

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 286

5 SEPTEMBER 2014

PAGES 37027 TO 37183



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Page 37027

1 [PROCEEDINGS ON 5 SEPTEMBER 2014]
 2 [08:28] CHAIRPERSON: The Commission resumes.
 3 You're still bound by your affirmation, Mr De Rover. Ms Le
 4 Roux – you took, of course, I beginning your pardon, you
 5 took the oath. It's the other man from the lowlands who
 6 affirmed. You are still bound by your oath.
 7 CEES DE ROVER: (s.u.o.)
 8 CROSS-EXAMINATION BY MS LE ROUX (CONTD.):
 9 Thank you, Chair, and let me express on the record my
 10 appreciation for the early start. Good morning, Mr De
 11 Rover.
 12 MR DE ROVER: Good morning.
 13 CHAIRPERSON: It was the least we could
 14 do, Ms Le Roux.
 15 MS LE ROUX: Mr De Rover, to start with
 16 some housekeeping, have you been able to locate your terms
 17 of reference overnight?
 18 MR DE ROVER: I have. I have indicated
 19 them to our legal team. I've actually just mailed them
 20 across so there is a letter of the 22nd of February of this
 21 year and, sorry, of last year, that is the letter of my
 22 appointment and it holds a tasking and there are guidelines
 23 that were established March this year for continued work
 24 and that document will be made available to you via the
 25 legal team.

Page 37029

1 MS LE ROUX: It's the call-up list
 2 provided by Mr De Rover.
 3 CHAIRPERSON: Yes.
 4 MS LE ROUX: For the walk through at
 5 scene 2.
 6 CHAIRPERSON: Mr De Rover's call-up list
 7 is an adequate description, thank you.
 8 MS LE ROUX: Mr De Rover, have you ever
 9 consulted with either officer Myburgh or Swart?
 10 MR DE ROVER: I did consult with Swart.
 11 I did not consult with Myburgh because he was on sick leave
 12 throughout my presence.
 13 MS LE ROUX: And when did you consult
 14 with, I think he's a warrant officer?
 15 MR DE ROVER: Warrant Officer Swart?
 16 MS LE ROUX: Swart, when did you consult
 17 with Warrant Officer Swart?
 18 MR DE ROVER: Either the 26th or the 27th
 19 of March last year.
 20 MS LE ROUX: Of last year.
 21 MR DE ROVER: He is on that He is on that
 22 call-up list that you have and it was in the course of
 23 those gatherings that I spoke to him.
 24 MS LE ROUX: And in your consultations
 25 with Warrant Officer Swart did he describe to you the

Page 37028

1 MS LE ROUX: Thank you very much, we'll
 2 follow up with the SAPS legal team for those. Mr De Rover,
 3 you testified yesterday that you had consulted with
 4 officers Annandale –
 5 CHAIRPERSON: Who is doing that? There's
 6 something making a noise there. Please turn it off. If it
 7 goes off again I'll ask you to leave the room. I'm sorry,
 8 Ms Le Roux.
 9 MS LE ROUX: Mr De Rover - thank you,
 10 Chair – you testified that you had consulted with officers
 11 Annandale, Merafi, Mpembe, Scott and Calitz, correct, and
 12 then we've seen the call-up list. Chair, for the record
 13 it's UUUU11, for the members that you did your walk through
 14 at scene 2. Other than those – and you testified that you
 15 had not spoken to Colonel Vermaak – other than those
 16 commanders, have you spoken to any other, and those on the
 17 call-up list, have you engaged with any other members?
 18 CHAIRPERSON: Ms Le Roux, this call-up
 19 list – [microphone off, inaudible.]
 20 MS LE ROUX: It's pre-marked as UUUU11.
 21 CHAIRPERSON: I say what exhibits are
 22 going in, you don't just give me a list of the exhibits
 23 that are before me, I've got to accept each one. I'm not
 24 saying I'll refuse it but I'm just, let's get the rules
 25 right. UUUU11 is Mr De Rover's call list.

Page 37030

1 evidence that is contained in his statement before the
 2 Commission, that he recognised Officer Myburgh as a SAPS
 3 member who essentially executed a striker at scene 2? Did
 4 you discuss those allegations with him?
 5 MR DE ROVER: The way that that came to
 6 light is different from how you describe it. When we held
 7 that meeting I was first obviously interested in who was
 8 there, then I was interested in their statements and I'd
 9 seen statements of some of them, most of them, and they
 10 left questions to me. The next thing I did was try to plot
 11 their positions on Google maps, to get them to tell me
 12 where they were and then talk about their actions again and
 13 a simple question that followed that was, tell me who was
 14 on your left and who was on your right so that we actually
 15 established exactly when it comes to the TRT line, for
 16 example, I would think it could be of use to the Commission
 17 to actually be able to pinpoint an individual rather than
 18 someone in uniform because then it becomes generic and the
 19 other option would allow you to make it specific. So once
 20 we had plotted who was where around scene 2, I took it unit
 21 by unit and I tried not to pass judgment but just ask
 22 questions for clarification on what they did, how they got
 23 there and what they did. When it was Swart's turn he
 24 simply described his actions at scene 2 that include that
 25 he shot and wounded a person who he claims attacked him and

<p style="text-align: right;">Page 37031</p> <p>1 that in the aftermath while they were standing there 2 waiting for medical personnel to arrive to render 3 assistance, he said that a person came walking out from 4 between the rocks in front of him, that would be a person 5 coming from the east walking westwards, a police sergeant, 6 and that he later realised was Myburgh who asked him 7 whether the person lying at Warrant Officer Swart's feet 8 was deceased and Swart said no, he is alive and we are 9 waiting for medical personnel. According to Swart, Myburgh 10 then said, when the medics come can you send them in there 11 and he points behind himself to a narrow corridor between 12 rocks on the southern side, because I believe I may have 13 just shot someone and I think he's dead. That is the story 14 that Swart came with on that day. Now obviously that is, 15 at that stage to me that's upsetting news because there was 16 a new element there that I had not heard before. Of course 17 at that time I think in the Commission the evidence of 18 Myburgh had seen the light of day, his allegation that he 19 made I think for the first time in October to, coincidence 20 of coincidences I think, but to Lieutenant-Colonel Vermaak. 21 I leave that as it stands but my concern now is that here 22 is someone who makes an equally serious allegation against 23 another police officer to what at least constitutes then an 24 admission of potential use of lethal force that I think 25 needs to be investigated. So I had on that date initiated</p>	<p style="text-align: right;">Page 37032</p> <p>1 steps within SAPS to alert and the legal team were there 2 during that meeting, so steps were initiated to engage SAPS 3 on this revelation and to request that in accordance with 4 the procedures that apply in your national context, this 5 situation now gets taken over because I'm an expert in your 6 country, I have no right to question people that 7 potentially are either witnesses of crime or suspects of 8 crime. So if you want to know the reason why I did not 9 speak to Myburgh, that would be another one because I can't 10 advise him of his rights. I could talk to him if he would 11 agree to talk to me but I still think that it would pose a 12 precarious proposition.</p> <p>13 MS LE ROUX: Do you know whether any 14 steps were taken as you had recommended?</p> <p>15 MR DE ROVER: Again I've, at a few 16 corners, stated to you that I am retained as an adviser. 17 My competence and influence or reach, if you want, does 18 simply not extend to checking whether they do something 19 with that information or not.</p> <p>20 MS LE ROUX: Do you know if anything has 21 been done?</p> <p>22 MR DE ROVER: I've left this information, 23 with the help of the legal team at a high level in SAPS and 24 I was assured that it would be given the follow-up 25 required. I have never received feedback on it.</p>
<p style="text-align: right;">Page 37033</p> <p>1 MS LE ROUX: When you say a high level, 2 what are you referring to?</p> <p>3 MR DE ROVER: On the day I had a long 4 telephone conversation with General Masemola and with 5 General Mbombo.</p> <p>6 MS LE ROUX: One further question on 7 this. Did you, when you had your, when you took notes of 8 scene 2 - we understand you don't have them with you, 9 they're in Australia but did you record anything relating 10 to this Myburgh/Swart chain of events in those notes?</p> <p>11 MR DE ROVER: Ja, of course.</p> <p>12 MS LE ROUX: Okay.</p> <p>13 MR DE ROVER: Because that – but I've 14 made the information contained therein obviously available 15 and I know that affidavits were subsequently taken at least 16 of Warrant Officer Swart that I am aware of, and of another 17 TRT member who was able to corroborate the story because 18 Swart's information with regards to Myburgh does not limit 19 itself to the incidents on the 16th of August. He also made 20 statements with regard to an encounter that he had with 21 Myburgh subsequently when people were called to give –</p> <p>22 MS LE ROUX: Yes, we've seen that –</p> <p>23 MR DE ROVER: Ja, so you are aware of 24 that.</p> <p>25 MS LE ROUX: If I could then, if I could</p>	<p style="text-align: right;">Page 37034</p> <p>1 then ask you to focus on the decision to move to the 2 tactical phase on the 16th of August. Are you aware of 3 Lieutenant-Colonel Scott's evidence that he had two pre- 4 conditions for moving to the tactical phase, the first 5 being an escalation of the threat of violence and 6 destruction by mobilising as a group to move to a pre- 7 determined target or if all other options to resolve the 8 situation without force were exhausted and there was no 9 other means to restore order, are you aware that those were 10 Lieutenant-Colonel Scott's two preconditions to initiate 11 phase 3? You're aware of that?</p> <p>12 MR DE ROVER: Yes.</p> <p>13 MS LE ROUX: Yesterday we addressed the 14 risk assessments that you described in your interrogatory 15 responses, specifically those to the evidence leaders. 16 Chair, UUUU2.5 paragraph 1.7, we don't need to go there 17 though, and you described the risk assessment exercise as 18 essentially looking at what you intend to do and then 19 trying to put probabilities to outcomes and you describe in 20 that interrogatory response how something gets ranked from 21 likely to not likely and the like. Two questions on that. 22 First of all, you accept that before the 1:30 JOCCOM there 23 was no plan for stage 3 that had yet been presented and 24 agreed.</p> <p>25 MR DE ROVER: I would politely disagree</p>

Page 37035

1 because, for two reasons. One, that effectively if you
 2 look at what happened on the Monday, even for a short
 3 period of time SAPS went to a stage 3. So if not, and
 4 again now we come back to auditable trail but if not in
 5 writing, at least in intention and implementation on Monday
 6 temporarily I would describe what occurred, whatever the
 7 trigger, but what occurred there is, in its confined
 8 reality is a stage 3 situation. They go back –
 9 MS LE ROUX: Mr De Rover, I think you may
 10 have misunderstood my question.
 11 MR DE ROVER: Sorry?
 12 MS LE ROUX: I think you may have
 13 misunderstood my question. I just want to check –
 14 MR DE ROVER: No, I think –
 15 MS LE ROUX: - we're not missing each
 16 other.
 17 MS LE ROUX: I think I did but please go
 18 ahead.
 19 MS LE ROUX: So on the 16th of August
 20 before the 1:30 JOCCOM the evidence before the Commission
 21 has been that there was no written plan that detailed what
 22 stage 3 would look like. In concept there was a tactical
 23 phase but what that would actually entail, there was
 24 nothing in existence before the 1:30 JOCCOM. The only
 25 thing Lieutenant-Colonel Scott had that he presented at the

Page 37037

1 have to spell it out because the people concerned have been
 2 trained, they know exactly what those procedures involve
 3 but that's not what Ms Le Roux is asking you about. Put
 4 the question again so that the witness can understand the
 5 question.
 6 MS LE ROUX: Mr De Rover, the evidence
 7 before the Commission is that before the 1:30 JOCCOM there
 8 was no written plan. There was no documentation that set
 9 out how all the different units involved in the tactical
 10 phase at Marikana, what they were going to do, how they
 11 were going to do it. We accept that, the evidence has been
 12 there's no need to have definitions of how to arrest
 13 someone. We're talking about how to co-ordinate –
 14 MR DE ROVER: Ja.
 15 MS LE ROUX: - these multiple units in an
 16 unprecedented complex operation. There was no written
 17 plan. At the 1:30 JOCCOM and then at the briefing
 18 thereafter at 3:30 all that there is, is Lieutenant-Colonel
 19 Scott's Google Earth image with the icons that he placed on
 20 that image to indicate how he intended to deploy resources
 21 in his plan. That is all that we understand was the
 22 contemporaneous planning documentation.
 23 MR DE ROVER: Okay.
 24 MS LE ROUX: Does that accord with what
 25 you have been told?

Page 37036

1 JOCCOM was his Google Earth image that you've seen
 2 with the icons on it showing the deployment of resources
 3 that he intended, but other than that image there was no
 4 written plan. There was no document that spelt out in any
 5 detail how all the different units in the Marikana
 6 operation would co-ordinate themselves, what their roles
 7 would be and the like. Do you accept that that is the
 8 evidence before this Commission?
 9 MR DE ROVER: Chair, respectfully, no.
 10 My understanding is different and I think part of it was
 11 covered by Mr Budlender yesterday when specifically asking
 12 about the detailing of disperse, disarm, arrest with
 13 regards to stage 3 and how much detail you would expect to
 14 see in writing for such a phase.
 15 CHAIRPERSON: No, no, no. I think that,
 16 with respect, is a different point.
 17 MR DE ROVER: Mm.
 18 CHAIRPERSON: What Ms Le Roux is putting
 19 to you is, all that was put before the Commission, before
 20 the committee, the JOCCOM committee, was the concept and
 21 the Google Earth image.
 22 MR DE ROVER: Mm.
 23 CHAIRPERSON: That was all. What you've
 24 said and what other evidence has been to the effect is that
 25 when you talk about disarm, disperse and disarm, you don't

Page 37038

1 MR DE ROVER: Ja, I think - you must, I
 2 think, remember that my two statements are now one and a
 3 half years old. You've learned a lot in that time. I had
 4 a limited time frame and of course I realise that some of
 5 the documents I was given looked like they were, how do you
 6 say that, created to show what intentions were and not
 7 necessarily reflecting the documents that were there when
 8 things happened. So although for example I've seen
 9 extracts of occurrence books but I've never physically held
 10 the occurrence book concerned. So I would have to rely
 11 that the extracts that I've been given represents the
 12 entirety of what is contained in that book. So if that is
 13 what you put to me, if that is what the evidence is before
 14 the Commission then, ja, I will have to say I –
 15 CHAIRPERSON: That was Colonel Scott's
 16 evidence.
 17 MR DE ROVER: Ja.
 18 CHAIRPERSON: We discussed it yesterday.
 19 Many of the plans and so forth that you saw were
 20 retrospectively created in an attempt to capture in writing
 21 what was alleged to have been present in a non-written
 22 form.
 23 MR DE ROVER: Ja.
 24 CHAIRPERSON: I did tell you that there
 25 was an inaccuracy which we were told about which was

