

# RealTime Transcriptions

TRANSCRIPTION OF THE

## COMMISSION OF INQUIRY

### MARIKANA

#### BEFORE TRIBUNAL

THE HONOURABLE MR JUSTICE FARLAM (RETIRED) - CHAIRPERSON  
MR TOKOTA SC  
MS HEMRAJ SC

#### HELD ON

DAY 251

27 JUNE 2014

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1 [PROCEEDINGS ON 26 JUNE 2014]  
 2 [09:08] CHAIRPERSON: The Commission resumes. Mr  
 3 White, you're still under oath.  
 4 GARY WHITE: [s.u.o.]  
 5 CHAIRPERSON: Mr Semenya.  
 6 MR FISCHER: Chairperson –  
 7 CHAIRPERSON: Before Mr Semenya resumes  
 8 his cross-examination Adv Hemraj would like to ask the  
 9 witness a question.  
 10 MR FISCHER: Chairperson, I apologise.  
 11 Can I just point out that Adv le Roux is not here at the  
 12 moment. I'm not sure where she is.  
 13 CHAIRPERSON: She's outside. Do you want  
 14 me to send a posse of policemen to find her? She's found  
 15 herself. [Microphone off, inaudible] light moments are  
 16 helpful to relieve the tedium from time to time. Ms  
 17 Hemraj.  
 18 COMMISSIONER HEMRAJ: Mr White, do you  
 19 accept that the reason the Colonel asked for the  
 20 intelligence about the attitude of the community was that  
 21 he wanted to know the attitude of the community after the  
 22 incident of the 13th and whether in setting up the neutral  
 23 area as he did, with the police facing the strikers,  
 24 whether there would be any danger to the police in the  
 25 neutral area from the rear, the community in the settlement

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1 behind them? Do you accept that that is his reason?  
 2 MR WHITE: I would have to say,  
 3 Commissioner, I don't know, is the honest answer, of his  
 4 reasons. My assumption was based on reading his statement.  
 5 If there is something perhaps in his oral evidence that  
 6 I've missed where he gives a specific reason for that, then  
 7 my observations therefore were based on facts without  
 8 seeing that. So I'm unsure and I'm in your hands as to  
 9 whether he said anything specifically on that. As I said,  
 10 I certainly have engaged with the transcript from  
 11 Lieutenant-Colonel Scott, but I couldn't say with all  
 12 honesty that I've read every single word and I'm saying to  
 13 you now that I'm not aware of that in terms of his intent,  
 14 if you like. I read it and I thought it was a very good  
 15 point that he was trying to get community intelligence in  
 16 relation to a general picture.  
 17 COMMISSIONER HEMRAJ: Well, it does  
 18 appear in the transcript at page 13419, lines 4 to 12. But  
 19 are you aware that as a result of wanting that  
 20 intelligence, that they then put into practice the idea of  
 21 sector patrols in the area to try and gain that  
 22 intelligence? Do you accept that?  
 23 MR WHITE: Yes, I'm absolutely aware that  
 24 that happened, and again I congratulate Lieutenant-Colonel  
 25 Scott; I think it was a very good idea. The point that I

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1 was raising yesterday is that the fact that TT5 doesn't  
 2 reflect therefore information/intelligence coming back as a  
 3 result of that activity.  
 4 COMMISSIONER HEMRAJ: Yes, and that the  
 5 idea of intelligence was at that very early stage discussed  
 6 with Brigadier Engelbrecht, who talks about the limitation,  
 7 that it was close to impossible, he says, to get  
 8 intelligence gatherers to recruit informers or to go into  
 9 that area themselves because of the position of  
 10 vulnerability they would place themselves in. You're aware  
 11 of that evidence?  
 12 MR WHITE: Again I'm aware and I think I  
 13 said yesterday that I understand the difficulties in  
 14 relation to obtaining intelligence. I don't deny that at  
 15 all –  
 16 COMMISSIONER HEMRAJ: Sorry to interrupt  
 17 you. What I'm raising with you is that are you aware that  
 18 there was this discussion with the Colonel and the  
 19 Brigadier about this requirement about the intelligence and  
 20 why it came out in the discussion that it was so difficult  
 21 to put informers into this area? Are you aware of that  
 22 evidence, Sir?  
 23 MR WHITE: I'm, again I wouldn't be  
 24 specifically aware – I don't recall being specifically  
 25 aware of that, but again just in terms of even the remarks

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1 that you made a few moments ago, Commissioner, my  
 2 interpretation of the activities that Colonel Scott was  
 3 describing in relation to gathering the community  
 4 intelligence was around the visible policing presence and  
 5 he actually talks about getting the police officers to be  
 6 in there talking to members of the community, which may  
 7 well happen in addition to tasking informants, but it's  
 8 certainly a distinct activity.  
 9 COMMISSIONER HEMRAJ: Yes, it appears in  
 10 the transcript at page 13423 in line 16 onwards where he  
 11 quotes Brigadier Engelbrecht specifically about the  
 12 difficulty of sector patrols being sent into the community  
 13 and the dangers attendant, and on the following page you  
 14 will find quite a lot of evidence as regards why the sector  
 15 patrols had to be accompanied by armoured vehicles and the  
 16 difficulties that they endangered going into these areas in  
 17 the event that there was an adverse reaction to their  
 18 presence. Are you aware of that evidence in the  
 19 transcript?  
 20 MR WHITE: Again I'm not specifically  
 21 aware of that evidence in the transcript, but again I would  
 22 come back to the point that Lieutenant-Colonel Scott's  
 23 intention in sending police officers in there in terms of  
 24 visible patrolling was so that they could gain community  
 25 intelligence, and if he has taken particular precautions

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1 given the difficulties of the operating environment, again  
 2 I congratulate him for thinking about that and for doing  
 3 it.  
 4 The point is, you know, in terms of his statement  
 5 and the intelligence requirement that he issued, which I'd  
 6 referred to, he's basically saying I need more information  
 7 to help me devise this plan. One of the ways that we'll do  
 8 that is if I task police officers visible patrolling with  
 9 whatever security provisions they need - and he knew that  
 10 assessment, it's not for me to judge that. But what he's  
 11 actually doing is tasking those officers to be in the  
 12 community to try and get that information to come back.  
 13 Now he said in oral evidence he got nothing back and -  
 14 COMMISSIONER HEMRAJ: Yes.  
 15 MR WHITE: That's the point that I'm  
 16 making.  
 17 COMMISSIONER HEMRAJ: Yes, the point I'm  
 18 trying to make is that we're not left to speculate about  
 19 what was done about it. There's evidence, as yet  
 20 uncontroverted, about what the police said and I think this  
 21 needs to be clarified. If you will at some stage at your  
 22 convenience look at pages 15115 to 15119 of the transcript  
 23 you'll find that in addition to sector patrols they also  
 24 placed observation posts, created observation posts to get  
 25 what he quotes as real-time ground picture, but that there

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1 were difficulties with the circumstances surrounding this  
 2 as well.  
 3 There's also evidence, Mr White, that the sector  
 4 patrols were reporting to Brigadier Calitz and the  
 5 difficulties that they encountered are all a matter of  
 6 evidence on the transcript. Are you aware of that  
 7 evidence?  
 8 MR WHITE: I'm certainly aware of the  
 9 evidence in relation to the observation post, as you say.  
 10 I've read that, yes.  
 11 COMMISSIONER HEMRAJ: In cross-  
 12 examination Adv le Roux elicits from the witness whether  
 13 having encountered these difficulties with the sector  
 14 patrols and the observation post, whether he tried to  
 15 repeat the exercise to get the information, and at page  
 16 15126 he says that the members of the Special Task Force  
 17 were sent out to set up another post on a higher koppie to  
 18 see if that would enable them to get some information, but  
 19 again they encountered difficulties because of the distance  
 20 from which they were, and you're aware of that evidence, no  
 21 doubt.  
 22 MR WHITE: Yes, I am, and with respect I  
 23 think that that's maybe a slightly different thing because  
 24 of, you know that is, I suppose you know, coming back to  
 25 this issue again about an observation post, which again I,

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1 you know, the fact that they're covering all bases, I  
 2 congratulate them for it, but I do also think that when you  
 3 refer to cross-examination by Ms le Roux, that Colonel  
 4 Scott when he's asked about the fact that he issues this  
 5 intelligence requirement or then the visible policing and  
 6 he got nothing back, did he then task again? Did he sort  
 7 of challenge the fact that he wasn't getting anything back?  
 8 And my recollection is that he said no, he didn't task  
 9 again, he didn't ask.  
 10 COMMISSIONER HEMRAJ: Well, that's the  
 11 very point I'm addressing at page 15126 that says he did  
 12 something about it, or other members of the force did  
 13 something about it. I would like that point cleared up.  
 14 But it goes one step further. It's put by Ms le Roux that  
 15 it's very essential to the planning of the tactical phase  
 16 that the intelligence is available and he says that what  
 17 they did was, although it was essential, because they  
 18 didn't have it they did what is called a risks analysis and  
 19 then a mitigation of risks.  
 20 Now my question to you is in arriving at the  
 21 conclusion that you do that some or other person was  
 22 remiss, that the police force at large was remiss in trying  
 23 to get this intelligence, there is evidence that they did  
 24 try, whoever it is, senior officers did try to get the  
 25 evidence - or the intelligence, I beg your pardon.

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1 MR WHITE: Absolutely, and let me be  
 2 crystal clear on that point. Absolutely I've seen lots of  
 3 evidence of where they tried. Mr Semanya yesterday said to  
 4 me, you know, did I suggest that there was, you know, any  
 5 suggestion of remiss and I said yes, there was, and I  
 6 pointed to three particular aspects - Colonel Scott's  
 7 intelligence requirement that we've just discussed; I  
 8 talked about the issue in relation to the conversation  
 9 between Brigadier Engelbrecht and Mr Mpenbe vis-à-vis the  
 10 intelligence that didn't seem to be properly acted on, and  
 11 I mentioned, you know, I talked about Mr Victor's statement  
 12 where he laid out a number of things that were done,  
 13 including interviewing witnesses and security guards and  
 14 whatever, but my point was what came of that, because it  
 15 didn't find its way then into TT5. So, and then he asked  
 16 me, you know, who particularly was at fault and I said the  
 17 South African Police Service on the basis that, you know,  
 18 this is an organisational issue and it's not for me to be  
 19 pointing fingers at particular people. I'm just simply  
 20 saying well here are three instances which - and I used the  
 21 word "remiss" because that's the word Mr Semanya used.  
 22 But could I say that one thing that I'd hoped to  
 23 clarify and I know that Ms le Roux has already spoken to Mr  
 24 Semanya to get permission for me to clarify this, this  
 25 morning, because I think this is really very important. I

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1 did leave yesterday afternoon slightly concerned and  
 2 slightly frustrated from the point of view that we started  
 3 to talk about a lot of detail in relation to this and I  
 4 hope that I've answered questions honestly and openly and  
 5 fully in relation to some of the issues I have of the  
 6 detail, but from the very beginning of my evidence-in-chief  
 7 I'd said that, you know, I have raised consistently across  
 8 my three statements issues of concern or criticism in  
 9 relation to a number of key areas, one of those being  
 10 intelligence.  
 11 So I stand by all I say in relation to  
 12 intelligence and I'm trying to give the Commission  
 13 hopefully the benefit of some of my experience in relation  
 14 to how these things work within the police. But the  
 15 overriding issue in relation to intelligence is this; that  
 16 this is a very, very significant operation involving  
 17 hundreds and hundreds of police officers, heavily armed,  
 18 potentially going to interface with thousands of people,  
 19 many of whom are armed and some of whom seem to have a  
 20 particular intent.  
 21 The intelligence that the police had at the time  
 22 - so irrespective of the difficulties and how hard they  
 23 tried and all of that - the intelligence that the police  
 24 had at the time that they were making the decision to go  
 25 and developing the plan was effectively this; there were

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1 around 3 000 or thereabouts people on the koppie. They are  
 2 armed with dangerous and traditional weapons and they're  
 3 prepared, basically they will not give those up and they  
 4 will resist the police, and yet with the very sparse - I  
 5 think was the terminology that Mr Semenya used yesterday  
 6 and I used it as well - with that, the very sparse amount  
 7 of intelligence available, that's where it's at.  
 8 So irrespective of how we got to that point, that  
 9 is the intelligence that they had and yet given that that  
 10 was the intelligence, they decided at 3:30 that they were  
 11 going to go and carry out this operation. That is my chief  
 12 point in relation to the issues of intelligence, that it  
 13 was, yes, it was very limited, and for all the reasons that  
 14 we've talked about, but given that that's what the  
 15 intelligence was, that's what they, you know, they then  
 16 responded in the way they did, and that was the  
 17 clarification I wanted to offer.  
 18 COMMISSIONER HEMRAJ: For us to be able  
 19 to place the full value on the criticism we need to be  
 20 assured that you arrive at that conclusion on a full  
 21 conspectus of all the evidence in the transcript as well as  
 22 the statements, and that's why I raise this with you.  
 23 MR WHITE: Of course, and hopefully my  
 24 answers to you have been open, honest, and as I say -  
 25 COMMISSIONER HEMRAJ: Yes.

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1 MR WHITE: - the majority of the things  
 2 that you refer to, Commissioner, I have read and I think  
 3 there was one particular paragraph that I don't recall  
 4 reading and as I say, my intention to be as open and honest  
 5 as possible.  
 6 COMMISSIONER HEMRAJ: I'm sorry, Mr  
 7 Chaskalson -  
 8 MR CHASKALSON SC: No, Commissioner  
 9 Hemraj, I have nothing to say. I'll switch on my light  
 10 when I have something to say.  
 11 COMMISSIONER HEMRAJ: And the second  
 12 point that you make about the adverse impact on the  
 13 planning, bearing in mind the purpose for which the  
 14 information was sought, you still say it had an adverse  
 15 impact?  
 16 MR WHITE: I think the lack of  
 17 information has an adverse impact in the sense that, you  
 18 know, I think as I explained yesterday what type of  
 19 information would I have been looking for from within the  
 20 community. If we are delineating sort of the difference  
 21 between the two groups, the group that has been described  
 22 as the warrior group and the larger group on the koppie, as  
 23 I explained yesterday I want to know what the reaction, as  
 24 far as possible, and if we just can't simply get that, well  
 25 then we have to deal with that issue, but that's, I want to

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1 know what the reaction of that larger group are going - as  
 2 far as possible, obviously I want to know what the reaction  
 3 of the warrior group is going to be and I accept that there  
 4 were informers somewhere either within the larger group or  
 5 within the smaller group, because it refers to that in TT5,  
 6 but that's the type of information I was looking for, and  
 7 if it just simply wasn't available, as I say I pointed to  
 8 particular aspects where I'm questioning, and I'm offering  
 9 those questions to the Commission for you to be able to  
 10 obviously think about the relevance of those. So I think  
 11 it had an adverse impact on the planning because there is  
 12 limited intelligence.  
 13 Then my fundamental point is with the very sparse  
 14 intelligence that's available it tends to suggest, with all  
 15 due respect in my opinion it tends to suggest this is maybe  
 16 not the right time to do this. That's what the  
 17 intelligence seems to be saying.  
 18 COMMISSIONER HEMRAJ: Yes. Thank you  
 19 very much, Mr White, for clarifying those points for me. I  
 20 appreciate that. Thank you.  
 21 CHAIRPERSON: May I just summarise to you  
 22 what I understand you to be saying, just to make sure I've  
 23 got it right. There are basically two points, aren't  
 24 there? The first is you would have expected, if you were  
 25 in charge you would have wanted substantially more

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1 intelligence than they had. That's right?  
 2 MR WHITE: Yes, Chair, I would have  
 3 expected to see more than I see in TT5.  
 4 CHAIRPERSON: Yes, and you would have  
 5 wanted more for the purpose of formulating a plan, if it  
 6 could be got.  
 7 MR WHITE: As much as possible, would be  
 8 the answer, Chair.  
 9 CHAIRPERSON: Yes, right. Now we  
 10 discussed yesterday the fact that they didn't have it  
 11 wasn't necessarily their fault. It may have been caused by  
 12 the kind of factors we discussed, and some of the passages  
 13 that Adv Hemraj referred to support that, that they tried  
 14 and they encountered something like a brick wall, which  
 15 prevented them getting the information, and one can  
 16 understand in the dynamics of the community and what was  
 17 going on, that that was so.  
 18 Anyway, that's the first point. You'd have liked  
 19 more information if you'd been in charge. There wasn't  
 20 enough, but there appears to be a good reason why they  
 21 couldn't get it.  
 22 The next question is that being so, that doesn't  
 23 mean you don't plan. You've got a plan and you would like  
 24 the information, but you haven't got it, but you've still  
 25 got to plan then in the absence of the kind of information

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1 you'd like. I take it you'd agree with that, right?  
 2 MR WHITE: Absolutely, Chair.  
 3 CHAIRPERSON: The next point is there was  
 4 some information and your point, as I understand it, is  
 5 that in the light of the information they had it appears to  
 6 have been unwise to have embarked upon the operation they  
 7 did at 3:30 on the Thursday afternoon.  
 8 MR WHITE: That would be correct.  
 9 CHAIRPERSON: That's really a summary of  
 10 what you say.  
 11 MR WHITE: The only one tiny thing I  
 12 would add to that is come back to your first point and that  
 13 is basically that again I think I've been very open in  
 14 accepting I understand that because in the world that I  
 15 live in there are huge challenges sometimes with gathering  
 16 intelligence. I fully accept, I'm sure lots of efforts  
 17 were made, but I have been able to point to a number of  
 18 specific instances where actually it seems to me there has  
 19 been some sort of a breakdown, even set aside the fact that  
 20 there were difficulties, there has clearly been some type  
 21 of breakdown in relation to the information which may have  
 22 been available not ultimately coming basically to inform  
 23 TT5.  
 24 CHAIRPERSON: Thank you. Mr Semenya.  
 25 CROSS-EXAMINATION BY MR SEMENYA SC (CONTD.):

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1 Mr White, good morning. I want to move from a premise that  
 2 you have had the opportunity to clarify what you thought  
 3 you'd do before I ask questions.  
 4 MR WHITE: I have indeed and I'm  
 5 genuinely grateful to you.  
 6 MR SEMENYA SC: Chair, I intend to start  
 7 by playing the video that I threatened to play yesterday,  
 8 and –  
 9 CHAIRPERSON: You didn't threaten, you  
 10 promised.  
 11 MR SEMENYA SC: And I think a warning  
 12 would be required.  
 13 CHAIRPERSON: Ja, we're going to see a  
 14 video which will show a number of the people who died in  
 15 circumstances which I'm sure will cause a good deal of  
 16 emotional distress to their relatives and loved ones, and  
 17 so I would ask that the video not be shown until 30 seconds  
 18 have elapsed from now, to enable those who wish to leave  
 19 the chamber to do so.  
 20 [09:28] 30 seconds are up, the video can be shown.  
 21 MR SEMENYA SC: Mr White, I want to play  
 22 a number of videos and a number of photographs, and show  
 23 you a number of photographs and then we can take our  
 24 conversation further. I ask that we play exhibit RRR17.  
 25 CHAIRPERSON: Do you want the whole

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1 exhibit or do you want to show it from some point to some  
 2 other point.  
 3 MR SEMENYA SC: It is not a long –  
 4 CHAIRPERSON: We're going to see the  
 5 whole video, alright. We don't have to record what part  
 6 specifically we'll hear.  
 7 MR SEMENYA SC: Correct, Chair.  
 8 CHAIRPERSON: It starts I see at eTV time  
 9 15:53:29.  
 10 MR SEMENYA SC: And if you can play it a  
 11 little slower.  
 12 [VIDEO IS SHOWN]  
 13 CHAIRPERSON: I see it is on, I forgot.  
 14 Because it's in slow motion, we can't have the soundtrack.  
 15 [VIDEO IS SHOWN]  
 16 MR SEMENYA SC: Okay, this one we can  
 17 stop here.  
 18 CHAIRPERSON: We're stopping at 30  
 19 seconds, eTV time 15:53:58.  
 20 MR SEMENYA SC: The next one I'd like us  
 21 to watch is number 4.3, the unseen video footage of  
 22 Marikana which appears on the list.  
 23 CHAIRPERSON: Has it not got an exhibit  
 24 number?  
 25 MR SEMENYA SC: I'm told, Chair, it's an

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1 exhibit.

