



ISS SEMINAR REPORT

Proceedings of the Seminar on the Khampepe Commission Report and the draft Bills relating to the demise of the Directorate of Special Operations (DSO) Pretoria, 27 May 2008

The Crime, Justice and Politics Programme (CJPP) of the ISS hosted a Seminar on the Khampepe Commission Report and the new draft Bills dealing with the disbanding of the DSO/Scorpions. The Bills include the General Law Amendment Bill and the National Prosecuting Amendment Bill.

The Seminar was organised against the consideration that although the prospects for retaining the Scorpions appear bleak, it is still important to question the extent to which the findings of the Khampepe Commission weaken or strengthen the ANC's reasons for dismantling the Scorpions? There is also the possibility of constitutional and legal challenges to the dismantling of the Scorpions. However, are such challenges likely to succeed? In addition, questions regarding the current work of the Scorpions remain unanswered. For instance, how is the DSO operating under the current context of being closed down? Does its work proceed as usual? Following its demise, will the cases it used to handle not get affected?

It is against this background that CJPP invited a panel of experts to shed some light on these and other critical questions. The panelists included Prof. Shadrack Gutto, Director, Centre for African Renaissance Studies UNISA, Ms Raenette Taljaard, Director, Helen Suzman Foundation and Prof TS Maluleke, Executive Director Research, UNISA.

As part of his analysis, Prof. Shadrack Gutto reflected on the question concerning the constitutional and legal challenges to the dismantling of the DSO. He elaborated on the conditions under which the constitution allows for private citizens to make legal challenges against government decisions. A relevant example in this regard is Hugh Glenister's failed court bid to stop government from disbanding the Scorpions. He is now looking to take the case to the Constitutional Court.

According to Prof. Gutto, such challenges have got a lot to do with the question of 'rights' given that crime violates peoples rights (e.g. economic and democratic rights). It is in this sense that the constitution makes room for individuals to challenge governments especially if such challenges are to the benefit of the rights and interests of the public. He went on raise question marks about the integration of the DSO into a new unit at the South African Police Services (SAPS). Based on his reading of the General Law Amendment Bill and the National Prosecuting Amendment Bill it was evident that the new unit would not have the same powers of investigation and prosecution all of which does not bode well for the fight against organised crime in South Africa.

Prof. T.S. Maluleke focused on the findings of the Khampepe Commission Report and its stance on the status and future of the DSO. To start with, he was keen to reveal that the way in which the future of the DSO has been handled indicates a crisis of governance that is similar to those that are associated with SABC, NPA and SAPS. In his remarks, he gave a background to the set-up of the DSO as an organised crime busting entity. He argued that the DSO seems to have scored successes right from the start especially in tracking down corrupt public officials, politicians and syndicates. However, they also became a political hot potato as the received scathing criticisms from politicians and even other law enforcement agencies about their: mandate, location in the DSO, overlap of roles, conduct, abuse of powers and media leaks. It is in this regard that the Judge Khampepe was tasked to look into the rationale, mandate and operation of the DSO.

At the Seminar, participants heard that the Commission had clearly stated that the DSO's powers to investigate and prosecute were not unconstitutional and that the rationale for the establishment of the DSO was still valid. Having said that, Prof. Maluleke also reminded the audience that although the Commission's Report is often read as being in favour of the retention of the DSO, it also raises some concerns that can be used to argue against their retention. Some of these include:

- the conduct of the DSO (e.g. leaks to the media)
- less than satisfactory implementation of the mandate
- disjunction in political accountability between Ministers for J&CD and Safety and Security regarding the work of the DSO
- the DSO's involvement in gathering intelligence information

In his conclusive remarks, Prof. Maluleke cautioned that it was important for civil society, the public, the media and all interested parties to stay focused on the broader question of how to respond to organised crime and not get caught up in the trap of simply saving the DSO for the sake of it.

Ms. Raenette Taljaard's presentation was for the most part focused on: (i) the technical aspects of the legal and constitutional challenges against the dissolution of the DSO and (ii) the General Law Amendment Bill and the National

Prosecuting Amendment Bill.

With regard to the constitutional challenges she felt that because of the principle of separation of powers the court would not be quick to interfere with the executive's power to prepare and initiate legislation, as well as with the right of Parliament to deliberate on proposed legislation brought before it. To do this, would be setting a precedence that could have negative implications for the separation of powers between the executive and the judiciary.

As part of her analyses she also reminded us that the DSO had actually been caught up in an ongoing power struggle and that there was demise was indicative of a of an institutional and leadership hiatus in the country.

With regard to the current status of the DSO - whereby it is almost in a state of not being functional - she felt that this would particularly have a negative impact on the element of trust between witnesses and the prosecutors and investigators at the DSO. This is essentially about the question of trust, which is the fundamental basis for going to court.

Rather similar to Prof. Gutto, she also went on to point out some concerns that she had about the new Bills and their implications for the new unit that would replace the DSO. These include:

- the absence of search and seizure powers for the new unit
- the absence of the elements of investigation, intelligence and prosecution within one single unit as had been the case with the DSO
- the power of the office of the police commissioner over the new unit
- the absence of any indication as to the financing and finances of the new unit, budgeting and financial implications
- the Bills need to indicate more clearly what the cost implications are of setting up the new entity. Issues to do with salaries are not dealt with at all. The cost implications of all these potential legislative changes are not addressed
- the absence of information concerning the organisation and staff of the new unit
- the consideration that the tabling of the bills did not follow legal and parliamentary procedures.

Raenette concluded by insisting that it was important in terms of the fight against organised crime for the new unit to retain the powers to prosecute and to investigate.

The question and answer / discussion that followed focused on:

- the Acts and their implications for the new proposed SAPS unit that is expected to replace the DSO

- the role of civil society in the public hearings concerning the closure of the DSO
- the absence of the powers to prosecute and investigate at the new unit.