<p style="text-align: right;">Page 37039</p> <p>1 explained on the basis that it was just help us to 2 understand. We don't have to discuss that further, but Ms 3 Le Roux is right, she has correctly summarised Lieutenant- 4 Colonel Scott's evidence on that point.</p> <p>5 MS BALOYI: Mr De Rover, just one further 6 point of clarification on that, are you aware that the 7 Google Earth image that Lieutenant-Colonel Scott used for 8 the 1:30 JOCCOM and the subsequent briefing, represented 9 what's been called the second stage configuration. So 10 there was an initial encirclement plan of the koppie, 11 secondly there was a plan that had half of an arc dealt 12 with by barbed wire and the remainder of that arc dealt 13 with the deployment of NIU, STF and other units. And then 14 of course we have the actual stage 3 configuration which 15 was only barbed wire, no officers completing the arc. Are 16 you aware that the image that he utilised was the second 17 version, the one that had half an arc of barbed wire, half 18 an arc of personnel. Were you aware of that?</p> <p>19 MR DE ROVER: I have seen, I think, all 20 those images and asked questions to it when I was shown 21 them.</p> <p>22 MS LE ROUX: Okay, so if you accept my 23 summarisation of the plan that he had at the time, you will 24 accept that that plan did not set out in any detail what 25 role the different units would perform, how they are to be</p>	<p style="text-align: right;">Page 37040</p> <p>1 co-ordinated, there was no contemporaneous document that 2 set that out. If you accept that and assume that, will you 3 agree with me –</p> <p>4 CHAIRPERSON: I think he said quite 5 fairly that what you've put to him, if it's in accordance 6 with the evidence that's what he accepted –</p> <p>7 MS LE ROUX: Yes.</p> <p>8 CHAIRPERSON: And my job, in a way, is to 9 make sure that what you've put is in fact in accordance 10 with the evidence.</p> <p>11 MS LE ROUX: Yes.</p> <p>12 CHAIRPERSON: And I've ticked that block 13 so you can carry on from there.</p> <p>14 MS LE ROUX: Thank you, Chair. So Mr De 15 Rover, accepting that, would you agree with me that there's 16 not much value in doing a risk assessment where there isn't 17 a proper plan that, in detail, sets out what the different 18 units should be doing, how this tactical phase should be 19 implemented because absent that detail, it's very difficult 20 to do a meaningful risk assessment because you don't 21 actually understand what you're assessing the risk of?</p> <p>22 MR DE ROVER: This is where I think the 23 rubber meets the road because now if you only take 24 contemporaneous documentation as a basis to qualify that, I 25 would be inclined to agree with you but you are dealing</p>
<p style="text-align: right;">Page 37041</p> <p>1 with professional police officials. That's why yesterday I 2 did refer to Stockwell for the simple reason that here 3 there seems to be, and I can understand that because of 4 your profession, you want documented evidence because it 5 gives you certainty and objectivity. Stockwell complements 6 this where there are gaps with testimony of officers 7 concerned, assuming that because they are public officers, 8 they swore an oath, they will tell the truth unless you can 9 demonstrate that to not be the fact.</p> <p>10 [08:48] So whilst I accept that they then did not perform 11 well on the point of entrusting to paper what they were 12 going to do. A briefing was held and you can see in the 13 videos you showed yesterday from the moment Nyala 4 starts 14 moving you can see several vehicles starting to move and 15 move towards to what I would call the jump off point to 16 start the dispersal action proper. So obviously there was 17 communication and people did understand what they were 18 supposed to do and what I'm implying with that is that I 19 would take that at a professional level people did know and 20 people did have a clear mind on what was supposed to happen 21 and did make those assessments. What they failed to do is 22 put that in writing, well put that in writing for you, but 23 put it in writing for themselves so that after the fact 24 they could actually demonstrate to you.</p> <p>25 CHAIRPERSON: I don't think, with</p>	<p style="text-align: right;">Page 37042</p> <p>1 respect, it's quite as simple as that. What Colonel Scott 2 told us was they were presented with this fait accompli by 3 the Provincial Commissioner. She didn't say what do you 4 think about going - I've decided this will happen and we 5 know it had been decided the night before. Then the 6 question is then how are we going to do it and he waited 7 for other people, as I told you yesterday, to put their 8 hands and make suggestions. He then made his suggestion. 9 This was accepted. It's not suggested that there was a 10 pause and people said well let's just discuss the risks and 11 never mind entrusting it to paper, entrusting it to the 12 spoken word is – it didn't happen either. According to the 13 evidence there's no suggestion that anybody said well what 14 are the risks, let's look at the risks of implementing that 15 plan. That's really Ms Le Roux's point. If there had been 16 that evidence then the point you make would obviously be 17 very valid, but there wasn't time, I think, to put things 18 on paper. But the evidence doesn't suggest that there was 19 any discussion of that kind. Then when you go out to the 20 briefing and remember there are no POP people present there 21 at all to say hang on a second, let's look at this 22 possibility. Then when they go out into the field at 2:30 23 he and Brigadier Pretorius the POP commanders were then 24 summoned to his vehicle and he then shows them on his 25 laptop and told them the story. There's also no suggestion</p>

<p style="text-align: right;">Page 37043</p> <p>1 that there was a discussion of risk and Brigadier Calitz 2 gave a very interesting answer when he was questioned about 3 that. He was asked well why didn't you hey but you know 4 this is risk you're doing. We should wait until tomorrow 5 morning, I'm summarising loosely, but that was the 6 question. And he said well I couldn't have done that 7 because if there'd been trouble that night then I would 8 have been held responsible for stalling the operation and 9 therefore I said nothing. Now that was very, to use the 10 word insiggewend in Dutch, maybe you do, a very 11 insiggewende answer and I think that's really at the root 12 of the questions you're being asked. Am I right, Ms Le 13 Roux? Mr Semanya. 14 MR SEMENYA SC: Chair, I think that ought 15 to be qualified by saying in the JOCCOM, you'd recall when 16 this cross-examination started Ms Le Roux herself says 17 there was a – General Mbombo was cautioned that there would 18 be risk associated with going tactical and if that does not 19 constitute some form of risk assessment that is why the 20 witnesses say it is not documented, but you can accept that 21 that would have ordinarily been a risk assessment 22 discussion around going tactical. 23 CHAIRPERSON: You are right. I didn't 24 have to put that to the witness because it was mentioned 25 yesterday, but that so-called risk assessment took place</p>	<p style="text-align: right;">Page 37044</p> <p>1 about 9 o'clock in the morning. It was a conversation 2 between General Annandale, General Mpembe and General 3 Mbombo. General Mbombo was told about the risk and she 4 said well just do your best to make sure it doesn't happen. 5 That's as far as it went. There was no discussion at the 6 JOCCOM at 1:30 and remember at that stage no plan actually 7 was on the table, so there was nothing to consider in 8 relation to the risks attached to it. And then at 2:30 – 9 so nothing happened in the JOCCOM and as far as I can 10 recall from the evidence there was no suggestion that 11 anyone said hang on a second, Colonel Scott, I think he was 12 Lieutenant-Colonel Scott, Lieutenant-Colonel, let's 13 consider the risk first before we go ahead. That didn't 14 happen either. 15 MS LE ROUX: Now, Mr De Rover, in your 16 response to the interrogatories to the evidence leaders 17 which, Chair, is UUUU2.5, paragraph 1.7 of that, this is 18 where you set out this risk assessment exercise for the 19 first time. And you conclude that answer by saying based 20 on its previous experiences in public order management SAPS 21 gave that scenario, the scenario being that one of the 22 possible outcomes of forcible disarmament would be injury 23 or death. So they gave that scenario a probability of not 24 likely because of its experiences of the outcomes of many 25 operations to date they'd been different. Now I'd like to</p>
<p style="text-align: right;">Page 37045</p> <p>1 ask you the basis of that answer. When you say that the 2 SAPS gave the scenario a probability of not likely, who at 3 the SAPS do you say assigned not likely to the scenario of 4 possible injury or death following the tactical phase? 5 MR DE ROVER: My understanding is that 6 that was Lieutenant-Colonel Scott and General Annandale. 7 MS LE ROUX: Okay and when is it your 8 understanding that they did this exercise of assigning not 9 likely as a risk assessment of the operation? 10 MR DE ROVER: I think on the 16th. 11 MS LE ROUX: Do you if that would have 12 been at the 1:30 JOCCOM or – on the 16th – 13 MR DE ROVER: I'd almost think that a 14 pointed interrogatory to them on that point may serve you 15 better than my speculation. I don't know. 16 MS LE ROUX: Mr De Rover, I'd like to ask 17 you whether – did you apply your mind independently when 18 you were answering the evidence leaders' interrogatories 19 and consider for yourself whether assigning not likely as a 20 risk assessment to the operation was a reasonable risk 21 assessment? Do you share the SAPS view that it was not 22 likely that this operation would cause death or injury? 23 MR DE ROVER: I think I know a little bit 24 about this operation. I know not much about any other SAPS 25 operation, so it's a quantitative answer that I got from</p>	<p style="text-align: right;">Page 37046</p> <p>1 SAPS because obviously my interest is and Mr White has 2 canvassed that, that you countenance the possibility that 3 the message you intend to send with a particular action is 4 not understood the way you intend it because perceptions 5 build in people's minds. Not just with you unfurling a 6 wire. That may trigger a reaction that you in fact, maybe 7 you try to say you can't come here, but people may perceive 8 it as oh the whole tone of the encounter is changing now. 9 You expect me to make trouble and people may well decide 10 then to make trouble. I think Mr White has spoken 11 extensively on that and Mr Hendrickx, so I do not need to 12 repeat that. But what I asked SAPS particularly with that 13 in mind what is your generalised experience when you do 14 this? And what they say and what they brought, images for 15 Marikana to show me is that indeed the majority of the 16 people move away at that stage. It's almost like it's a 17 conditioned response. People know that this is what the 18 police will do and that the next thing they risk if they 19 stay is that in a dispersal action SAPS would use water 20 canon, teargas or rubber bullets to then convince people to 21 leave from a particular area. 22 CHAIRPERSON: Sorry, I'd like to ask a 23 question. Finish your answer, I interrupted you. Forgive 24 me. 25 MR DE ROVER: No, no please.</p>

Page 37047

1 CHAIRPERSON: All right, I'm not
 2 interested in whether it could really be said that there
 3 was a probability of not likely, never mind what they now
 4 say or said to you. I don't remember them saying that to
 5 us by the way, but we won't go there now, they may have
 6 done. This is conceded by Colonel Scott in the passage
 7 that I think was put to you yesterday being a first time
 8 situation, a very unusual situation that they never had
 9 before. Now there are a number of factors that are
 10 relevant. They knew that these people had taken muti,
 11 their understanding was, it's disputed actually from the
 12 other side, but the understanding was that gave the
 13 strikers a belief in their invulnerability or
 14 invincibility. They knew how the strikers had reacted on
 15 the Monday. The intelligence that they received was that
 16 they were not going to lay down their arms, they were not
 17 going to abandon their position on the koppie, the were
 18 going to fight to retain their arms and retain their
 19 position. That was all the information, that's the
 20 information they had. They also foresaw as a possibility
 21 that the POP with their non-lethal methods would not be
 22 able to deal with the situation which is why they put in
 23 place the TRT people. The TRT people were there for two
 24 reasons. Firstly to do mopping up if the POP people were
 25 successful, but secondly and more importantly they were

Page 37049

1 Major-General Annandale went to Brigadier Pretorius who was
 2 keeping the minutes and said please make t his note in the
 3 minutes, this decision was made by the Provincial
 4 Commissioner. And he stood over her while she wrote that
 5 down. That in itself spreek boekdele as we say in
 6 Afrikaans. That indicates things I would imagine, anyway
 7 in the light of those facts I ask you the question. What
 8 do you say on the suggestion, let's not discuss whether
 9 they really thought it was not likely, perhaps let's
 10 consider the reasonableness of such a finding? What do you
 11 say of the assessment that in these circumstances the
 12 probability of it's not likely that there'll be loss of
 13 life and serious injury? What's your answer to that?
 14 MR DE ROVER: Chair, I think on a careful
 15 reading of that response that I gave the not likely does
 16 not apply to, in general, the likelihood of injury or
 17 death. What the not likely label applies to is whether the
 18 group, as a whole, would be turning on the police. And I
 19 know that that is a contested matter, but that there would
 20 be a confrontation with that group, as a whole, if you
 21 will. What I think the presence of TRT and your allusion
 22 to what is before the Commission as evidence the
 23 expectation of TRT involvement, as I understood it, was
 24 that when the dispersal starts and that lead group would
 25 have been broken up into smaller groups or even individuals

Page 37048

1 there to protect the POP people, to ensure that there was
 2 no loss of life on the police side. And the only way they
 3 could do it, you can't blame the TRT for doing what they
 4 did because that's what they had to do and the only
 5 equipment they had to do it with was TRT rifles. So they
 6 must have foreseen, this is obviously a prima facie issue
 7 I'm putting to you, but they must have foreseen the POP
 8 people mightn't be affected regard been had to these
 9 special circumstances. The muti, the conduct of the 13th,
 10 the information and that was really a first time situation,
 11 they never dealt with this kind of situation before. I can
 12 understand they dispersed and disarmed people in the past,
 13 but this lot who behaved as they had behaved, who had shown
 14 themselves to be the kind of people they were, well not all
 15 of them obviously, but some of them. Based on the
 16 information and so forth, I would have thought that, again
 17 prima facie that to way that it was not likely that the POP
 18 people wouldn't have to do what they had to do. It was not
 19 likely that the TRT people would have to take over, fire
 20 shots which would have a probability of causing death or
 21 serious injury. That's a difficult one to accept and
 22 there's something I must tell you, I don't think you know.
 23 The decision to proceed then was not taken by the JOCCOM,
 24 it was something imposed from above, in fact from the night
 25 before. And the evidence is that at the end of the meeting

Page 37050

1 they would be approached and arrested and disarmed. Now if
 2 that was not feasible to be done by POP TRT members would
 3 be on hand to assist them with accomplishing that task and
 4 I will frankly say I don't think that SAPS anticipated that
 5 as a not likely event. I think that that was actually what
 6 they thought was going to be the very likely scenario that
 7 would unfold, that they would manage to break up that
 8 group, approach them in smaller numbers or individual,
 9 surround them and disarm them. Starting with POP doing
 10 that and if, for some reason from prima facie appearance of
 11 a suspect that would not be feasible TRT would do it.
 12 CHAIRPERSON: The evidence is partially
 13 that. The evidence is that the TRT people were to assist,
 14 but also the role of defending the POP was also mentioned.
 15 But what one also has to factor in is the intelligence that
 16 the police got that the strikers would not surrender their
 17 position on the koppie, would not surrender their arms,
 18 would fight to protect both. In other words if the POP
 19 approached them and tried to disarm them or the TRT
 20 approached them and tried to disarm them they would fight.
 21 And they believed, so the police thought anyway, they
 22 believed they were invincible, so they weren't scared of
 23 being shot at because they thought the bullets would turn
 24 into water. So the police believed, that's denied by the
 25 strikers, it's something that we'll have to decide at the

<p style="text-align: right;">Page 37051</p> <p>1 end. So you're faced with people who've shown what they're 2 capable of on the Monday and indeed in certain other 3 incidents, obviously not all of them, but some of them, 4 people who believe they're invincible, bullets will turn 5 into water. People who the police believe or not believe, 6 police are told people who will fight to protect their 7 position and their arms. Then you look at the likelihood 8 and make an assessment.</p> <p>9 MR DE ROVER: Well I think that if you 10 take that you would qualify then a confrontation as very 11 likely to happen the risk that that confrontation then 12 produces death or serious injury and I just point to the 13 Monday where whatever the trigger that caused the 14 confrontation, once the proximity occurred, death and 15 injury occur on both sides. And that lamentable loss of 16 mind, of life would obviously also have played on the 17 Monday when the incident eventually unfolded as it did. 18 But I think that if – I still believe on what I have been 19 told that there was never the anticipation that they would 20 have to deal with the group as one at the time that they 21 were confronted by that reality. I think their 22 anticipation was that if that happened it would be in 23 smaller numbers and in a situation that they could control. 24 And if I can just share a personal feeling I got talking to 25 SAPS members. In a strange way there was almost a relief</p>	<p style="text-align: right;">Page 37052</p> <p>1 that now the operation was actually going to something that 2 they knew and understood and that from experience they know 3 they can do, they can handle. Whatever you would label it 4 in terms of quality, but it seemed to be familiar 5 territory. Disperse, disarm, arrest, now we're talking 6 issues that we know, recognise that we're comfortable with 7 and in terms of lessons learnt I don't think that the 14th 8 and the 15th were sufficiently utilised to critically look 9 at how was that possible. And to maybe draw something from 10 that for what you planned to do on the 16th.</p> <p>11 CHAIRPERSON: Yes there are two other 12 points that I must put to you and that is on the 13th, of 13 course, the police and the strikers were in close proximity 14 to each other. So that's why the police sustained – that's 15 why the two policemen were killed and injuries were 16 sustained. On this occasion, of course, the TRT line was 17 further back and TRT line, members of that were able to 18 fire without receiving any injuries themselves which is a 19 distinguishing factor for the 13th. But there's another 20 factor that I must put to you, I should have mentioned to 21 you earlier and that was the police evidence is, again it's 22 disputed by the other side, but we are looking at the 23 police evidence this time. The police evidence is they 24 received threats during the day from the strikers, from the 25 leader of the strikers. There was a threat that the Hippos</p>
<p style="text-align: right;">Page 37053</p> <p>1 as they recall, that's the Nyalas would be burnt. There 2 was a suggestion that one of the senior police officers 3 who'd come from the homelands, former homelands, would be 4 killed. There were distinct threats of violence in the 5 course of the build up from the strikers' side. That also 6 was a relevant factor in deciding the risks and deciding 7 the likelihood or non-likelihood of the particular 8 scenario, you would agree with that I take it.</p> <p>9 MR DE ROVER: Yes, Chair. I had prepared 10 for an evidence in chief a power point to set out some of 11 the characteristics of the protest, I know that it is made 12 available to the evidence leaders. It would possibly even 13 be useful to get once slide up on the screen, if that could 14 be organised.</p> <p>15 CHAIRPERSON: Is that possible, Mr 16 Wesley? I think in fairness to the witness and frankly I'd 17 like to see it.</p> <p>18 MR WESLEY: I'm sorry, Chair, I was busy 19 here attending to some correspondence.</p> <p>20 CHAIRPERSON: The witness says he was 21 going to - when he thought he was going to give evidence in 22 chief he had prepared a power point presentation and in the 23 power point presentation there's a particular slide which 24 is relevant. Is this now on the screen?</p> <p>25 MR DE ROVER: It's on the screen.</p>	<p style="text-align: right;">Page 37054</p> <p>1 CHAIRPERSON: Right, can you tell us – 2 MR DE ROVER: Can you go to slide 7 3 please? 4 CHAIRPERSON: All right, let's look at 5 slide 7. 6 MR DE ROVER: And what I'd just like to 7 put to you is on – 8 [09:08] CHAIRPERSON: I think this will have to 9 be an exhibit and as much as most of the exhibit numbers 10 have already been pre-empted by others without my 11 authority, I will have to have my own one. What's your 12 last, what is your last – 13 MS PILLAY: Chair, Chair, if I could just 14 ask, I've worked through the HRC's proposed exhibit numbers 15 now and we are in a position to finalise it, if in the 16 meantime we could mark this as UUUU12. 17 CHAIRPERSON: UUUU12 on their list is an 18 article by Prof Stott called "Crowd Psychology and Public 19 Order Policing." So we have to take the – 20 MS PILLAY: No, Chair, that will become – 21 CHAIRPERSON: - and use the number 13, 22 UUUU13 will be, what's the name of your presentation or 23 slide, PowerPoint? What's it called? How do I describe 24 this exhibit? 25 MR DE ROVER: The title I put on the</p>