2 CHAIRPERSON: It would be helpful to tell

3 us what the exhibit is, to have that on record so that when

4 we read the record or historians in the future read the

5 record, they'll know what we are looking at.

6 MR SEMENYA SC: Let's have the visuals,

7 Chair, and maybe Mr Chaskalson can also help us and if you

8 can go –

9 MS LE ROUX: Chair, it was a presentation

10 by SERI, if that assists.

11 MR SEMENYA SC: Ja.

12 MS LE ROUX: If you haven't succeeded in

13 tracking down the exhibit number.

14 MR SEMENYA SC: Can we go to five seconds

15 13 into that video?

16 CHAIRPERSON: It's described as unseen

17 footage, which made me think it wasn't an exhibit but you

18 say it is now an exhibit. It became an exhibit after it

19 received that caption "Unseen footage."

20 MS LE ROUX: Yes, Chair. I believe my

21 learned friend Mr Gotz for AMCU played it at some point.

22 CHAIRPERSON: Alright, well –

23 MS LE ROUX: And then it did get an

24 exhibit number at that point, I just don't know what that

25 was.

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1 CHAIRPERSON: If you can't find it now,

2 when it's found we can put it we can say on the record what

3 it is but it's important, not only for when we read the

4 record, we should be able to look at the videos that have

5 been shown but we're all conscious of the fact that the

6 eyes of history are upon us. In years to come this

7 transcript I think is going to be gone over again and again

8 by various people. It's important that they get their

9 judgment right, that they see exactly what it is that we

10 see.

11 [VIDEO SHOWN]

12 MR SEMENYA SC: Yes, you can stop it now.

13 CHAIRPERSON: Well, it's now at 5:18. I

14 can't remember where we started, it must have started at

15 about –

16 MR SEMENYA SC: 5:13.

17 CHAIRPERSON: 5:13, so we've seen five

18 seconds of this.

19 MR SEMENYA SC: The next video I would

20 like you to have a look at, Mr White, is exhibit Z1, number

21 1.1 on our list of videos and, Mr Operator, if you can go

22 into 23 to 25 of that video.

23 CHAIRPERSON: This is a video of the

24 scene at the railway line on the 13th of August.

25 MR SEMENYA SC: Correct.

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1 CHAIRPERSON: We're now at 23:26, is that

2 what you want us to see, Mr Semenya?

3 MR SEMENYA SC: Correct, he can plan it

4 from here.

5 [VIDEO IS SHOWN]

6 MR SEMENYA SC: Yes, you can stop now.

7 CHAIRPERSON: 23:33.

8 MR SEMENYA SC: Mr White, from the videos

9 we have had you can see, this is the 13th of August 2012,

10 the formation of the group moving in unison and in a tight

11 formation, am I right?

12 MR WHITE: I can certainly see them close

13 together moving as a group. With regard to whether or not

14 they're in a tight formation, I think the honest answer to

15 that is I don't know. However, what I would say to you is

16 that, you know, I think just before, literally a couple of

17 seconds before I saw a police officer in relatively close

18 proximity to them and they're certainly not attacking the

19 police officer. So I don't know, I mean with regard to

20 whether they're in attack mode or not, I think my answer

21 has to be I don't know.

22 MR SEMENYA SC: No, I didn't ask whether

23 they are attacking the police. I'm saying they are moving

24 in a particular formation. Is that not your observation?

25 MS LE ROUX: Chair, I think Mr White

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1 misheard Mr Semenya, he said tight formation –

2 CHAIRPERSON: I think he thought he said

3 attack, I thought he said attack, I think the witness

4 thought Mr Semenya said attack formation –

5 MS LE ROUX: But he said tight.

6 CHAIRPERSON: - Mr Semenya talked about a

7 packed formation. Am I right, Mr –

8 MR WHITE: Apologies, both to you Mr

9 Semenya, Chair, in that I thought you said that they were

10 moving in formation and then you said, I thought you said

11 in attack formation. I apologise, that's what I heard.

12 MR SEMENYA SC: Okay.

13 MR WHITE: Could you repeat the question?

14 CHAIRPERSON: What he said was packed, a

15 packed formation.

16 MR SEMENYA SC: A tight –

17 CHAIRPERSON: Oh, tight? Oh.

18 MR WHITE: T-H-I, or T-I-G-H-T.

19 MR SEMENYA SC: Correct.

20 MR WHITE: Yes, absolutely. Yes, they're

21 in a tight formation. Sorry, apologies again.

22 MR SEMENYA SC: And acting in unison as

23 you see.

24 MR WHITE: They're certainly tight,

25 they're certainly – yes.

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1 MR SEMENYA SC: Okay and it is the same  
 2 movement you see, even on the 16th as they come around the  
 3 kraal, it is that tight formation in a bended way, am I  
 4 right?  
 5 MR WHITE: This would be the middle  
 6 video, the second of the two videos?  
 7 MR SEMENYA SC: Correct.  
 8 MR WHITE: Again certainly they're close  
 9 together and there's a gentleman at the front who seems to  
 10 be crouched over, yes.  
 11 MR SEMENYA SC: And I want to read to you  
 12 – maybe before we do that, what we also see in the videos  
 13 is POP police officers running away before the beginning of  
 14 the shooting of the volley -  
 15 MR WHITE: Are you referring specifically  
 16 to the first video?  
 17 MR SEMENYA SC: Correct.  
 18 MR WHITE: I saw a police officer  
 19 standing considerably further in front of the rest of the  
 20 TRT line. I mean I've seen this video many times and  
 21 certainly he remains standing well out in front of the rest  
 22 of the crowd for some, the other police officers, for some  
 23 considerable time. And then as the crowd starts to get  
 24 closer to him then he starts to retreat, yes.  
 25 MR SEMENYA SC: Okay. And I also invite

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1 you to look at exhibit ZZ4 which I invited you to have a  
 2 look at this morning. That would be the statement of one  
 3 of the security, Lonmin security personnel.  
 4 MR WHITE: Yes, I've seen that.  
 5 MR SEMENYA SC: You have. Can I invite  
 6 you to look at paragraph 13? There you will see, so  
 7 records the security officer, "All the vehicles of my  
 8 colleagues parked facing opposite direction for in case if  
 9 there is a need to escape from the protesters, as there  
 10 were many, it would be easy for us to do so. Mr Debukwane  
 11 ordered that all members must be on line, facing the  
 12 protesters with shotguns. Mr Debukwane raised his hands to  
 13 the air, instructing the protesters to stop and to resolve  
 14 the problem in peace. I also joined Mr Debukwane in  
 15 addressing the protesters to 'please stop'" – in quotes –  
 16 "as I could see that they will cause trouble." Then  
 17 follows paragraph 14, "The protesters ignored our call and  
 18 kept coming closer and closer on us with pangas,  
 19 knobkerries and other sharp and dangerous weapons. As the  
 20 protesters were marching closer and closer, being  
 21 aggressive, Mr Mabelane ordered us to shoot at the  
 22 protesters with rubber bullets. We shot with rubber  
 23 bullets without success in scaring them away and the  
 24 protesters kept coming on us and there was no sign of them  
 25 being affected by our attempt to shoot them with pump guns

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1 in trying to stop them. We all decided to run away for our  
 2 safety as they were coming to us in full force. I ran for  
 3 a distance of plus-minus 50 metres and looked back. I saw  
 4 the crowd surrounding our blue and white Nissan Livina  
 5 which was utilised by Mr Mabelane and Fundi and suddenly  
 6 there was a smoke from the VW Polo vehicle which was driven  
 7 by Mr Masibi. After a few seconds the car which was used  
 8 by Mr Mabelane was also burnt by the protesters. All the  
 9 members escaped for their safety. Out of our group Mr  
 10 Mabelane and Mr Fundi were killed." Can I then read to you  
 11 paragraph 19. Now the witness, I mean the statement here  
 12 now deals with the events of the 13th. In paragraph 19 it  
 13 says, "The protesters used the same movement of crawling  
 14 tactics as used on Sunday when they killed the two security  
 15 officers. I can be able to identify the people who were  
 16 leading, giving instructions and always being in front of  
 17 the group. I can possibly identify the people who murdered  
 18 the two security officers and the police officials." I'm  
 19 suggesting that these two corroborate that we are dealing  
 20 here with a group with intent and possibly a single intent.  
 21 Would you accept that that is consistent with the material  
 22 you're looking at?  
 23 MR WHITE: I think that, you know, all  
 24 the material included in this statement show that what  
 25 you're dealing with is, and if it is exactly the same

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1 people and I don't dispute that, I think that there's  
 2 evidence to suggest at least a significant number are the  
 3 same people across a number of these incidents – then I  
 4 don't dispute it and I've never disputed the fact that  
 5 you're dealing with a potentially violent, very violent  
 6 crowd.  
 7 MR SEMENYA SC: I want to invite you to  
 8 look at exhibit B38.  
 9 CHAIRPERSON: Before you look at that,  
 10 you didn't quite answer the question. Perhaps Mr Semenya  
 11 can repeat it. You say you accept it was a potentially  
 12 violent crowd. Mr Semenya is trying to get you to make a  
 13 further concession that you didn't deal with, so perhaps  
 14 you could repeat the question to give the witness a chance  
 15 to reply to it specifically.  
 16 MR SEMENYA SC: That it is a group  
 17 operating with a single intent about their purpose.  
 18 MR WHITE: Certainly, and again I'm not  
 19 trying to avoid the question, I don't know and genuinely  
 20 can't know what is their group intent. I have hopefully  
 21 engaged honestly and said that yes I think that they're  
 22 moving very closely together, they certainly are  
 23 demonstrating that there seemed to be a degree of  
 24 organisation. With regard to do they have a single intent,  
 25 Chair, I can't possibly say and I'm not trying to deny the

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1 issue that, you know, certainly that they certainly seemed  
 2 to be organised up to a point.  
 3 MR SEMENYA SC: Yes, no, Mr White, that's  
 4 why I used the word "appear." I wouldn't expect you to  
 5 know what intent they have. Can we now look at –  
 6 CHAIRPERSON: - it looks like it, doesn't  
 7 it?  
 8 MR WHITE: They certainly look like a  
 9 group that are together.  
 10 CHAIRPERSON: And they seem to be more or  
 11 less, all more or less doing the same thing as far as one  
 12 can see.  
 13 MR WHITE: Well –  
 14 CHAIRPERSON: As you say, one can't see,  
 15 look into their minds, can't see what they were thinking  
 16 but judging by appearances it looks like it, doesn't it?  
 17 MR WHITE: As you say, can't see into  
 18 their minds but you know when you deal with crowds, let's  
 19 say for example large crowds, football hooligans and I use  
 20 the term advisedly, you know, there will be a large group  
 21 of them who are walking together, quite often in packed  
 22 tight formation or whatever. Does it mean that every  
 23 single person within that group, you know, is going to  
 24 react in the same way, that they have a single intent  
 25 because there seems to be a degree of organisation and a

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1 degree of connection between them, you know. No, it  
 2 doesn't and I think this relates back to some of the  
 3 conversations we were having yesterday vis-à-vis the Le Bon  
 4 and you know, the thinking around how crowds are, that  
 5 people act as individuals within crowds as opposed to a  
 6 single entity. No, again honestly engaging with the  
 7 circumstances that are in front of me now, I think that  
 8 this is perhaps not a typical crowd and therefore, you  
 9 know, a general sort of crowd, the theory may not  
 10 necessarily apply. There does seem to be a degree of  
 11 organisation. The video shots that I've seen, all three of  
 12 them and I'm sure obviously because time doesn't permit us  
 13 to see all the way through, you see a number of the people  
 14 within the group – I mean again I've been engaging with  
 15 this evidence on the basis that the warrior group, I stress  
 16 again it's not my terminology, is up to around 300 people.  
 17 In none of those videos do you see 300 people, so you see  
 18 you know, maybe a couple of thousand people so – in tight  
 19 formation. If the camera zooms out, you know, were all 300  
 20 in that tight formation? I don't know but certainly you  
 21 know the images that I see, you know, in and around 20  
 22 people are – a couple of dozen, whatever it is – are  
 23 tightly packed and they certainly seem to be following a  
 24 leader, for want of a better term. And again what their  
 25 intention is and as you say, Mr Semenya, you used the word

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1 "appear" to, as you say I can't know what's in their minds.  
 2 So yes, there does appear to be a degree of organisation,  
 3 Chair, I don't dispute that at all.  
 4 CHAIRPERSON: Yes. On the videos of what  
 5 happened on the 13th one sees quite a number of them  
 6 clanking their weapons together. That would also be  
 7 something they were doing in unison, as it were.  
 8 MR WHITE: Yes, I've seen a number of  
 9 them doing that and again I'll be honest, I don't  
 10 understand exactly the significance of that. Does that  
 11 mean, and I obviously bow to the judgment of South Africans  
 12 on that, does it mean that they're ready to attack, does it  
 13 mean you know that they're indicating any particular intent  
 14 or does it just simply mean that they're passing the – I've  
 15 no idea but I have seen them do that, yes.  
 16 CHAIRPERSON: There is some, there's  
 17 evidence given by Mr X as to what, as to why they were  
 18 doing that. Whether we will accept that evidence at the  
 19 end of the day is something no-one knows yet but it's  
 20 presented by the police, I take it, by way of this evidence  
 21 about the clanking of the weapons as corroboration of what  
 22 he said. Whether it does corroborate, whether what he said  
 23 is correct we don't know the answer to yet but that's the  
 24 case they're presenting.  
 25 MR WHITE: Absolutely, Chair, and – I've

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1 seen both of those statements by Mr X, yes.  
 2 MR SEMENYA SC: And also the evidence  
 3 will show, if we have to go there, that this happens whilst  
 4 they are singing the same song together in a group but –  
 5 and you're not challenging that, are you?  
 6 MR WHITE: I've seen evidence that on  
 7 occasions they're singing songs, yes.  
 8 MR SEMENYA SC: Now, somewhere I thought  
 9 you said there would be a group of 20.  
 10 [09:48] Did you use that number?  
 11 MR WHITE: I said in the videos that you  
 12 showed me, the first, the second and the third video and  
 13 again I said I'm sure because obviously for the purposes of  
 14 being conscious of time. We haven't let the whole video  
 15 run through but the images that I saw, you can see around  
 16 20 to, you know, two dozen people in the images. I'm sure  
 17 - or you watched it loner you'd maybe see many more but the  
 18 point that I'm making is that I make my commentary in  
 19 relation to the fact that they're tightly packed on the  
 20 images that you've shown me and I'm trying to comment on  
 21 that.  
 22 MR SEMENYA SC: But surely the group that  
 23 are in a line that we just played it's as a group more or  
 24 less 200 to 300, that you accept.  
 25 MR WHITE: Apologies if I've missed

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1 something on the video, I'm more than happy to see it  
 2 again. I've engaged with this evidence all the way through  
 3 where people have talked about 200 or 300 people, I don't  
 4 dispute that at all, I'm more than happy to accept that.  
 5 You asked me the question in relation to the formation of  
 6 the group from the videos about them being tightly packed  
 7 and I'm saying to you that on reflection and recollection  
 8 the video, even the third one that you showed me at the  
 9 railway line shows a section of that group but not  
 10 necessarily, I don't think that the images show 2 to 300.  
 11 And rather than take any more time with this, I mean I'll  
 12 be guided by you, Chair, if perhaps you've seen something  
 13 very different than I've seen in that couple of seconds  
 14 that you showed.  
 15 MR SEMENYA SC: Maybe if we restrict  
 16 ourselves to the question we might save a little bit of  
 17 time. Do you want us to show you –  
 18 CHAIRPERSON: What he says he doesn't  
 19 dispute that there appear to be 200 or 300 people, what he  
 20 says is on the small section of the clip he saw there  
 21 wasn't space on the screen for more than about 20, 24  
 22 people to be seen, the image he saw. That there were other  
 23 people behind, he doesn't dispute, that if one sees the  
 24 whole video you might even see all 200. All he's saying is  
 25 that clip didn't show 200, there wasn't space on the screen

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1 for more than about 24. I think that's his evidence. I  
 2 don't think he's evading the question, he's being candid in  
 3 his reply. It doesn't necessarily detract from the point  
 4 that you're putting either.  
 5 MR SEMENYA SC: No, thanks, Chair. Let's  
 6 go to exhibit Z1 again and go to between 23 to 25 into that  
 7 video. Let's stop here.  
 8 CHAIRPERSON: That's 10:36.  
 9 MR SEMENYA SC: This is the group I'm  
 10 talking about, clearly numbering far beyond 20, Mr White,  
 11 right?  
 12 MR WHITE: Absolutely, you're absolutely  
 13 correct.  
 14 MR SEMENYA SC: And this is on the 13th.  
 15 MR WHITE: Yes.  
 16 MR SEMENYA SC: I now want to show you  
 17 that –  
 18 CHAIRPERSON: I just wanted to say the  
 19 evidence is there are about 200 people there, 200 strikers  
 20 at the railway line on the 13th and one can't count the  
 21 number of bodies one can see on the screen. There's  
 22 obviously more than about 20 but it's all the people  
 23 sitting down. The people at the front have got weapons,  
 24 whether the people at the back have got weapons we can't  
 25 see but they probably have.

