of “erroneous views,” “inaccurate assessments,” “exceedingly misleading,” “stretching credulity,” being based on “ill informed conclusions,” and “fuelled unwarranted speculation and assertions in the public domain,” because SCOPA, according to the Ministers, “had no first hand account of how the actual decisions were taken.”

As if the “re-examination” of this particular paper of Parliament had not already received its due, the Deputy President, on 19 January 2001, wrote a letter entitled *Letter from the Deputy President, Mr Jacob Zuma, to the Chairperson of the Standing Committee on Public Accounts, Dr Gavin Woods* criticizing SCOPA itself and discrediting aspects of its 14th Report to Parliament.10 For the Deputy President, the Report was, *inter alia* “a

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10 Following from the conviction and sentencing of Durban businessman Schabir Shaik - “an associate of the Deputy President” - on two counts of corruption, and one of fraud, Deputy President Jacob Zuma was fired from Cabinet and the National Executive Government and charged with two counts of corruption (see *The State versus Schabir Shaik & 11 others* CC27/04 31 May 2005, *Full text of President Thabo Mbeki’s speech*, in *Business Day* 14 June 2005; *Thales may join Zuma in the dock*, in *Business Day* 30 June 2005). In *the State versus Schabir Shaik & 11 others*, Justice HJ Squires held, as the State alleged, *inter alia* that on 30 September 1999, and at Durban, Schabir Shaik, acting for himself and all the charged companies, met the local director of the Thompson-CSF South African companies (which bided and won contracts in the
fishing expedition,” and had “extremely damaging assumptions.” “SCOPA (he charged) had seriously misdirected itself and thus arrived at decisions that are not substantiated by facts,” a “strange manner of proceeding,” he concluded. The Deputy President made reference to Speaker Frene Ginwala’s public statement on 27 December, where the Speaker “drew attention to relevant details of SCOPA’s 14th Report to Parliament,” viz “the Speaker is not aware of any resolution of Parliament or the National Assembly instructing the President to issue any proclamation regarding the work of the Heath Commission. Any such action would be of dubious validity. A Committee of the National Assembly has no authority to subcontract its work to any of these (investigative) bodies, or require them to undertake any particular activity, or to report directly to the
Committee. Nor are Chairpersons expected to act on major issues without the agreement of the Committee. Such direction as the Assembly may wish to give would require specific referral by a resolution of the National Assembly, and be subject to the procedures provided in relevant legislation” (Speaker Ginwala’s Press Statement, in Letter to President Mbeki from the Minister of Justice and Constitutional Development, Dr P Maduna, 15 January 2001).

Advising the President, in his Letter to President Mbeki, on 15 January 2001, regarding the requests from Judge WH Heath, Head, Special Investigating Unit, and G Woods, Chairperson, SCOPA for a proclamation, under the special investigating units and the special tribunals Act, 1996 (Act 74 of 1996), to enable the Special Investigating Unit to investigate serious allegations relating to the selection process of Government’s arms purchases, the Minister of Justice PM Maduna (MP) called the attention of the President to the Speaker’s media report and argued that ‘according to a press statement issued on 27 December 2000, “[t]he Speaker is not aware of any resolution of Parliament or the National Assembly instructing the President to issue any Proclamation regarding the work of the Heath commission. Any such action would be of dubious legal and constitutional validity.” Moreover, (Minister Maduna continues), Dr Ginwala, in the same press statement, states that “[a] Committee of the National Assembly has no authority to subcontract its work to any of these bodies, or require them to undertake any particular activity, or to report directly to the Committee. Nor are Chairpersons expected to act on major issues without the agreement of the Committee. Such direction as the Assembly may wish to give would require specific referral by a resolution of the National Assembly…” As far as I am aware, (the Minister concludes), there has hitherto been no request from Parliament or the National Assembly that the President should consider issuing a proclamation either establishing a special investigating unit or extending the mandate of the existing Unit to the matter referred to above. It would thus be incorrect

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11 One can only speculate what was implied above. Having been urged to so do by the AG, Gavin Woods said he wrote to the State President in his capacity as the Chairperson of SCOPA to urge him to consider a proclamation on the HSIU as was entirely consistent with SCOPA documentation and very significant notes by ANC members of SCOPA which clearly indicated the inclusion of the HSIU and which historically fed into the Committee’s 14th Report. The Rules of Parliament No 129 clearly states the authority of the Chairperson to carry out the decisions of the Committee on its behalf, particularly when Parliament is on recess. According to the Chairperson of SCOPA, no member of SCOPA has objected to this letter to date although some have objected to his interpretation of the Committee’s 14th Report (see Gavin Woods The arms deal investigation: accountability failure – a critique of the JIT Report, February 2002, John Kane-Berman Arms deal and injured innocence, SAIRR, 5 February 2001).
and, in fact, mischievous, for any person to argue, as has been done in certain circles, that if the President, for any legitimate reason, does not issue a proclamation under the Act, the President would be acting in defiance of Parliament.’ In the Minister’s opinion, the matter should not, at this stage, be referred to the HSIU, and no other unit should be constituted for the purpose of pursuing this matter. As the executive authority of the Republic (vested in the President by the Constitution) is exercised collectively with members of the Cabinet not excluding the Minister of Justice, the President, as advised, refused to issue a proclamation for the Special Investigation Unit to investigate the arms procurement deal.

The Constitutional Court, in the matter of the South African Association of Personal Injury Lawyers versus Judge WH Heath and the SA Government, on 28 November 2000, “held that the appointment of a judge to head the SIU violated the separation of powers required by the Constitution.” The Court stressed the importance of the separation of the judiciary from the other branches of government and the need for courts to be, and be seen to be, independent of the legislature and the executive so that they can discharge their duty of ensuring that the limits to the exercise of the public power are not transgressed. “This separation of powers prevents the legislature and the executive from requiring judges to perform non-judicial functions that are incompatible with judicial office and which are not appropriate to the central mission of the judiciary, and prohibits judges from undertaking such functions… The function that a judge is required to perform under Act No. 74 of 1996: Special Investigating Units and Special Tribunals Act, 1996 are of a nature incompatible with the independence of the judiciary and judicial office” (see Constitutional Court of the RSA, South African Association of Personal Injury Lawyers v the President of the RSA and another – CCT27/00, 28 November 2000).

On this score, there can be no other reasonable interpretation of the “spirit and essence” of this ruling by the Court than that Mr Justice WH Heath urgently be removed from the headship of the SIU to ensure, without undue delay, the separation of powers (see Letter from President Thabo Mbeki to Judge Wilhelm Heath, 19 January 2001). However, whereas the Constitutional Court (CCT27/00) ruled that “the provision of the Act that requires a judge or acting judge to be appointed as head of the Unit, and the appointment by the President of Justice Heath to this position were accordingly unconstitutional and invalid,” the Court, nevertheless, for continuity of work by the SIU, suspended these declarations of invalidity for a period of one year to ensure an orderly transfer of the leadership of the SIU to a functionary who is not a member of the judiciary. Whereas it is
an interpretation of the “spirit and essence” of the ruling by the Court that Justice WH Heath be removed without delay from the headship of the SIU to urgently ensure that the principle of separation of powers in a fledgling democracy is not further compromised, that same court judgment can, in our opinion, neither be interpreted as an urge by “our courts” on the President never to refer new matters to the SIU regardless of the degree of their seriousness, nor “make it undesirable for the President to establish a special investigating unit” for the investigation of matters of concern to the public (see Letter to President Mbeki from the Minister of Justice and Constitutional Development...). In neither, had the President deemed fit, would the “spirit and essence” of the Constitutional Court judgment have been “undermined” or “defied.” The President could still have issued a proclamation for the SIU to be part of the joint investigation with the headship of the Unit easily transferred to a non-judge, probably, an existing senior member of the SIU, to ensure the continuity of work stressed by the Constitutional Court as well as the relevance of the expertise, skill and experience of the Unit in the investigation without either “defying the courts” or “undermining its spirit and essence.” The judgment through which Judge WH Heath’s position in the SIU was ended did not in any way down play the expertise and experience of the SIU itself.