<p style="text-align: right;">Page 37055</p> <p>1 front was "Rules of Engagement."</p> <p>2 CHAIRPERSON: Okay, "Rules of</p> <p>3 Engagement."</p> <p>4 COMMISSIONER HEMRAJ: 12 Rules.</p> <p>5 CHAIRPERSON: No – oh, you've changed it</p> <p>6 now. Oh, I see. So it is 12, I beg your pardon. So we</p> <p>7 can leave 13. It's UUUU12, "Rules of Engagement" and we're</p> <p>8 looking, I take it we're looking at the whole thing. The</p> <p>9 whole exhibit is before us now but we must look at slide 7,</p> <p>10 you say. Alright, thank you.</p> <p>11 COMMISSIONER HEMRAJ: Is there anything</p> <p>12 else, Mr De Rover, that you've handed over that we haven't</p> <p>13 had an opportunity to look at as yet?</p> <p>14 MR DE ROVER: I gave an entire memory</p> <p>15 stick and there is a report of the previous special</p> <p>16 rapporteur on summary executions. There is another article</p> <p>17 on crowd control of one of the authors of the Stott article</p> <p>18 but I made that available, I just don't know where these</p> <p>19 documents are.</p> <p>20 CHAIRPERSON: May I suggest that during</p> <p>21 the first short break, comfort break, there can be</p> <p>22 discussions between the Human Rights Commission counsel and</p> <p>23 the police counsel and the evidence leaders in regards to</p> <p>24 what can go in on mere production and in fact seeing you've</p> <p>25 very kindly taken it upon yourselves to give exhibit</p>	<p style="text-align: right;">Page 37056</p> <p>1 numbers to these things, you can carry on with that</p> <p>2 function as far as these things are concerned as well.</p> <p>3 Okay, can we carry on? Now we've got the slide, yes, what</p> <p>4 do you want to show us about the slide?</p> <p>5 MR DE ROVER: Now on the left-hand side</p> <p>6 in the yellow square I've just attributed some qualifiers</p> <p>7 to the behaviour as I observed it, particularly on the</p> <p>8 Monday and let me stray away from that, let's separate it</p> <p>9 from the 16th although that, there are other, there might be</p> <p>10 that you say that equally applies on that day still to that</p> <p>11 group –</p> <p>12 CHAIRPERSON: I suggested a distinction –</p> <p>13 differences.</p> <p>14 MR DE ROVER: Okay. So what I saw is the</p> <p>15 group on the Monday was willing to be confrontational.</p> <p>16 They appeared to be organised, they were mobile, they were</p> <p>17 armed, they were violent and they showed themselves</p> <p>18 volatile and whatever triggered the volatility, I know that</p> <p>19 that is a point of discussion but they showed that they can</p> <p>20 be. Now if – I put in the middle there with a question</p> <p>21 mark and I think it is important to consider that because</p> <p>22 yesterday I said that SAPS has more than 100 cases open</p> <p>23 between February and the 1st of August that relate, in my</p> <p>24 experience at least, to extreme forms of violence that all</p> <p>25 seem to be strike related or mining problem related in the</p>
<p style="text-align: right;">Page 37057</p> <p>1 Rustenburg area. So I put in red there, "Society</p> <p>2 acceptance of contemporary forms of protest and violence"</p> <p>3 because I submitted that in response to an interrogatory,</p> <p>4 that the incident of the Monday, if that had happened in</p> <p>5 Holland there would not just be a police response, there</p> <p>6 would be a huge community outcry and I'm sure that someone</p> <p>7 from government would appear on TV to express that this is</p> <p>8 an incident that shocks the conscience of a nation and that</p> <p>9 we can't and mustn't stand for it and that perpetrators,</p> <p>10 one, must be brought to justice but two, must be informed</p> <p>11 and educated on the point that you can't behave like that.</p> <p>12 So I've put that there as a reminder but if you offset it</p> <p>13 against current POP capabilities and I'm happy to even</p> <p>14 elaborate on those, they are mainly reactive, they're</p> <p>15 mainly static, they're mainly set piece, they're largely</p> <p>16 aimed at containment and, crucially, POP prefers a distance</p> <p>17 between themselves and the crowd and it's compounded by the</p> <p>18 fact that POP in its current configuration has very limited</p> <p>19 options to deal with the situation. It's just that when</p> <p>20 you look at those two qualifiers, you wonder whether</p> <p>21 they're even able in absolute terms to effectively deal –</p> <p>22 and what you see on the Monday is they can't, some of them</p> <p>23 even ran away and left their colleagues in the lurch.</p> <p>24 So I'm simply saying that on the Monday you see</p> <p>25 an abject failure of public order policing demonstrated on</p>	<p style="text-align: right;">Page 37058</p> <p>1 video, well documented, and you can trace it back to the</p> <p>2 way POP is organised and I think that this form of protest</p> <p>3 at Marikana and I don't know about other ones but the</p> <p>4 characteristics of protests are such that it simply</p> <p>5 outpaces what police can do and I know that during the</p> <p>6 London riots, for example, UK police had that same problem.</p> <p>7 People communicating quickly via social media, arriving in</p> <p>8 jeans and sneakers, so you can run way faster than a riot</p> <p>9 policeman in heavy gear and they quickly, it's almost</p> <p>10 guerrilla tactics, they quickly strike, they loot a shop or</p> <p>11 they attack a centre and they disappear again into the</p> <p>12 night and the UK police found themselves tested and</p> <p>13 challenged to actually come up with the tactical responses</p> <p>14 that matched, for example, the issue of mobility. And I</p> <p>15 would venture, although I'm not an expert on the detail but</p> <p>16 Mr White can answer, that at least when it comes to the</p> <p>17 mobility aspect, I think that in the UK some serious though</p> <p>18 ahs been given to how you can counter, prevent, contain and</p> <p>19 counter particularly when a group is mobile and willing to</p> <p>20 confront and not shy of closing that gap between themselves</p> <p>21 and the police. My reading of current POP capabilities,</p> <p>22 they're totally not qualified, equipped or prepared to deal</p> <p>23 with that.</p> <p>24 MS LE ROUX: And Mr De Rover, you'll</p> <p>25 accept of course that this analysis of yours is limited to</p>

<p style="text-align: right;">Page 37059</p> <p>1 POP. Obviously in the London riots they didn't shoot 34 2 people dead with live ammunition. 3 MR DE ROVER: No. 4 MS LE ROUX: So you're only looking at 5 POP response in this. That's a yes or no question, you're 6 only looking at POP, correct? 7 MR DE ROVER: I am only looking at POP – 8 MS LE ROUX: Right. 9 MR DE ROVER: - if that puts, if that 10 eases the discussion definitely. 11 MS LE ROUX: Now the Chair has helpfully 12 advanced my cross-examination but I'd like to – 13 CHAIRPERSON: I'm sorry, before you carry 14 on I would like to put two things, put one thing actually 15 and maybe two, and Adv Hemraj wants to get clarification on 16 a point before you carry on. Looking at the left-hand side 17 of your slide dealing with the situation as you saw it in 18 respect of the strikers, in comparison with, comparing 19 Monday with Thursday, on Monday they were, they said they 20 weren't aggressive towards the police, there were no 21 threats to attack the police. 22 MR DE ROVER: Mm. 23 CHAIRPERSON: On the contrary, they said, 24 we're not attacking you. They were on their way to the 25 koppie being escorted by the police, they weren't in an</p>	<p style="text-align: right;">Page 37060</p> <p>1 aggressive mood towards the police. 2 MR DE ROVER: Mm. 3 CHAIRPERSON: What I've, the evidence 4 I've put to you indicates that Thursday was different, 5 there were threats of aggression towards the police. On 6 Monday they weren't standing in a position to defend where 7 they were. They weren't defending their position, they 8 were actually on their way to the koppie which they were, 9 according to the information that the police got, the 10 intelligence they got, what they were going to defend on 11 the Thursday and they weren't actually being disarmed or an 12 attempt wasn't being made to disarm them on the Thursday. 13 They may have thought that that was going to happen – I 14 mean on the Monday but on the Thursday, according to the 15 information received, they were going to defend their 16 position and they were going to defend their arms and they 17 were aggressive towards the police and there's evidence 18 that somebody said you can't have two bulls in the same 19 place and there was talk about – there's other evidence as 20 well which indicated it was they or the police who were 21 going to be there, there wasn't room for both of them. So 22 the situation on Thursday was significantly more serious 23 than it had been on Monday and in the light of what you say 24 about Monday then a fortiori the points you make apply to 25 Thursday. You would agree with that, I think.</p>
<p style="text-align: right;">Page 37061</p> <p>1 MR DE ROVER: Yes. 2 CHAIRPERSON: Yes. Adv Hemraj wants a 3 clarification, then we'll stop using up Ms Le Roux's time 4 and give her a chance to carry on with the cross- 5 examination. 6 MS LE ROUX: I'd appreciate that, Chair. 7 COMMISSIONER HEMRAJ: Mr De Rover, what 8 does set piece mean? 9 MR DE ROVER: Well, POP works with 10 standard responses, like you deny access by forming a line 11 or you create a cordon or you channel or you block, those 12 type of responses that are essential set piece, that I must 13 add work probably better in an urban environment than in a 14 rural environment because structures can then be used to 15 complement what you are trying to do and people can't 16 simply walk around a line that you put up. 17 COMMISSIONER HEMRAJ: If you think that 18 the POPS in the South African Police are unable to deal 19 with what you've got in the left-hand side block, is there 20 any unit that you know in the South African Police that is 21 well placed to deal with that? 22 MR DE ROVER: Well, this is, I think you 23 face – that's why I know that the emphasis is and the 24 attempt, you're looking at something else in this 25 Commission but my concern is that if you put 300 people</p>	<p style="text-align: right;">Page 37062</p> <p>1 with those characteristics in Pretoria and they decide they 2 will walk into the Union Building, I don't think that at 3 this stage the South African Police has the ability to stop 4 them doing that. 5 COMMISSIONER HEMRAJ: None of the units 6 in the South African Police? 7 MR DE ROVER: That comes with a price tag 8 because then you will go into your risk assessment and 9 there is plenty recent example of how such confrontations 10 in Greece, in Turkey, in Egypt, how such confrontations end 11 when the state decides that nevertheless it will try and 12 put a stop to that type of protest and, you know, then you 13 get state controlled use of lethal force, sanctions beyond 14 judicial control. And I know in Egypt I think 180 people 15 have been condemned to death – 16 COMMISSIONER HEMRAJ: Thank you. 17 MR DE ROVER: - because of public 18 protests. 19 COMMISSIONER HEMRAJ: Thank you, Mr De 20 Rover. 21 CHAIRPERSON: [Microphone off, inaudible] 22 set piece, do I understand you to be saying, if I'm wrong 23 correct me, the POP approach is almost choreographed moves. 24 It doesn't sound from what you say as if they're very good 25 at improvising. They're choreographed moves, they know, I</p>

Page 37063

1 mean what they do is certain drills, as it were, a routine
 2 they can follow but if the strikers behave in an
 3 unpredictable fashion, then they're not very good at – it's
 4 not a criticism, it's just, they're not very good at
 5 improvising.

6 MR DE ROVER: That I would hold true
 7 because it would, you'd have to have a high degree of
 8 training to be able to improvise but you'd also need the
 9 commanders to facilitate such improvisation and typical the
 10 structures that SAPS has in place, you create an
 11 organisational contradiction. You have so many different
 12 units in place that there is a need for centralised control
 13 of those units so that they don't run rogue or riot on you,
 14 but the complexity of the situation would require that you
 15 decentralise command decisions and that is where, when I
 16 talked yesterday about unravelling systems, you build it
 17 into your operation almost that it happened this time, it
 18 can happen another time and maybe the next time not all
 19 elements will conspire to thwart you but it will become a
 20 problem. So because of the different elements there is a
 21 desire to exert central command and control on the
 22 operation but an operation of this type also needs
 23 reponsibilising and authorising commanders on the ground to
 24 make decision that are necessary and not obliging them to
 25 first ask permission from a superior because the time that

Page 37065

1 CHAIRPERSON: Can I just go back? I'm
 2 sorry, Ms Le Roux, I'm breaking my promise to you but I
 3 hope you'll forgive me. I want to go back to this risk
 4 assessment not likely – there was evidence, I don't know if
 5 you're aware of it, that on the Wednesday night, the night
 6 before the action with the National Management Forum was
 7 engaged, was discussing matters elsewhere, there was a
 8 discussion between Mr Zokwana and General Mpembe. Mr
 9 Zokwana said you must disarm them and General Mpembe said
 10 this, he said there's no amount of training which enables
 11 me to, with a rifle, to disarm someone with an axe without
 12 bloodshed. That was his assessment actually of the risks
 13 of dealing with the situation in the way they did it on
 14 Thursday. It will be argued, I would imagine. Were you
 15 aware of that evidence?

16 MR DE ROVER: Yes, Chair, and one of the
 17 problems is that the approach of Marikana had never been
 18 field tested so – and the reality of it actually is that
 19 that's such a dangerous situation, you could not even
 20 countenance the idea that you go and train that because of
 21 the risk that is involved in it. The other thing is, in
 22 part it wasn't imagined, so how can you prepare for the
 23 unimaginable? So it puts up big questions in terms of
 24 preparedness. I know that General Mpembe was and is still
 25 very passionate and emotional about his assessments and

Page 37064

1 passes can totally change the requirements of the situation
 2 on the ground again and a solution for which you get
 3 permission is no longer appropriate.

4 MS LE ROUX: But Mr De Rover, you'll
 5 accept then that those commanders on the ground also need
 6 to be fully briefed and aware of what their role and what
 7 every other unit's role is in order to ensure that they can
 8 make decision making without endangering or jeopardising or
 9 undermining the roles of the other unit.

10 MR DE ROVER: Ja, but you know that the
 11 problem is that you're now looking at possibilities of
 12 interactions that go well beyond what is planned and that
 13 the situation may dictate. I think one element that you
 14 will find when you look at it is that although commanders
 15 were responsabilised for different parts of the action,
 16 they weren't authorised to make decisions. They would
 17 still be expected to ask permission before going ahead. So
 18 there is an attempt from the JOC to still, with remote
 19 control or central steer, control the operation and direct
 20 the different entities and although commanders were briefed
 21 on their role on the ground, i.e. my assessment is that
 22 they were insufficiently put in a position that they could
 23 also make their own decisions and then report back on hose
 24 rather than reporting on a situation and asking permission
 25 to do something.

Page 37066

1 reading and I think in the end his voice did not prevail in
 2 what SAPS decided to do. His opinion is known and he
 3 shared it, I know that he made it known to people but his
 4 voice did not prevail.