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1 MR SEMENYA SC: And I would like us to  
 2 now look at the group again on the 16th now and show the  
 3 comparisons. All right can we play this just for a short  
 4 while?  
 5 CHAIRPERSON: Sorry the one we have at  
 6 the moment from 10:36?  
 7 MR SEMENYA SC: Correct, Chair.  
 8 [VIDEO SHOWN]  
 9 Can we go from 23 to 25?  
 10 [VIDEO SHOWN]  
 11 Okay, we can stop it here now.  
 12 CHAIRPERSON: We're now stopping at  
 13 23:56. What we did see was that the camera was stationary  
 14 and a lot of people were going past. So there might have  
 15 been 24 on the screen initially but those 24 disappeared  
 16 and another 24 came along. So we saw quite a lot of people  
 17 going past the camera and we saw and heard a lot of  
 18 clashing of metal objects against each other. Is that  
 19 right?  
 20 MR WHITE: Yes, Chair, absolutely.  
 21 MR SEMENYA SC: And in the other video  
 22 materials as well this group is distinct from the other  
 23 larger group that is in the koppie on the 16th and other  
 24 days. You're familiar with that body of evidence?  
 25 MR WHITE: Yes, I've seen photographs and

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1 video evidence showing them being apart.  
 2 MR SEMENYA SC: Yes okay. Now I invite  
 3 you to look at exhibit –  
 4 MR WHITE: Mr Semenya, could I just say,  
 5 just for clarification, in the few seconds that you showed  
 6 me earlier on as the Chair says, there were around 20, 24  
 7 people and we saw a few seconds of that within this longer  
 8 version, now that you've shown me the longer version  
 9 there's absolutely no dispute that they are a crowd of 200  
 10 to 300. But I would have to say that as the group moves  
 11 forward and they're clearly all moving in the same  
 12 direction in my understanding, but this is the 13th, they're  
 13 being escorted by the police at this stage, certainly when  
 14 they came through this sort of like rock crevice at the  
 15 beginning of this particular clip, people were tightly  
 16 packed. But I just simply would point to the images that  
 17 are still on the screen now, you know, they're not, the  
 18 word used was tight, they're not tightly packed. People  
 19 are just simply walking along as part of a crowd is my  
 20 observation of this.  
 21 MR SEMENYA SC: Okay, at least that is  
 22 objective evidence, we can debate it. Can I invite you to  
 23 look at B38? This is a collection of the weapons that were  
 24 collected after scene 1. Are you familiar with that  
 25 photograph?

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1 MR WHITE: Yes I am, Chair.  
 2 MR SEMENYA SC: All right and B39 would  
 3 just be an amplification of the other set of weapons that  
 4 appear on B38. Do you see those?  
 5 MR WHITE: I do indeed.  
 6 MR SEMENYA SC: I would like again to  
 7 show you some exhibit, Chair, again this does require a  
 8 warning.  
 9 CHAIRPERSON: We're now going to see  
 10 exhibits, a slide on the screen which again like some of  
 11 the ones I referred to earlier, dead people, relations,  
 12 husbands, children of some of the people present here. And  
 13 they may find, looking at it very distressing, cause them a  
 14 great deal of emotional pain. So I ask that this slide not  
 15 be shown until 30 seconds has lapsed from the time I stop  
 16 speaking to enable those who do not want to be confronted  
 17 with this painful picture to leave the chamber. 30 seconds  
 18 starts now.  
 19 MR SEMENYA SC: Chair, I'm told that the  
 20 wife of Mr Langa is in the room, maybe she's not quite  
 21 alive that's where I'm going.  
 22 CHAIRPERSON: Mrs Langa, you've been very  
 23 brave before but it may well be that you would wish not to  
 24 see the pictures that are going to be shown in a moment.  
 25 I'll give you a chance to leave, if you want to stay, if

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1 you feel it's your duty out of respect to your husband,  
 2 obviously we won't stop you but if you'd like to leave  
 3 we'll understand. We'll carry on another 15 seconds has  
 4 expired. No I thought she might well, I think she feels  
 5 she has a duty to her husband to see this through. I  
 6 respect that, very well. The slide can now be shown.  
 7 MR SEMENYA SC: Okay now have a look at  
 8 AAAA21. Photo 1 depicts the body of Mr Langa so does photo  
 9 2, do you see those?  
 10 MR WHITE: Yes, I do.  
 11 MR SEMENYA SC: I would like us to look  
 12 at photo 5, do you see the stab wounds there?  
 13 MR WHITE: Yes, I do.  
 14 MR SEMENYA SC: So on photo 6 as well.  
 15 MR WHITE: Yes, I can confirm that.  
 16 MR SEMENYA SC: Photo 7.  
 17 MR WHITE: And again yes.  
 18 MR SEMENYA SC: Multiple wounds obviously  
 19 caused by sharp instruments, correct?  
 20 MR WHITE: Yes correct.  
 21 MR SEMENYA SC: And photo 8 as well.  
 22 MR WHITE: Again I can confirm.  
 23 MR SEMENYA SC: Showing multiple wounds  
 24 caused by sharp instruments, correct?  
 25 MR WHITE: It appears to be so, yes.

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1 MR SEMENYA SC: All right, so does photo  
 2 9 and photo 10. All right. Now I would like you to also  
 3 look at exhibit L and go to slide 102. That is the body of  
 4 Mr Twala, you are aware of this –  
 5 MR WHITE: I'm familiar with that  
 6 photograph and the full slide presentation, yes  
 7 MR SEMENYA SC: Just out of curiosity,  
 8 these are not the type of images you'd see in Northern  
 9 Ireland from a public unrest situation, am I right?  
 10 MR WHITE: Well certainly the placing of  
 11 the animal skull. I don't fully understand the  
 12 significance of that but certainly we have experience  
 13 whereby people have been killed within crowds. I've been  
 14 fortunate of attending a scene not that long before I  
 15 retired where within a crowd somebody who was identified as  
 16 an informer, they killed and was actually decapitated by  
 17 use of a shovel, a spear I think.  
 18 MR SEMENYA SC: I'm sure there would be  
 19 people killed, I'm trying to deal with how chilling this  
 20 really looks. It just goes beyond just killing.  
 21 MR WHITE: And I think I said to Mr  
 22 Semenya yesterday when we were talking about some of the  
 23 other killings, I think I used the word shocking.  
 24 MR SEMENYA SC: And can we have a look at  
 25 slide 173 of exhibit L? That's Mr Twala again. 103, 103

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1 sorry. You do see the gaping wound that is reflected there  
 2 don't you?  
 3 MR WHITE: Yes I do.  
 4 MR SEMENYA SC: Now having done this  
 5 exercise I want us to –  
 6 CHAIRPERSON: On looking at this picture  
 7 you've made your point, Mr Semenya. Perhaps it could be  
 8 taken off the screen. Thank you.  
 9 MR SEMENYA SC: Now you can see, Mr  
 10 White, that we have dealt with the profile of this group  
 11 now, correct?  
 12 MR WHITE: Indeed.  
 13 MR SEMENYA SC: And you can see that the  
 14 weapon they use in the killings are really just sharp edged  
 15 instruments, correct?  
 16 MR WHITE: Certainly the images that you  
 17 show are consistent with people being killed with sharp  
 18 instruments, yes.  
 19 MR SEMENYA SC: And when we look at this  
 20 group of people they are carrying those weapons of mayhem  
 21 with them as on the 13th and as on the 16th, is that right?  
 22 MR WHITE: I don't think there's any  
 23 dispute that people are armed, I've said that frequently in  
 24 my statements.  
 25 MR SEMENYA SC: And the point I'm making

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1 is a pistol here, a pistol there is not really the picture.  
 2 The threat posed by the individuals is a threat posed by  
 3 300, 400 people carrying these dangerous weapons that I  
 4 have just illustrated to you. Am I right?  
 5 MR WHITE: Absolutely and even the  
 6 Intelligence says that.  
 7 MR SEMENYA SC: So the threat is a threat  
 8 of 300 to 400 dangerous weapon wielding individuals, it's  
 9 not a threat of one, two individuals carrying a pistol or  
 10 two.  
 11 MR WHITE: I think it would fair to say  
 12 it's certainly not a threat of one or two individuals  
 13 carrying a pistol or two. I am again more than happy to  
 14 say in the longer piece of video footage that you've shown  
 15 me and I've said all the way through 200 to 300 people who  
 16 were all carrying what I think is referred to here as  
 17 traditional weapons. And we've seen images of those,  
 18 whether or not all of the people who were carrying those  
 19 weapons within that crowd have specifically the same  
 20 violent intent we don't know. But I'm not disputing the  
 21 fact that this is an armed group and certainly clearly they  
 22 have shown propensity to violence in the past. At least  
 23 some of them, or at least a significant number of them.  
 24 MR SEMENYA SC: Well we have covered the  
 25 area that they seem to be acting in unison, they are

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1 singing together. Are you aware also, on top of that, that  
 2 on the 16th the intent of the group through the mouth of Mr  
 3 Noki is that we're going to kill each other today?  
 4 MR WHITE: I've seen a number of threats  
 5 including that specifically directed, I think it was at Mr  
 6 Calitz and Mr McIntosh.  
 7 MR SEMENYA SC: And describing the intent  
 8 of the group, not only he's – he's not saying I'm going to  
 9 be killing you and you're killing me. He says we are going  
 10 to be killing each other, so he is expressing in verbal  
 11 terms the intent of the group as a whole. Am I right?  
 12 MR WHITE: He certainly refers to we as  
 13 opposed to me. And I think again in fairness those threats  
 14 were issued on a number of occasions and potentially even  
 15 not only on Thursday but I think on Wednesday as well if  
 16 I'm correct.  
 17 MR SEMENYA SC: Now I'm trying to come to  
 18 this point that this is not a threat you remove by use of  
 19 a sniper here or a sniper there if we are able to establish  
 20 that there was an attack on the police line. Am I right?  
 21 MR WHITE: If we're able to establish  
 22 this is an attack on the police line a sniper here and a  
 23 sniper there is going to take a long time to deal with a  
 24 group of 200 to 300 if that's what the sniper's going to do  
 25 to engage all of those people.

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1 MR SEMENYA SC: Right and certainly if it  
 2 is an attack that happens in a fraction of eight seconds.  
 3 It is a threat of 300 to 400 spear wielding, panga wielding  
 4 individuals that are charging at the police line. Am I  
 5 right?  
 6 MR WHITE: Well I don't know if that's  
 7 right or not. I mean I think that is one of the key facts,  
 8 an issue here and again it's not my place to decide  
 9 specifically yes or no as to what happened. I mean I've  
 10 seen evidence to suggest an attack, I've seen other  
 11 evidence to suggest not.  
 12 CHAIRPERSON: Mr White, perhaps we can  
 13 deal with it this way. As I think I indicated to you  
 14 previously, one of the matters we have to decide is whether  
 15 these people were intending to attack the police line and  
 16 the Nyalas and so on. That's the police case, that's the  
 17 evidence of Mr X. The other version by those strikers that  
 18 testified is they were just going to Nkaneng, they did  
 19 nothing wrong and they were simply on their way to Nkaneng.  
 20 One of the questions, so I've said one of the questions  
 21 we've got to decide is whether the police allegation is  
 22 correct. It's not for you to decide that for us. There  
 23 is, of course, a further question which we also have to  
 24 decide and that is even if the strikers are right and they  
 25 were simply on their way to Nkaneng and they weren't

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1 intending to attack the police, did the police genuinely  
 2 believe, honestly believe there was an imminent threat? In  
 3 other words they would be attacked and did they have  
 4 objective, justifiable grounds for so believing? So I  
 5 think we call that putative self defence. So those are the  
 6 issues we've got to decide.  
 7 [10:07] Were they on their way to attack the police or  
 8 alternatively were they on their way to Nkaneng peacefully?  
 9 A further question is even if they were right, they were on  
 10 their way to Nkaneng, were they acting in such a way as to  
 11 give rise to a reasonable belief on the part of the police  
 12 that they were attacking them? Those are the questions we  
 13 have to decide. I think what Mr Semenya is asking you is  
 14 assume for the sake of answering the question that we find  
 15 in his favour that they were attacking, if so then certain  
 16 things follow. Am I correct, Mr Semenya?  
 17 MR SEMENYA SC: That's correct, Chair.  
 18 CHAIRPERSON: So we can approach it in  
 19 that way.  
 20 MR WHITE: Good.  
 21 CHAIRPERSON: I understand the  
 22 reservation you put up. I understand you quite properly  
 23 say it's not for you to say they were attacking or weren't.  
 24 That's our difficult function to discharge at the end of  
 25 the day, but on the assumption, then you can proceed.

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1 MR WHITE: And I'm grateful for your  
 2 clarification, Chair.  
 3 MS LE ROUX: Chair, could I just clarify  
 4 the assumption you'd like Mr White to make? Is it that all  
 5 300 are intent on attacking?  
 6 CHAIRPERSON: No, I suppose to use the  
 7 word that was used yesterday, a significant number of those  
 8 who were approaching in that group were minded to attack  
 9 the police, to implement the threats which the police  
 10 allege had been made earlier in the day, and I think there  
 11 was, as the witness said, an attack, a threat the previous  
 12 day. I take it you mean are we going to have to find  
 13 whether all 300 – you're not talking about 3 000 now – all  
 14 300, or the whole, I'm not even sure what the number is. I  
 15 think there's a suggestion that it was actually less than  
 16 300, but that whole bundle of people –  
 17 MS LE ROUX: Yes, Chair, I –  
 18 CHAIRPERSON: - that were coming around  
 19 the kraal –  
 20 MS LE ROUX: Yes.  
 21 CHAIRPERSON: - advancing up what we've  
 22 called the channel or the corridor, towards the police  
 23 line.  
 24 MS LE ROUX: Yes, Chair, I just – so the  
 25 two aspects to the assumption you'd like Mr White to make,

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1 1, it's the so-called warrior group, not the 3 000 –  
 2 CHAIRPERSON: Yes, yes, yes –  
 3 MS LE ROUX: - and it's the group at the  
 4 front coming around the kraal essentially, however many  
 5 their number.  
 6 CHAIRPERSON: Yes, well I take it so. It  
 7 occurs to me as we're discussing it that there's actually a  
 8 further issue we're going to have to decide, and let's get  
 9 this on the table now because it's relevant for what  
 10 follows. There is also the possibility, I think, whether  
 11 we will find that to be so we don't know ourselves yet.  
 12 There's another possibility that they were intending to go  
 13 to Nkaneng, but they weren't prepared to tolerate any  
 14 obstruction. In other words if the police were in their  
 15 way, they were going to hack their way through to get to  
 16 Nkaneng, so the possibility is an attack because they  
 17 wanted to chase the police away and remain in undisturbed  
 18 possession of the territory that they'd appropriated for  
 19 themselves. Alternatively, were they on their way to  
 20 Nkaneng, but then that gives rise to the next question;  
 21 were they intending to go peacefully to Nkaneng where if  
 22 there was an obstruction were they going to walk around it  
 23 and go peacefully to Nkaneng, or was their attitude we're  
 24 going to Nkaneng, these people are in our way, we're going  
 25 to hack our way through? That's another possibility we

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1 have to consider. I'm not sure that this extra point makes  
 2 any difference to the question the witness is being asked,  
 3 but it's clearly a question we'll have to think about and  
 4 consider and I hope we'll be assisted by argument when we  
 5 make the factual findings at the end.  
 6 MS LE ROUX: And Chair, there's obviously  
 7 the fourth possibility that we probably should just note as  
 8 well at this point, which is the crowd comes around and in  
 9 response to being engaged by the POP there may have been a  
 10 decision to then attack, sort of mimicking the 13th.  
 11 There's a fourth potential –  
 12 CHAIRPERSON: No, no, that's another  
 13 possibility, but that still would be an attack of course.  
 14 MS LE ROUX: Yes.  
 15 CHAIRPERSON: The principles I would  
 16 again, the prima facie views as I'm expressing them, the  
 17 principles of self-defence wouldn't avail the strikers if  
 18 that was their mind, if they were provoked as it were by  
 19 the POP and they were therefore going to attack the TRT  
 20 line which was in front of them, that wouldn't be a defence  
 21 that would wash in a criminal court. But anyway, we won't  
 22 get there now, but you're correct in saying that that's  
 23 another possibility we'll have to apply our minds to, and  
 24 thank you for drawing my attention to it.  
 25 MR SEMENYA SC: Mr White, if we were able

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1 to establish that this group of 3, 400 sharp instrument  
 2 wielding people were in fact attacking on the police, I  
 3 want to suggest to you that it is a threat that could not  
 4 be contained through non-lethal force.  
 5 MR WHITE: If – and I'm grateful for the  
 6 Chair's clarification. If you're asking me to basically  
 7 engage in this on the basis of you have 2 to 300 – or  
 8 sorry, in your question you said 3 to 400 people who are  
 9 armed with these sharp instruments that I've seen on the  
 10 photographs, could that threat have been neutralised, if  
 11 you like, or dealt with without the use of live ammunition,  
 12 I think my honest answer is it depends on the  
 13 circumstances.  
 14 It may well be that the police might be able to  
 15 engage those people from vehicles, from using the cover of  
 16 vehicles, by using, you know, some of the other tactical  
 17 options available to them, and I absolutely accept it may  
 18 be necessary if individual officers feel that there is an  
 19 imminent threat to their life for them to use live rounds.  
 20 So I'm – please, I'm not trying to underestimate  
 21 the level of threat that potentially this group posed, and  
 22 to work through the sort of hypothetical situation if  
 23 you're asking me if 3 or 400 heavily armed people attacked  
 24 the police, might it be a requirement for the police to use  
 25 live fire, well under those circumstances then it may well

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1 be, yes.