The opinion is strongly expressed that the exclusion of the SIU from the joint investigation into the Government arms acquisition programme had less to do with the aforesaid judgment of the Constitutional Court, CCT27/00, than the “attention” the Speaker, in her media statement, on 27 December, “drew to relevant details” of SCOPA’s 14th Report of 2000 to Parliament, and Deputy President JG Zuma’s “unnecessary and hostile” letter to Chairperson G Woods on 19 January 2001. It was these to which references were made in every important correspondence in respect of the Government arms procurement packages, from 27 December, through the exclusion of the SIU from the JIT up until the investigators’ submission of their Report to Parliament and the subsequent debate over it. Forgetfulness breaks out (Financial Mail 26 January 2001) concludes, “there is no doubt that Madam Speaker’s press statement of 27 December helped the ANC national leadership in its campaign to exclude Heath from the arms probe. It served as a point of departure in several (if not all) ANC criticisms of SCOPA for daring to raise questions about the Strategic Defence Acquisition Programme.” The discernible dismay among senior ANC officials at the recommendation of SCOPA that the concerns of the Auditor-General with regard to the defence procurement packages process be further investigated, the pressure on the leader of the ANC component of SCOPA Andrew Feinstein to resign, the reconstitution of the make-up of SCOPA and the
appointment of an ANC Chairperson VG Smith, all fell within the Deputy President’s office as the Leader of Government Business in Parliament. As Justice HJ Squires (2005) sums up, there may well have been other valid reasons for excluding the SIU from the joint investigation into Government arms acquisition programme, other than the Constitutional Court’s decision about Judge Heath’s role and status, but the tone of Zuma’s letter indicated obvious satisfaction in the decision. Furthermore, he gave it the widest publicity, including dispatch to the contracting parties involved on the arms acquisition process. If the Government preferred suppliers of the defence packages in the arms acquisition programme were not concerned about the outcome of any inquiry into the exercise, there would hardly be any need for that (see HJ Squires, in *The State versus Schabir Shaik & 11 others* 2005, 52) - an issue we will return to and elaborate on later in this work.

Now, Government insists there must be *prima facie* evidence in law that any person or persons has actually committed a criminal offence in connection with Government arms procurement packages before the President could issue a proclamation. But how does a lack of *prima facie* evidence of a criminal offence impact on the need for a comprehensive investigation? It is a fact that there was no *prima facie* evidence of criminal misconduct at this early stage of the investigation, however questions have been posed about the *integrity* of the arms procurement packages, both in terms of the awarding of main contracts and in the subsequent awarding of subcontracts – questions which have been raised in good faith by the SA Auditor-General and SCOPA (Parliament’s oversight body tasked with holding Government to account for its stewardship of the public purse).

In terms of section 2(2) of the Special Investigating Units and Special Tribunals Act 74 of 1996, the President may refer matters to the Unit on the grounds of, *inter alia* “any alleged improper or unlawful conduct by employees of any State institution” which has caused or may cause serious harm to the interest of the public or any part of it. In other words, SIU could have become involved in the investigation based on allegations rather than fully formed information, and on the basis that the Unit may prevent a loss to the State, rather than simply recover money that has already been lost. Given this, and in the light of well over *fifty* serious allegations in the public domain of impropriety in respect of Government arms procurement programme, one is led to believe that to insist that any potential impropriety in the arms purchases be assessed against a criminal standard of proof (wherein such crimes as fraud, corruption and theft should be proven beyond
reasonable doubt) is far off the mark. In his Democratic accountability in South Africa at crossroads, Colm Allan contends,

The fact of the matter is that most of the contracts making up the arms procurement deal have already been signed between the various parties (that is, between the State and primary contractors, and between the primary contractors and the sub-contractors). So the limits of any criminal investigation into the procurement process would be reduced to establishing the prevalence of extortion in the awarding of these contracts or, alternatively, instances of fraud and theft subsequent to the contracts having been signed. In the absence of uncovering any of the above common-law crimes the criminal investigation would remain silent on the crucial question of the integrity of the contracts entered into by the State in the first place. Consequently, it would not address the most important concerns of ordinary South Africans. Whether the ordinary citizens’ interest is met by awarding the main contracts to the most cost effective and economical tenders, and the realizability of offsets/jobs creation and economic development as agreed to at the sub-supply contracts, is the crux of the matter.12

These questions are not amenable to the principles and methods of criminal law. As Colm Allan argues, the integrity of the entire Government arms procurement packages will be questioned should contracts have been awarded to sub-suppliers based on cronyism or nepotism, putting public money at risk of ending up in the pockets of individual contractors instead of being invested in the creation of local manufacturing industries, trade opportunities and jobs.13 And, as these are actions, which do not constitute the

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12 Minister Alec Erwin was unequivocal in his submission to SCOPA, on 26 February 2001, that “the LIFT technical aspects and the NIPs/DIPs were decisive rather than the cost” in the choice of the prime supplier of the LIFT, hence Ministers admittance (inadvertently though) “that these investment and trade agreements (along with the job opportunities that they were to have created) formed the very basis for entering into the arms contract in the first place,” as Colm Allan argues (see Committee Minutes, SCOPA, 26 February 2001; Colm Allan Democratic accountability in South Africa at crossroads, 19 January 2001, as well as Why the involvement of the Special Investigating Unit in the arms probe is vital to the public interest, 26 January 2001, The Public Service Accountability Monitor, Rhodes University). And, noting that ‘it is primarily at the level of the subcontracting arrangements that the “offset” agreements for investment, trade and job creation opportunities would be realized in any event,’ Colm Allan concludes, “the integrity of the sub-contracting arrangements entered into are consequently crucial to the integrity of the entire deal.”