5 MS LE ROUX: Mr De Rover, the Human
 6 Rights –

7 CHAIRPERSON: Sorry, sorry. He had an
 8 acute appreciation for the doctrine of situational
 9 appropriateness.

10 MR DE ROVER: Ja.

11 CHAIRPERSON: Sorry, sorry, Ms Le Roux.

12 MS LE ROUX: Mr De Rover, the Human
 13 Rights Commission intends to submit that with foresight,
 14 knowing what the police knew at the time, they should have
 15 been able to determine that it was in fact likely that
 16 their plan would require the use of force and that it
 17 carried a high risk to both strikers and police. The Chair
 18 has put certain aspects of the evidence to you that are
 19 included in my list of evidence that supports the
 20 contention that we will make but I'd like to give you a
 21 list of 10 pieces of evidence that the Human Rights
 22 Commission will rely on to say that it was entirely
 23 foreseeable that there was a very high risk of injury and
 24 death to both strikers and possibly police with this plan.
 25 The first is the conduct of the operation on the 13th of

<p style="text-align: right;">Page 37067</p> <p>1 August where police members used force against strikers, it 2 resulted in retaliation, five people died. The second is 3 Lieutenant-Colonel Scott's view that there was going to be 4 conflict and that the protesters being armed, emotions 5 running high, there was likely to be a confrontation. The 6 third piece of evidence is the use of muti by the strikers 7 and their belief that it made them somehow invincible 8 potentially to the use of force by police, which may make 9 them disregard that risk in their conduct. The fourth is 10 that this mindset of invincibility was in fact reflected in 11 some of the planning. The fifth piece of evidence is that 12 the police had information to suggest that there were 13 firearms within the possession of the strikers who were 14 present on the koppie, so there was a firearms threat. The 15 sixth piece of evidence is that the intelligence available 16 to the police by the 16th of August noted that many of the 17 mineworkers were in possession of dangerous weapons which 18 they were likely to decline to surrender and they would be 19 prepared to fight if their demands were not met, including 20 by resisting the police. The seventh piece of evidence is 21 Lieutenant-Colonel Scott's oral evidence that he was 22 mindful that the tactical option could elicit a violent 23 response from the strikers and it was important not to send 24 the SAPS members into what he called a blatant death trap. 25 So he proposed a line of TRT to back up the pops. The</p>	<p style="text-align: right;">Page 37068</p> <p>1 eighth piece of evidence is that we've had no evidence from 2 anyone in the JOCOM that they seriously thought that the 3 so-called militant group would voluntarily just disperse 4 and disarm when they were asked to do so. The ninth piece 5 of evidence is Lieutenant-General Mbombo's oral evidence 6 that she'd been warned of the risk of the TRT using live 7 ammunition when they went tactical to try to disarm the 8 strikers. 9 [09:28] The tenth piece of evidence is the threats that 10 were made from the strikers towards the police in the days 11 before the 16th and on that day as well. So in light of 12 those 10 pieces of evidence – 13 CHAIRPERSON: May I add two more before 14 he answers? 15 MS LE ROUX: Certainly, Chair. 16 CHAIRPERSON: In relation to what senior 17 people in the police force saw as possible there is 18 evidence which was put to you before, I think yesterday, 19 that somebody ordered four funeral hearses to be, early on 20 the morning of the Thursday to be there. They didn't come 21 actually, but that's not the point. There's also evidence 22 that, and there's a dispute as to who was responsible for 23 it but the evidence of, I think it was Colonel Merafi – if 24 I'm wrong with that I'll be corrected – he ordered, he 25 arranged for 4 000 extra rounds of ammunition to be</p>
<p style="text-align: right;">Page 37069</p> <p>1 delivered to the JOC before the tactical operation started. 2 He says, I think it was Colonel Merafi, he said that 3 Brigadier Calitz ordered it. Brigadier Calitz denies it. 4 This is one of the issues we may have to decide. 5 MR DE ROVER: Mm. 6 CHAIRPERSON: But the relevance of it is 7 this, that somebody high up thought there's going to be a 8 lot of ammunition fired, we will need an extra 4 000 9 rounds. They were actually delivered. Brigadier Pretorius 10 said, don't be silly, we don't need them and sent them back 11 but while we're talking about what the police actually 12 foresaw, senior people in the police foresaw, if you put in 13 the funeral hearses ordered, you put in the extra rounds of 14 ammunition ordered and sent, later sent back, that's quite 15 interesting evidence, isn't it, in relation – plus the 16 other factors that Ms Le Roux has put to you. Perhaps you 17 could answer the question in the light also of my two extra 18 factors. 19 MS LE ROUX: Mr De Rover, let me sum up 20 then for you. The 12 pieces of evidence that we've placed 21 before you – Chair, of course some of those are subject to 22 dispute but what we know is that on the 16th of August all 23 of those facts were known to the police or they believed 24 them to be true. In light of those 12 pieces of evidence, 25 do you agree that in fact it was likely and that they</p>	<p style="text-align: right;">Page 37070</p> <p>1 should have been able to foresee the risk of injury or 2 death in the operation when they went tactical on the 16th 3 of August? 4 MR DE ROVER: Chair, I think and I felt 5 and I've written this, that what you underscore is a great 6 need for this Commission to unearth who, who made the 7 policy decision on this point and I – 8 MS LE ROUX: Mr De Rover, I must – 9 MR DE ROVER: No, no, can I – 10 MS LE ROUX: - ask you to answer the 11 question. 12 MR DE ROVER: Please – 13 CHAIRPERSON: No, Ms Le Roux, he's 14 answering the question, don't interrupt him. 15 MR DE ROVER: I think it's a long 16 question you asked, you gave me many bits of evidence to 17 consider and I promise you I will answer your question but 18 I have to then also be given a chance to contextualise – 19 CHAIRPERSON: I've given you the time. 20 Don't argue with her, I've already given you the time. 21 MR DE ROVER: Sorry, Chair. I know of 22 the meeting of the National Management Forum, I heard that 23 as a rumour while I was here, my first week here and again 24 my testimony is one and a half years old now, a lot has 25 come to light that I wasn't aware of when I wrote those</p>

<p style="text-align: right;">Page 37071</p> <p>1 statements but one thing I do know is that in no democratic 2 country an incident that doesn't only have national 3 security ramifications but definitely serious economical 4 dimensions, does a police force decide that it is time for 5 whoever is there to go. That decision comes and originates 6 from somewhere else and it may well be that that then 7 becomes the subject for a discussion in a management forum 8 of the police but it's an order that comes from the 9 executive and the police must implement that order and then 10 – because how else, like in the face of what you say, how 11 can anyone decide that you are going to do that if what, if 12 I just accept at face value that each of those 12 points is 13 true, you can't implement an operation on that. Now you 14 have been given an order, international law says if an 15 order is manifestly unlawful and if you have a reasonable 16 opportunity to refuse it, you should do so. That for me 17 now is a \$64 000 question. Is the order that was given to 18 the police that I will take came from the executive, from 19 government, is that order an unlawful order? Can you now, 20 on the basis of what you know because you're now asking the 21 police to resolve a situation of which they could have 22 demonstrated to the executive that it would likely produce 23 this result, then you have that problem and I recall your 24 Deputy President in answer to a question of Mr Mpofo, 25 qualifying Marikana as a collective failure. It's really a</p>	<p style="text-align: right;">Page 37072</p> <p>1 pity that he wasn't drawn to qualify that because I think 2 that part of the answer that you need, one, to unearth the 3 structures behind what happened and how that happened is to 4 get clarity why, in the face of such overwhelming evidence 5 as you now present and that you hold the police were aware 6 of when they were making that decision and trying to 7 operationalise it, why didn't they refuse to do it, because 8 if it originated from within the police itself it would 9 have been simple to stop that. And I hope that the police 10 are not an entity on itself, they are agents of the state. 11 They are accountable to the executive, at first to the 12 Minister for the Police, Minister for Justice and maybe 13 even the President and I would hope that an incident like 14 Marikana in the way it escalated in that week, posed 15 ramifications for safety and security that well over- 16 stepped something that you leave your police force to deal 17 with if you are in government and it had ramifications at 18 industrial level with the involvement of Lonmin and the 19 unions that have economic ramifications. I read in 20 Lonmin's annual report that that week alone cost them \$326 21 million and that one year on after Marikana, they were 22 still only at 85% of pre-production capacity, of pre- 23 Marikana production levels. So it was still costing them 24 money. So there have been all these references made. I 25 think it's time to then unearth who gave that order.</p>
<p style="text-align: right;">Page 37073</p> <p>1 CHAIRPERSON: I'm glad you raised that 2 point. We're still busy with that. We tried to find out 3 what exactly happened at the National Management Forum but 4 the National Management Forum consists only of members of 5 the police service. It consists of the National 6 Commissioner, the various deputy commissioners of the rank 7 of Lieutenant-General, you know, from the national office 8 and then each of the Provincial Commissioners. Those, that 9 I think is the people who were there. There's an 10 allegation which has been made that there was political 11 influence brought to bear. Now when you say that it was an 12 order from the executive, are you basing it on something 13 you were told at the time you heard the rumour or what is 14 the basis of your saying that? 15 MR DE ROVER: Chair, two things for that. 16 One, you are talking about an extraordinary session of the 17 Management Forum so, and it was held on the 15th in the 18 evening. 19 CHAIRPERSON: Well, I'm sorry to 20 interrupt you. It was extraordinary because the ordinary 21 meeting had ended – 22 MR DE ROVER: Of course, ja. 23 CHAIRPERSON: - and what happened was, 24 some people had left but all the Provincial Commissioners 25 had stayed behind, the National Commissioner was there and</p>	<p style="text-align: right;">Page 37074</p> <p>1 I think most of the people from head office were still 2 there as well. 3 MR DE ROVER: Ja. 4 CHAIRPERSON: The Provincial Commissioner 5 Mbombo was then asked to report, which he did. There was a 6 discussion for up to an hour and the minutes which you saw 7 says her proposal that they proceed with the tactical 8 option was endorsed. One of the questions of course which 9 I've asked since the beginning of this inquiry and I 10 haven't yet got the answer, is why Thursday? Because there 11 was a plan which Mr White says, and I think he's not alone 12 in saying it, was less risky if they, which they'd 13 implemented early on the Friday morning. The question is 14 why it was not decided – by all means act, but why 15 Thursday? Why Thursday when you can't implement the plan 16 you've got at the moment because built into the situation 17 was, they wouldn't know till 9 o'clock whether the weapons 18 were going to be handed down voluntarily. Obviously if 19 they're going to do it voluntarily, that's the sensible way 20 to go. As a result, for reasons that I don't want to 21 trouble you with, Mr Mathunjwa only arrived on the scene at 22 the koppie in the afternoon. By that time the idea of 23 proceeding early in the morning when there weren't many 24 people there couldn't be implemented because there were a 25 lot of people there and it was foreseeable that by 9</p>

Page 37075

1 o'clock already, even though that is the time that they
 2 had, most of the people would be back from the koppie – so
 3 why Thursday? Why Thursday when you know that you can only
 4 do it after 9 o'clock? That's the question I've been
 5 asking. I haven't yet got a definitive answer. If, of
 6 course, it was some order from on high not based on peace
 7 consideration, not based on knowledge of what was happening
 8 on the ground, that's a different matter. That's one of
 9 the things we're trying to investigate. Have you got any
 10 information you can give to us that'll help us?

11 MR DE ROVER: Chair, like I said, one, it
 12 was an extraordinary session and it held people back that,
 13 in the normal structures that exist within SAPS for
 14 managing incidents of this kind in their initial phases,
 15 that that forum doesn't have a place. Now if you call that
 16 meeting, and with what I've said about police forces in a
 17 democratic society, I would be very surprised that SAPS
 18 would have been permitted to make that decision on its own
 19 alone and not guided or would not have actively sought the
 20 guidance of the executive on this prior to doing it,
 21 definitely when faced with the 12 elements that you have
 22 just presented, that's my problem, that I would fine it –
 23 one, if that is held because of the way people talk about
 24 it, that it's held that that was a decision that was made
 25 by SAPS and that forum was used to discuss it and decide it

Page 37077

1 freedom and independence to the Police Commissioner –
 2 MR DE ROVER: Ja, but under direction of
 3 – government.
 4 CHAIRPERSON: Yes, only on policy though,
 5 actually but anyway let's not debate that point. A number
 6 of the factors that were put to you didn't, certainly
 7 weren't known to the National Management Forum. I mean for
 8 example the order for the 4 000 bullets, that only happened
 9 in the course of the morning of the 16th. The funeral
 10 hearses were only asked for early in the morning, they
 11 didn't know about that but what, there's one piece of
 12 evidence that I think I must give you and that is, the way
 13 it's presented is it's a proposal by the Provincial
 14 Commissioner and she had been talking for some days already
 15 of, we must act immediately, soon. In fact originally on
 16 Tuesday she said we must act on Wednesday but there were
 17 reasons why they couldn't act on Wednesday but what she did
 18 say was this, in answer to a question I asked here, look
 19 here, your background is mainly financial, that was her
 20 speciality and you can understand that in the circumstances
 21 but there are a number of experienced operational people
 22 among the other Provincial Commissioners who were present
 23 and indeed I think the people from the head office, the
 24 Lieutenant-Generals, if any of them had said, no – no, you
 25 can't do this, there are problems, we can't endorse this

Page 37076

1 as a one-off way of dealing with it, then the least I want
 2 to say about that, that is unacceptable. You cannot have a
 3 police force essentially deciding on issues that have such
 4 ramifications attached to it and consequences as Marikana,
 5 on its own, and place that beyond the political and
 6 judicial control that you would want to exercise before you
 7 go ahead. And what I then inversely, if I take that that
 8 is what is normal in a democratic society and therefore
 9 normal here, I would find it very hard to believe that
 10 there weapons no political or judicial guidance on that
 11 decision and because a higher authority made it and gave it
 12 as an order, then you have your answer to your question as
 13 to why it was implemented and why the haste and why the day
 14 and why those 12 points in the end, although raised, did
 15 not weigh heavily enough to counter the order. And hence
 16 my question is the order, because were the ones that issued
 17 it made sufficiently aware of those 12 points and the risk
 18 that in going ahead – because then it entails a
 19 responsibility and the line of command responsibility in
 20 law enforcement doesn't stop at the National Commissioner,
 21 it goes right through to the top because the police is not
 22 an independent organisation. They are under government
 23 control.

24 CHAIRPERSON: Yes, there are provisions,
 25 though, in the Constitution and the Act which do give

Page 37078

1 proposal because of this and this and this or we want to
 2 know more information, would you have backed off? And she
 3 said yes. Obviously it was the sensible thing to do. I
 4 mean if three or four experienced Provincial Commissioners
 5 had said look here, this plan of yours isn't going to work
 6 without serious risks, why not hold over till Friday
 7 morning, she would obviously have accepted that and that's
 8 what, effectively what she said.

9 Now in fairness to everyone at the National
 10 Management Forum, a lot of the facts I think that Ms Le
 11 Roux has put to you and the two that I've added obviously
 12 weren't before them but the question of course is whether,
 13 and there's been criticism from some of your colleagues,
 14 colleague experts, that that decision shouldn't have been
 15 taken by that forum the night before, not knowing the
 16 situation on the ground the next day. Would you be
 17 inclined to agree with that?

18 MR DE ROVER: Well, again I can only
 19 stress that I can't see a reason to have an extraordinary
 20 session unless there was an executive decision and that to
 21 an extent the opinions of the Provincial Commissioners
 22 don't matter. Like it's more, we now have to do this, how
 23 are we going to do it and –

24 CHAIRPERSON: Sorry to interrupt you but
 25 to be fair, no, let's not go on a dwaalspoor here.

<p style="text-align: right;">Page 37079</p> <p>1 MR DE ROVER: No, no.</p> <p>2 CHAIRPERSON: Do you use that expression</p> <p>3 in Holland as well?</p> <p>4 MR DE ROVER: Ja.</p> <p>5 CHAIRPERSON: A wrong track. It's called</p> <p>6 an extraordinary session simply because some of the people</p> <p>7 had gone. They were there at the meeting, the meeting</p> <p>8 ended apparently, the people, some people left and then the</p> <p>9 National Commissioner said let's now discuss this</p> <p>10 information, they'd just got the information that it was</p> <p>11 said that the strikers might voluntarily hand down their</p> <p>12 arms the next morning and so she said, let's discuss it.</p> <p>13 And they then discussed it, as I said, for apparently</p> <p>14 something like an hour, it was minuted but it was called an</p> <p>15 extraordinary session because not everybody was there. So</p> <p>16 it isn't as if they specially convened an extraordinary</p> <p>17 session because of some order that they received from</p> <p>18 elsewhere to discuss it. The extraordinary is explained in</p> <p>19 the way I've given you, so let's not go on a dwaalspoor</p> <p>20 there. Sorry, I interrupted you but I think that's</p> <p>21 important information to have.</p> <p>22 MR DE ROVER: Ja, but what I maintain as</p> <p>23 my opinion is that I would expect a political direction to</p> <p>24 a situation of this kind and I, obviously I don't live</p> <p>25 here, I don't know how you deal with that red square,</p>	<p style="text-align: right;">Page 37080</p> <p>1 society's acceptance of contemporary forms of protest and</p> <p>2 violence but if it's an incident that puts at risk the</p> <p>3 interests of a big international enterprise, that obviously</p> <p>4 is of economic importance to South African Police, if it</p> <p>5 puts at risk lives and communities and if it occasions now</p> <p>6 with regularity death and injury, I can't imagine that just</p> <p>7 to be policing questions and that directions and choices</p> <p>8 that are made are not subject to political scrutiny or</p> <p>9 political advice, at least to a National Provincial</p> <p>10 Commissioner, and I remember at least from the early days</p> <p>11 of the Commission that a lot of discussion was held about</p> <p>12 who called whom, what phone calls were made, what e-mails</p> <p>13 were sent, who engaged themselves on this issue. Did, I</p> <p>14 think the problem for me is that it is less than</p> <p>15 transparent who involved and engaged themselves because -</p> <p>16 and it's simply on my expectation of having been in many</p> <p>17 countries around the world, that operations of this kind</p> <p>18 are not left to the police to run there because the policy</p> <p>19 that would underpin the action needs the sanctioning from</p> <p>20 the executive and the judiciary. It can't be the police</p> <p>21 alone.</p> <p>22 CHAIRPERSON: I understand, you've made</p> <p>23 that point. The question, I don't think in South Africa</p> <p>24 the judiciary plays a role but let's not, we don't have</p> <p>25 examining justices and so on as you have but let's not get</p>
<p style="text-align: right;">Page 37081</p> <p>1 involved in that for the moment.</p> <p>2 MR DE ROVER: No, no.</p> <p>3 CHAIRPERSON: I asked you a question</p> <p>4 earlier, you told us how you understood, you heard about</p> <p>5 this National Management Forum decision not as part of the</p> <p>6 official briefing you received. It was, you used the word</p> <p>7 it was divulged to you by somebody.</p> <p>8 MR DE ROVER: Ja.</p> <p>9 CHAIRPERSON: A third party, I think you</p> <p>10 said, over a cup of coffee or tea or whatever the beverage</p> <p>11 was that you were drinking and then you went back to</p> <p>12 Annandale and I think you said Mbombo and put it to them.</p> <p>13 As part of the information you received was there any</p> <p>14 suggestion that there was an executive order which was the</p> <p>15 reason why the National Management Forum made this</p> <p>16 decision?</p> <p>17 MR DE ROVER: No, I think my questions</p> <p>18 have been straightforward on the point, the answers have</p> <p>19 not been. So I've raised that issue, of course I've raised</p> <p>20 that issue because it's an important issue but the answers</p> <p>21 are not helping me.</p> <p>22 CHAIRPERSON: Did you ask why the</p> <p>23 National Management Forum made the decision, to use the</p> <p>24 language of the resolution, made the decision to endorse</p> <p>25 the proposal of the Provincial Commissioner? Did you ask</p>	<p style="text-align: right;">Page 37082</p> <p>1 why that decision was taken, what the motivation of the NMF</p> <p>2 was?</p> <p>3 MR DE ROVER: Ja, no, the way – I think</p> <p>4 it was General Mbombo who, when I asked her how that came</p> <p>5 about, that it was almost like, oh, you know, there</p> <p>6 happened to be that meeting and a few of the members</p> <p>7 remained behind and then we had that discussion. So, but</p> <p>8 I'm already armed with at least my personal experience and</p> <p>9 exposure of 22 years in 70 countries where I see this done</p> <p>10 differently and I hear what she says.</p> <p>11 [09:47] I have a problem accepting it as an utterance of</p> <p>12 how modern democracies work because the ramifications of</p> <p>13 such an action would invariably come back on the</p> <p>14 government, as they did after Marikana. So to imagine a</p> <p>15 reality that that was given a go-ahead or left to go ahead</p> <p>16 without the government having its say on it but still being</p> <p>17 confronted now with the consequences of it, the least of</p> <p>18 which is that they pay for this Commission to now happen, I</p> <p>19 just can't imagine a reality where that is par for the</p> <p>20 course.</p> <p>21 CHAIRPERSON: You put that problem to</p> <p>22 those instructing you?</p> <p>23 MR DE ROVER: We've have discussions on</p> <p>24 it –</p> <p>25 CHAIRPERSON: Did you raise it with them?</p>