2 MR SEMENYA SC: I'm not asking you a

3 hypothetical question, Mr White. I've shown you the

4 videos. I've shown you the videos of the people

5 approaching the police line. The question is can that

6 threat have been contained with non-lethal weaponry?

7 MR WHITE: And I'm answering the question

8 with the clarification from the Chair because I can't

9 possibly, from the videos that you've shown me I cannot

10 possibly say that this was a crowd of 3 to 400 people who

11 were heavily armed with, who have the intent to attack the

12 police. The Chairman, very helpfully I think, clarified

13 and said if you assume that, answer the question assuming

14 that. So I have answered the question assuming that, but

15 again in terms of my evidence I need to make it very clear

16 I have done that on the basis of the requirement from the

17 Chair to assume that. I don't necessarily assume from the

18 evidence that you've shown me that that is the case.

19 MR SEMENYA SC: I'm not on the

20 assumption –

21 CHAIRPERSON: Mr Semenya, you know there

22 is an issue of fact which we have to decide and it's not

23 for the witness to decide the question, it's for us. It's

24 not for you to decide it either. So it's perfectly

25 permissible to say if you accept that what we will argue is

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1 correct, namely that they were approaching to attack the

2 police, either they hack their way through to Nkaneng or to

3 chase the police away so that they could remain in

4 undisturbed possession of the koppie, on that assumption

5 could it have been stopped by non-lethal force, I

6 understand the witness to concede that probably not.

7 That's correct, is it?

8 MR WHITE: Chair, what I am conceding is

9 that it may be a requirement to use lethal force in those

10 circumstances. I can't say with absolutely certainty

11 exactly what the outcome will be, but again I'm trying to

12 be helpful and I'm genuinely not trying to avoid the issue

13 by saying it may well be that you might have to use lethal

14 force.

15 CHAIRPERSON: I understand, and you

16 wouldn't necessarily criticise people who did lethal force

17 to do that if the factual finding that you're asked to

18 assume is in fact the correct one. I take it that's also

19 right, isn't it?

20 MR WHITE: If a police officer is in

21 genuine fear of imminent threat of his life, I will not,

22 absolutely not criticise whatsoever.

23 CHAIRPERSON: Yes, and the further point

24 would be, which Mr Semenya would argue, that what we see

25 and you know the surrounding circumstances were such as to

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1 give rise to an objective justification for the fear on the

2 part of the policeman that his life was in danger. I take

3 it one can accept that too, provisionally at least.

4 MR WHITE: I can provisionally accept

5 that, but as you rightfully pointed out, Chair, there are

6 potentially – well, you'd said three and Ms le Roux then

7 added potentially a fourth option here. So if we assume

8 option 1 – and I think that's what you asked me to do and I

9 have hopefully honestly engaged with Mr Semenya's question

10 on the basis of that clarification that you gave - assuming

11 option 1 then I'm saying it may well be that there is a

12 requirement to use live fire.

13 CHAIRPERSON: The next question of course

14 does not directly flows from what Mr Semenya said, but it

15 occurs to me and I'd better mention it now while I remember

16 it, and that is going back to the question of snipers; if

17 it's correct, and again this is a controversial question,

18 but if it's correct that these strikers were minded to

19 attack the police, that they weren't afraid of ammunition

20 being fired at them, weren't deterred at all by the fact

21 that they're approaching a group of 60 TRT people armed

22 with R5s, because they thought the bullets would bounce off

23 because of the muti, once one or two had in fact been shot

24 and had fallen, then obviously the bullets hadn't bounced

25 off, I take it there was also a possibility that the belief

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1 in the muti would then disappear and the strikers might

2 behave in a different fashion once it had dawned on them

3 that the muti wasn't working. I take it that's also a

4 possibility.

5 MR WHITE: Absolutely, Chair.

6 CHAIRPERSON: The snipers might in fact –

7 this is speculation obviously, but the snipers might in

8 fact have been effective for the reason I've mentioned, but

9 of course we'll never know.

10 MR WHITE: Absolutely we'll never know,

11 Chair.

12 MR SEMENYA SC: Now Mr White, you see the

13 reason I played you ZZ4, which is the statement of the

14 security of Lonmin, was precisely to say it was his

15 experience that this non-lethal weaponry had no effect

16 whatsoever on the charging people. You recall that

17 evidence?

18 MR WHITE: I do indeed, yes.

19 MR SEMENYA SC: And I want to be very

20 clear, I'm not asking you whether the police would be

21 justified in using sharp ammunition once the attack has

22 been established. I'm not asking you that question. I'm

23 asking you a different question. Would that type of threat

24 have been contained with non-lethal force? That's the

25 question I'm asking you.

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1 MR WHITE: And my answer to that is it  
 2 may have been possible to contain it with non-lethal force.  
 3 You make reference to the incident on - is it the Sunday?  
 4 - the Sunday where unfortunately the security officers were  
 5 killed after using non-lethal force and because it doesn't  
 6 have an effect, plus if you want to draw a parallel across  
 7 to it then, you know, where no two sets of circumstances  
 8 are exactly the same, so let's look at least some of the  
 9 circumstances we could perhaps draw across. How many  
 10 security guards were there that day? I don't know and I  
 11 genuinely don't know, Chair, and I'm conscious of the fact  
 12 that I asked a question from Mr Semenya yesterday, so let  
 13 me just park that and say but I assume -  
 14 CHAIRPERSON: I don't know either.  
 15 MR WHITE: But what I'm assuming is that  
 16 there were nowhere near as many security officers present  
 17 there as there were police officers armed with a variety of  
 18 non-lethal. So it may well be that just because the non-  
 19 lethal options were not sufficient to save the security  
 20 officers' lives on the Monday - or sorry, Sunday,  
 21 tragically, that's not necessarily to say that these  
 22 various non-lethal mechanisms may not have been sufficient  
 23 to repel the crowd on the Thursday.  
 24 CHAIRPERSON: It wasn't entirely an  
 25 academic question because we do know, although there may be

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1 some controversy as to the extent, but we do know that non-  
 2 lethal force was used to some extent, that there was water  
 3 cannon, the POP people used water cannon and rubber balls  
 4 and tear smoke I think, and stun grenades, and they don't  
 5 appear to have had any effect. It's also that complicated  
 6 issues, apparently it's suggested that some of the strikers  
 7 were wearing blankets so the rubber balls bounced off and  
 8 there's also - I'm not sure if we've got the evidence yet,  
 9 but there certainly is evidence available that sometimes  
 10 teargas in fact enrages people and contrary to popular  
 11 belief that they sometimes turn around and go away, they  
 12 sometimes get so angry that they advance with increased  
 13 aggressiveness. That's certainly been the experience in  
 14 cases which I've appeared as counsel, and I think we either  
 15 have or are going to get some evidence on that. But  
 16 certainly what does appear is that there is evidence, and  
 17 there may well be more, to the effect that a significant  
 18 degree of non-lethal force was used to dissuade these  
 19 people from proceeding on the course they were on,  
 20 advancing towards the TRT line, and it had no effect. I  
 21 think that's correct, Mr Semenya?  
 22 MS LE ROUX: Chair, the objective  
 23 evidence shows that the water cannon was not used on the  
 24 front group.  
 25 CHAIRPERSON: Well, we'll take the water

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1 cannon out of my proposition. The other things were.  
 2 Water cannon also is a rather dubious way of - some people  
 3 don't like being, having water cannon fired at them, other  
 4 people seem again to get angry and proceed with more  
 5 vigour, but anyway, the point I'm putting is that there is  
 6 some evidence to the effect that non-lethal force was used  
 7 in an attempt to dissuade these people from proceeding on  
 8 the course on which they were and it wasn't successful. I  
 9 think that is correct, Mr Semenya?  
 10 MR SEMENYA SC: That is correct, Chair.  
 11 MR WHITE: Chair, just if it's helpful,  
 12 I've seen lots of evidence, lots of statement evidence from  
 13 the police and of course exhibit L in relation to exactly  
 14 as you say. I've also seen evidence from my legal team  
 15 around which indicates the use of less lethal force which  
 16 may have had a different effect on the crowd. Again, which  
 17 of those two versions is true? I've obviously taken both  
 18 into consideration in trying to form my judgments. Which  
 19 of them is true and more accurate is obviously an issue for  
 20 yourself, but I just think that that needs to be said.  
 21 CHAIRPERSON: I think we can accept  
 22 therefore that some less than lethal force was used.  
 23 Anyway, when I put the proposition to you earlier I did say  
 24 there was a dispute as to how much. So the short answer to  
 25 what I put to you may well be that if more non-lethal force

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1 was used maybe it would have had a different effect, but  
 2 what I was objectively putting to you was there is some  
 3 evidence that some non-lethal force was used without  
 4 apparent effect. In other words it wasn't just a purely  
 5 academic question, if non-lethal force had been used it  
 6 might have made a difference. It's a bit more subtle and  
 7 complicated than that.  
 8 MR WHITE: I think it's hugely subtle and  
 9 complicated, Chair, and I think that's one of the issues  
 10 that certainly the evidence that I've seen and sort of I  
 11 suppose from my legal team as opposed to the statements  
 12 from the SAPS might indicate that actually the non-lethal  
 13 force could potentially - and there's no dispute whatsoever  
 14 that the police have used non-lethal force before what's  
 15 referred to as scene 1, but not only that it mightn't have  
 16 had the impact on the strikers that they would have wanted,  
 17 i.e. to move them away, but there might have been a  
 18 unintended consequence of actually moving them in a not,  
 19 rather than moving them away moving them in a different  
 20 direction, which ultimately led to them then going to  
 21 confront the TRT line. Again I've seen all of this  
 22 evidence, engaged with it all, and which is actually, which  
 23 version is actually true is very much for yourself and the  
 24 two Commissioners, not me.  
 25 CHAIRPERSON: While we're on the point

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1 can I ask you this; you don't use teargas in Northern  
 2 Ireland, do you? Or do you?  
 3 MR WHITE: No Chair, we don't use it. We  
 4 haven't used it since the early 70s.  
 5 CHAIRPERSON: I see. So you can't deal  
 6 with the point that I put to you earlier that there have  
 7 been cases and there is evidence to the effect that  
 8 sometimes teargas has the opposite effect. Sometimes it  
 9 makes people go away, they don't like it, it's really  
 10 unpleasant and they go away, but sometimes they get so  
 11 angry that they in fact advance with renewed vigour, and  
 12 that's what happened in Uppington, but you can't comment on  
 13 that from your own experience.  
 14 MR WHITE: Only to say that - actually I  
 15 think I gave evidence yesterday to the effect that quite  
 16 often a variety of different tactics have that effect. You  
 17 know the police intended to maintain distance, and I talked  
 18 both in relation to water cannons and AEP, two tactics that  
 19 we do use, and said whilst the police's intention is to  
 20 maintain distance and hopefully try and by distance then  
 21 calm the crowd down, but even the mere presence of water  
 22 cannons before they're used will sometimes inflame the  
 23 situation. So I'm sure absolutely the same in relation to  
 24 teargas, and I have seen teargas in use in other countries  
 25 and have been subjected, experienced the consequences of

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1 it.  
 2 CHAIRPERSON: You've also inhaled some  
 3 teargas, did you?  
 4 MR WHITE: Yes, I have -  
 5 CHAIRPERSON: Did it make you angry?  
 6 MR WHITE: It made me angry, but  
 7 certainly it made me close my eyes and do all the things I  
 8 think it's supposed to make you do so that obviously you  
 9 can't then pose the threat. I think that's the purpose in  
 10 using it, yes.  
 11 CHAIRPERSON: Mr Semenya, we took up your  
 12 time on a point that I hope may have assisted to some  
 13 extent to throw light on the difficult questions we have to  
 14 decide, but I'll take the tea adjournment about - or not,  
 15 the first comfort break as we call it, round about half  
 16 past 10. That gives us about four or five minutes, but so  
 17 when we reach a suitable stage for you to signal that it's  
 18 appropriate for us to take that break, you will let me  
 19 know.  
 20 MR SEMENYA SC: I will, Chair, yes. But  
 21 the reality again, Mr White, is that all of these things  
 22 that we spent days discussing happened in split seconds on  
 23 the day for these police officers to respond to. That's  
 24 common cause, right?  
 25 MR WHITE: Absolutely.

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1 MR SEMENYA SC: Now there is this aspect  
 2 perhaps that I can handle, Chair, after the comfort break,  
 3 because it -  
 4 CHAIRPERSON: Do you want to take the  
 5 comfort break now?  
 6 MR SEMENYA SC: Yes, Chair.  
 7 CHAIRPERSON: Request granted.  
 8 MR SEMENYA SC: Thank you.  
 9 [COMMISSION ADJOURNS COMMISSION RESUMES]  
 10 [10:46] CHAIRPERSON: The Commission resumes. Mr  
 11 White, you're still under oath.  
 12 GARY WHITE: (s.u.o.)  
 13 CHAIRPERSON: Mr Semenya?  
 14 CROSS-EXAMINATION BY MR SEMENYA SC (CONTD.):  
 15 Thank you, Chair. Mr White, can I invite you to look at  
 16 your provisional statement and particularly page 16? I  
 17 draw your attention to paragraph 3.19. The issues we have  
 18 been discussing this morning, this is how you describe them  
 19 in your statement. You say, "Around 15:51 the same group  
 20 made an attempt to breach or outflank the police line.  
 21 Many of the members of the group were in possession of  
 22 traditional weapons such as pangas, spears and knobkerries.  
 23 At least one person was armed with a pistol and appears to  
 24 have fired that pistol at public order police who were  
 25 shooting at the group with rubber bullets. In response to

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1 the approach of the group, a line of tactical response team  
 2 members opened fire, killing 16 miners and injuring many  
 3 others." Approaching the line, that's the word you used,  
 4 this group was just approaching when 16 of them were  
 5 killed.  
 6 MR WHITE: That's the word I've used,  
 7 "approach."  
 8 MR SEMENYA SC: In the same meaning one  
 9 says a train is approaching the station, in that innocent  
 10 way.  
 11 MR WHITE: No -  
 12 MR SEMENYA SC: I'm asking, Chair.  
 13 CHAIRPERSON: No, Mr Semenya, to be fair  
 14 he does use the word "approach," that's correct, but he  
 15 also uses the word "breach" or "outflank" in the first  
 16 sentence. The two have got to be read together.  
 17 MR SEMENYA SC: Can I invite you to -  
 18 your final statement, I'm looking at paragraph 7.5.  
 19 CHAIRPERSON: If you look at 3.1.11 at  
 20 page 23 of his final statement, the passage you've quoted  
 21 from his provisional statement was his summary of the facts  
 22 really as he saw them and then he takes that over with  
 23 slight modification in his final report at 3.1.11, page 23  
 24 of the final report. Yes, the passage put was from the  
 25 provisional statement when he was summarising the facts as

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1 he understood them and he summarises them again in his  
 2 final report with modification and the passage appears to  
 3 be 3.1.11, if I'm correct.  
 4 MR SEMENYA SC: Can I invite you, Mr  
 5 White, to your final statement paragraph 7.5.10. It would  
 6 be on page 112.  
 7 MR WHITE: Thank you. I have it, yes.  
 8 MR SEMENYA SC: Paragraph A of that  
 9 paragraph you're dealing with the amount of ammunition  
 10 used, 327 rounds of live ammunition, right?  
 11 MR WHITE: Yes.  
 12 MR SEMENYA SC: Now Mr White, you don't  
 13 know how many of those rounds were fired to the ground, do  
 14 you?  
 15 MR WHITE: No, I don't.  
 16 MR SEMENYA SC: And you can't tell us  
 17 what proportion of those rounds were fired to the ground,  
 18 can you?  
 19 MR WHITE: No, I don't because it was  
 20 very difficult to discern that from the statements.  
 21 MR SEMENYA SC: You don't know how many  
 22 of those rounds were aimed at the strikers, do you?  
 23 MR WHITE: Again I agree, for the same  
 24 reasons that I've given.  
 25 MR SEMENYA SC: And you can't tell us

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1 what proportion of those were aimed at the people, correct?  
 2 MR WHITE: Once again you're correct, for  
 3 the reasons I say.  
 4 MR SEMENYA SC: But you would need those  
 5 facts to determine proportionality, won't you?  
 6 MR WHITE: I'm saying, the reason that I  
 7 say in this statement is that it prima facie constitutes  
 8 disproportionate response to the threat perceived, it's  
 9 because it is 328 rounds or 27, I think there's a  
 10 clarification on that and I'm not sure which the number is  
 11 but it doesn't really matter whether it's 328 or 27, is  
 12 that on reading the statements it is not clear as to, as  
 13 you say, how many were fired at the ground, how many were  
 14 warning shots, how many were fired at the crowd. A  
 15 substantial number seemed to be fired at the crowd without  
 16 very detailed explanation of what has been fired at, but I  
 17 make the point that - for two reasons. Number 1, the  
 18 number of rounds that are being fired and, secondly, the  
 19 circumstances in which they're fired and I made reference  
 20 to this in relation to my evidence in chief. So you know  
 21 this paragraph has to be taken in the widest context, i.e.  
 22 that we're talking about scene 1, we're talking about what  
 23 people appear to be firing at and I absolutely stand by the  
 24 position that - and the reason I've used the words prima  
 25 facie is that on the face of it, and I can't prove and I've