13 Beyond the argument in the footnote supra, the undue influence the DoD, ARMSCOR, PCB, JPT and “a Cabinet Committee” (words of the Head, Procurement, Department of Defence) exercised over the award of subcontracts inextricably links Government to the subcontracts, and does not exonerate the Cabinet, Government, from such responsibility, as claimed in the JIT (see JIT 2001 11.5.1.1(j) & (l), 11.11.4.15, Committee Minutes, SCOPA, 11 October 2000, 4). Responding to Nomvula L Hlangwana’s PM (ANC) question, as to why the Navy’s preferred
common law criminal offences of fraud and theft, the citizenry could not seek redress against the beneficiaries of any of these actions in a criminal court of law. But, in respect of civil law (where a person need only demonstrate one’s case “on a balance of possibilities” in order to successfully prosecute a civil case), it is an improper act, a wrongdoing, if, on the balance of possibilities, contracts were entered into contrary to the interest of the public.14

One can only wonder at the logic behind Government’s constitution of the SIU and its empowering of it with a special set of abilities to defend the public interest, when it decapitated and incapacitated it precisely at the moment the public needed it most. The

local company’s Integrated Management System (IMS) for the Corvettes’ Combat Suite was passed over for the French Thompson-CSF Detexis product, Head of Procurement of DoD Shamin Chippy Shaik told SCOPA: “A Cabinet Committee instructed the tender process not to take that risk” (Committee Minutes, SCOPA, 11 October 2000, 4). In light of evidence and admittance of a degree of the State Government’s involvement in subcontracts, and possible *quid pro quo* links between prime contractors and subcontractors, the Executive’s aim of delimiting their decision-making role and responsibility to the realm of primary contracts is to reduce the scope of executive accountability to Parliament. Only for the purpose of dismissing Parliament’s oversight of the Executive’s business in running the daily affairs of State could JIT assiduously try, as the team did in their Report on the arms deal, to erect a Chinese wall, and hermetically demarcate, between decisions of Government Ministers and Government Departments and decisions of State and those of the State Government.

14 In the adoption of the White Paper on Defence in May 1996 (White Paper), Parliament satisfied itself that there was a need to equip the South African National Defence Force, hence Government’s weapons procurement packages. This thesis does not contest the parliamentary approval of the arms acquisition programme for Parliament’s ratification of the Defence Review in 1998 mandates the purchases of weapons. Indeed, a dangerous precedence is being set in the “re-examination” of Parliament’s adopted documents and papers by the same MPs who presided over their ratifications. It is inconsistent, in fact, illogical, to contest Parliament’s approval of the strategic defence packages while simultaneously overseeing “the charges of corruption and conflict of interests surrounding the arms deal” because by the exercise of your oversight function over the deal you inadvertently acquiesce in its approval. Nor does it argue for the cancellation of contracts already entered into with Governments of other countries and major international arms companies in light of the large implicit cost (JIT 2001 4.7.8.4), and more importantly, other incalculable invaluable *costs* to be incurred. However, this thesis, in conjunction with, *inter alia* the Chairperson, Parliament’s Committee on Defence, doggedly campaigns for the investigation of “all allegations, all inappropriate actions, and appropriate action carried out.” This includes that “all wrongdoers” (those whose participations, undue influences, and decisions, during the strategic defence procurement process led to entering into contracts with suppliers who otherwise would not have won such contracts) “meet their just desert,” in the phraseology of the State President. For these interventions, see Gavin Woods, *SCOPA’s intended arms deal investigation – the interventionist causes of its failure*, January 2002; John Kane-Berman *Arms deal and injured innocence*, www.saivr.org.za 5 February 2001, *The last rites have been read*, in *Mail & Guardian* 1 March 2002; *Debate on committee reports on Joint Investigation Report into the Strategic Defence Packages*, 13 August 2002.
“powers and areas of competence and relevant experience particular to the SIU and distinct from the powers, areas of competence and relevant experience of the Judiciary, Public Protector and the Auditor-General,” is not at issue: if the establishment of the Judiciary, Public Protector and the Auditor-General preceded the inauguration of the SIU (in 1997) then the logic behind the establishment of the SIU justifies the work it does and ought to do; unless of course the Government’s inauguration of the agency was meant to be, from the beginning, a wasteful venture. And, to say, as Government does, “that the SIU was investigating over one hundred organs of State involving 221 580 cases,” does not immediately translate into saying that the Unit is “overwhelmed by work,” nor that it is exhausted, in which case it could no longer undertake matters of extreme concern to the public. The fact that “Cabinet is yet to be provided with any information to suggest an unlawful appropriation of public funds” is not a basis for the exclusion of the SIU from the joint investigation, in view of public allegations of irregularities and improprieties in the awards of main and sub-contracts (cf. Letter from President Thabo Mbeki to Judge Wilhelm Heath...; and ANC door slams on Heath, in Financial Mail, 19 January 2001). This reminds us of the entire purpose of the forensic investigation as recommended by the Auditor-General and SCOPA, which was to establish whether indeed there had been any irregular, improper, unlawful, appropriation of public funds, as variously alleged. Had whistle blowers’ information (including Patricia de Lille’s allegations) been established beyond all reasonable doubt at the time the information was given, on 9 September 1999, such facts would not have been termed allegations in the first place but prima facie facts, hence the investigation of the joint task team, or any other probe, for that matter, would have been both unwarranted and unnecessary.

Government’s “request that SCOPA indicate the specific matters it wants investigated and why, providing prima facie evidence which it believes justifies the investigation” so as to give proper and necessary direction to the prosecuting agencies, thus flies in the face of the Committee’s 14th Report; and it isn’t coherent because, in a related and similarly serious matter, the declared “existence of prima facie evidence sufficient to warrant an investigation” in terms of the National Prosecuting Authority Act No 32 of 1998 s 28, led to nothing. The Investigating Directorate of Serious Economic Offences’ investigation into “Deputy President JG Zuma’s possible involvement in transactions allegedly relating to the Government’s controversial arms deal” concluded: “After careful consideration in which we looked at the evidence and facts dispassionately, we have concluded that, while there is a prima facie case of corruption against the Deputy President, our prospects of success are not strong enough. That means that we are not sure we have a winnable case”
Both the Deputy President and the Minister of Justice alluded to the justification of SCOPA’s brief to JIT in their letters to the Chairperson of SCOPA on 19 January 2001 and the President on 15 January 2001, respectively. They seem in the dark as to what was to be investigated by SCOPA and the HSIU, and a fortiori the JIT. The Speaker of Parliament also establishes a rationale for such a brief when she complains that “the SCOPA report does not say how the wide-ranging investigation is to be conducted” (see Arms Deal Review: Briefing by Speaker Ginwala, Committee Minutes, SCOPA, 29 January 2001, 2). The Auditor-General’s submission to SCOPA on 14 March 2001 reveals the extent to which his office and those of his colleagues comprising JIT were uncertain about the entire concerns of SCOPA and needed a brief on the Committee’s concerns, which they were established to investigate. In the words of the Auditor General, “the (joint investigating) team is looking at all the allegations and concerns raised by SCOPA in its 14th Report. It would be very helpful if you specifically indicate what SCOPA’s needs are, rather than leave it to our interpretation. What (SA Fakie asks of SCOPA) are the concerns of SCOPA that the Auditor General’s Office should address? The Parliamentary legal advisor has this morning already referred to the dangers of vague wordings” (Committee Minutes, SCOPA, 14 March 2001, 3).