Page 37083

1 MR DE ROVER: Ja, especially with the
 2 legal team.
 3 CHAIRPERSON: Yes, well never mind the
 4 legal team. They wouldn't have more information anyway.
 5 MR DE ROVER: Ja.
 6 CHAIRPERSON: Did you raise it with those
 7 instructing them?
 8 MR DE ROVER: Well, I've had lengthy
 9 discussions on it with General Mpembe and General
 10 Annandale –
 11 CHAIRPERSON: And did they give you any
 12 answers which you could understand on the point?
 13 MR DE ROVER: Ja, that they share my
 14 view. They, and, but they are not privy as eyewitnesses or
 15 witnesses of fact to any information that helps other than
 16 say they share that view.
 17 CHAIRPERSON: Did you put the view to
 18 General Phiyega?
 19 MR DE ROVER: I did –
 20 CHAIRPERSON: Sorry, National
 21 Commissioner Phiyega.
 22 MR DE ROVER: Yes.
 23 CHAIRPERSON: And what was her answer?
 24 MR DE ROVER: A diplomatic answer and you
 25 know in fact I –

Page 37085

1 Commission process, particularly the expert process?
 2 MR DE ROVER: No, I, and I attach value
 3 to expressing this here because it took me a while
 4 yesterday to realise that I was seen as a SAPS gun for hire
 5 and I regret that because I would face unemployment forever
 6 if I put my professionalism and integrity on the line here,
 7 and I made that clear even before coming, when I received
 8 the phone call from SAPS I made that abundantly clear to
 9 them that I am not your guy, I have my own professional
 10 standards and integrity that come first, I will not lie for
 11 you, and I've made that also clear to the National
 12 Commissioner and her response to that was that she did not
 13 expect me to, that she expected me to look at every bit of
 14 information I wanted, or that they could make available to
 15 me, and to form my own opinions on that and advise the
 16 Commission of them.
 17 Where I wrong-footed myself, and I should have
 18 educated myself better on the process before this
 19 Commission, when I saw two other international experts and
 20 saw what they had already done I thought well, there is no
 21 point in me giving you more of the same. You already have
 22 two peers on which you can judge and you've been informed
 23 by recognised experts on how they view this, offset against
 24 an international framework. So I went another direction
 25 and tried to give you a footing, appreciating that you are

Page 37084

1 CHAIRPERSON: How diplomatic? What were
 2 the ipsissima verba of the diplomatic answer?
 3 MR DE ROVER: I, it's, that's a long time
 4 ago, this discussion, Chair, and –
 5 CHAIRPERSON: Is it recorded in your
 6 notes?
 7 MR DE ROVER: No, there were many
 8 informal meetings that I had, or several I should say, with
 9 her and I've tried to raise this but you must accept that
 10 at the time those took place I'd only been in the country a
 11 few weeks –
 12 CHAIRPERSON: Yes, yes. No, leave the
 13 note point. It was just a –
 14 MR DE ROVER: Yes, I don't know, but it's
 15 more that my relationship with her was very much still of a
 16 stranger, of two strangers meeting and I asked that
 17 question that that's a hot one if, you know, to even enter
 18 into, to divulge to me what you're working relationships
 19 are with the executive. So I got a diplomatic answer –
 20 CHAIRPERSON: By diplomatic do you mean
 21 evasive?
 22 MR DE ROVER: Ja.
 23 MS LE ROUX: Mr De Rover, in any of your
 24 discussions with the National Commissioner did she express
 25 any reluctance to you that you participate in this

Page 37086

1 not operational police people, you're trying to understand
 2 concepts, so I've used methods and I've used clarifications
 3 and I've used comparisons that are not meant to justify
 4 anything, but to explain, to give you a possibility to
 5 comprehend how certain actions on the ground can happen,
 6 and other than that there has been no point that I was told
 7 oh, you can't say this or you can't say that. And frankly,
 8 I would hear that and that wouldn't wash with me.
 9 MS LE ROUX: Because you see, Mr De
 10 Rover, I'm trying to understand why you didn't engage with
 11 the other experts when that was precisely the process the
 12 Commission tried to initiate. There were repeated attempts
 13 to have the three experts engage and the SAPS were either
 14 unresponsive or did a very, very limited engagement with
 15 us, and I'm trying to understand where that came from, if
 16 it was your reluctance, if it was an instruction you were
 17 give not to participate. That's what I'm trying to
 18 understand.
 19 MR DE ROVER: I think it was a little bit
 20 of both. I still don't completely understand the process
 21 here, you know, that of course there is a quest to truth,
 22 justice, restoration, but there are to me at times
 23 presentations and representations made that I would qualify
 24 as preferred narrative, and I have a problem that because
 25 it makes a possible engagement with the experts, I wouldn't

<p style="text-align: right;">Page 37087</p> <p>1 have done nothing rather than sit down, have a beer and get 2 to work on this, but because that, because of the fact that 3 parties before this Commission also have their particular 4 interest at heart because of the representations that they 5 make, those discussions are prejudiced from the word go. 6 They're not objective expert discussions anymore, and 7 that's why I was reluctant, because I don't feel a need to 8 enter into yes, no, and arguing and actually not honestly 9 arguing but trying to find something that derails a 10 completely valid proposition. So that's my answer to that. 11 CHAIRPERSON: Sorry, what we do in the 12 courts where there's conflict of expert testimony, what we 13 very often do is – when we, I mean as judges – we say to 14 the parties look here, we accept the experts are impartial 15 because they are supposed to be giving their expertise 16 irrespective of who's called them. We invite the experts, 17 we say can't you get the experts together to have a 18 discussion to see whether they can't reach agreement and 19 what very often happens then, experts go away for a couple 20 of days, they come back with a report saying we discussed 21 the matter, we agree on the following, and then set out 22 what they agree on, we disagree on the following points and 23 this expert says that and the other expert says something 24 else. That's what I had hoped could be achieved here. I 25 thought it would save a lot of time if we did that and I</p>	<p style="text-align: right;">Page 37088</p> <p>1 made the suggestion on a number, a couple of occasions at 2 least, and I understood it was taken further, the 3 suggestion I made was communicated to the parties and 4 nothing happened. So that really what Ms Le Roux is about. 5 MS LE ROUX: Mr De Rover – 6 CHAIRPERSON: We don't expect people, 7 experts to come like some international arbitrators do – 8 MR DE ROVER: No. 9 CHAIRPERSON: - and argue for the side 10 that's appointed them. We expect the experts to get 11 together and say we genuinely can agree on the following 12 points; we genuinely disagree on these points. It narrows 13 the debate, you see. That's what I had hoped would happen. 14 I'm sorry it didn't, but what Ms Le Roux is probing is why 15 it didn't happen. 16 MS LE ROUX: Mr De Rover, your answer was 17 that it was a bit of both and I've understood your last 18 answer to be describing in a sense your feeling that since 19 you largely were in agreement with Mr White and Mr 20 Hendrickx, that it would somehow be redundant for you to 21 add to that. Is that a correct summary of in part your 22 explanation as to your attitude to it? But I'm interested 23 in the other part of the both, which was, were you ever 24 instructed not to engage, or if not instructed, were you 25 ever, was it made clear to you that it was discouraged, or</p>
<p style="text-align: right;">Page 37089</p> <p>1 anything like that? 2 MR DE ROVER: Look, I don't think it was 3 discouraged. I obviously did not attend every single 4 session here, so what I get with regards to expert 5 witnesses comparing notes, if that is a lucky way, or a 6 good way to describe it, is obviously a representation and 7 it, my question at one stage whether we couldn't just hire 8 a room and sit together was, I think the discussion we had 9 on that was that that was probably not likely to happen. 10 I – 11 MS LE ROUX: And who did you have that 12 discussion with? 13 MR DE ROVER: With the legal team. 14 MS LE ROUX: Okay. Did you discuss it 15 with any member of SAPS? 16 MR DE ROVER: Well, at the time and on 17 instruction of the National Commissioner I've always 18 affiliated myself with the SAPS legal team and lately 19 mostly at my square foot of office space at the JOC across 20 the road, so it's – I would have liked that, but the, my 21 understanding, my understanding of the atmosphere was never 22 that it was going to be possible in an objective manner. 23 Let me just summarise it like that. 24 CHAIRPERSON: Ms Le Roux, I'm proposing 25 to take the first adjournment soon, but you will tell me –</p>	<p style="text-align: right;">Page 37090</p> <p>1 MS LE ROUX: Chair, I just have one 2 question and then if we – 3 CHAIRPERSON: You will tell me – 4 MS LE ROUX: Because it will round out 5 what we've done this morning. 6 CHAIRPERSON: You don't have to confine 7 yourself to one question. You will tell me when it's 8 appropriate. 9 MS LE ROUX: Okay. Mr De Rover, taking 10 you back to the decision to move to the tactical phase and 11 the debate we had this morning, the 12 pieces of evidence, 12 the likelihood, the risk assessment, a further question on 13 that for the Human Rights Commission is do you consider the 14 decision to move to the tactical phase on the 16th of August 15 to be consistent with the requirement in Standing Order 262 16 to avoid the use of force at all costs? 17 MR DE ROVER: You know, I've given much 18 thought to this, how could you avoid Marikana from 19 happening, and I know, I'm aware of a number of people who 20 have endeavoured to try and do so. I think the last in 21 that line was Bishop Seoka who actually found that he 22 couldn't get the access that he wanted, but I read his 23 statement on that account. Now I, what I look at as a 24 chance are actually the 14th and the 15th and what I look 25 at, and I do that with sincerity, I look at all of you here</p>

Page 37091

1 and I think you all were here, you, some of you even have a
 2 mandate that empowers you to act and I'm thinking that
 3 there were people that engaged themselves with that
 4 situation because they were aware of it, and the Bishop is
 5 one utterance of someone who obviously took it to heart and
 6 decided to physically go there, and I think that more of
 7 that might, could have created other opportunities that
 8 simply then don't eventuate, and I'm particularly looking
 9 at the 14th and the 15th because it seemed to be days of
 10 relative calm there, where attempts at getting some form of
 11 constructive dialogue going maybe from different
 12 perspectives and different actors and stakeholders who
 13 again in democratic societies are expected and entitled to
 14 engage themselves on those issues, that's a missed chance
 15 too.

16 If you are, in answer to that question on 262 I
 17 would consider that part of trying your damndest, is that
 18 word is permitted in this setting, to avoid that you need
 19 to deploy and put a stop to it because inevitably when you
 20 stop talking, things become confrontational, and I've
 21 worked long with the United Nations; the core principle in
 22 any relationship is that we try and maintain constructive
 23 dialogue, however futile, because for as long as we're
 24 talking, we're not fighting, and even if we agree to
 25 disagree, and rather than focussing on the essence of a

Page 37093

1 to protecting human rights. Is there no platform then for
 2 you to engage in this situation and say we can project on
 3 the basis of past experience that this may well lead to
 4 catastrophe? So if we talk missed opportunities, I see
 5 that as a big missed opportunity and as to 262, the text of
 6 262 is clear.

7 MS LE ROUX: So you'll agree with me that
 8 the move to a tactical option was not trying to avoid the
 9 use of force at all costs?

10 MR DE ROVER: I think the inherent risk
 11 when you move to a tactical option is that you may end up
 12 in a situation where you will have to use force, so that
 13 you'd stick a percentage on it, I'm happy with anything
 14 that you want to say. 100% I wouldn't go to because then
 15 obviously we need to have another discussion, but once you
 16 decide that, that is a possibility. You must factor in the
 17 possible consequences of that.

18 MS LE ROUX: Now Chair, just to round
 19 this out, you mentioned two possible alternatives to going
 20 tactical and therefore avoiding the use of force. That was
 21 maintaining what we'd call the stage 2 presence because it
 22 seemed to be working. There hadn't been significant
 23 violence after the Monday. The second one you mentioned
 24 was having Bishop Seoka continue to try to negotiate and
 25 speak to the strikers. If I put three other potential

Page 37092

1 problem my tactic has always been to make it bigger because
 2 if you make it bigger there is a bigger chance that you'll
 3 actually find some common ground, something that you can
 4 agree on, and not that you whittle it down to that
 5 essential key point that you forever will differ of opinion
 6 on. I look at, that's again society acceptance of forms of
 7 violence.

8 I've been in your country now one and a half
 9 years and the last time I went home after four months it
 10 takes me a week to get back to normality, that I don't have
 11 to lock my doors, that it's alright to leave the keys in my
 12 car, and I don't have an electrified fence around my house
 13 and armed response on standby. You have 1.2 million
 14 registered private security providers in this country.
 15 That's to me a demonstration of how safe your country is
 16 and an indication of how well you law enforcement is doing
 17 because they charge you for a service that the police
 18 should give you for free, and that is, there are just some
 19 factors there that I put in alignment and I think well,
 20 people were watching the news and definitely on the 11th and
 21 the 12th and then on the 13th you get that flashpoint that
 22 would have made headlines. People would have seen that,
 23 people in government, individuals in the street. Aren't
 24 people outraged? And South African Human Rights
 25 Commission, you have a constitutional mandate when it comes

Page 37094

1 alternatives to you would you comment on them and tell me
 2 if you'll accept them; the first would be to have waited
 3 until at least the following morning and implemented the
 4 encirclement plan which had a lower risk and therefore less
 5 likelihood of the use of force; fourthly, trying to gather
 6 further intelligence to support the cordon and search part
 7 of the operation; or fifthly, trying to bring pressure to
 8 bear on Lonmin to send a representative to speak to the
 9 strikers? Would you accept that those other three
 10 scenarios are also alternative to going tactical on the
 11 afternoon of the 16th of August?