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1 never sought to prove, I never sought to suggest that I'm  
 2 saying that any round was justified or not. I simply don't  
 3 know.  
 4 CHAIRPERSON: Mr White, exhibit is a  
 5 schedule of what is described as munitions expended at  
 6 scene 1. That now has to be revised because, as you say,  
 7 the police themselves conceded that the original schedule  
 8 that they gave in exhibit in this regard was incorrect and  
 9 I think that's where you get your 327 rounds from, which is  
 10 exhibit FFF8 and exhibit FFF35, being the corrected version  
 11 of the ammunition discharged at scene 1, but if you look at  
 12 slide 211 of exhibit L which is the uncorrected version and  
 13 I haven't got the two exhibits you refer to in front of me  
 14 at the moment but if you look at the uncorrected version it  
 15 gives one some kind of an idea of the ballpark that you're  
 16 in. They say that there they were talking about 284  
 17 bullets, 284 sharp point ammunition, so he has called it  
 18 and there they say 109 bullets were fired by way of warning  
 19 and that's 9 millimetre, 5.56 millimetre and 7.62  
 20 millimetre. There was only one 7.62 millimetre so we can  
 21 ignore it really, but the towards figure is 175. So 175  
 22 over 284 is substantially more than 50% and those were  
 23 fired towards and of those, 140 of 175 were 5.56  
 24 millimetre, in other words R5s. So that gives us some kind  
 25 of an idea, obviously subject to the correction that you

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1 refer to, as to the proportion of warning shots versus  
 2 aimed at shots. Would you like to say what your comment is  
 3 in relation to the question as to whether there was a  
 4 disproportionate response to the perceived threat if one  
 5 has regard to the number of shots towards as opposed to the  
 6 warning shots?  
 7 MR WHITE: Yes, Chair, two points.  
 8 Firstly, that you know the overall total here is 284 out of  
 9 which say 175 were fired towards the crowd. You know the  
 10 later revised version is 327 or 28 but it's, you know it's  
 11 an extra 30 or 40 rounds. How many of those were fired at  
 12 the crowd, I don't know but let me just -  
 13 MS LE ROUX: Chair -  
 14 CHAIRPERSON: - it's 327. So let's  
 15 assume for the sake -  
 16 MS LE ROUX: Chair, we've done the  
 17 calculation. If we do the same proportion -  
 18 CHAIRPERSON: Yes?  
 19 MS LE ROUX: - on the 328 it will be 202  
 20 towards.  
 21 CHAIRPERSON: Yes - yes, I know. I was  
 22 going to be more generous to the police. I was going to  
 23 say let's assume that all the towards, all the extra shots  
 24 - it may not be correct but, you know, it always helps to  
 25 make allowance in favour of the person that the point may

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1 ultimately be against, if you understand what I mean. If  
 2 you say, if you take 175 over 327, what's that proportion?  
 3 Mr Fischer with his electronic aids or his mental  
 4 arithmetic will tell us.  
 5 MS LE ROUX: Sorry, Chair, if we could  
 6 just repeat the calculation?  
 7 CHAIRPERSON: Well, 175 is the –  
 8 MS LE ROUX: Out of 328.  
 9 CHAIRPERSON: Out of the 327, I think.  
 10 MS LE ROUX: 175 out of 327 is – I think  
 11 we've established why Mr Fischer is a lawyer, not an  
 12 accountant.  
 13 CHAIRPERSON: No, an accountant's  
 14 mathematics isn't very good either normally. As far as I  
 15 can see it's 58 over 109, so it's just over 50%.  
 16 MS LE ROUX: Yes, Chair, it's 53.5%. I'm  
 17 not sure of the number of shots that would be, we can do  
 18 that calculation.  
 19 CHAIRPERSON: Yes, no, obviously if you  
 20 say – it's also unscientific, of course – is to take the  
 21 same proportion of aimed at shots from, as a fraction of  
 22 the 327 as was in the case with the 284. That's the  
 23 calculation you've done but that's not scientific, that's  
 24 not scientific either, is it? But if you do it my way then  
 25 you make the maximum allowance in favour of the police and

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1 you get a figure of 53.5% are fired at. The question then  
 2 arises, would you describe that as a disproportionate  
 3 response to the perceived threat, to use your language in  
 4 7.5.10 sub-para A?  
 5 MR WHITE: Chair, I would even be, go as  
 6 far as to say if you even deal with 175 rounds, which is  
 7 the police case and that's on the basis of 284 but let's  
 8 set aside that there are more rounds fired than that, 175  
 9 rounds fired at the crowd, I would say still appears to me  
 10 on all of the circumstances that I've engaged with,  
 11 watching the Reuters video that we watched earlier on, for  
 12 example, and specifically engaging with the statements of  
 13 the police officers who were there and describing what they  
 14 were firing at, I would say in relation to 175 rounds fired  
 15 at the crowd, in my view it still appears to be prima facie  
 16 excessive use of force.  
 17 CHAIRPERSON: Well, it's not as simple as  
 18 that, you know, because I don't know how many of the 50 or  
 19 60 people actually fired, we know some of them didn't but  
 20 the clever people here will be able to tell us instantly  
 21 how many fire and how many didn't, but let's take 50 for a  
 22 moment for, as a convenient starting point.  
 23 MS LE ROUX: Chair, 54 fired.  
 24 CHAIRPERSON: Thank you, 54. Well, let's  
 25 stick to 50 because the arithmetic is easier. Take it to

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1 50, 50 people fired 175. So that means each one, assuming  
 2 each one of them fired it's just over three. Now - these  
 3 are aimed at shots, of course, isn't it? Now I know you've  
 4 got a criticism of people who put their rifle on automatic  
 5 and that's not, that's not relevant to the point we're  
 6 putting at the moment, it has its own relevance in its own  
 7 sphere, as it were, but if you've got people standing in a  
 8 line, they're being approached by what, for the purpose of  
 9 the present question we assume either was an attack or was  
 10 objectively perceived to be an attack then – and they  
 11 assume these people are trying to kill them and they are  
 12 shooting to defend themselves and their colleagues - you've  
 13 got the problem, I don't like the idea of 50 people all  
 14 shooting and we've debated that in another context because  
 15 there are all sorts of, I'm not sure what the law is but I  
 16 can also see all sorts of practical problems. If I'm  
 17 standing there and I'm not sure whether my colleagues are  
 18 going to fire or not, so I think it necessary to fire, so  
 19 they all may have thought that. But let's just take 50, is  
 20 three shots excessive in the circumstances? If, you see  
 21 175 is a lot if you take them altogether but 50 people each  
 22 of whom, on the assumption we're making, is entitled to  
 23 shoot, is three excessive?  
 24 MR WHITE: Well, first of all, Chair, and  
 25 as you very clearly articulated, we're doing averages

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1 because it's not that everybody fired – at no stage in any  
 2 of my three statements have I ever sought to engage with  
 3 the justification of an individual officer, whether he or  
 4 she fires or not and it may well be that an individual  
 5 officer who perceives a threat fires three rounds. I gave  
 6 evidence yesterday to the fact that in the UK our officers  
 7 tend to be trained, if the target's exposed fire two shots.  
 8 So you know, an officer perceives a threat to his life or  
 9 to the life of his colleagues and he engages with three  
 10 shots, does that appear to be disproportionate in the  
 11 circumstances that we describe? No. You multiply that up  
 12 across, you know, the 50 people or whatever it is, then you  
 13 might say does that appear to be disproportionate and one  
 14 obvious answer based on the mathematics of that would be  
 15 no.  
 16 We come back, however, and you alluded to this,  
 17 sir, in your comments, we come back to – it was a bit like  
 18 when I was talking about intelligence earlier on – there  
 19 are details in relation to intelligence and then there was  
 20 my overriding point and for the purposes of time I'll not  
 21 revisit that. So in relation to, you know, what I was  
 22 saying here around disproportionate use of force, it's  
 23 exactly the point that you were talking about earlier on.  
 24 Why are they there? Why do we have this line of 60 people  
 25 who are all lined up? It was foreseeable. There's

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1 evidence to suggest that this was foreseeable and as a  
 2 result of which, even if – and I stress, even if the  
 3 circumstances are justified that individual police officers  
 4 fire because this armed group with weapons that Mr Semenya  
 5 has very clearly described, running after them and police  
 6 officers perceive a threat to their lives, I would still  
 7 say the issue in relation to disproportionate force is  
 8 around how this operation was planned and set up and that  
 9 particular tactic of the line. So each individual officer  
 10 may be, and I think I do make reference to this in my  
 11 statement somewhere and I'd ask my legal team to help me  
 12 around the particular reference, I this actually may be  
 13 even the very last comments I made in the final statement  
 14 perhaps – ja.  
 15 CHAIRPERSON: I'm sorry, I'm going to  
 16 interrupt you.  
 17 MR WHITE: That's –  
 18 CHAIRPERSON: I understand your point  
 19 about the planning, I understand your point that the answer  
 20 to the why Thursday question is that it wasn't justifiable  
 21 in all the circumstances to go ahead on Thursday,  
 22 particularly when they did and how they did and so on. I  
 23 understand that argument. Whether it's right or not I'll  
 24 only know later, but we're now dealing with what amounts to  
 25 a sort of self-standing point on its own. It may be that

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1 they shouldn't have been there, it may be that that's a  
 2 point of criticism but we're not busy with that. The  
 3 question is, looking solely at the fact that you've got a  
 4 line of 50 people being approached in this way by this  
 5 group of people, each one of the 50 people we'll assume  
 6 believes there's a threat to his life and that of his  
 7 colleagues and we assume that he's got objective grounds  
 8 which justify that. And then they fire and they fire three  
 9 and you say that's not disproportionate, on average, each.  
 10 The other question of automatic as opposed to aimed, that's  
 11 another question in itself but that point taken on its own,  
 12 I'm not sure that that's necessarily a point that hits the  
 13 target, if one can use an unfortunate metaphor in this  
 14 context. Maybe they shouldn't have been there and maybe  
 15 that was wrong. Maybe the – I don't know what the law is  
 16 but maybe the practice of having a line of 50 people, each  
 17 of whom is entitled to shoot a group of approaching people,  
 18 maybe that's undesirable and the standing order should be  
 19 changed on that but once one gets to the point that they're  
 20 there, 50 people, they're being approached by this group,  
 21 they have this fear, it's objective, I'm not sure, I think  
 22 you've conceded three bullets each on average isn't in  
 23 itself, standing alone, a basis for saying the response was  
 24 disproportionate. That's right, isn't it?  
 25 MR WHITE: Chair, to be crystal clear, a

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1 police officer individually engaging a threat where he  
 2 feels his life or the lives of some of his colleagues or  
 3 members of the public for that matter is under an imminent  
 4 threat, then the fact that he fires one shot – I mean I  
 5 gave evidence earlier on in the week to the fact that each  
 6 individual shot has to be justified but this is, as Mr  
 7 Semenya said, people have split seconds to make decisions.  
 8 So let's roll that forward. Might three rounds  
 9 in those circumstances to engage this threat be  
 10 unreasonable? It may well not be and therefore the  
 11 converse of that is, is it justified? Absolutely, it may  
 12 well be. However, sir, please, in terms of coming to this  
 13 Commission, I cannot in my mind divorce this issue and this  
 14 is not something I'm making up on the hoof. I have said  
 15 this repeatedly through my statements that irrespective of  
 16 the justification in relation to each and every individual,  
 17 this issue about disproportionate force, it has to be  
 18 looked at in the round. For example, say there were 300  
 19 officers on that line, now we're talking about 900 rounds.  
 20 And then I come back to the point that we were discussing  
 21 earlier on and I know that you've a particular interest in  
 22 it, it's something that I have to engage with, had to  
 23 engage with when I was a police officer and I appreciate  
 24 the European jurisdiction or European Court of Human Rights  
 25 jurisdiction, maybe it doesn't necessarily directly apply

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1 here but you had expressed interest in the issues in  
 2 relation to McCann.  
 3 [11:06] And that is that when you're planning these  
 4 operations you have to plan them in a way that minimises  
 5 the likely use of force, particularly lethal force, and  
 6 it's on that basis I say –  
 7 CHAIRPERSON: Sorry to interrupt. I can  
 8 understand that. What I was doing was dealing with your  
 9 point as a self-standing point, I understand the argument  
 10 based on McCann and though it's not binding here, it's  
 11 eminent court, it's persuasive, it's the grand chamber -  
 12 admittedly it was 10-9 but the 9 didn't disagree on the  
 13 law, they disagreed on the facts as I understand it. They  
 14 held that the individual – I can't remember if they were  
 15 police or soldiers, but the individual shottists –  
 16 MR WHITE: [Microphone off, inaudible]  
 17 CHAIRPERSON: Sorry?  
 18 MR WHITE: [Microphone off, inaudible]  
 19 CHAIRPERSON: Yes, we use the word  
 20 shottist here. I'm not quite sure it's accurate, but the  
 21 individual shottists they held were justified in acting as  
 22 they did. They believed, to some extent erroneously, but  
 23 that wasn't their fault, they believed there was an  
 24 imminent threat. They also believed that, and they had  
 25 objective grounds to justify the belief, so the court, the

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1 Inquest Court in Gibraltar and the European Human Rights  
 2 Commission both were of the view that they acted  
 3 justifiable in self-defence. The British Government then  
 4 said right, well that's the end of it, we're not liable  
 5 either and the court said no, you are liable because your  
 6 plans were defective; if you planned properly the situation  
 7 wouldn't have arisen, and that essentially as I understand  
 8 it is your criticism here. Whether it's right or not is a  
 9 different matter, but we're not busy with that at the  
 10 moment, we're busy with a particular thing and I understand  
 11 that you've got to take everything together and so on, but  
 12 looking at this individual point I think you've now  
 13 conceded that you can't say on these facts alone and these  
 14 number of shots that there was disproportionality, but  
 15 that's not the enquiry. That's fair?  
 16 MR WHITE: Chair, I can say that the –  
 17 and I'm conscious of time – I'm more than happy to state  
 18 for the record that if an individual police officer  
 19 perceives an imminent threat to his life or someone else  
 20 and they were under the circumstances that they're engaging  
 21 with to fire three rounds, on the face of it would that be  
 22 absolutely therefore disproportionate use of force, I don't  
 23 think so. I think you need to engage the circumstances and  
 24 it might well likely be justified use of force, and on that  
 25 particular point, confined with that, if it's helpful to

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1 you, Chair, I'll accept that point.  
 2 CHAIRPERSON: Thank you. I'm sorry to  
 3 have taken over, Mr Semenya. I trust you'll forgive me.  
 4 MR SEMENYA SC: No, thanks. Thanks,  
 5 Chair. To that, Mr White, we must include the number of  
 6 sharp-point instruments that was held by 3 to 400 people in  
 7 determining that proportionality, correct?  
 8 MR WHITE: We've already talked about the  
 9 level of threat that the police officers potentially were  
 10 facing. We've already discussed the level of threat that  
 11 potentially the police officers were facing. You asked me  
 12 before the break around whether or not I accept that there  
 13 was a group of 3 to 400 and that they had the weapons that  
 14 you said, so yes, you have to take that into consideration.  
 15 MR SEMENYA SC: In determining  
 16 proportionality?  
 17 MR WHITE: In determining – yes, in  
 18 determining proportionality, yes.  
 19 MR SEMENYA SC: Okay, and clearly the  
 20 sharp-point instruments that we see in the exhibits don't  
 21 reflect the totality of those sharp-point instruments,  
 22 given that many of the people fled from the scene.  
 23 Correct? You can accept that as a fact.  
 24 MR WHITE: If your question is am I  
 25 trying to base this on the fact that there were 40 or 50

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1 sharp instruments, and I'm suggesting that that's the only  
 2 40, 50 – no, absolutely not. If you ask me to accept that  
 3 every single one of that group had some type of sharp  
 4 instrument, I'm more than happy to accept that.  
 5 MR SEMENYA SC: Okay, now I see this  
 6 McCann judgment has piqued even the interest of the Chair –  
 7 CHAIRPERSON: [Microphone off, inaudible]  
 8 MR SEMENYA SC: It is a judgment of the  
 9 European Court of Human Rights, is it not?  
 10 MR WHITE: That's correct.  
 11 MR SEMENYA SC: Binding on member states,  
 12 correct?  
 13 MR WHITE: That's correct.  
 14 MR SEMENYA SC: And South Africa is not a  
 15 member state, is it?  
 16 MR WHITE: No, it's not.  
 17 MR SEMENYA SC: Okay.  
 18 CHAIRPERSON: That's why I said it's  
 19 persuasive, it's not binding.  
 20 MR SEMENYA SC: Persuasive maybe to a  
 21 court of law, Chair. I don't know –  
 22 MR CHASKALSON SC: Chair, that has been  
 23 cited with approval by the Constitutional Court in the  
 24 Walters case.  
 25 MR SEMENYA SC: Yes, in determining

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1 questions of constitutional rights.  
 2 MR CHASKALSON SC: In determining  
 3 questions of proportional use of lethal force.  
 4 CHAIRPERSON: Constitutional right to  
 5 life, yes.  
 6 MR SEMENYA SC: But Chair, we – okay,  
 7 we'll deal with that because it –  
 8 CHAIRPERSON: It's a matter for argument,  
 9 Mr Semenya, really. I'm sure you can deal with it far more  
 10 effectively without being heckled by Mr Chaskalson and me  
 11 when you get a chance to argue at the end of –  
 12 MR SEMENYA SC: Of course I'll do that,  
 13 Chair, in due course. Now your evidence really in relation  
 14 to the curtain, you remember that?  
 15 MR WHITE: I remember it very well.  
 16 MR SEMENYA SC: The underlying premise  
 17 for that opinion really is that the threat is of one or  
 18 other individuals in a bigger group, correct?  
 19 MR WHITE: No, I –  
 20 MR SEMENYA SC: No, I'm saying if the  
 21 threat is the entire 400, then the example doesn't apply.  
 22 MR WHITE: You're going to have to  
 23 explain to me why you think it wouldn't apply. I'm sorry,  
 24 I just don't follow your reasoning.  
 25 MR SEMENYA SC: Okay, is the premise

1 underlying your opinion that he could not be shooting in  
2 the dust, that's why you used the example of a curtain?  
3 I'm saying the premise that was underlying your opinion  
4 there was that it is important to isolate the threat in a  
5 group of people as opposed to just shoot at the group. It  
6 is premises that what the threat is, is individuals in a  
7 group. Am I right or wrong?