All these are suggestions that, although the team had declared its capacity to investigate the weapons acquisition process, it still needs the “added value of the brief,” and that in issuing the team with a term of reference, SCOPA neither pretends to be a supper-auditor nor limits the investigators’ scope of investigation, contrary to the ANC’s VG Smith (see Committee Minutes, SCOPA, 14 February 2001, 2). At any rate, SCOPA was subsequently advised that a) it cannot instruct these investigating agencies as there are different forms of accountability for the four investigative bodies named in the SCOPA 14th Report and b) there is no statutory provision for the establishment of such a joint

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15 In setting out to neutralize the independence and deliberative orientation of SCOPA, the ANC-in-Government shows here how party-majoritarian democracy and deliberative democracy can part ways with a consequent decline in the quality of democracy itself. The theoretical issues involved are thoroughly discussed in the introductory Chapter one and concluding Chapter eight.
investigative body (see Arms Deal Review: Briefing by Speaker Ginwala, Committee Minutes, SCOPA, 29 January 2001, 1; Letter to President Mbeki from the Minister of Justice and Constitutional Development...). However, the concern of “the team” for a brief in respect of the intended joint investigation raises very specific questions, viz a) was SCOPA’s actual recommended investigation into Government weapons purchases carried out? b) were the terms of reference, which the investigating team declared they needed from SCOPA issued? and c) by whom? d) what “allegations and concerns,” in this regard, would have been investigated should the controversial arms procurement have been probed? or, rather, what “wide-ranging investigation” was “conducted,” given the vagueness of SCOPA’s 14th Report as variously expressed by the leadership of Parliament, the Parliamentary law advisor and the investigating team themselves, through the AG, their coordinator? e) what conclusions could be drawn from this investigation in the event of it proceeding without the much-needed terms of reference?

Opposition parties and parliamentary observers concur, in respect of 27 December, that Speaker Ginwala’s conduct, in relation to Parliament and the arms deal investigation, involved a dereliction of duty and the intentional obstruction of parliamentary processes. She was responsible for the stalling of the 14th Report of 2000 by SCOPA to Parliament, and improper interference in both the Committee’s function and constitutional structures such as the National Directorate of Public Prosecutions, the Public Protector and the Office of the Auditor-General, the three agencies which probed the arms deal. Commentators agree that the Speaker’s involvement in the arms deal investigation “has not been her finest hour” (see Woods refuses to apologise to Ginwala, www.iol.co.za 22 May 2001; Ginwala takes more flak – this time from Leon, in Daily News 21 May 200). But as she herself has said, “you must remember that I am a politician. And I became a politician before I became a speaker” (Feisty Frene under fire, in Mail & Guardian, 25 May 2001). The question then arises as to whether Madam Speaker, the politician, can be accountable to both the ANC and be answerable to Parliament. While her contribution to the establishment of a democratic parliamentary tradition in a “fragile” Parliament is praiseworthy, ‘when there was a clash between her role as a politician and her role as a speaker (commentators say) “her role as a politician has sometimes won”’ (see ANC uses majority to clear Ginwala, in Cape Times, 8 June 2001; Ginwala defends her actions on arms probe, in The Star 21 May 2001; Ginwala takes more flak – this time from Leon, in Daily News 21 May 2001). They see instances of “error, blemish, on the record of her good leadership,” providing a compelling case against her (Business Day 27 May, 30 May, and 10 June, 2001, Mail & Guardian May and June 2001, the Independent Group
Newspapers www.iol.co.za May and June 2001). Given “her two hats,” they feel that over the 2-year period of the (new) highly politicised and adversarial South African Parliament, she has demonstrated her political commitment to the ANC in support of the Executive and her party bosses rather than to Parliament in the investigation into the multibillion Rand arms deal. Commentators say she failed to live up to the principles of parliamentary convention when Tony Yengeni, the former Chief Whip of the ANC, contemptuously refused to answer the queries of the registrar of Members’ Interests Committee. And she was silent when the Ethics Committee passed the buck in dealing with Yengeni’s contempt. They feel she revealed her loyalty to the ANC rather than to Parliament when she tried to discipline Patricia de Lille MP (then PAC, now ID) for naming various ANC MPs who had allegedly received payments from the apartheid government. They feel she did the same with Parliament’s somewhat limp response to the unconstitutional attack by former Minister Penuel Maduna on former Auditor-General, Henri Kluever, for covering up the alleged theft of R170-million in oil money.

For her, Speaker Ginwala’s “too many hats” in her membership of the ANC’s key national decision-making structures “is not an issue, I dealt with that in 1995. We’re no longer a British colony. If you look at other examples of speakers around the world, you’ll see that in some cases they’re leaders of political parties” (see Saturday Star 18 May 2001; Business Day 22 May 2001; Mail & Guardian 25 May 2001). According to Madam Speaker, speakers in other countries often play a political as well as a presiding role, and sometimes even act as head of government. However, in the US, the split-party control of Congress and the Presidency is the preference of the public, which is maintained by Congress (LD Longley and RD Davidson 1998, 229). In Britain, the speaker resigns his or her party and has never been removed from office when there has been a change of government. A labour speaker remains in office even if a Tory government is elected. As Labour Party MP Barbara Follett puts it, this tradition is “accepted by all parties. It does work well. As speaker you have to be impartial and you have to resign the whip” (Feisty Frene under fire, in Mail & Guardian 25 May 2001). Another British Labour MP says the UK Parliament would regard a controversy of the multibillion Rand arms deal type as “the utmost test of Parliament’s scrutiny role.”

The Speaker wishes to be accountable to the public if found in a political position on an issue before her, “I have said in the past that the day I take a party-political position in Parliament, people must come to me” (Saturday Star 18 May 2001). Speaker Ginwala would either demand apology or threaten charges of defamation against fellow MPs in
such instances, and rather than stand corrected, she would prefer her fate, as Speaker, to be decided by an ANC majority in the House. “These are serious accusations to make, particularly against an elected presiding officer. It is quite unacceptable that a member should attack a presiding officer in the media on these serious grounds, and not raise them substantively within Parliament,” says Madam Speaker of Gavin Woods’ (MP) critique of her intervention on the work of SCOPA (Ginwala calls on MPs to examine her conduct, www.iol.co.za 15 May 2001). “I just want him to justify these comments,” she added, “When the Speaker of Parliament steps off her throne and steps into the hurly-burly of contested politics, she cannot invoke her speakership and the dignity of the chair of Parliament to defend herself,” was her response to Tony Leon’s (MP) comments on the consequences of her intervention in the political sphere where she should have been seen to be a neutral arbiter (Daily News 21 May 2001; Business Day 22 May 2001; The Sunday independent 19 May 2001). “Apart from being defamatory this letter contains very serious allegations of my conduct as the presiding officer of this House, which is why I am referring it to you (ANC majority Assembly and MPs) to decide,” were the words of Madam Speaker against Bantu Holomisa (MP), reflecting once again the ANC party-political alignment she assumed in Parliament in respect of the Government’s arms procurement programme (Business Day 25 May 2001; The Star 21 May 2001; Mail & Guardian 25 May 2001; the Independent Group Newspapers www.iol.co.za May 2001).

As argued in Put democracy before party, the Sunday Times editorial of 27 May 2001, a feature of the more politicised and adversarial SA Parliament is the adoption of majoritarianism as a decision rule by the ANC. Sunday Times (27 May 2001) says Speaker “Ginwala, in her actions over the arms deal, and in the Yengeni cases, is part of that trend. She, too, has fallen in step with a stronger party line.” Although “Ginwala roundly rejects suggestions that she has been partisan” (see Passing judgment on Parliament’s powers, in Financial Mail 2 February 2001), How does the majority rule? (Mail & Guardian 8 June 2001) records her view, viz “in a democracy, the majority’s decision must prevail.” Following this view, the majority party in Parliament has, as Put democracy before party observes, stated again and again that since the majority elected it, the ANC will not fear to rule. Accordingly, during the arms procurement debates, minority reports in Parliament were not tolerated, as the assertion was that the view of the majority must be given the respect it deserves.