12 MR DE ROVER: You know, if I'm just
 13 fatalistic about it anything that can delay the decision is
 14 an option that you should consider and I can probably, if I
 15 sit down for a second and write a list can probably come up
 16 with 20 more. But that doesn't explain the pressure on the
 17 timing that we discussed previously. So I hear what you
 18 are saying and I recognise that. If I take the problem,
 19 you have to acknowledge that we are talking about
 20 symptomatic relief. We're not doing anything about the
 21 cause. So I can think of a reality where I continue to try
 22 and maintain a dialogue with the strikers on the kopple,
 23 but I – and this is part of the police's problem; you can
 24 negotiate if you have something to bargain with, but when
 25 that – and the bargaining chips the police had or managed

Page 37095

1 to put in line was to bring representatives from NUM and
 2 AMCU and actually act as facilitators, as a conduit. I
 3 think that in the process the police lost their neutrality
 4 by doing that, that from a mediator, especially when they
 5 were the bearers of the bad news that there would be no one
 6 else coming, that Lonmin would not be coming and that now
 7 it was time to go home, that there may have been a
 8 confusion on the part of the strikers because now the
 9 police act as the speaking tube for corporate enterprise
 10 and for that other group that obviously were not friends
 11 with the people on the hill, and that some of the
 12 aggression that then develops in fact gets directed at the
 13 police and that, I actually think that the police failed to
 14 recognise that as a risk, that by putting yourself as a
 15 neutral intermediary and doing something on behalf of one
 16 of the parties, that you may be perceived you're then doing
 17 something against another party, and that might not be your
 18 intention but that may well be the reading. That's why I
 19 refer to Operation Restore Hope in Somalia where with the
 20 best of intentions the UN distributed food to 300 000
 21 people starving, but that was a weapon of war in the hands
 22 of General Aidid and he did take offence. He didn't care
 23 that these people were dying because that's exactly what he
 24 wanted them to do, and when the UN gave them food he turned
 25 on them and he killed UN peacekeepers. He killed 24

Page 37097

1 [COMMISSION ADJOURNS COMMISSION RESUMES]
 2 [10:37] CHAIRPERSON: I'm sorry, Ms Le Roux, we
 3 had a bit of housekeeping to deal with in relation to the
 4 inspection on Monday. It ate up some of your time, for
 5 which I apologise but I'm sure you'll have fine-tuned your
 6 cross-examination and won't be prejudiced.
 7 MR SEMENYA SC: Chair, can I for the
 8 record state that Mr De Rover is unable to be here beyond 1
 9 o'clock.
 10 CHAIRPERSON: Yes. No, you told me.
 11 CEES DE ROVER: (s.u.o.)
 12 CROSS-EXAMINATION BY MS LE ROUX (CONTD.):
 13 Mr De Rover, the National Commissioner, when she came and
 14 gave evidence, testified that the plan had been what she
 15 called disrupted. Have you been told by the SAPS when they
 16 believe the plan was disrupted?
 17 MR DE ROVER: I'd like to say I'm
 18 grateful for the videos that I saw yesterday because I
 19 think they show a comprehensive, if very long, summary but
 20 at least they allow that multi-camera view and the
 21 animations I think are particularly helpful. From what
 22 I've understood all along right from the beginning and
 23 what's illustrated in that video is that at the moment that
 24 Nyala 4 arcs and cuts to that corner of the kraal, that I
 25 would, that I take as it has been told to me, is the moment

Page 37096

1 Pakistani and two weeks later eight Americans and we pulled
 2 out, the UN pulled out of Somalia and we never went back.
 3 So the proposition of being misunderstood in your role is a
 4 risk there.
 5 [10:07] So you want the police to maintain a presence and
 6 to try and maintain dialogue. I would at least venture you
 7 need a bargaining chip, you can't just try and talk because
 8 I think the talks that were there were strained enough
 9 whilst the police had a bargaining chip those talks were
 10 not easy. And those talks were not safe, they were
 11 conducted from within a Nyala. So the conditions of the
 12 talks were already not very happy. So that is why I'm
 13 saying that if the bishop had arrived on the 14th or the
 14 15th I'm sure he would have been welcomed with open arms as
 15 you would have been as anybody else who would have wanted
 16 to engage probably would have been welcome by the police as
 17 a means of relieving pressure. If I was there on the
 18 ground I'd be desperately looking for ways to relieve the
 19 pressure even if I have to bring a portable TV and a radio
 20 to play music or to distribute food to people to try and
 21 get a sense or an atmosphere that would make it possible to
 22 have a conversation rather than adversarial stand off.
 23 MS LE ROUX: Chair, if you'd like to take
 24 the adjournment now.
 25 CHAIRPERSON: I would, 15 minutes.

Page 37098

1 that the plan starts to diverge from what was anticipated
 2 because that Nyala was supposed to go straight and 5 was
 3 supposed to make the curve.
 4 MS LE ROUX: Now in the –
 5 CHAIRPERSON: I must say I thought the
 6 disruption point was slightly different. They intended to
 7 keep the people on the koppie side of the barrier, on the
 8 sort of plain by the koppie and after a suitable, when
 9 everyone was in position Brigadier Calitz was going to give
 10 the warning that we're going to do the dispersing and
 11 disarming and arresting, he was going to wait for a while
 12 and then repeat it, have it translated into the vernacular
 13 languages and then they were going to do that. And of
 14 course what happened was that he never got that far because
 15 the strikers either decided to go to Nkaneng or decided to
 16 attack the police, whichever version one accepts, and that
 17 I thought was the so-called disruption, was that there was
 18 then an argument which we don't have to worry you about,
 19 that the plan was then back on track when they got to scene
 20 2, but we won't debate that with you but the disruption, as
 21 I understood the police case to be and Mr Semanya will tell
 22 me if I'm wrong, the disruption was instead of being able
 23 to proceed with what we call the DDA as it was planned,
 24 they had to deal with what they perceived, so they say, to
 25 be an attack by the strikers and they were trying to defend

<p style="text-align: right;">Page 37099</p> <p>1 themselves. That, I think in a nutshell, is their case. 2 Am I right, Mr Semenya? 3 MR SEMENYA SC: It is so, Chair. 4 CHAIRPERSON: [Microphone off, inaudible] 5 MR DE ROVER: Chair, looking at that 6 because that has come to light after the fact but I'd put 7 that in fact the first disruption already happens when the 8 deployment of the barbed wire is done consecutively and not 9 simultaneously as Lieutenant-Colonel Scott foresaw at the 10 time. So if you want an earliest indication of when the 11 plan already did not, the action on the ground did not 12 reflect what the plan said, that that would for me be the 13 earliest manifestation. When I asked specifically with the 14 exhibits available at the time where they figured that 15 tangibly things went different, that is at the moment Nyala 16 4 starts to arc. Is it permitted, Chair, to ask a question 17 about this exhibit because that would be a useful addition 18 – 19 CHAIRPERSON: I'm sure you can ask a 20 question. I must say I would have thought the first 21 disruption was actually when they moved Nyala 6. I seem to 22 remember the evidence was that Colonel Scott wasn't aware 23 of it, I may be wrong on that but the original plan has 24 Nyala 6 in a position where it was and it was then moved at 25 about 11 o'clock or 11:20 or thereabouts, so that was</p>	<p style="text-align: right;">Page 37100</p> <p>1 really the first disruption and it's said in quotation 2 marks. The second one is the one you've mentioned and the 3 third one is the one which I think the National 4 Commissioner meant, but you want to ask a question. Do you 5 want to ask me or – you've got more chance of getting an 6 answer out of Ms Le Roux. 7 MR DE ROVER: No, no. Well, Chair, I 8 know I need to address you but I know that the owners of 9 the exhibit are the Human Rights Commission. Now I think 10 that that exhibit would benefit from an effort and I've 11 checked, I'm sure SAPS is willing to come to party, if I 12 can call it that, on that because I know that it will cost 13 money to do it but you can identify the command vehicles in 14 those presentations and specially the animations. Now what 15 we saw yesterday shows camera views but those camera views 16 do not equate lines of sight commanders had. If you would 17 use that same principle of the yellow line arcs, it would 18 at least permit in the animation to show what commanders at 19 that time were looking at because you get a camera on 20 someone's right there, I remember one sequence where 21 there's a camera here and a Nyala drives through the screen 22 left to right and we see things behind that Nyala that the 23 camera keeps focusing on, that could have been Brigadier 24 Calitz's Nyala but obviously his line of sight is different 25 from the line of sight that we are being presented with and</p>
<p style="text-align: right;">Page 37101</p> <p>1 I think the exhibit would benefit, for your understanding 2 but for everybody's, if for the command vehicles, those 3 lines could be included and secondly I think that the 4 exhibit would probably give rise to a number of pointed 5 interrogatories for those operational commanders pursuant 6 to it. And I know that you are under, time bound, but 7 you've used that tool for the experts, I don't know if it 8 can be used but I see that the exhibit as such could give 9 rise to a number of questions but I'd be answering second- 10 hand. I'd think that there would be reason with what you 11 have, to ask them to comment on that, taking into account 12 the direction of their movement and the arc of sight that 13 they would have at the time that those movements occur. 14 CHAIRPERSON: May I say that that point 15 has actually been raised with me by Adv Hemraj who 16 suggested that that exercise be done and I'm afraid the 17 suggestion stayed with me for the moment but certainly it's 18 something I take it that the SAPS and the Human Rights 19 Commission can talk about and I hope something can be done 20 along those lines. It shouldn't take too long if the 21 necessary willingness is there but anyway, that's a matter 22 which we don't have to debate further. Mr Chaskalson, 23 you're leaning forward to your microphone. 24 MR CHASKALSON SC: I was going to say 25 that if there's difficulty in that respect because there</p>	<p style="text-align: right;">Page 37102</p> <p>1 may be budgetary difficulties, it's something that the 2 parties should come to the evidence leaders to discuss 3 because we might be able to assist. 4 CHAIRPERSON: It sounds as if something 5 may happen along those lines but certainly I'm sure – do 6 you use the expression "daadwerklike pogings" in Dutch – 7 I'm sure those can be done. 8 MR DE ROVER: Daadwerklike poging in 9 Dutch is a punishable offence. 10 CHAIRPERSON: Not in South Africa. 11 COMMISSIONER HEMRAJ: Certainly the 12 perspectives and the visibility factor will make a huge 13 difference to us as to how we understand it, doesn't it? 14 MR DE ROVER: Well, look, I think the 15 exhibit is extremely useful for giving an understanding and 16 if you offset it against the fact that the commanders 17 didn't have multiple camera views, they did not have 18 replays, freeze frames, multiple frames, so they got one 19 chance of looking at it and trying to get it right. So in 20 that context it is important that you factor in what could 21 they actually see and which facts could they have 22 appreciated and then decide whether they were in a position 23 to act on those and I think that that would be very 24 beneficial. And if I take that point of Nyala 4 bending as 25 an indication of SAPS diverting now from what it was</p>

1 planning to do, it is also important to note that from that
 2 moment till the shooting starts there is two minutes in
 3 real time available to them. Now at that time you see
 4 vehicles moving. They're obviously on their way to their
 5 jump off point where that dispersal action needs to start
 6 so their attention and direction are to get towards that
 7 end of the line where they will then come around and start
 8 the dispersal proper. Are they actually able to observe
 9 what the camera is showing us? And I don't want to qualify
 10 that unless we can actually draw in on the exhibit the
 11 lines of sight so that you can say, not only say look, this
 12 happens because the camera caught it, but that you can
 13 superimpose on it a line of sight and say look, just on the
 14 basis of the line of sight that commander was in a position
 15 to observe that same fact and then you'd have a point to
 16 question them and get them to speak to that because all,
 17 you've managed to identify every single vehicle there and
 18 the occupants of every single vehicle are known. So I
 19 would think that to be a very useful and worthwhile
 20 exercise to conduct.

21 COMMISSIONER HEMRAJ: Bearing in mind
 22 that some of those commanders would have been inside the
 23 Nyalas at the time.

24 MR DE ROVER: Ja, but that's – like I
 25 know and that's why I don't, my opinion is second-hand on

1 this point but I know that Brigadier Calitz was in the
 2 centre of his Nyala, sitting sideways, focused on radio
 3 communication and occasionally looking out of the windows.
 4 Now, I know you are going to Marikana on Monday. I've
 5 already contacted General Annandale and recommended that a
 6 Nyala is there. I know you have been inside Nyalas before,
 7 that you had a chance but it might be good to refresh that
 8 opportunity, but to play that role then and be told where
 9 he was sitting and for you to have a chance, even plot some
 10 of these routes and see what can you actually see when you
 11 are there because I think they are factors that, in the end
 12 when judging decisions, can be critical. And we are
 13 talking about a serious matter so if you want to invoke a
 14 commander's responsibility you must get to a point that you
 15 can prove that that commander saw, or if you want I can use
 16 the word "knowledge," that that commander had knowledge and
 17 failed to act on it. And the exhibit I think supremely
 18 enables that possibility, so I would think that with that
 19 in mind the exercise of Monday might even gain some
 20 significance on that point as well.

21 MS LE ROUX: And Mr De Rover, if we're
 22 engaged in an exercise of suggestions for Monday, we should
 23 then probably also have 328 rounds fired next to that Nyala
 24 and see if it's possible to hear them.

25 MR DE ROVER: Ja, but the same applies to

1 calls of cease fire, you know, that is true. I think in
 2 all fairness, rounds going off, you can, you don't have to
 3 test 300 rounds but multiple rounds going off at the same
 4 time, there is a limit to the amount of decibels they
 5 generate. So you generate that amount of noise and you can
 6 substitute. Once you've measured the decibels you can
 7 substitute it with white noise and you can sit in that
 8 Nyala and you can test at least, and it's a sterile
 9 environment because you don't factor in engine noise,
 10 people noise and urban noises around it but you could make
 11 that comparison, is it audible at all?

12 The other thing you could do is have white noise
 13 at the decibel level of gunfire played and you go and stand
 14 away from that source, 20 metres, and yell "cease fire" and
 15 get someone who is next to that source to confirm whether
 16 he can actually hear you.

17 CHAIRPERSON: Forgive my ignorance, I'm
 18 probably the only person in the room who doesn't know what
 19 you mean. What is white noise?

20 MR DE ROVER: White noise is the polite
 21 term for methods of interrogation the US has used to put
 22 prisoners under stress and it's noise that generates in
 23 excess of 120 decibels.

24 CHAIRPERSON: So you damage the eardrums
 25 and hope they'll confess.

1 MR DE ROVER: Well, it's not quite at a
 2 damaging level but I can tell you that it's annoying if you
 3 are forced to listen to it for a lengthy period of time.

4 CHAIRPERSON: [Microphone off, inaudible]
 5 the US Embassy to help us but I'm sure our South African
 6 Police don't know how to do that, do they, we can make a
 7 plan.

8 MR DE ROVER: Chair, it's important and I
 9 know that SAPS is in the process of exploring the
 10 possibility to purchase a long range acoustical device.
 11 You go into YouTube, Google long range acoustical device
 12 and you will see one used in action by the American Police
 13 during a G20 protest and just put – I warn you in advance,
 14 put the volume of your computer to half and see if you can
 15 listen to the sound it produces and know then the actual
 16 sound is at 140 decibels. It does cause injury and you
 17 will want to get away from that area, the area denial
 18 systems.

19 The second one that exists is a mobile area
 20 denial system that effectively has a large microwave on the
 21 top and it sends out a radio wave at a particular frequency
 22 that only penetrates the skin for half a millimetre. It
 23 will give you that sensation all of a sudden that you feel
 24 incredibly hot and you don't know why, a hot flush times
 25 100 and you just want to move away. That can be projected

<p style="text-align: right;">Page 37107</p> <p>1 at 500 metres distance plus. These systems exist. Now my 2 contention, I said that yesterday, it's not in arming up, 3 it's in smarting up but you can expect your police to 4 differentiate the approaches but the means that are 5 available on the market are generally marketed under 6 euphemisms of less lethal technologies. All of them, every 7 single one of them has multiple attested cases that they do 8 produce injury and death. So there is – 9 MS LE ROUX: Mr De Rover – 10 CHAIRPERSON: What you're suggesting – 11 MS LE ROUX: Mr De Rover – 12 CHAIRPERSON: Sorry, what you're 13 suggesting, we get a decibel counter and then we do 14 something to simulate sound at – 15 MR DE ROVER: Well, if – 16 CHAIRPERSON: - at the relevant decibel 17 reading. 18 MR DE ROVER: I know that the contentions 19 about the cease fire shouts, I think they are important 20 because you'd expect that one command of cease fire would 21 be enough for that fire to cease. Now – 22 MS LE ROUX: Mr De Rover, you accept that 23 there are several cease fire calls which are indicated by 24 gesture, though, so – 25 MR DE ROVER: Ja, but are people looking</p>	<p style="text-align: right;">Page 37108</p> <p>1 at those? 2 MS LE ROUX: If we could now return to my 3 cross-examination, you've observed annexure V2 which is 4 around the movement of strikers and you've seen the 5 animation that is V2A. In your statement – Chair, just for 6 the record it's FFF11A page 18, paragraph 33, there you 7 refer to the strikers repeatedly approaching the barbed 8 wire line and trying to breach or skirt it. Having seen 9 annexure V2, the video, and V2A the animation which 10 indicates the position of the lead group at all times, do 11 those presentations accord with what you were told by the 12 SAPS about the movement of strikers? 13 MR DE ROVER: Again what I was told by 14 SAPS and at the time I wrote that, that's before the 8th of 15 March 2013, I had been shown exhibit L, that does contain 16 SAPS version of photographs that purport to show that they 17 were approaching the line. If we can hold, and I've heard 18 the reservations yesterday to the videos, I have no beef 19 with that. What I see does not support that. So if it can 20 be held that your presentation is correct, then my 21 statement on that point is incorrect. 22 MS LE ROUX: Mr De Rover, turning then to 23 the question of water cannons, you'll accept of course that 24 water cannons are an important part of the less than lethal 25 equipment that's available to police in crowd situations.</p>
<p style="text-align: right;">Page 37109</p> <p>1 You will agree with that. 2 MR DE ROVER: Given that they are one of 3 two means that I would qualify as mostly non-lethal, yes. 4 MS LE ROUX: And now you've seen the 5 video presentation V3 which deals with the use of water 6 canon on the 16th of August, does that presentation change 7 the statement you've made about the use of water canon at 8 Marikana? Do you wish to revise what you said about water 9 canon in light of what you've seen in that video? 10 MR DE ROVER: I think it needs to reflect 11 what is seen in that presentation but like I said, you 12 know, this is two years on. You know so much more. Are 13 you referring to a statement that was one and a half years 14 ago, made in the absence of that particular knowledge? It 15 was made to the best of the information available at that 16 time. 17 MS LE ROUX: But in your response to the 18 evidence leaders which was only a few weeks ago, you still 19 recorded that the water canon had been used to spray the 20 strikers attempting to enter the police line, which we 21 interpret to mean the lead group of strikers. If the 22 presentation is correct and is accepted by the Commission 23 you will agree with me that that is incorrect and water 24 canon was never used against the lead group of strikers. 25 MR DE ROVER: But you have another</p>	<p style="text-align: right;">Page 37110</p> <p>1 problem then because I referred in that response to a 2 number of statements. Again, I don't make these things up. 3 I base myself on at least an auditable information that 4 people make statements, the crew of that water cannon, so I 5 base myself on that. Clearly from what you have compiled, 6 if we can trust that, what they say did not happen or if it 7 happened they may actually be referring to another time 8 than they thought they were referring and they're confused 9 on the timing as to when. 10 MS LE ROUX: Well – 11 MR DE ROVER: But that leaves four 12 statements, I think, that at least then warrant an 13 interrogatory on that point, whether people want to revise 14 their opinion and that I need to revise mine I would take 15 as a given. If you trust the veracity of what is said 16 there, then of course. 17 MR DE ROVER: And you'll accept that it 18 could be that those statements in fact are referring to the 19 use of the water canon against other strikers, not the lead 20 group that come around the kraal. Do you accept that 21 possibility? 22 MR DE ROVER: Well, again now I'm 23 speculating that people may have been mistaken about the 24 fact and the time line, so I would suggest that the ones 25 that claimed what I quoted and I have put the names of the</p>