8 MR WHITE: It is premises on the basis  
9 that if you're firing a shot, you're firing that shot  
10 because you perceive an imminent threat. So you have to be  
11 firing that shot at someone who is presenting that imminent  
12 threat to you, and therefore I would suggest in order to be  
13 able to ensure that you hit that person, the point that  
14 you're shooting at in order to neutralise the threat, you  
15 need to be able to see them.

16 MR SEMENYA SC: I'm not denying that.  
17 I'm merely saying that if the threat comprises of  
18 individuals with sharp instruments who are 300 and 400 of  
19 them, you're talking a different picture than if you're  
20 talking about a militant individual in a group of many  
21 others who are not a threat to you. That is the context  
22 within which you offer that opinion. Am I right?

23 MR WHITE: Well, let me explain a bit  
24 further. In the circumstances that I see in front of me  
25 there's a relatively narrow channel that this group come

1 through. I'm not sure how wide it is, but let's say across  
2 the front of that group there's, because of the narrowness  
3 of the channel there are perhaps about eight or nine  
4 people. So because we've had an exercise in mathematics  
5 earlier on, if you do the mathematics around eight or nine  
6 people - let's make the maths easy, 10 people across the  
7 front of the group, then how many, you were talking 30 or  
8 possibly 40 ranks further on back. Isn't that correct? So  
9 therefore are you suggesting - it's a rhetorical question  
10 perhaps to myself - is it the case therefore that we can  
11 simply open fire at that group?

12 Now given the nature of those sharp instruments  
13 for example, I mean the, what I would call machetes I think  
14 are called pangas - forgive me if I'm getting that wrong -  
15 and the spears and one of the things I talked to my legal  
16 team about during the course of this week is around spears  
17 obviously would be a threat at a considerably longer  
18 distance than the pangas, but I'm advised, and I stand to  
19 be corrected on this, it's just the information I got from  
20 my legal team, that those spears aren't really, they're  
21 sort of stabbing spears as opposed to throwing spears. So  
22 I don't think that there's any evidence of anyone throwing  
23 a spear. Therefore in order for those weapons to be able  
24 to do damage, to be an imminent threat to life, they need  
25 to be in close proximity.

1 I say this and I'll pause briefly on the basis  
2 that I've also engaged throughout my three statements with  
3 the fact that there was a firearms threat as well, okay,  
4 but you've talked to me about the slides that have -  
5 therefore I would say, 1, there's an issue in relation to  
6 proximity of the crowd to the police officers in relation  
7 to the imminence of the threat, but secondly I would make  
8 the point that if we're talking about people who are 30 or  
9 potentially 40 rows back, what threat, imminent threat  
10 could they be posing that, it seems to be your question is  
11 implying that we simply fire perhaps 175 rounds, some of  
12 which go into a cloud of dust where we can't see what we're  
13 firing at, on the basis that we've made an assessment that  
14 that crowd is acting in unison, they're all intending to do  
15 exactly the same thing and therefore they should be subject  
16 to exactly the same sort of interpretation from the point  
17 of view of the police being justified in firing. I'm  
18 saying to you quite clearly, I can't agree with that.

19 MR SEMENYA SC: I'll try again. Was the  
20 premise on which you made that opinion on a scenario where  
21 what you seek to address is a threat residing amongst a  
22 group of innocent other people who do not pose a threat to  
23 you?

24 MR WHITE: And I'm saying to you very  
25 clearly, when you use lethal force as a police officer, and

1 we're talking about making a decision whether or not to  
2 take someone's life, then the circumstances in which you do  
3 that as I understand against international norms, including  
4 the UN document that I'd referred to, is that you must  
5 perceive an imminent threat to your life or to someone  
6 else's, and if you're saying to me that - let's take for  
7 example the fact that you want me to assume is that every  
8 single person in this group, and we'll call it 400 if that  
9 helps the argument, and you want me to assume that every  
10 single person in that group of 400 has a clear intent to  
11 kill the police officers, I would still say that given the  
12 circumstances that I watched on that video, how on earth  
13 could be a proportionate use of force that you fire blindly  
14 into that dust cloud in the hope of perhaps hitting someone  
15 on the 40th row of that crowd, because what threat could  
16 they be posing to you at that particular time that could be  
17 described as imminent? And that is the test.

18 MR SEMENYA SC: Of course you remember  
19 that you're not a fact-based witness. You don't impose  
20 certain hypothesis on the evidence, and we are always  
21 warned, aren't we Mr White, of a desktop analysis of an  
22 event, aren't we?

23 MS LE ROUX: Chair, I don't think that's  
24 a fair question. He explicitly assumed - Mr White was very  
25 explicit that he was making certain assumptions to answer

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1 Mr Semenya's question. I don't think that's a fair  
 2 criticism.  
 3 CHAIRPERSON: He's saying that on the  
 4 basis of certain assumptions he makes, and he made it clear  
 5 what they are, if we find those assumptions are correct  
 6 then he would invite us to accept his opinions as being  
 7 correct. If of course we don't make those assumptions,  
 8 don't agree with them, then his opinion falls away. I  
 9 think that's the point. Mr Semenya is asking him to assume  
 10 certain facts based upon, some of them not just assumption  
 11 really, based upon what he actually saw on the video and  
 12 asked him to express opinions on those, and he's urging him  
 13 not to adopt an armchair attitude, and the cases, I'm sure  
 14 – I haven't studied the English ones, but the South African  
 15 cases are full of references to the fact that in deciding  
 16 self-defence questions one mustn't adopt the attitude of an  
 17 armchair critic, and that really I think is where Mr  
 18 Semenya – anyway, I'm sure he can reformulate the question  
 19 in a way which eliminates any objection and we can carry  
 20 on.  
 21 MR SEMENYA SC: And if we are able to  
 22 establish the threat was there, it was imminent, the  
 23 members were entitled to react to it in defence of own life  
 24 or that of their colleagues, a fatality that happens inside  
 25 that group from 50 metres behind, you say that is not

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1 understandable, as an expert?  
 2 MR WHITE: Well, if the front of the  
 3 group is, let's say 50 metres from you, if this is what  
 4 you're asking me assume, and then the group extends back by  
 5 another 50 metres –  
 6 MR SEMENYA SC: No, even if they were one  
 7 metre away from you but the depth of the group to which you  
 8 are entitled to act in self-defence is 50 metres, that's  
 9 what I'm postulating for you.  
 10 MR WHITE: So again if I'm following you  
 11 correctly, are you asking me if a police officer engages by  
 12 shooting a round because people are a metre away from him  
 13 and that round happens to hit somebody who's 50 metres away  
 14 from him, is that justifiable, is that the question you're  
 15 asking me?  
 16 MR SEMENYA SC: No.  
 17 MR WHITE: I'm sorry I'm frustrated  
 18 because I'm confused as to what I'm being asked.  
 19 CHAIRPERSON: I thought it was. You put  
 20 to him that he has someone, or a row, the front row of the  
 21 attacking group is a metre away. He fires at that group,  
 22 misses the people in the first 39 rows and hits someone in  
 23 the 40th row, you asked him whether he would regard that as  
 24 being justified – that was my understanding of your  
 25 question. If I misunderstood you, and I think then he did

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1 too, perhaps you must reformulate the question so we both  
 2 can understand it.  
 3 MR SEMENYA SC: No, the word I used was  
 4 it is "understandable" that you would find a body that far  
 5 from the line that was firing.  
 6 MR WHITE: Well, if you fire a round on  
 7 the basis of you perceiving imminent threat at someone  
 8 who's a metre and you miss them and you hit the person  
 9 who's 50 metres away, then it's understandable that that  
 10 person is going to be found dead there, yes.  
 11 MR SEMENYA SC: Now it was also your  
 12 evidence that we have to take into account that there are  
 13 officers who did not fire and therefore I thought you said  
 14 ergo they did not find themselves to be facing imminent  
 15 threat. Did you say that in your evidence-in-chief?  
 16 MR WHITE: Can you point me – oh, in my  
 17 evidence-in-chief? I'm not sure if I did say that, but –  
 18 MR SEMENYA SC: That there were other  
 19 officers who did not fire at all in that line, clearly  
 20 meaning that they did not perceive themselves to be under  
 21 threat. That was your evidence. If you didn't say it,  
 22 it's alright. It's not an opinion you will hold.  
 23 MR WHITE: I genuinely don't think that I  
 24 said that.  
 25 MR SEMENYA SC: Okay, but it's not an

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1 opinion you'd hold that the fact that some of the police in  
 2 that line did not fire shows that they did not perceive  
 3 themselves to be under threat.  
 4 MR WHITE: If they –  
 5 MR SEMENYA SC: It's not an opinion you  
 6 hold?  
 7 MR WHITE: Excuse me, if they didn't fire  
 8 there could be a number of reasons for that. 1, they  
 9 didn't perceive themselves to be under threat; 2, maybe  
 10 they did and they froze in the moment. That sometimes  
 11 happens, I'm sure. You know I've been in situations myself  
 12 where, you know, police officers are human beings and they  
 13 get frightened and sometimes even if the proper reaction,  
 14 even if the, if you like, the legitimate reaction and the  
 15 proportionate reaction is for them to respond in a certain  
 16 way, be that use their baton or potentially use their  
 17 firearm, sometimes people freeze. So the fact that someone  
 18 doesn't fire doesn't necessarily indicate that they don't  
 19 think that they're under threat. But they might think that  
 20 they're not under threat.  
 21 MR SEMENYA SC: Yes, because we have  
 22 heard the evidence of Colonel McIntosh, who didn't fire.  
 23 CHAIRPERSON: McIntosh wasn't at scene  
 24 1 –  
 25 MR SEMENYA SC: No, that wasn't – Captain

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1 Loest –

2 CHAIRPERSON: Captain Loest didn't fire.

3 MR SEMENYA SC: We have heard the

4 evidence of Captain Loest who says he didn't fire and it

5 was also further his evidence that had his colleagues not

6 fired, he would have fired. So I'm saying with that

7 evidence it does not follow that because one has not fired

8 it means that person or the individual did not perceive to

9 have been subject to a threat.

10 MR WHITE: And I'm prepared to accept

11 that there would be a range of reasons why someone wouldn't

12 fire.

13 CHAIRPERSON: [Microphone off, inaudible]

14 points in Standing Order 251 Part 3, admittedly it deals

15 with a slightly different context but it also suggests that

16 if there's going to be shooting done the officer in charge

17 shouldn't shoot, he should rather give instructions to

18 others, and so that would also be a factor that would

19 operate here, wouldn't it?

20 MR WHITE: And it could be, Chair, yes,

21 although I understand that there wasn't any order to –

22 excuse me, I haven't engaged, I haven't seen any evidence

23 of any order to shoot.

24 CHAIRPERSON: Yes. No, no, there isn't

25 evidence to that effect.

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1 [11:25] But the idea seems to be that in an armed

2 conflict situation where people are shooting, the officer

3 in charge shouldn't shoot, in any event. He should rather

4 be in a position to give instructions to others, for

5 example to give the order to cease fire when he considers

6 that necessary but he should rather refrain from firing

7 himself, provided he's satisfied that other people are

8 firing and the threat is being dealt with. I take it that

9 must be right?

10 MR WHITE: Well, I think that my

11 recollection of that paragraph which you'd asked me to read

12 the other night, Chair, is exactly that and it also says

13 that the commanding officer should be directing a specified

14 number of officers to shoot. My response to you in

15 relation to you asking me to review that force order was

16 that I, you know, was very surprised to see that that force

17 order is still in effect because I don't think that that

18 paragraph in particular, you know, it's questionable

19 whether or not it meets the test with regards to what I

20 would use to be engaging with, including for example the UN

21 basic principles in terms of the use of force and firearms.

22 And then I also commented that there are other aspects of

23 that same general order which talk about using firearms,

24 you know, if your station is attacked. Well, if your

25 station is attacked then there's an imminent threat to life

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1 and absolutely, but that force order, general order seems

2 to be saying of itself that your station is attacked and as

3 I said to you, I think it's highly questionable, certainly

4 in terms of the international norms that I would be

5 familiar with.

6 MR SEMENYA SC: Can I invite you to look

7 at the HMIC report? It is the rules of engagement, we

8 would need to give this one an exhibit number, Chair.

9 CHAIRPERSON: A document headed "The

10 Rules of Engagement – a Review of the August 2011

11 disorders." It's also got the heading "HMIC Her Majesty's

12 Inspector of Constabulary," is it? Is that what HMIC

13 stands for?

14 MR WHITE: Yes, Chair, that's correct.

15 CHAIRPERSON: And then the next page it

16 says "Inspecting policing in the public interest." Anyway

17 that document will be BBBB –

18 MR SEMENYA SC: 7, I'm told, Chair.

19 CHAIRPERSON: 7, is it? "The Rules of

20 Engagement," I just need to call it that, of engagement,

21 issued by HMIC. I've marked that as an exhibit.

22 MR SEMENYA SC: BBBB6 I'm told, Chair.

23 CHAIRPERSON: Yes, I was going to say I

24 didn't see a BBBB6 in my notes, so I think 7 is wrong, it

25 is 6 unless Ms Pillay corrects me.

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1 MS PILLAY: Chair, it is BBBB6.

2 CHAIRPERSON: 6, okay. BBBB6. You've

3 got the document in front of you, have you? What passage

4 in it do you wish to –

5 MR SEMENYA SC: Let's go to page 12 which

6 is part of the summary.

7 MR WHITE: I have page 12.

8 MR SEMENYA SC: I want to point your

9 attention to that grid.

10 MR WHITE: Sorry, Mr Semenya, you want to

11 point my attention to which?

12 MR SEMENYA SC: To the grid appearing on

13 page 12.

14 MR WHITE: Yes, I have it.

15 CHAIRPERSON: The table outlining what

16 are described as a number of real scenarios witnessed

17 during the August disorders and then it goes on, "and the

18 level of force that might be used within the law" and then

19 I think it refers to Mr Otty QC's opinion. It refers to a

20 discussion of the law later on in the report. What is the

21 particular line or column in this table that you wish to

22 refer the witness to?

23 MR SEMENYA SC: Chair, before that, I'm

24 advised that the operator doesn't have it so – but attempts

25 are being made to get that screened.

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1 CHAIRPERSON: Is it available  
 2 electronically?  
 3 MR SEMENYA SC: It is, Chair.  
 4 CHAIRPERSON: Well, can we carry on in  
 5 the meanwhile? Do we have to have it on the screen for the  
 6 moment for the purposes of your question? Perhaps I should  
 7 say that the table contains a number of entries of what is  
 8 described as "Scenarios witnessed during the August  
 9 disorders" and then there are a number of columns, 14  
 10 columns indicating various steps or described perhaps as  
 11 level of force although some of them aren't really levels  
 12 of force, which were appropriate or not appropriate in the  
 13 case of each of the scenarios. And these columns are,  
 14 warning, containment, dismantle barrier, arrest, mounted  
 15 branch, vehicle tactics, water cannon, possibly AEP,  
 16 possibly firearms, firearms, negotiation withdrawal, road  
 17 blocks, vehicle immobilisation. Now which of the  
 18 particular scenarios do you wish to refer to, Mr Semenya?  
 19 MS LE ROUX: Chair, I'm sorry, I haven't  
 20 been provided with a copy. I wonder if I could borrow one  
 21 of the Commissioner's copies, the SAPS seems to be trying  
 22 to find a copy, if I could.  
 23 CHAIRPERSON: I see Mr Pretorius has  
 24 given you something so we can keep ours. While you're  
 25 about it you may as well mark it BBBB6 because you may need

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1 it for other purposes. Which of these scenarios are you  
 2 referring to, Mr Semenya?  
 3 MR SEMENYA SC: Chair, I'll deal with  
 4 that. I think it is important, though, that we have it but  
 5 in the meantime just so as not to waste time I'll ask other  
 6 questions around the documents. This document also dealt  
 7 with the "Keeping the Peace" guideline, am I right?  
 8 MR WHITE: Yes, I'm aware it had  
 9 commentary on "Keeping the Peace". I've read this  
 10 document, I'm familiar with it but you know I couldn't  
 11 quote bits of it but that's not what you're going to ask  
 12 me.  
 13 MR SEMENYA SC: One of the observations  
 14 made there was that "Keeping the Peace" had aspirational  
 15 elements to it and it was necessary to begin to move to  
 16 actual scenarios which have been, which would provide  
 17 better guidance on police conduct.  
 18 MS LE ROUX: Chair, could we – sorry, if  
 19 my learned friend could direct us to a particular paragraph  
 20 in the document it would assist us.  
 21 MR WHITE: I was going to say, Mr  
 22 Semenya, I'm aware that it had something to say in relation  
 23 to tactics around keeping the peace but beyond that, I mean  
 24 my recollection of it was, is that I think the phraseology  
 25 used perhaps is from the pavement or from the page to the

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1 pavement or something like that but I don't know that it  
 2 used the word "aspirational." It's some time since I've  
 3 read the document, so as Ms Le Roux says, perhaps if you  
 4 could direct me to the particular bit.  
 5 CHAIRPERSON: We've now got the rules of  
 6 engagement on the screen so perhaps we can look at that  
 7 now. [Microphone off, inaudible] – sorry. We have the  
 8 table in front of us on the screen. On the one side the  
 9 scenarios and on the other, and there are columns which are  
 10 horizontal and then vertical, we have vertical columns  
 11 dealing with the various levels of force and other things  
 12 which are linked thereto. Is there something you wanted to  
 13 specifically refer the witness to?  
 14 MR SEMENYA SC: Yes, Chair. Have you  
 15 familiarised yourself, Mr White, with that table?  
 16 MR WHITE: Yes indeed, Chair, I'm  
 17 familiar with the table.  
 18 MR SEMENYA SC: Alright. I would like to  
 19 direct your attention to the line which is the one but last  
 20 where firearms are directed at police, do you see that?  
 21 MR WHITE: I do indeed.  
 22 MR SEMENYA SC: And there what is said to  
 23 be level of force that might be used within the law would  
 24 be, well, containment if that is a level of force, am I  
 25 right?