But while it is true that “democracy means that the majority must rule” (see Committee Minutes, SCOPA, 14 February, 28 February and 11 December 2001), it is also true that,
in a context like South Africa’s, where democracy is, in the words of the Speaker “fragile,” (Sunday Times 27 May 2001), special care must be taken to protect it. Care must be taken to reach consensus. Care must be taken to allow minority parties to have their fair say. And care should be taken when Parliament finds itself in conflict with the executive to ensure that the interests of democracy – and not those of one party – are upheld. In a democracy as young as SA’s, it is essential that there is vigorous and robust debate about open accountable clean government. An effort must be made to make parliamentary debates a genuine engagement. Put democracy before party bemoans Parliament fast becoming a place where parties hurl insults at each other and where the person who shouts loudest and filibusters,\(^\text{16}\) rather than the one who argues best, wins,

\(^{16}\) The public decry and condemn the events which precipitated both A Feinstein’s resignation from Parliament, and G Woods’ resignation of the Chair of SCOPA. Commentators and MPs alike have variously described these as, “saddening,” “regrettable” “a massive blow to the credibility of SCOPA and to the course of vigorous oversight and accountability.” A certain ANC leader on SCOPA, however, sees Woods’ “surprise” resignation as “a publicity stunt,” as he was “shocked and dismayed that Gavin Woods chose to resign in this fashion” (see Woods quits SCOPA over ‘ANC Interference,’ in Cape Times 25 February 2002). Is Smith just doing his job? (Mail & Guardian 1 March 2002) however, perceives this ANC leader on SCOPA as ‘an ambitious politician understood to have said that the handling of the arms deal would be his “political Rubicon,”’ a “master filibuster” (see Sunday Times 3 March 2002; Mail & Guardian 1 March 2002; Cape Times 25 February 2002; Mail & Guardian 2 February 2001; Mail & Guardian 25 May 2001; Mail & Guardian, 23 November 2001; the Independent Group Newspapers www.iol.co.za 2001 & 2002). Mail & Guardian (1 March 2002) highlights VG Smith’s surprise deployment to SCOPA, which conducts work in a nonpartisan way and resists attempts to politicize its business and in which each MP interrogates government officials in the same way as if they represent the views of the whole committee, not a single party: “up to this day I don’t know why I was made (SCOPA’s) deputy chair” - a purely technical committee, whose work and modus operandi contrasts with the ordinary portfolio committees where members are entitled to represent their respective parties’ material and ideological interests. VG Smiths’ zeal and longing for membership of the Public Enterprises Committee - a committee of party policy interest - is not accidental, “If you say walk into a meeting and disregard ANC policy, that is never going to happen. If you say come in there and regardless of party politics do what is proper financial management, we will support that because it coincides with ANC policy...in the organization I come from, we have to consult” (Cape Times 25 February 2002; Mail & Guardian 1 March 2002). He is confident, SCOPA will undergo a renaissance during the arms deal imbroglio, and that party loyalty does not compromise the committee’s oversight over public finances, “I have no guilt saying that I am a member of the ANC, because the ANC’s principles espouse anti-corruption and anti-mismanagement” (Mail & Guardian 1 March 2002). Smith is sure, “there is no SCOPA party. People in SCOPA were a real team when I joined it. And there is nothing wrong with being a team. But I firmly believe that I am in politics and in Parliament not to conform, but to transform. Because of the different style of operation that I and some other members – I don’t think I was the only member – adopted, things had to change at SCOPA. Certainly the ANC component had to change.” Yet, as Woods quits SCOPA over ‘ANC interference’ observes, Smith denies that SCOPA had become politicized over the arms deal investigation, “I don’t understand what he (Gavin Woods) means by de-politicizing the
and it cautions that a mud-slinging match wherein members of Parliament blindly follow their party loyalties does not serve democracy at all.\textsuperscript{17}

Speaker Ginwala contends that to assert that ANC MPs need to act independently of their party in order to ensure effective oversight is wrong. “No MP in Parliament is independent of their party. They are selected by their parties. That they must be independent of Government is a different thing,” she warns (see \textit{Passing judgment on Parliament’s powers} (\textit{Financial Mail} 2 February 2001). The Speaker did not come forth about the ways in which ANC component of SCOPA could be both independent of Government while taking instructions from the ANC Executive, ANC caucus, whippery, and its other “heavyweights” on matters of proper financial management. However, the events which played themselves out during the debates on Government’s controversy-shrouded multibillion Rand expenditure on weapons of war (at a time of supposed fiscal austerity and peace) are typical of the dangerously imbalanced \textit{modus vivendi} she alludes to. Of special interest to the principle of executive accountability to Parliament is how a committee can determine conformity with financial management relations and practices if its reference point is the interests of the parties to which its members belong. Of course “the logical outcome of such a process is that anyone with connections to the majority party will be above reproach, and those without such connections will face the wrath of the committee” (see \textit{The last rites have been read}, in \textit{Mail & Guardian} 1 March 2002).

Pieter Pretorius, in his dissertation on the Office of the Speaker of the SA Parliament, stresses the need for a speaker to both balance all contending interests on an issue and maintain the support of the whole house. ‘In a constitutional dispensation based on proportional representation it would be essential that the Speaker retain “the absolutely independent and impartial nature of the Office” ’ was his conclusion, after a survey of democratically elected legislatures the world over (Pieter Pretorius quoted in \textit{Feisty Frene under fire...}). Pretorius emphasizes the need for the Speaker to always ensure credibility among all MPs and all political parties – a role which has been described as well nigh impossible for Speaker Ginwala, being a member of the national executive council of the ruling party. For Barry Streek (\textit{Mail & Guardian} 25 May 2001), it is “a great pity” that in the wake of the arms procurement controversy and conflict over the committee. I disagree SCOPA is politicized” as it has been “in the interest of certain individuals” to portray the committee as dysfunctional.

\textsuperscript{17} See \textit{supra} introductory Chapter 1 and \textit{infra} Conclusion on the tension within liberal democracies between party-based majoritarianism and the deliberative imperatives of democracy.
Speaker’s role, neither Ginwala nor the ANC seem likely to change their positions in order to set a different precedent for South Africa’s post-1994 democracy.

The powers of the Speaker are usually set, in traditional parliamentary democracies, by accepted precedents rather than the constitution. As parliamentary procedures are the results of precedents, and rarely legal or constitutional imperatives, it is proposed, as a novel, forward looking, precedent, to help propel the new democracy in SA to the heights it aspires, that the Speaker be barred from political activities, and required by protocol to be seen to associate equally with members of all political parties. The Speaker should resign his or her party on appointment into the Office of the Speaker. Save for proven impropriety, the Speaker should not be removed from office, irrespective of the alternation of political parties in government and there is no need to be embarrassed about copying the West and America either: the SA Constitution including its Parliament, already resembles several of these, but may need structures even a little stronger than these. Such questions can only be answered within the context of their special circumstances, however.