<p style="text-align: right;">Page 37111</p> <p>1 people that made that claim in that reply, that you get 2 them to verify now. 3 [10:57] MS LE ROUX: Mr De Rover, we'll obviously 4 contend that those statements are false in light of the 5 objective evidence that shows how the water cannon was not 6 used on the lead group of strikers. You also in your 7 interrogatory response to CALS indicated that you had been 8 informed that the water cannon operators were properly 9 trained. Have you been aware of the statement of Warrant 10 Officer Fourie – Chair, it's HHH37 – where he sets out what 11 he calls a two-hour crash course that Officers – 12 CHAIRPERSON: Perhaps we could have it on 13 the screen. 14 MS LE ROUX: We can, Chair. I'm just 15 conscious of time. The phrase they used was "two-hour 16 crash course that Warrant Officers Kruger and Dicks went 17 through. It was not an official course and they would need 18 to get proper training but that never took place." If you 19 accept that that evidence is true, all that Kruger and 20 Dicks have had is a two-hour crash course, not an official 21 programme, would you revise your opinion that the water 22 cannon operators were properly trained? 23 MR DE ROVER: The statements I saw from 24 Kruger and Dicks do not contain that qualification, so I've 25 obviously seen earlier versions of that. You –</p>	<p style="text-align: right;">Page 37112</p> <p>1 MS LE ROUX: It's a statement by Warrant 2 Officer Fourie – 3 MR DE ROVER: No, I haven't seen that – 4 MS LE ROUX: - who describes the two-hour 5 crash course he gave Kruger and Dicks and that's all the 6 training they've had. 7 MR DE ROVER: Well, they in their 8 statements only refer to the fact that their training was a 9 year ago and I think in another statement someone qualifies 10 that they did receive the operator training but not the 11 training on how to operate the video system. 12 MS LE ROUX: Warrant Officer Kruger and 13 Dicks also acknowledge their training was what they call 14 "very limited." 15 MR DE ROVER: Ja. 16 MS LE ROUX: Ja. Are you aware of the 17 evidence that Warrant Officers Kruger and Dicks were not 18 expecting to have to operate the water cannon and they did 19 not receive any briefing in advance of the commencement of 20 the operation? Are you aware of that evidence? 21 MR DE ROVER: It's part of their 22 statements, I think, where they say that it was actually 23 the crew of the other cannon that told them what would be 24 expected of them. 25 MS LE ROUX: Yes, and you have no</p>
<p style="text-align: right;">Page 37113</p> <p>1 evidence to the contrary as to their preparedness to 2 participate in the operation? 3 MR DE ROVER: No. 4 MS LE ROUX: So if the evidence is 5 accepted by the Commission that the Johannesburg water 6 cannon operators were not properly trained, first, second 7 that they were not briefed before the operation other than 8 in a very limited way by the other water cannon crew, and 9 thirdly that they did not expect to be operating the water 10 cannon in the operation until the very commencement of that 11 operation, if you knew those three things would you have 12 been concerned about the ability of the water cannon to 13 contribute effectively to the use of less than lethal 14 measures on the 16th of August? 15 MR DE ROVER: Ja, of course. 16 MS LE ROUX: If we can then turn to the 17 utilisation of teargas and stun grenades at scene 1; you 18 obviously watched the video V4 yesterday and again I'm 19 going to ask you to assume that the analysis in that 20 presentation is correct. Assume that what is shown in that 21 presentation, namely that the stun grenades and teargas 22 were only ever discharged behind the front of the lead 23 group of strikers and that that group consistently moved 24 away from the stun grenades and moved away from the 25 teargas. So if you accept that as it's shown in the video,</p>	<p style="text-align: right;">Page 37114</p> <p>1 then surely you can't say that teargas and stun grenades 2 were ineffective against that group of strikers because 3 they had the intended effect, the strikers moved away from 4 the teargas and the stun grenades that were used against 5 them. Would you accept that? 6 MR DE ROVER: I think it's important to 7 stress that obviously the events as they started to develop 8 there, there was a two-minute window until the first 9 gunshots occur. I don't know what at that time the 10 instructions of the operational commanders on the ground 11 are, but they become critical because the fact that Nyala 4 12 closes at the corner of that kraal causes that group 13 movement to go around. 14 Now part of the vehicles that I see and 15 understand from what I was told are actually on their way 16 to their jump-off point where they would start the 17 dispersal, I see on that evidence, but I've never – how do 18 you say? – have the detail of who fired, from what 19 direction, the teargas and the stun grenades. That was 20 first shown, or at least apparent yesterday in the detail 21 that it was presented. 22 I see that they move away from the police, that – 23 I don't know, like I think that that is open for debate. I 24 do see an acceleration in their movement once they come 25 around that bend and then see the line in front of them.</p>

<p style="text-align: right;">Page 37115</p> <p>1 If, there was one brief aerial shot where that group is 2 still I think seconds before they made the second turn that 3 puts them on an inverse course on the one that they 4 actually were walking on, so in that shot you see many 5 people actually walking away to the north and that's the 6 part that looking at it I see the two differences and I 7 don't understand it. So, and I just have to leave that for 8 what it is.</p> <p>9 But I do see that the exercise of trying to 10 isolate the commanders, because I'd like to know, because 11 the use of the teargas and the stun grenades is still 12 supposed to be subject to someone giving that order. So 13 someone gave that order. It would be important now with 14 this material to try and isolate who did, especially if you 15 put, your contention is that it causes them to move towards 16 the police line in fact, or it forces them in that 17 direction. I would still ask why they didn't simply turn 18 around and do what the rest of the crowd did and walk in 19 the opposite direction. So there is a manifest difference 20 in the intended direction of that group and what a lot of 21 other people are doing. But that's what I'm seeing 22 yesterday, and what I'm saying now I'm saying off the cuff 23 on just watching that.</p> <p>24 MS LE ROUX: But let me break this down 25 then. The expected response to the deployment of teargas</p>	<p style="text-align: right;">Page 37116</p> <p>1 or stun grenade is for a protester to move away from the 2 teargas and the stun grenade, correct? That's the expected 3 response of someone when they have teargas or stun grenades 4 used near them, it's to move away from those.</p> <p>5 MR DE ROVER: Well, it depends on two 6 factors. It depends on a possibility to move away and it 7 depends on the intention of the use. Specifically with 8 teargas you're obviously dependent on wind direction 9 because if on that day a stiff breeze had been blowing 10 towards the north it would have been quite difficult to 11 effectively use teargas unless you deploy it on the other 12 side.</p> <p>13 Now I think, and that's why I put that slide up 14 before; I think that SAPS' use of teargas and stun grenades 15 is more aimed at maintaining that separation between police 16 and protesters, and I see much more, like knowing that and 17 knowing that preference from speaking to them, that I see 18 the use of that teargas and those stun grenades there as 19 POP members trying to have that safety barrier between them 20 and the demonstrators. I don't think, because physically 21 it would have been impossible for the strikers to move 22 further away because that would have only been possible if 23 the kraal hadn't been there, they could have moved towards 24 a westerly direction.</p> <p>25 So I think that I read the action, and again I'm</p>
<p style="text-align: right;">Page 37117</p> <p>1 saying this with respect that I've only seen that footage 2 yesterday, I'm looking and considering that now. I haven't 3 spoken to anyone about it. I can only read it as an intent 4 to keep a barrier, to avoid physical contact between the 5 units that are there actually trying to get to the point 6 where they will move around and start their dispersal and 7 are then confronted by a number of people that unlike many 8 others are coming now around and actually coming towards 9 them.</p> <p>10 MS LE ROUX: Mr De Rover, have you seen 11 any evidence of any barrier being placed between the 12 strikers and the TRT?</p> <p>13 MR DE ROVER: No.</p> <p>14 MS LE ROUX: If we can then move on to 15 the use of firearms. In your statement FFF11, Chair, for 16 the record it's page 18, paragraph 80, you say there that 17 the police were "confronted with a heavily armed group with 18 guns," plural, "being fired from within that group." In V5 19 which we watched yesterday there's only video footage of 20 one handgun being discharged by a striker. Do you have any 21 evidence of more than one gun being fired within the group 22 of strikers that come around the kraal?</p> <p>23 MR DE ROVER: Chair, this is where 24 registered video footage has a serious limitation because 25 it can only capture what it sees and –</p>	<p style="text-align: right;">Page 37118</p> <p>1 MS LE ROUX: Hence my question. Are you 2 aware of any other handguns, any other guns being used by 3 that group?</p> <p>4 MR DE ROVER: What I was shown was that 5 in the items that were seized by police after there were 6 multiple firearms. So then, and they obviously also refer 7 to the fact that the group was alleged to have taken 8 firearms on the Monday that belonged to the police, an R5 9 and a 9 millimetre pistol. So when I compiled – and again 10 you've had two years now, I had one week. When I compiled 11 that I relied on that information to write that particular 12 paragraph. So talking to the people, asking them about 13 what was seized on the scene, seeing that snippet of 14 footage where, okay there was video registration of one 15 shot, but confronted by police officers who say to me that 16 there were multiple, whether that was a mistake of fact 17 appreciation where, you know where your videographer points 18 out that one shot coincides with a stun grenade going off 19 and it, the sound overlaps, that I don't know. I can't 20 judge that. You have to either isolate officers concerned 21 and ask the question, or ride on the strength of what you 22 know and what you can prove.</p> <p>23 When I wrote that paragraph I went as far as I 24 could in auditable evidence in terms of seeing what they 25 seized at that scene, and in talking to the people that</p>

<p style="text-align: right;">Page 37119</p> <p>1 were there and asking them, and those two combined, and 2 again like I know your preference is with the first one, 3 that what can be proven, and that you want to accept 4 someone's testimony if it can be underpinned by such 5 auditable evidence, but not necessarily on and of its own. 6 So that is problematic.</p> <p>7 So my contention would still remain that the 8 possibility that there were other firearms there I think is 9 demonstrated by the fact that multiple firearms were seized 10 at that scene and the police's contention, the way they 11 presented it to me is that none of those firearms had a 12 full magazine, they had rounds missing. The thing is, and 13 I've said that to them, that the fact that rounds are 14 missing doesn't necessarily say anything about when they 15 were used, or whether they were used or whether someone 16 simply didn't have more than five rounds for a eight-round 17 magazine. So these other options also stay open. So on 18 what I've seen and heard I can't agree 100% with you that 19 there was only one shot fired and there was only one 20 firearm.</p> <p>21 MS LE ROUX: Mr De Rover, have you been 22 instructed that three firearms were seized at scene 1 and 23 the only cartridge that was found is a 9 millimetre, which 24 would match the gun that we see fired on the footage? Were 25 you told those two facts; three firearms seized, only one</p>	<p style="text-align: right;">Page 37120</p> <p>1 cartridge?</p> <p>2 MR DE ROVER: Yes, but the problem with 3 the cartridges is that even when I went there on the 26th of 4 March I kicked up a cartridge in the sand. So I know that 5 the evidence collection at the scene because of the size 6 has been problematic. So I know that for example of, I 7 think of General Naidoo's use of the firearm at scene 2, 8 only one of his cartridges of the two shots he claims to 9 have fired has been recovered.</p> <p>10 CHAIRPERSON: I think it's correct to say 11 that if one has regard to the number of shots fired by the 12 police at scene 1, I don't think all the cartridge cases 13 were found, were they? And the same applies of course to 14 scene 2. So the fact that only one cartridge case is found 15 is evidence which has some value, but it's rather limited 16 in regard to what I've put to you, isn't it?</p> <p>17 MR SEMENYA SC: And Chair, if I may for 18 the record point to statement KKK23, the description of the 19 shot fired there is dissimilar to the one we see on the 20 video.</p> <p>21 MS LE ROUX: So Mr De Rover, you said 22 that there were two sources of information for you from the 23 SAPS about the usage of firearms by the strikers. The one 24 was what was seized; we've covered that. You also said you 25 spoke to members that were there.</p>
<p style="text-align: right;">Page 37121</p> <p>1 MR DE ROVER: And there is of course the 2 exhibit of the ballistics –</p> <p>3 MS LE ROUX: And then the exhibit that Mr 4 Semenya has just mentioned.</p> <p>5 MR DE ROVER: Ja.</p> <p>6 MS LE ROUX: Apologies, Chair, I'm just 7 trying to accommodate your conversation with the 8 Commissioner.</p> <p>9 CHAIRPERSON: I didn't intend you to 10 accommodate it. I just said to my colleague – I may as 11 well tell you that – that the police knew that the strikers 12 had firearms and were entitled to factor that in, in their 13 response. But anyway, but firearms obtained in amongst 14 those on the 13th, but I didn't intend to interrupt the flow 15 of your cross-examination by that.</p> <p>16 MS LE ROUX: Thank you, Chair.</p> <p>17 CHAIRPERSON: But seeing it's happened, 18 I've told you what I'd said.</p> <p>19 MS LE ROUX: Mr De Rover, in any of your 20 interviews with SAPS members did anyone describe in any 21 detail shots being fired from the group? Did anyone 22 explain they saw a striker wearing this at this point, 23 discharging a weapon in this way? Any detail to the –</p> <p>24 MR DE ROVER: No, and you know –</p> <p>25 MS LE ROUX: - the contention that shots</p>	<p style="text-align: right;">Page 37122</p> <p>1 were fired?</p> <p>2 MR DE ROVER: I have a professional 3 problem with the situation that very early on SAPS members 4 have been given warning statements by IPID. So there was a 5 general reticence to be specific with me on detail. I've, 6 there are a few statements that I read of people that said 7 they fired and they thought their life was in danger and I 8 ventured that if you try to present and convince a third 9 person of imminent threat to life or serious injury, you 10 try to put into words what must be an incredible emotional 11 experience, and having had my life put in danger a few 12 times in law enforcement I can tell you that I might 13 struggle at times to find the right words but it's quite a 14 narrative to try and convey that. The expectation was 15 always put upon us by the court to be as elaborate in 16 describing that as you possible could and to try and convey 17 as much of that emotion or fear, because that is in the end 18 what you need to judge, whether such fear existed and 19 whether there was a factor of imminence that warranted and 20 necessitated the response given.</p> <p>21 Now I've seen many statements that fall far short 22 from that and the explanation I was given for that is 23 IPID's involvement, where people are no longer witnesses of 24 truth that because of their public office can help you and 25 assist you and should assist you to piece together in</p>