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1 MR WHITE: I think the first thing it  
 2 says is warning and then it says containment as you move  
 3 across, yes.  
 4 MR SEMENYA SC: So too arrest.  
 5 MR WHITE: Yes.  
 6 MR SEMENYA SC: Possible use of AEPs.  
 7 MR WHITE: Yes indeed.  
 8 MR SEMENYA SC: And it actually says  
 9 firearm as well.  
 10 MR WHITE: Yes.  
 11 MR SEMENYA SC: So that would be in line  
 12 with, as you call it, best international practice.  
 13 MR WHITE: Well, I think basically what  
 14 this grid is saying in outline is, in circumstances where  
 15 the police would come under attack with firearms one of the  
 16 tactics that they could use would be firearms in response.  
 17 MR SEMENYA SC: And I suspect by parity  
 18 of reasoning, if there were assegais in that part of the  
 19 world they would have been in that column as well.  
 20 MR WHITE: If there were? Apologies.  
 21 MR SEMENYA SC: If there were assegais  
 22 and machetes.  
 23 MR WHITE: I'm actually surprised, to be  
 24 honest with you Mr Semenya, that there's not references to,  
 25 you know, sharp weapons and whatever because that happens.

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1 Now my assumption is therefore that, as it says at the top  
 2 of the grid, this is dealing specifically with the types of  
 3 attacks or tactics that were used during the period of four  
 4 or five days, you know, not only in London but –  
 5 CHAIRPERSON: It makes it clear, it makes  
 6 it clear that these arms – sorry to interrupt you – it  
 7 makes it clear these are real scenarios witnessed during  
 8 the August disorders, so if none of the people during the  
 9 August disorders had an assegai then you won't find an  
 10 assegai in the real scenario column.  
 11 MR WHITE: Of course. And to be honest  
 12 with you, Chair, I can't remember whether or not firearms  
 13 were – I assume that this is, as you say, it's real  
 14 incidents that actually happened as opposed to actually  
 15 potentially or threat –  
 16 CHAIRPERSON: Well –  
 17 MR WHITE: I unfortunately can't remember  
 18 the firearms being used but I'm not suggesting –  
 19 CHAIRPERSON: They say there were  
 20 firearms. This is one of the real scenarios and the rest  
 21 of the report deals with what happened and there's a table  
 22 at the end of various incidents over the period and so on.  
 23 So firearms were used, I see that petrol bombs were thrown,  
 24 barricades and missiles were used and there were violent  
 25 attacks on the public in the presence of the police,

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1 amongst the other incidents that are referred to.  
 2 MR SEMENYA SC: Yes, the point I'm saying  
 3 is by parity of reasoning, if there were such dangerous  
 4 weapons as a – if the sharp weapons we have been talking  
 5 about were there, you would expect them to have been  
 6 categorised the same as the firearms on that grid, no?  
 7 MR WHITE: It may well be. I mean I  
 8 don't dispute the fact that if you're under attack by a  
 9 sharp weapon, something that's capable of killing you, I  
 10 mean it really doesn't matter what it is, then I think  
 11 firearms is a justified response depending on the  
 12 particular circumstance.  
 13 MR SEMENYA SC: The reference to the  
 14 report is on page 71 under paragraph 5.6.2. 5.6, 5.6.1.  
 15 CHAIRPERSON: It's headed "Public order  
 16 tactics" which starts at 5.60 and then proceeds for some,  
 17 down to 5.62.  
 18 MS LE ROUX: I'm indebted to my learned  
 19 friend.  
 20 MR SEMENYA SC: So there you would see,  
 21 Mr White, the conclusion is that, "The ACPO manual Keeping  
 22 the Peace notionally provides the police service with a  
 23 wide range of tactics to deal with public disorder ranging  
 24 from normal policing that promotes close links with  
 25 communities, through to the use of use of AEPs. However,

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1 beyond the basics, these tactics are not all widely  
 2 accessible to every force and some (for instance water  
 3 canon) are simply not available at all. Therefore, for all  
 4 practical purposes a number of these tactics remain as  
 5 aspirations as opposed to practicable." That's the  
 6 reference.  
 7 MR WHITE: Yes, I see that.  
 8 MR SEMENYA SC: Okay, so that was one of  
 9 the identified limitations on "Keeping the Peace" which you  
 10 used as your reference, am I right?  
 11 MR WHITE: Yes, but again I think this is  
 12 worthy of a slight further examination in that it says in  
 13 "Keeping the Peace" that water canon is a tactic and this  
 14 document is basically saying that it's not available for  
 15 all forces. The only force in the UK that has water canon  
 16 is the police service in Northern Ireland. During the  
 17 August riots that this document refers to, I was consulted  
 18 by the Chief Constable, in fact conversely I consulted the  
 19 Chief Constable on the basis that I got a telephone call  
 20 from the Metropolitan Police asking whether or not we could  
 21 make the water cannons available to them, given the  
 22 circumstances of what was happening. I, Chair, consulted  
 23 with the Chief Constable and because of our operational  
 24 need, given that it was August, it's the middle of our  
 25 marching season, on that occasion we said no, we couldn't

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1 release them. In other circumstances we might have been  
 2 able to and I understand that the Metropolitan Police have  
 3 actually just recently purchased their own water cannons  
 4 but you know, I think what that point is talking about in  
 5 terms of aspirational is the fact that, you know, it  
 6 specifically talks about water cannons.  
 7 The other issue that this is dealing with is the  
 8 fact that a lot of forces, you know, if you look at the  
 9 report in the whole, a lot of forces have actually moved  
 10 away from practising, rehearsing tactics in relation to  
 11 public order. Why? Because like all public services in  
 12 the UK, with the global financial crisis you know things  
 13 were being cut back, numbers were being cut back, so chief  
 14 constables and chief officers take particular positions  
 15 with regard to where they're going to make those cuts. It  
 16 had been some considerable time in the UK since they'd seen  
 17 anything like this in terms of disorder and I think a lot  
 18 of police forces would therefore then submit the fact that  
 19 actually they had cut public order response capability as  
 20 opposed to then something else, because this document is  
 21 actually aligned with another previous document, HMIC  
 22 document - forgive me, the title just escapes me at the  
 23 moment – which was pre the London riots and it had made  
 24 commentary in relation to the state of readiness of a  
 25 number of police services and particularly engaged with

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1 issues like mobilisation and how quickly they could stand  
 2 up resources, which again is referred to within this. So  
 3 the point being that when it talks about tactics, part of  
 4 the issue of this is that, you know, they were saying  
 5 basically tactics in "Keeping the Peace" now need to be  
 6 made more practical for a lot of forces. It certainly  
 7 would have been the criticism with the police service in  
 8 Northern Ireland, because of the context in which we  
 9 operate and we were regularly practising all of the tactics  
 10 and had all of them available to us.

11 CHAIRPERSON: Mr Semenya, I don't know  
 12 how much longer you're going to be, I know it depends on  
 13 the length of the answers and so on, the number of  
 14 questions we ask by way of interruption of your cross-  
 15 examination but I think it's fair to those here that we  
 16 should take a short break now anyway. If you think it's  
 17 justified to take a tea break, we'll take a tea break, the  
 18 tea break. If you feel that that may cause problems for  
 19 you to conclude your cross-examination, we can just take a  
 20 short five minute comfort break but tell me which of the  
 21 two you prefer.

22 MR SEMENYA SC: A short comfort break,  
 23 Chair.

24 CHAIRPERSON: Short comfort break, five  
 25 minutes.

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1 [COMMISSION ADJOURNS COMMISSION RESUMES]  
 2 [12:34] CHAIRPERSON: The Commission resumes. We  
 3 took some time, actually longer than we thought we would,  
 4 because we had consultations in chambers to deal with the  
 5 problem that arises from the fact, it seems clear, it is  
 6 clear that we won't be able to finish the witness's  
 7 evidence today. What has happened, however, is that the  
 8 witness has said he wishes to clarify and amplify, as I  
 9 understand it, some of the answers he gave in respect of  
 10 the HMIC report and it seemed sensible to deal with that  
 11 now. There will then have to be further discussions as to  
 12 what happens thereafter, but I think we must use the time  
 13 we have now to deal with the amplification of the HMIC  
 14 report. Mr White, am I stating accurately what the  
 15 position is? We came back because we understood –

16 MR WHITE: Yes.

17 CHAIRPERSON: - that you wish to amplify  
 18 things you said in respect of the HMIC report. Is that  
 19 correct?

20 MR WHITE: Up to a point, Chair. I'd  
 21 given an answer which was very much off the top of my head  
 22 in order to be helpful and I was conscious of time. I  
 23 don't know whether or not Mr Semenya has a specific  
 24 question as to that or, I mean I dealt with it in the terms  
 25 of what I felt that that particular reference to

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1 aspirational issue in relation to tactics were about. I'm  
 2 more than happy to give a further answer, but in terms of  
 3 expediency if you have a specific question I'll respond to  
 4 that and if not, I certainly would be very keen to refer  
 5 you to a number of paragraphs which I think helps to give  
 6 weight to the answer that I'd given off the top of my head.

7 CHAIRPERSON: What would you prefer, Mr  
 8 Semenya? Would you like to put a specific question to him,  
 9 or shall we give him an opportunity to refer to the  
 10 specific paragraphs that he wants to refer us to in  
 11 relation to the question you asked him before we adjourned?

12 MR SEMENYA SC: No, I'd prefer to have  
 13 the witness amplify the answer and refer us to where he  
 14 wants to, if it is a response to the question.

15 CHAIRPERSON: Alright, we'll go that  
 16 route.

17 MR WHITE: At the risk of answering a  
 18 question maybe that I haven't been asked, Chair, and I'm  
 19 conscious of your admonishment to me yesterday around that,  
 20 it's just that Mr Semenya made reference to that first  
 21 paragraph in the section which talks about some of the  
 22 tactics being aspirational, could I refer you to 5.67 of  
 23 that same chapter?

24 CHAIRPERSON: Page 72.

25 MR WHITE: I think so, Chair. Yes,

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1 indeed, Chair, and if it's helpful I'll read, "Tactics need  
 2 to be framed around clear strategic intentions and  
 3 available resources. However, we find that a combination  
 4 of factors, including the cost of training and equipment  
 5 and competing priorities is that the police service has had  
 6 to make hard choices about what tactics they train officers  
 7 in. As a consequence there are gaps in the type of tactics  
 8 trained, the way they are deployed, and shortcomings in  
 9 access to equipment. This is combined with the confidence  
 10 issue on the use of force," and it refers to another  
 11 paragraph, "inhibit the effective use of tactical options.  
 12 In terms of danger to the public and property this is not  
 13 acceptable."

14 So I would make the point that that's not a  
 15 specific criticism of "Keeping the peace," it's reflecting  
 16 the issues that I'd mentioned off the top of my head.

17 If I could also then, Chair, in part of my answer  
 18 I would refer to three specific parts of "Keeping the  
 19 peace" and I don't know what the reference number for  
 20 "Keeping the peace" is, if it's helpful. I'm not sure if  
 21 any of my legal team know it off the top of their head.

22 MS LE ROUX: It's GW2.

23 MR WHITE: Thank you. GW2, I don't know  
 24 if that can be shown on the screen.

25 MS LE ROUX: JJJ178, and it's – Chair, it

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1 appears they don't have GW2. Chair, I'm afraid we don't  
 2 have it – oh, there it is.  
 3 CHAIRPERSON: Your statement is  
 4 withdrawn, I take it.  
 5 MS LE ROUX: Indeed.  
 6 MR WHITE: I'm not sure if that's the  
 7 actual document and, because I was going to ask to go to  
 8 page number 7. That is indeed the document, so page 7, at  
 9 that point. It's a page entitled "Preface." If I could  
 10 point to the, I think it's the fourth paragraph down, so in  
 11 bold where you see "Act 4/2010," so this is a preface by  
 12 Chief Constable Matt Hughes. He's the overall lead on  
 13 uniform operations, so how that works is that he sits as  
 14 the overall lead in relation to uniform operations and I  
 15 mention Chief Constable Sue Sim is a specific public order  
 16 lead, so sits in underneath that umbrella.  
 17 So basically it was just to draw attention to  
 18 that paragraph which says, "Manual guidance for keeping the  
 19 peace has been and will continue to be an essential  
 20 reference for all officers involved in public order  
 21 policing. The manual provides a framework for the  
 22 management of operations and the deployment of resources at  
 23 local, regional and national level. This is also a  
 24 reference to those involved in planning and command in  
 25 public order and public safety events. It remains a

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1 comprehensive guide and will continue to evolve to meet the  
 2 future demands of the service."  
 3 Two points I make there is that this is  
 4 principally aimed at commanders in terms of planning for  
 5 events, and the second one is that in any learning  
 6 organisation of course you would expect to see an evolving  
 7 of these sorts of documents.  
 8 I briefly refer then to page 8, so if you just  
 9 simply scroll down, please. It's the third paragraph on  
 10 page 8. You've got to scroll.  
 11 CHAIRPERSON: What's happened? Do we  
 12 have page 8?  
 13 MR WHITE: It's not moving, Chair.  
 14 CHAIRPERSON: I know. That's why I'm  
 15 asking, not you, I'm asking the operator –  
 16 MR WHITE: Apologies. There we go.  
 17 CHAIRPERSON: Have you got it?  
 18 MR WHITE: So it's the third paragraph  
 19 which is, starts off, "This guidance," so again it's  
 20 emphasising the point from over – "This guidance should be  
 21 used as a reference to those involved in command and  
 22 planning of public order operations. It provides a  
 23 framework for the management of operations and the  
 24 deployment of resources at a national, regional and local  
 25 level."

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1 I'm emphasising the point that it's not  
 2 principally a tactical document. However, the last  
 3 reference I would make then to is to appendix 1 which is  
 4 considerably further on in the document, which is on page  
 5 96. I don't know if you need to see this, Chair, because  
 6 I'm not going to lead you through the appendix line by  
 7 line. I'm simply going to make the statement. I'm happy  
 8 enough to examine it in depth if you need me to be, but it  
 9 gives a list of tactics. There's not a single tactic in  
 10 this list –  
 11 CHAIRPERSON: We've got appendix 1 on the  
 12 screen now.  
 13 MR WHITE: Okay, so there's not a single  
 14 tactic on that list that doesn't appear on the grid that Mr  
 15 Semanya referred to earlier. So basically in terms of the  
 16 response to the rights, you know, all the tactics that  
 17 they're suggesting that be listed right up to and including  
 18 the use of firearms are listed in the tactical options.  
 19 But that's not the important point. The  
 20 important point is that this document was never intended to  
 21 be, you know, a key tactical document. This document was  
 22 intended as a preface and the introduction says it's  
 23 principally aimed at commanders about the sorts of issues  
 24 that I've highlighted within my statements in relation to  
 25 this particular incident. It's about planning, it's about

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1 command and control, and all of those issues, and that's  
 2 why I refer to it, and again I would just, the fact that  
 3 it's been raised I would simply say if there is a  
 4 particular part of any of my statements, any of the three  
 5 of them that make reference to "Keeping the peace" which  
 6 you, Chair, or the Commission feel that actually is  
 7 outdated or irrelevant and not, hasn't any sort of value,  
 8 then I'm prepared to consider that and if necessary  
 9 withdraw it.  
 10 CHAIRPERSON: Is that the amplification  
 11 you wanted to give?  
 12 MR WHITE: It is indeed, Chair. Thank  
 13 you.  
 14 MS LE ROUX: Chair, if I could be of  
 15 assistance – because we haven't marked GW2 as an exhibit,  
 16 it would then be JJJ178.13.  
 17 CHAIRPERSON: Well, let's make it BBBB –  
 18 MS LE ROUX: Chair, we've put all the  
 19 other annexures to Mr White's statement, all of the other  
 20 GWs we –  
 21 CHAIRPERSON: Okay, what will it be?  
 22 MS LE ROUX: JJJ178.13.  
 23 CHAIRPERSON: JJJ178.13, what's that?  
 24 "Keeping the peace".  
 25 MS LE ROUX: So annexure GW2 –

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1 CHAIRPERSON: Hang on.  
 2 MS LE ROUX: "Keeping the peace".  
 3 CHAIRPERSON: Annexure GW2, "Keeping the  
 4 peace". Okay. Anything else you want to ask him? Or  
 5 you're not cross-examining so you can't ask him anything.  
 6 But I'd like to ask him something, unless – or Mr Semenya  
 7 can take over if he wants to. At page 79 of the Rules of  
 8 Engagement there is a document headed "10 key principles  
 9 governing the use of force by the police service." Are you  
 10 familiar with that document?  
 11 MR WHITE: Yes, Chair.  
 12 CHAIRPERSON: Now as far as I can see a  
 13 number of them are relevant to the work that we're engaged  
 14 on. Is there anything – there are a couple I'd like to  
 15 hear you on, but perhaps I could just invite you to look at  
 16 the document yourself and possibly without reading them or  
 17 referring to them in any depth or any length, refer to  
 18 particular principles that you think may be of assistance  
 19 to us in the work that we're doing, and of assistance to  
 20 the South African Police in the work that they will be  
 21 doing from today onward.  
 22 MR WHITE: Well Chair, I think the  
 23 obvious one is point number 5, because I think the  
 24 conversation that we were having over the last hour or so  
 25 is specifically in relation to lethal or potentially lethal

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1 force. So, but again I think these things need to be  
 2 looked at - you know they talk about 10 principles, so they  
 3 need to be looked at as effectively a package, and I think  
 4 each of them are self-explanatory. You know, because I  
 5 haven't engaged with them in detail and sometimes, I'll  
 6 make the statement, I'm assuming that they will be sort of  
 7 almost mutually reinforcing.  
 8 CHAIRPERSON: I'm particularly interested  
 9 in 7. I thought 7 might have particular application to at  
 10 least a part of your evidence. Whether the criticisms  
 11 you've made we will accept is a matter that we'll only know  
 12 at the end of the Commission, but it seemed to me that para  
 13 7, or principle 7 underlies a number of the criticisms  
 14 you've advanced.  
 15 MR WHITE: Absolutely, Chair, and that  
 16 was an oversight on my part. I mean I just, because when I  
 17 scrolled down lethal force caught my eye, number 5. You're  
 18 absolutely correct and I thank you for that.  
 19 CHAIRPERSON: I think the points made  
 20 there, or the points which flow therefrom you've made.  
 21 Whether, as I say whether the points you've made are well  
 22 taken, that's a matter we'll have to consider in the light  
 23 of the other evidence and so on, but it does seem – am I  
 24 right? – that a good deal of your criticism is essentially  
 25 based upon the invocation of the principle, or attempted