The manner in which SA institutions reacted in respect of the arms procurement investigation was, according to Koos Van Der Merwe MP (IFP), (Speaker in eye of storm, in Business Day 30 May 2001), a bad precedent which, if entrenched, will set parliamentary democracy back for many years to come (if not forever). Accusations and counter claims of “defamation” of character, “stalling,” “sidelining,” and “obstructing” the parliamentary process and parliamentary justice, are matters that would ordinarily be adjudicated by a speaker required by the wisdom of convention to be always above controversy, party and issue. But, here, Speaker Frene Ginwala was right at the centre of all sorts of allegations including having, of her own accord, and quasi secretly, effectively ruled that the investigating bodies, the Auditor-General, the Public Protector and the Directorate of Serious Economic Offences are not accountable to Parliament, and of deliberately withholding the resources SCOPA needed to conduct its own further investigation, hence denying the Committee its constitutional powers. Commentators are of the view, then, that the Speaker simply exercised powers of her own, with no basis in a speaker’s traditional role.18

18 Thus, the exclusion of the Special Investigating Unit from JIT did not really have any constitutional foundation but was apparently intended to weaken the JIT’s ability to probe into and clarify the arms deal. The Speaker’s intervention was the beginning of the process whereby the Government sought to ensure that the arms deal was not thoroughly investigated. Her
It is advised that MPs raise the dignity of the Speaker of the SA Parliament, and learn a lesson from the problematic conduct of Speaker Ginwala. This, it must be emphasized, is an institutional, rather than personal, matter. Did the Speaker play a disproportionately prominent role in her interactions with SCOPA and the Executive on Government’s controversial multibillion Rand arms expenditure - one far from the model of a speaker who speaks only as mandated by the House? Should the Speaker of Parliament be seen to be an impartial arbiter, or a magistrate, a commander, a controller, of the House? Whether Parliament becomes, in the aftermath of the SDP process debate, the monitor of the Executive rather than vice versa, and the Speaker the magistrate of Parliament, instead of vice versa, will mean much for accountability in the nation’s new democracy. For some, however, we have already seen the death of transparency, accountability and good governance in the short history of democracy in SA as a consequence of the neutering of SCOPA “unless (of course) the ANC can pull itself back from the brink and revert to the position it introduced with the advent of democracy by insulating SCOPA from party politics and allowing the members of the committee to determine by consensus whether financial regulations have been transgressed” (Mail & Guardian 1 March 2002).

With the leadership of Parliament leading the way “in unjustifiably challenging the Committee’s work,” and amidst the controversy surrounding the Government arms procurement packages, the Executive weighed-in heavily in the work of SCOPA and the three agencies finally chosen by the Executive to investigate its weapons purchases (see The Mercury 22 May 2001; Mail & Guardian 25 May 2001 & 1 March 2002). It is possible to point to various actions and statements by Government suggestive of its objections to the proposed investigation into the arms acquisition process that go far beyond its rejection of Judge WH Heath. Arms deal and injured innocence (SAIRR, 5 February 2001) records certain inaccurate claims by the Executive about the relevance of the Constitutional Court judgment to the constitution of JIT and allegations about SCOPA’s 14th Report of year 2000 to Parliament that do not stand up to scrutiny. As commentators say, the ANC component of SCOPA was subjected to ministerial pressure on the scope of the inquiry and the participation of Judge WH Heath (see The Sunday
Tribune, in Arms deal and injured innocence). It is public knowledge that in the aftermath of the meeting of the investigative agencies in Pretoria, ANC members of SCOPA were called to the President’s Office in Tuynhuys, Parliament, and that after this meeting the ANC members, in the majority on the Committee, were reported as having endorsed the State President’s decision to exclude Judge WH Heath. Subsequent to that meeting, says Arms deal and injured innocence, senior members of the ANC whippery made it clear that ANC members of the Committee would be subject to party discipline (see Yengeni denies arms-deal interference, www.iol.co.za 4 February 2001; Committee set to debate arms-probe, in The Star 4 May 2001; The last rites have been read, in Mail & Guardian 1 March 2002).

Andrew Feinstein, leader and spokesperson of the ANC members of SCOPA who had favoured the probe and had closely worked with the Committee’s Chairperson, was effectively demoted and replaced in that senior position by the party’s Deputy Chief Whip. But to what purpose would have been Government and party pressure on

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19 For the purpose of thwarting SCOPA’s oversight activity over the arms procurement packages, the ANC brought new political heavyweights who had no appreciation of the arms procurement into the Committee. Old members became more partisan and aggressive in the way they dealt with the arms acquisitions related matters at the Committee’s meetings and, though, showing little initiative apropos of matters of public finance, were very conspicuous in the ANC’s management of SCOPA. 2001 saw on-going interventions, instructions, by the then ANC Chief Whip, and attempts to intimidate the ANC component of SCOPA into dealing with the Government arms acquisitions programme as an internal ANC matter rather than a public Parliamentary one, while other senior ANC non-members of SCOPA developed approaches to be used by the ANC in the Committee. This determination to defend the ANC’s interests by members almost immediately split over to Committee work which did not concern Government arms purchases, but where there was a possibility that these issues, if pursued, might embarrass Cabinet Ministers and senior Government officials (see Mail & Guardian 2 February 2001, and 1 March 2002; Gavin Woods The arms deal investigation: accountability failure – a critique of the JIT Report...). This resulted in the ANC using its majority to ram its positions on the Committee to ensure that the will of the leadership of the ANC is served, regrettably, in stark contrast with the non-partisan and consensual type decision-making that had characterized the Committee since 1994 (see The Star 28 February 2001, Business Day 3 September, and 13 December, 2001, Mail & Guardian 8 June 2001). In fact, with the arms acquisition programme, voting as a decision rule - the Don Gumede introduced, and much vaunted, option - was orchestrated, formalized and factored into SCOPA’s internal organizational mechanism. By March 2001, through proposals put forward and espoused by the ANC’s DM Gumede, GQM Doidge, VG Smith, and BW Kannemeyer respectively, voting was, as a mechanism for decision-making, adopted in SCOPA, where Gumede and Doidge considered it wishful thinking that the Committee will always overcome differences and deadlocks without pro-actively instituting the voting mechanism as a decision procedure in anticipation of difficult times (see Committee Minutes, SCOPA, 28 February, 7 and 14 March, 2001). When forcefully steamrollering through the Committee’s 2nd Report on Government weapon purchases on 30 May 2001, the ANC rejected the contributions of
SCOPA (dating back to the Tuynhuys meeting in mid-November, 2000 and thereafter on 18 January 2001), the changes to its composition as well as threats that ANC members of the committee would be whipped to party discipline? SCOPA, the super Committee of Parliament, is specifically appointed to scrutinize the activities of government as a whole, and to ensure that government only spends in accordance with the stated intentions of Parliament. The Executive is dependent on Parliament to appropriate money and it must be accountable to Parliament for what it does with that money. In the words of *Arms deal and injured innocence*, “it is hardly appropriate for the Executive to stipulate the terms under which it will be investigated by Parliament, to reshuffle the personnel involved, or suggest that they will have to be subordinate to party discipline.” Other key watchdogs, the Auditor-General, SA Fakie, the Public Protector, SAM Baqwa, and the National Director of Public Prosecutions, BT Ngcuka, subsequently adjusted their original positions on the involvement of Judge WH Heath, or at least, found it expedient to have stressed certain conditions that have all along applied in respect of the SIU.

A Report in *The Sunday Tribune* (quoted in *Arms deal and injured innocence*) had it that SA Fakie views the attacks on his *Special Review* [RP 161-2000] as “posing a serious crisis for his office.” It is public knowledge that the Auditor-General had confirmed in writing, after the meeting of the four agencies on 13 November 2000, that they had reached agreement on the specific areas of investigation each would cover. Messrs SA Fakie and SAM Baqwa, documentation shows, initially supported Judge WH Heath’s involvement. The Auditor-General in fact said that the investigation needed the “special skills and experience” of the Heath Unit, and he has subsequently confirmed that this was his view, but he has now added the rider that it was “all along” dependent on the Unit’s obtaining the necessary presidential proclamation. *Arms deal and injured innocence*

the three opposition parties – DA, IFP and UDM – even refusing to accommodate minority views, as is allowed by the Rules of Parliament numbers 137 and 148. The previous consensus decision-making procedure with its consultative role of deliberation in decision-making and which set out seriously to respect and deepen the equality of individuals, was abandoned for an aggregative, majoritarian, approach (see Committee Minutes, SCOPA, February, March, and May, 2001). By 14 February 2001, barely ninety days after the adoption of the 14th Report and the controversy in its aftermath, SCOPA agreed not to process between 17 and twenty reports outstanding since 2000 from the Auditor-General (Committee Minutes, SCOPA, 24 January and 14 February 2001). Close observers of the Committee’s difficult year 2001 are aware that it was these interventions and conflict which led to the discordant relations and dysfunction within the Committee, and in turn accounted for SCOPA performing worse than any other year since its inception.
The odd note it strikes to now stress the requirement of a proclamation, which has indeed been necessary ever since the Unit was established in 1996.

In their letter to the Minister of Justice on 22 December 2000, the Public Protector, the Director of Public Prosecutions and the Auditor-General abruptly revised their view to now exclude the HSIU after agreeing to the HSIU involvement at the 13 November 2000 meeting in Pretoria. Whereas SAM Baqwa, and SA Fakie now saw no need for the involvement of the Heath Unit “at this stage,” BT Ngcuka “do not know what the hullabaloo is all about Heath. I do not understand it. We don’t need him” (see Arms deal and injured innocence…; We don’t need him, says Ngcuka, in The Star 24 January 2000).

Again, one can only speculate about the interventions, which led to this abrupt change of mind by the custodians of the trust of the South African citizenry. It is known to observers that the JIT met with the Executive a number of times and that in one of these meetings, in May 2001 the investigation into the arms procurement was discussed with the Auditor-General. It was reported in The Sunday Times that the Public Protector, the National Director of Public Prosecutions and the Auditor-General had met in Pretoria on 10 January and had subsequently written to the Minister of Justice to tell him they could carry on with the investigation without the HSIU. As one newspaper comments, they have adopted views “similar to the Executive,” but gave no satisfactory explanation as to why. “If a desire not to antagonize the Executive is the reason, they have tacitly confirmed the wisdom behind their original endorsement of the proposal to involve Heath,” Arms deal and injured innocence concludes. Government thus interfered at a very early stage in an investigation in which it may eventually stand accused. Through words and actions which might be interpreted as suggesting some sense of guilt vis-à-vis the series of arms purchase transactions, the Executive tried to win public sympathy, creating the impression that it had been falsely accused by people who themselves not

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20 On 9 September 1999, midway through the Auditor-General’s decision on the need for a special review of the procurement process and the Defence Minister’s signature on the finalized Special Review, Patricia de Lille (then member of the Pan Africanist Congress (PAC) and now of the Independent Democrat (ID)), an opposition MP, made allegations of “kickbacks” accruing to some of the key players in the arms procurement process, including government negotiators and private businesses, and moved for a notice of motion in Parliament for the appointment of a judicial commission of inquiry to investigate these allegations. There is nothing to suggest that she mentioned any person by name in that broad statement, let alone the new Deputy President. But the very same day there was issued by the Presidency an emphatic denial that Jacob Zuma was involved in any such activity, and, as Justice HJ Squires, in The State v Schabir Shaik & 11 Others, says, “that would only have been done if it was believed that de Lille’s general statement of this included him, as in fact it did,” in addition to others whose names are yet to be officially made public (HJ Squires 2005, 39-40).
The SIU and the Joint Investigation into the SDP Process

only flout the Constitution but also refuse to produce evidence in support of their claims. Whether or not Government feared that the probe into its controversial arms purchases would uncover corruption should the SIU not be excluded can only be speculation; nonetheless the risk is obvious that Government’s interference with the probe has left any “not-guilty” verdict, by a joint task team it chose to try itself, suspect.

The SIU did not form part of the investigation into the Government arms acquisitions programme as the President refused to issue a proclamation; hence the probe was undertaken by the Public Protector, Auditor-General and the Directorate: Serious Economic Offences (DSO) under the National Directorate of Public Prosecutions. Areas of responsibility of the three agencies, viz the Public Protector, under the Public Protector Act No 23 of 1994 s 7, focused on the quality of the SDP contracts and unethical conduct by any of the public officials; the Auditor-General, through the Auditor-General Act No 12 of 1995 s 3, was to conduct an extensive forensic investigation; whilst the DSO, under the National Directorate of Public Prosecutions (NDPP) Act No 32 of 1998 s 7 and 28, would look into allegations and suspicions of criminal conduct.21 The agencies’ separate reports were coordinated into a joint report by the Auditor-General.

The JIT expressed concern about the practical difficulties and challenges it encountered in the course of its work, most particularly where it had to a) obtain documents in line with a control access arrangement, and b) accept that documents found at the locations identified to them were all the documents pertaining to the procurement in question, even where “it was not possible to ensure that access was provided to all the documents.” JIT, however, argue, “there is no indication that any documents has been wilfully hidden, destroyed or kept from the agencies. (All) the difficulties experienced also did not have any effect on the results of the investigation,” JIT continues. And, while admitting the improper acts and attempts by individuals and institutions within government departments, parastatal bodies, and in their private capacity, to obtain undue benefits in relation to the arms acquisition packages, JIT saw no evidence to suggest that these improprieties and irregularities affected the selection of successful contractors or bidders, which may render the contracts questionable. “As matters stand, (it concludes), there are (presently) no grounds to suggest that the Government’s contracting position is flawed” (see JIT 2001 1.1.7.1(a), 1.1.7.2, 1.3.2.3).