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1 invocation shall we say, of this principle number 7.  
 2 MR WHITE: Yes Sir, and I think that that  
 3 goes back to the point that I made at the very outset of  
 4 giving evidence to this Commission when I'd said that, you  
 5 know, I've tended to engage on the basis of intelligence,  
 6 planning, the briefing and the communication of those  
 7 plans, command and control issues, and then subsequently  
 8 then issues of accountability, and I think that 7 actually  
 9 touches on a number of those issues. And then I've also  
 10 made specific reference in my statement - sorry, in my  
 11 final statement to an issue that jumps out there which is  
 12 around first-aid, you know, if you're going to plan an  
 13 operation where there's likely to be use of force then you  
 14 need to put it into your plan, some response to that. But  
 15 I did say yesterday I think in my evidence that I know  
 16 Lieutenant-Colonel Scott as part of his plan had put first-  
 17 aid in. I think there are issues in relation to first-aid,  
 18 but it wasn't that Lieutenant-Colonel Scott didn't think of  
 19 that.  
 20 CHAIRPERSON: Part of the problem is  
 21 based on the word, use of the word "availability," what  
 22 does availability mean and you know, they did have  
 23 paramedics at forward holding area 1 and I think they had  
 24 others as well. They took time to get from forward holding  
 25 area 1, or they went, took time to get from the place they

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1 were, which is actually beyond forward holding area 1, to  
 2 get to scene 1 for various reasons. But you know, that is  
 3 a point which obviously we'll look at.  
 4 The point I want to ask you though, about this is  
 5 it flows from a question you were asked by Mr Semenya  
 6 earlier today, that the non-lethal – which I took up also  
 7 to some extent – was the non-lethal equipment wasn't doing  
 8 the trick, if I may use a colloquialism. There's a debate  
 9 about that, but that was the point that was put to you, was  
 10 that they'd used, or tried to use non-lethal equipment to  
 11 stop this advance and it didn't work.  
 12 Now you know what non-lethal equipment was used.  
 13 Are you able to tell us from your knowledge and experience  
 14 of the equipment that's generally available, particularly  
 15 as used in Northern Ireland which seems for reasons that I  
 16 don't have to go into, to be better equipped in this area  
 17 than perhaps some of the forces on the other side of the  
 18 Irish Channel. Is there non-lethal equipment which from  
 19 what you've read was not used by the South African Police  
 20 Service but which is available and which they should  
 21 seriously consider getting which might well be of  
 22 assistance in this regard? It's a bit of a fishing  
 23 expedition, the question, I'm afraid, but I hope I make  
 24 catch something.  
 25 MR WHITE: And I'll certainly answer in

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1 the, as best I can in order to be of assistance. I am  
 2 aware within the evidence that there was a presentation in  
 3 relation to less than lethal technology that the South  
 4 African Police are currently using. There was some  
 5 criticisms around that, but that's not the point that I'm  
 6 making. I think that there was perhaps a suggestion within  
 7 that presentation around impact rounds, I think is the  
 8 terminology that's used, and again I'll ask my legal team  
 9 to make, to help me with the reference.

10 MS LE ROUX: Chair, I'm going to ask Ms  
 11 Pillay's assistance because that's the Brügger and Thomet  
 12 presentation, for an exhibit number.

13 MR WHITE: And I say that, Chair, simply  
 14 because if – and I don't know exactly the type of  
 15 technology that they're talking about. On the face of it,  
 16 it appears to be a similar type of technology to the AEP  
 17 that I referred to.

18 Now the benefit of that over rubber rounds is  
 19 basically that it's much more discriminating in the sense  
 20 that, you know, you fire at a particular target, the person  
 21 who's posing the threat at the time, as opposed to  
 22 obviously rubber rounds I think tend to spread. I also, my  
 23 understanding, and because we don't use them I stand to be  
 24 corrected on this, is that rubber rounds I think sometimes  
 25 are fired into the ground and they bounce. I don't know, I

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1 stress I'm operating out of my area of expertise here and  
 2 because we don't use them I'm not sure exactly how they're  
 3 used.

4 But what I am absolutely confident to tell you is  
 5 that, you know, around the AEP a significant investment was  
 6 made around AEP technology as part of the Patten report,  
 7 the reforms to the police service in Northern Ireland,  
 8 because of this huge political controversial issue in  
 9 relation to the use of baton rounds. Now in some respects,  
 10 and I've used this terminology myself, we spent a fortune  
 11 trying to come up with an alternative to baton rounds and  
 12 what they actually came up with was an alternative baton  
 13 round, if you're with me. The old baton round is a solid  
 14 lump of plastic of some sort – I'm not a chemist, but it's  
 15 solid, it's about that length and it's about that in  
 16 diameter.

17 CHAIRPERSON: Put in words what you're  
 18 showing us.

19 MR WHITE: Oh sorry, it –

20 CHAIRPERSON: Historians of the future  
 21 who are going to read the record won't know what you're  
 22 talking about.

23 MR WHITE: Apologies, Chair, I keep  
 24 forgetting. Thanks for the reminder. It's about three or  
 25 four inches in length and it's probably about an inch or

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1 thereabouts in diameter. The new round, the AEP, if you  
 2 can imagine something very similar but with a soft rubber  
 3 nose on top of it, so it's a sort of a nose that's filled  
 4 with air and because, as I've said in my statement that I  
 5 was involved to an extent in the project that developed  
 6 that, to a very limited extent – people who worked for me  
 7 were much more involved and then sort of they reported back  
 8 to me, but my limited involvement is that I understand the  
 9 physics of it works like this. I don't quite understand  
 10 how the physics work, but basically if that round hits  
 11 where it's supposed to hit, you know, in and around the  
 12 sort of centre of the body, the fleshy part of the body  
 13 will then, you know the impact, the impact doesn't  
 14 necessarily mean that it knocks you down; it momentarily  
 15 disables you, if you like, you know because it's supposed  
 16 to interfere with the threat that's being posed.

17 If however it was to impact with sort of the  
 18 harder part, in other words if for whatever reason, and we  
 19 have very strict regulations with regards to where it's  
 20 fired in terms of where it's aimed, but say in unforeseen  
 21 circumstances or whatever, you know, if it was to hit you  
 22 in the head basically then in effect that rubber nose – I  
 23 call it the Volvo round rather glibly because, you know,  
 24 the rubber nose is supposed to actually have the effect of  
 25 the crumple zone in a car. So therefore it's recognised, I

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1 think provably, by all of the technology that's used in  
 2 this type of policing activity in the UK as, is signed off  
 3 by – and again forgive me if I get it wrong, but it's the  
 4 sort of Home Office Scientific Development Branch after  
 5 lots of medical testing and whatever.

6 So that particular piece of equipment is  
 7 recognised as being potentially much safer. Certainly no  
 8 one has ever been killed by one of those things in Northern  
 9 Ireland. We've been, they were introduced into the British  
 10 Police Service in 2005 and fortunately I was the first  
 11 police officer to give authority to fire them very shortly  
 12 after they were introduced. Having said that, no one's  
 13 been killed even with the old baton round in Northern  
 14 Ireland since – again I'm off the top of my head here –  
 15 somewhere in the region of I think 1988.

16 I'm of the understanding, and this may have  
 17 changed but I was of the understanding that the company who  
 18 make this particular weapon set – because we talk about, or  
 19 sorry, a weapon system, which includes the launcher, the  
 20 round and whatever, were very reluctant to sell it to  
 21 anyone outside the UK simply because in the way I've  
 22 phrased some of my answers they see this as a package and  
 23 the package doesn't just include the hardware, but the  
 24 package also includes, you know, at the front end if you  
 25 like the training, the judgmental training and all of that

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1 that goes into it, and at the back end I would say, you  
 2 know, the issues of authority levels of when they're going  
 3 to be used, the circumstances and also the accountability  
 4 levels, and I think maybe there is a degree of concern in  
 5 relation to the protection of the reputation of that  
 6 particular piece of equipment. But I'm sure other  
 7 manufacturers make something similar and I think maybe  
 8 that's what that particular presentation was referring to.  
 9 It might be worth investigating.  
 10 [12:54] CHAIRPERSON: Yes, thank you. What I was  
 11 getting at was that we've been told – it is basically the  
 12 police case – that the non-lethal equipment they had didn't  
 13 do the trick; it wasn't effective in repelling what they  
 14 regarded as an attack, and what I really want to know from  
 15 you is are you able to tell us from your Northern Ireland  
 16 experience whether there is non-lethal equipment which our  
 17 people don't have, or didn't have, which might have been of  
 18 assistance in doing what the non-lethal equipment they used  
 19 wasn't able to do? That's really my question.  
 20 Yes, sorry, I'm reminded, I must tell you that  
 21 there's been a lot of evidence on it actually; we don't use  
 22 rubber bullets because they have inflicted harm on people  
 23 and in terms of the rules applicable in the police at the  
 24 moment they only use rubber balls which are regarded as  
 25 safe. So just in case there's a wrong impression, I hasten

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1 to correct that. Anyway, can you answer my question? Is  
 2 there, the question was is there non-lethal equipment that  
 3 you're aware of which is successfully used in Northern  
 4 Ireland which the South African Police didn't have, which  
 5 might have made a difference at Marikana?  
 6 MR WHITE: I think it's fair to say that  
 7 the AEP system that I've described in some detail is a very  
 8 effective system for maintaining distance with crowds. Now  
 9 I say that advisedly in the circumstances and with regards  
 10 to Mr Semenya's questions earlier on. If you had – and I  
 11 stress, if you like, you know, if I was working on the  
 12 assumption that Mr Semenya had put to me earlier on that  
 13 you had 400 people armed with, you know, very sharp  
 14 weapons, with an absolute intent to, you know, come as one  
 15 single unit and attack the police, do I think a number of  
 16 AEPs would be sufficient to stop that, then probably it  
 17 wouldn't in those circumstances.  
 18 However, we have certainly found, and I've given  
 19 lots of evidence during the course of the last couple of  
 20 days around the very serious threat that police officers in  
 21 Northern Ireland engage with in relation to public order  
 22 type situations, you know, real, genuine threat to their  
 23 lives and have we found that equipment to be of assistance  
 24 to us, yeah, absolutely we have. Whether or not in these  
 25 circumstances, and particularly at the extreme level of the

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1 circumstances that Mr Semenya painted as a picture in  
 2 engaging with that, I would even go as far as to say that  
 3 would be unlikely, if that's helpful.  
 4 CHAIRPERSON: You say it's unlikely to  
 5 stop the problem that Mr Semenya put?  
 6 MR WHITE: In the, at the very extreme  
 7 end –  
 8 CHAIRPERSON: Ja.  
 9 MR WHITE: - that Mr Semenya is talking  
 10 to, now again it's your job, Chair, to decide actually from  
 11 the other premise that you said that maybe these people  
 12 were just simply going home, or does it sit somewhere in  
 13 between.  
 14 CHAIRPERSON: Ja.  
 15 MR WHITE: And depending on where perhaps  
 16 you make your judgment, maybe then the issue in relation to  
 17 AEPs and how helpful it would be is a question to be  
 18 answered then.  
 19 CHAIRPERSON: It sounds from what you're  
 20 saying to us is this, that you would suggest that we  
 21 consider carefully making a recommendation to the South  
 22 African Police – and one of our jobs is to make  
 23 recommendations to the future, you see – that they might  
 24 seriously investigate – they may have done it already, but  
 25 in case they haven't – seriously investigate the AEP

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1 equipment to see whether it wouldn't be possibly a more  
 2 effective non-lethal piece of equipment than the ones they  
 3 currently use. Would that be a fair summary of what you  
 4 say?  
 5 MR WHITE: I think it would, Chair, and  
 6 if you go back to the Patten report, effectively they set  
 7 the same task. They said, you know, the police service of  
 8 Northern Ireland should be equipped with the widest range,  
 9 widest possible range of tactical options so that, I think  
 10 they were keen to look at specifically the issue of plastic  
 11 baton rounds, but also obviously with a requirement to look  
 12 at being able to use minimum force in any set of  
 13 circumstances, and it was as a direct result of that  
 14 recommendation that, 1, AEP came around; and 2, the fact  
 15 that the police service of Northern Ireland purchased water  
 16 cannons.  
 17 COMMISSIONER HEMRAJ: Mr White, what is  
 18 your comment about the reduced rubber rounds that are  
 19 currently used by the South African Police Service?  
 20 MR WHITE: I know very little about them,  
 21 Ma'am, so I really, it's hard for me to say. I would ask  
 22 even, you know, if it's helpful in my response to you, if  
 23 the, are they the type of weaponry that's fired directly or  
 24 fired sort of off the ground?  
 25 COMMISSIONER HEMRAJ: I would hesitate to

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1 answer any of those questions and I –  
 2 MR WHITE: I mean basically as a very  
 3 general statement anything that's not fired directly at a  
 4 target I would have questions with, you know, because I  
 5 mean there are lots of these less lethal technologies that  
 6 are – and I don't know if it's the case in South Africa,  
 7 but in many other countries, where you aim them at the  
 8 ground and then they bounce, and I have huge reservations  
 9 around that simply because where does it go, you know, as  
 10 opposed to actually aiming minimum force, whatever that  
 11 minimum might be, and it might be live rounds, it might be  
 12 rubber rounds, it might be plastic baton rounds or whatever  
 13 it is, but aiming that particular piece of force at the  
 14 threat, the person who's posing the threat. So if it's  
 15 something that ricochets I would have huge reservations  
 16 about that.  
 17 CHAIRPERSON: A ricochet is difficult to  
 18 control.  
 19 MR WHITE: Absolutely, Chair.  
 20 CHAIRPERSON: It's now 1 o'clock –  
 21 MS LE ROUX: Chair –  
 22 CHAIRPERSON: Yes, Ms le Roux.  
 23 MS LE ROUX: The Brügger and Thomet  
 24 presentation is exhibit OOO21.  
 25 CHAIRPERSON: Thank you. Alright, we'll

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1 have to look at that or get someone to look at it for us to  
 2 say how that compares with the AEP equipment that the  
 3 witness has told us about. It's now 1 o'clock. Mr  
 4 Semenya, I understood you to say that you would not be able  
 5 to finish your cross-examination today, for various reasons  
 6 we don't have to debate at this stage. What will happen in  
 7 regard to future evidence – yes, Mr Chaskalson?  
 8 MR CHASKALSON SC: Sorry, Chair, I think  
 9 it's very important that we sort this out now because in  
 10 effect SAPS is asking for an extension of the time  
 11 allocated to them in cross-examination and we cannot have  
 12 one rule for one party and another rule for another. I'm  
 13 not saying SAPS is not entitled to extra time to cross-  
 14 examine this witness, but I think it must be motivated and  
 15 it must be motivated in open Commission and the terms on  
 16 which it is granted must be made clear in open Commission  
 17 so everyone can see the basis on which that decision is  
 18 made.  
 19 CHAIRPERSON: Yes, I hear what you say.  
 20 The point is this, that I have in the past granted  
 21 extensions when it had been asked for. A number of the  
 22 parties were given time when as the cross-examination  
 23 proceeded it became clear that they needed longer and I  
 24 gave it to them. We don't know, because we don't know what  
 25 the logistical position is, we don't know whether the

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1 witness will in fact give any further evidence at all, but  
 2 if some way is found for him to give further evidence,  
 3 whether by way of a video link or by coming back, once  
 4 that's clear the SAPS may then wish to bring an application  
 5 for an extension and motivate it, as you say. Clearly it's  
 6 undesirable just to give people an extension because  
 7 they've asked for it. We've introduced time limits. We  
 8 require properly motivated applications for extension.  
 9 Those have been granted in the past in some cases and  
 10 refused in others, but clearly we won't depart from that  
 11 procedure. But that doesn't arise at this stage. It will  
 12 only arise if it becomes clear that the witness will  
 13 testify at some future date either from a television studio  
 14 in Belfast or here.  
 15 MR CHASKALSON SC: No, no, with respect,  
 16 Chairperson, it does arise now because if the extension is  
 17 not granted this witness is excused and the cross-  
 18 examination is terminated. So I think this is an issue  
 19 that does need to be resolved now in open Commission so the  
 20 witness knows where he stands, SAPS know where they stand,  
 21 the Human Rights Commission know where they stand. We're  
 22 not saying this witness is excused and if we're not saying  
 23 the witness is excused then the issue does have to be  
 24 resolved now.  
 25 CHAIRPERSON: I have to excuse the

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1 witness because we've run out of time for sitting and so  
 2 the witness gets an automatic permission to go because his  
 3 evidence comes to an end and it's not possible for me to  
 4 insist that he be here on Monday because for reasons that  
 5 we don't have to traverse he will be on his way to the  
 6 United States then through travel arrangements that can't  
 7 be changed. But the application for an extension, if one  
 8 is to be made, will obviously have to be made in open court  
 9 and we will do that at an appropriate time once we know  
 10 what the future will be as far as this witness is  
 11 concerned. There's no escaping that –  
 12 MR CHASKALSON SC: Sorry, Chair, it's  
 13 really not a satisfactory situation. I mean can the Human  
 14 Rights Commission now consult with Mr White? Is he still  
 15 under cross-examination? We do need to resolve this issue  
 16 now and the terms on which we resolve it need to be  
 17 clarified.  
 18 CHAIRPERSON: Well, we can have a  
 19 discussion. We don't have to have them now. We can have  
 20 discussions. Depending on the result of the discussions  
 21 the question as to whether the Human Rights Commission can  
 22 consult further with the witness can then be addressed as  
 23 well, but I don't propose addressing it now. I don't think  
 24 there's any point in doing it.  
 25 I must thank you for coming to South Africa and I

1 must thank you for the evidence you've given us. We excuse  
2 you on the basis that we hope that it will be possible for  
3 you to give further evidence either in person or by a video  
4 link, but whether that's possible and how that will work is  
5 something we can't say anything about at this stage. So at  
6 this stage we will adjourn until 9 o'clock Monday morning.

7 [COMMISSION ADJOURNED]

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