21 In order not to contravene s 41(6) of the National Prosecuting Authority (NPA) Act, the JIT considers it inappropriate to include areas of a criminal and sensitive nature in their report.
JIT observed that the participation of both the Management Committee, constituted in 1997, which initially coordinated the SDP process from the Request For Offers (RFO) stage up to the recommendation to the Ministers’ Committee, and the more formal interdepartmental Steering Committee namely the Strategic Offers Committee (SOFCOM) which replaced it in April 1998 and which consolidated evaluation results for presentation and eventually itself submitted recommendations to authorizing bodies, was “not normal procedure.” JIT, however, stressed “the prudence of SOFCOM, as a coordinating structure to effect additional safeguards and ensure uniformity of the arms acquisition programmes” (JIT 2001 3.1.2.3); but because JIT says nothing as to whether or not this Committee actually did coordinate the SDP process as intended, this line of defence is problematic. The “not normal procedure,” i.e., the impropriety and irregularity of the participation of the Management Committee and its successor, SOFCOM, remains valid and needs to be explained, as responsibility requires ownership.

Sequentially, in the approval of the weapons acquisition process, the recommendations of SOFCOM, co-chaired by the Chief of Acquisitions in the Department of Defence (DoD), go to the Armaments Acquisition Control Board (AACB), also chaired by the Chief of Acquisitions, through to the Armaments Acquisition Steering Board (AASB), to which the Chief of Acquisitions made recommendations, to the Armaments Acquisition Council (AAC), the highest approval authority and to which the Chief of Acquisitions also made recommendations, and then to the Cabinet sub-Committee where the Chief of Acquisitions was secretary. As submitted to the highest approval authority, these same recommendations were presented to Cabinet and, according to JIT, “all recommendations were in August 1998 accepted and approved by the Ministers’ Committee” and were subsequently “approved on 18 November 1998 by Cabinet” (JIT 2001 3.2.6). JIT attests to the self-evident disproportionately significant role of the Chief of Acquisitions at every stage in coordinating the SDP process, from the RFO stage up to the recommendation to the Ministers’ Committee. “Potentially (the process) made room for an individual to influence it,” the Public Protector says (Sunday Times 9 December 2001). According to Carol Paton, the extent to which the Chief of Procurement (Acquisitions) in DoD popped up in every single committee of the matrix of new (procurement) structures still gave the Auditor-General “an uncomfortable feeling. (It) weighed on our minds,” said SAM Baqwa (Parties should now put up hard evidence or shut up, in Sunday Times 9 December 2001).
Now, the *Special Review of the Selection Processes of the Strategic Defence Packages* [RP 161-2000] of the Auditor-General, discovered significant deviations from the generally accepted procurement practice pertaining to the independence, fairness and impartiality of the process, and the security clearance and potential conflicts of interest of the role players (*AG: Special Review of the Selection Process*, in JIT 2001 3.1). It also found material deviations from the original value system adopted in respect of the Lead-in-Fighter Trainer (LIFT), which had the effect of a different bidder, at a significantly higher cost, being chosen on the overall evaluation (JIT 2001 3.2). The *Special Review of the Auditor-General* [RP 161-2000] summed up the deviations, irregularities and improprieties discovered in respect of the Government arms procurement process in paragraphs 3.3 – 3.9, embracing, *inter alia* inadequate performance guarantees, flagrant disregard for Ministry of Defence (MoD) armaments acquisition policy, the abandonment of the required ARMSCOR tendering procedure, and deviation from government budget and financial regulations. Turning to these very significant deviations from generally accepted practice and laws, which, investigators acknowledge, have implications running into billions of Rand, JIT abruptly says, “the VB 1000 policy document states clearly that the only two non-negotiable milestone documents of the project are the Staff Target (ST) and the Acquisition Plan.” Submission of all other prescribed milestone documents is a

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22 Document VB1000, DoD and ARMSCOR local design-development weapons procurement policy during the sanction period prior to 1994, and which existed during the SDP process, did not meet the new opportunities created in the post-1994 acquisition management process as in the basically foreign designed and developed weapon system products acquisition management programmes of the SDP. The conclusion of the *Special Review of the Selection Processes of the Strategic Defence Packages* of the Auditor-General [RP 161-2000] that procedures of the acquisition process during Government arms procurement programme “were not in accordance with procedures laid down for armament acquisition” remains valid beyond the conclusions of the JIT Report. The conclusions of JIT in this regard is suggestive of the investigators’ concurring with Ministers of Government that indeed the AG’s *Special Review* [RP161-2000] on which SCOPA couched its 14th Report of 2000 to Parliament a) was just a review b) did not do justice to the arms procurement process by which it questioned the process unjustly c) was not adequately exposed to high-level decision-making process and accordingly based on incomplete information d) was incorrect in having to see the counter-trade aspects of the arms acquisition programme as a major objective rather than an important achievable consequence of the strategic procurement even when decision-makers agree that the LIFT technical aspects and the NIPS/DIPS were decisive on the LIFT/Gripen contract rather than the cost e) could not understand the intricacies of the acquisition process and f) was superficial. This was an adjustment (in the *material* findings of AG’s *Special Review*) which JIT had no restraint in making, most obviously, after “adequate exposure to high-level decision-making,” “complete information,” “full understanding of the intricacies of the procurement process,” and all that which Ministers alleged both the AG’s *Special Review* and a ratified paper of Parliament were devoid of. How else could State institutions strengthening a constitutional, nascent and “fragile”
derivative of the nature of the programme undertaken.” According to JIT, the policy on the acquisition of armaments that evolved during the SDP process and that was approved in July 1999 (ACQ/1/98) “compares favourably with defence procurement policies in the United Kingdom and Australia.” While investigators still hold that not to have approved the ST and Staff Requirement (SR) documents before sending out RFOs, were significant deviations, in JIT’s words, “it was established during the investigation that the VB1000 did not contain instructions in this regard” (see JIT 2001 3.2.3.1(d), 3.2.5, 3.3.8, 3.3.9).

There is an obvious difficulty in JIT’s argument in this regard when it just replicates the concerns of the Special Review of the Auditor-General [RP 161-2000] paragraphs 3.5.1-3.5.4 without any elucidation or clarification of the significant variations in question. Did investigators now find the two non-negotiable milestone documents, viz the ST and the Acquisition Plan, in place and appropriately approved during the SDP process, contrary to the concern of the Auditor-General? JIT did not tell us which of the other prescribed milestone documents were, if any, derivative documents of the strategic defence procurement packages. They say nothing about the submissions and approvals of these documents at the authorizing quarters during the arms procurement process. JIT refused to come forth with any explanation as to how policy ACQ/1/98, which evolved during the SDP procurement process and was only approved in July 1999, long after the commencement of a procurement process in 1995, could be said to compare favourably with defence procurement policies in the United Kingdom and Australia. JIT established during its investigation that the VB1000 did not contain the requisite instructions, hence the recommendation of the “refinement” of the acquisition policy in DoD (JIT 2001 3.2.5, 3.3.9, 3.4), though it was mute on whose responsibility it was to have ensured proper and adequate systems, procedures, organization and staffing in a Government Department.

democracy better shoot themselves in the feet, and denigrate themselves at the alter of the Executive they were supposedly to watch over?

23 A milestone document of an acquisition project for an arm of service of the SANDF is the different levels and stages of progressive authorization during the life of the (acquisition) programme. Each stage or level of authorization is depicted in a prescribed documentation, viz a) the Required Operational Capacity b) the Staff Target (ST) c) the Staff Requirement (SR) d) the Study Report e) the Acquisition Plan and f) the Closure Report. A milestone document is either mandatory or non-mandatory (see JIT Report 2001 3.1.1.4).