<p style="text-align: right;">Page 37123</p> <p>1 detail what happened, but now they are suspects, because 2 these warning statements basically accuse them, you know, 3 tell them you're a suspect of murder now and you are 4 advised to avail yourself of legal support. You are 5 advised of the fact that you do not have to say anything if 6 you do not wish to do so. Now personally I think well, if 7 I can't really oversee the consequences of speaking with 8 that warning being given, I'd rather say nothing for the 9 time being, and I think many SAPS members elected that 10 path, even when I tried to engage them.</p> <p>11 You know the, let me just tell you that the first 12 session I held with the people for scene 2 necessitated a 13 general to come in and give them an order to speak to me 14 because nobody was prepared to answer, not even a question 15 as to where were you. So I think the problem is that there 16 seem to be competing needs and authorities that exist as a 17 matter of law. There is the international principles that 18 say as a law enforcement official you're an agent of the 19 State. You swore an oath. You swore to uphold that. 20 There is a situation to which you can speak, you must speak 21 the truth. You're a witness of truth and we will treat you 22 as such and hold you to that truth unless we can prove that 23 your actions constitute a criminal offence, then we'll 24 change tack and tune and we'll call you a suspect and 25 advise you of your rights that come with that status.</p>	<p style="text-align: right;">Page 37124</p> <p>1 Now what IPID involvement does is actually not 2 consider that aspect of public account and the need for 3 public accountability and a right for the public to know. 4 They step in, they give you that warning statement and the 5 ballgame changes from there and I think you constables that 6 have limited knowledge and education and understanding of 7 the consequences and ramifications, they clam up, they 8 don't say anything. 9 [11:17] and that I think is, a lot of the evidence you 10 have is not very helpful or useful to either tell you what 11 happened, when did it happen, who was there, why did it 12 happen in that way, what are the justifications and under 13 normal circumstances there would be a delay in involving 14 IPID because if you put sufficient guarantees in place for 15 the public official role that in my book would come first. 16 And that you put integrity and professionalism of an 17 organisation first line. You'd first walk that path and if 18 you're not satisfied that you are getting what you need you 19 can still change tact. But now with bringing IPID on there 20 which is a formal requirement and IPID not bringing the 21 resources needed to effectively take control you get a 22 hybrid. You get SAPS securing a scene and doing forensics 23 and you're getting IPID getting very busy with issuing 24 warning statements to people that were there on the ground. 25 And I think the net effect of it is that it leaves you with</p>
<p style="text-align: right;">Page 37125</p> <p>1 a starting point for your quest to establish what now 2 happened that's most unfortuitous. And one thing I think 3 is that it would probably have assisted the Commission if 4 IPID and I don't know if that's within your might, to tell 5 them to speed up that investigation, to give it priority 6 and to assist the Commission with its findings. Because at 7 least then if that's now the channel that we are using that 8 would have produced the information you need, the dockets 9 you need, the information you need to base yourself on 10 rather than trying to piece it together here because you're 11 in fact a third line of inquiry now. And that to me is 12 part of the problem that this process is facing that as an 13 outsider I'm confused because I hear you when you say it's 14 puzzling that SAPS is not conducting its own internal 15 investigation. But if I understand the rules of IPID 16 correctly, they can't. They're not allowed to. It would 17 be considered interference and IPID has taken this case on 18 board but hasn't assigned it any priority. Its amidst the 19 tasks that they are performing and I'm not clued in as to 20 when they actually consider providing their findings to 21 this Commission or more particularly to the officials 22 concerned. And then there is your effort of trying to 23 piece together what now happened and obviously this 24 Commission is formally established and the evidence that 25 you produce has a formal place. But I think it's also</p>	<p style="text-align: right;">Page 37126</p> <p>1 important to recognise that you now at least have three 2 competing processes at stake that at some stage someone 3 will have to say what is going to take precedence because I 4 think there is a distinct possibility that your findings 5 contradict IPID or that you make findings on issues that 6 IPID hasn't considered. And I think that would of great 7 interest to at least try and align the processes.</p> <p>8 MS LE ROUX: Mr De Rover, I understand 9 you won't be able to do it now, but if you could refer us 10 to the rule that you just referenced, that prevents IPID 11 from doing something. I understand you may not have it to 12 hand now, but you said there was a rule that was going to 13 prevent IPID, sorry the SAPS.</p> <p>14 CHAIRPERSON: SAPS. 15 MS LE ROUX: Sorry, preventing – if you 16 could find that reference in due course.</p> <p>17 MR DE ROVER: I will do my best, but as 18 I've said I've taken that on face value and that is just 19 talking to SAPS senior officers. They referred to a rule 20 that prohibits them. I've never asked them to qualify that 21 rule, but –</p> <p>22 MS LE ROUX: Well then we'll take it up 23 with the SAPS legal team. Mr De Rover, given your 24 international legal qualifications as well you'll agree 25 with me though that when an officer waives their right to</p>

<p style="text-align: right;">Page 37127</p> <p>1 silence and provides some statement and if you accept my 2 description of a lot of the warning statements that we have 3 before the Commission where they admit to killing, they 4 admit to shooting. But they don't give any of the details 5 of the circumstances that would justify that shooting. 6 That officer is then in a very difficult position because 7 prima facie they've admitted to potentially killing 8 somebody yet have not taken the opportunity to set out all 9 of the detail and the circumstances that justify each and 10 every one of the shots that they fire. You'll agree with 11 that proposition.</p> <p>12 MR DE ROVER: Well I think it underscores 13 the problem that we face because to – it would be up to 14 IPID then to solicit that detailed statement and I would 15 expect that to be part of what IPID does. So they've taken 16 it on record, so they've got a start now, they've got a 17 basic admission of yes I fired my weapon and an answer to 18 the question did that occasion injury and or death. And 19 that's a start. Initially you would not require more. In 20 Holland I know that you get that stage then you have 48 21 hours because there's obviously let's say your moment 22 induced confusion and stress and trauma of the incident as 23 such, so you get your initial encounter with central 24 detectives and your warning statement and then you have 25 your 48 hours to compile your statement. But actually you</p>	<p style="text-align: right;">Page 37128</p> <p>1 are then subjected to an interview by our equivalent of 2 IPID who quiz you on what happened. And what I'm actually 3 trying to stress is and I've seen that in many other 4 countries, there's a close time correlation and requirement 5 between being confronted with the fact that they will treat 6 you as a suspect and the requirement to then follow up. 7 And here I understand that IPID's backlog runs into years. 8 Now as a matter of international principles I think that is 9 unacceptable because if it's about a theft I can sort of 10 understand that your priorities are elsewhere. But if it 11 is about the intentional or accidental taking of life or 12 occasioning grievous bodily harm those are not cases that 13 you can put on the back burner because you have a big 14 workload. And I would think that given that this incident 15 triggered a commission of inquiry a logical consequence of 16 that would be that an instruction would be given to IPID to 17 give those investigations priority so that it assists the 18 Commission in its findings.</p> <p>19 COMMISSIONER HEMRAJ: Doesn't your 20 warning, before taking a warning statement include a 21 warning to disclose everything that might be pertinent?</p> <p>22 MR DE ROVER: Well the thing is that and 23 this is where it differs in Holland. If I've been involved 24 in a shooting incident I don't get treated like a suspect 25 off the bat. Of course there's a judicial process that</p>
<p style="text-align: right;">Page 37129</p> <p>1 follows, but you're a police officer, you've sworn an oath 2 and I take that seriously. So I come with everything I can 3 say about that incident and the circumstances and that is 4 normal. And I think that path could have yielded different 5 results, but the prompt bringing of IPID to that scene, 6 which is a requirement and IPID not having the resources to 7 adequately manage that incident, ah really. That makes it 8 really difficult because now you create a reality where 9 you've done what you're supposed to do and you've given it 10 to an organisation that sends two people there to initially 11 administer the incident on site. That is inadequate and it 12 is unacceptable because then it would have been much better 13 to actually realise that that would likely produce and I 14 don't know if SAPS was in a position to judge what the 15 resources were that IPID could make available. But you'd 16 almost prefer a reality where SAPS indeed would have been 17 left with its organisational responsibility to provide the 18 information because then there wouldn't have been warning 19 statements. But there would have been witnesses of truth 20 that are obliged to speak the truth. And you would have at 21 least, I think, in terms of information have had a far 22 larger bulk than you have now.</p> <p>23 MS LE ROUX: Mr De Rover, when you 24 answered the interrogatories that are UUUU2.6 from CALS, 25 you answered those on the 26th of August of this year, you</p>	<p style="text-align: right;">Page 37130</p> <p>1 recorded that you had not read all of the statements of the 2 shottists of the 16th of August. Is that still the case?</p> <p>3 MR DE ROVER: Well it's still the case 4 because they all sing much of a tune and they don't offer 5 you much clue. And where they do offer a clue I'd actually 6 want detail, the same detail that you want. So they're a 7 frustrating bunch of statements in that sense and that is a 8 given.</p> <p>9 MS LE ROUX: That's putting it mildly. 10 Mr De Rover, in your first statement FFF11, page 18 of that 11 statement, paragraph 77 there you set out what we could 12 call a statistical analysis of shooting at Marikana. And 13 we understand because we've engaged with you this, we 14 understand the limited purpose for which you cited all of 15 the statistical evidence that appears in your statements 16 around US shootings and the like. But I would just like to 17 clarify here that you'll accept that the analysis you've 18 presented to the Commission works on averages and it 19 doesn't present the actual data of shots fired by 20 individuals. It's averaging out.</p> <p>21 MR DE ROVER: You know this morning I 22 said what I – I took a different tact to the other experts 23 because I sought to act in complementarity. No I can only 24 reiterate your concern that I wasn't seeking to justify the 25 shootings and I'm still not. What this methodology does is</p>

Page 37131

1 give you a footing for a quick scan of any shooting
 2 incident and the reason why this morning I said I have the
 3 special repertoire's report where Professor Philip Alston
 4 was special repertoire and he did a country study on
 5 Brazil. I've worked for him in the sense that I advised
 6 him, but roles without acknowledgement or glory, but you
 7 try and assist a special repertoire if you can. Had he's
 8 used those approaches to make quick analysis, am I looking
 9 at something dirty or not. And the second thing that I
 10 think is an important lesson to take is there is, I think,
 11 an overestimation of what you think the police can do. And
 12 especially when it comes to use of firearms there is, I
 13 think, the biggest lesson to draw from those figures and
 14 from the narrative that runs around it is that if an
 15 officer is on his own and he's supposed to fire shots under
 16 threat on average it's about 50% of those rounds that will
 17 find their target. Now that's not meant to explain
 18 shootings, what it's actually meant for is to improve
 19 training. And SAPS trains police officials on a range with
 20 a static target, at a set distance where your breathing is
 21 normal and where you get, in your own time, the chance to
 22 fire at that target. And surely if you can hit it at 15
 23 metres you can hit it at three. That is the base
 24 contention and it's erroneous because if you put officers
 25 under stress even just by simply asking them to sprint,

Page 37133

1 number at the onset. Let that not cloud your focus on you
 2 actually need to focus on which is the justification.
 3 MS LE ROUX: But, Mr De Rover we would
 4 contend that using averages and for example you say on
 5 average it was 6.18 rounds per officer, that in fact clouds
 6 the inquiry that this Commission needs to make because it
 7 needs to inquire for each and every officer if they can
 8 justify each and every round. And of course, we know for
 9 example we have Constable Kumar who fired 17 rounds.
 10 Constable Hlongwane fired 15, Constable Molotlogai fired
 11 24. So your exercise will not assist the Commission in
 12 trying to establish if it has sufficient evidence before it
 13 for each officer to justify each round, will it?
 14 MR DE ROVER: Look, with humbleness, as
 15 an expert I would never be able to detail that information
 16 for you. The only ones that can are the officers concerned
 17 and I acknowledge that averages hide the peaks, but they
 18 give you a base idea of the problem. And I think one of
 19 the problems is that there is a problem with the accuracy
 20 of shooting and there might be recommendation required
 21 that, how do you say, SAPS could usefully provide
 22 information on how officers are taught to shoot, how
 23 frequently are they subjected to training, how often are
 24 they actually given the chance to practise those skill.
 25 And not under clinical circumstances, but under more

Page 37132

1 jump, lift, carry and you make them tired and you give them
 2 then, still it's a static target and now they're tired and
 3 they have to shoot. Their results drop dramatically. If
 4 you take 100% of the first score then in the second similar
 5 test they only score about 30%. Now make it more
 6 difficult, now it's a moving target and the target is
 7 shooting back at you or at least you think the target is
 8 moving back at you the chances that you actually hit it
 9 diminish dramatically because those scenarios are currently
 10 in SAPS not trained. Or actually not many police forces
 11 train it. When I worked in Holland we did train it because
 12 we realised and were aware of the figures that when police
 13 officers get confronted by an armed criminal most of them
 14 die, 75% in the US die at a distance from zero to seven
 15 yards. And that's where they score the worst results when
 16 they are forced to shoot. And that doesn't make sense
 17 because that offers you a problem that you could solve
 18 through training. So all I've tried to do with offsetting
 19 the results is to say I know that the number of shots fired
 20 is horribly high, but I can show you and there's more
 21 recent examples, that have come out of US from Philadelphia
 22 where four police officers fired 138 rounds into a car.
 23 The mind boggles how that happens and why that happens and
 24 how that can ever be justifiable, but I just tried to offer
 25 it as a base to say please don't be distracted by the

Page 37134

1 realistic circumstances that would match possible threats
 2 they face. And I totally – look I know the rules that you
 3 quote and I fully agree with that that you fire one shot
 4 that doesn't automatically justify numbers 15 and 16. You
 5 would still at every pull of the trigger need to prove the
 6 existence of an imminent threat to life or serious injury.
 7 But only the person pulling that trigger can tell you that.
 8 CHAIRPERSON: Unless his firearm was on
 9 automatic.
 10 MS LE ROUX: Yes, Chair, I'll get there.
 11 MR DE ROVER: There is proof of that and
 12 –
 13 CHAIRPERSON: I take it you don't approve
 14 of that.
 15 MR DE ROVER: No because you know what it
 16 shows is what in jargon is called a thumbing mistake, the
 17 catch on the R5 pushes from safe, past full automatic to
 18 single shot. Now you make a mistake, you're stressed or
 19 whatever. Or you don't check – you don't push that far
 20 enough, it's on automatic. And people have admitted to me
 21 that they fired inadvertently on automatic and that a burst
 22 went off that might well account for five, six rounds on
 23 one pull of the trigger. So that is an utter reality that
 24 you must contend with whether that is ineptitude or stress
 25 I can't answer. But I know that individuals have admitted

Page 37135

1 to it.

2 MS LE ROUX: But whatever the

3 explanation, whether it was inadvertent or not you would

4 accept that that is reckless.

5 MR DE ROVER: I've said yesterday that I

6 think that R5 rifles do not belong in public order

7 management and if you take away the possibility for them to

8 be used you can't have the reality that you need to deal

9 with the consequences. And in a blanket answer automatic

10 rifle fire doesn't have a place in law enforcement, I'm

11 sorry.

12 MS LE ROUX: Mr De Rover, you described a

13 moment ago the SAPS firearm training as static target at a

14 distance, standing still and stressed. Are you aware of

15 whether the SAPS firearm training, in addition to testing

16 accuracy, ability to hit the target whether it also tests

17 judgment, distinguishing between a threat and a non-threat?

18 Does it have any judgment component to it that you're aware

19 of?

20 MR DE ROVER: I think that there is

21 theory component that police officers go through where

22 obviously that aspect of judgment is taught to them or told

23 them you know acting in proportionality means nothing if

24 you can't act proportionately when the situation occasions.

25 So the problem is with operationalisation. What I see

Page 37137

1 especially an automatic, is a conscious decision. There's

2 some writing about that, isn't there?

3 MR DE ROVER: That's why I was saying in

4 answer to your question yesterday why don't people go for

5 their 9 millimetre weapon, once they hold that it becomes

6 fixation. The basic training in firearms use is finger is

7 off the trigger. That's a safety thing. The other thing

8 is if you have a pistol in one hand you go to grab

9 something with your other, there's double-handed reflex.

10 So if you have your finger on the trigger – and there's

11 recorded incidents of this that I have my pistol, I have my

12 finger on the trigger and I grab this bottle, I might

13 actually inadvertently pull the trigger with my other hand

14 and that obviously gets worse if I'm at that time grabbing

15 a suspect that I want to control and I'm having my pistol

16 and a finger on the trigger. So base doctrine in training

17 is finger off; it's along the trigger guard. Base doctrine

18 is that your weapon is on safe and that when you need to

19 fire you bring it to single-shot mode. A pistol doesn't

20 know automatic, so it's either safe or it is on single

21 shot. An automatic rifle will have the choice to select

22 from either full auto or single shot.

23 Now if you take the German-made Heckler & Koch

24 which fires 9 millimetre rounds and which is designed for

25 use in law enforcement, there the selector switch goes from

Page 37136

1 concerns because I don't think that SAPS training in

2 elements is an adequate reflection of the threats and the

3 real circumstances policing every day here puts on police

4 officials. So I think they're poorly prepared. I think

5 that my preference would be that judgment is part of active

6 shooting training so that you create shoot, don't shoot

7 scenarios and there's very sophisticated ones that have a

8 video wall that even interacts with your voice command.

9 [11:37] So you have a suspect with a knife and yo draw

10 your weapon and you shout at the suspect will drop the

11 knife and those moments allow an instructor to judge

12 student response to more realistic scenarios, and I think

13 if you separate shooting from class room that connection

14 isn't necessarily made. Like I can put 20 people in a room

15 here that will recite for you the definition on

16 proportionality in the use of force, but if I put them in a

17 scenario where they have to use it I'm not so sure that I

18 could say with as much confidence that they all will behave

19 in proportion to what confronts them because that is a

20 function of what they are capable of physically and how

21 strong they are mentally and how they judge the requirement

22 of that particular situation and it becomes very much

23 individual.

24 COMMISSIONER HEMRAJ: Mr De Rover, the

25 removing of one finger from the trigger when you're firing,

Page 37138

1 safe, single shot, three-round burst, to full automatic.

2 So it's virtually impossible, unless you do it

3 deliberately, to select full automatic. But there are

4 five. It's inverse and it shows that it's designed for

5 warfare. So it's safe or it's initially on full auto and

6 if you go one further it's on single shot.

7 So you have to pay attention to what mode you

8 select, but if you are under stress or you fear that your

9 life is at risk, mistakes are being made and it's, the

10 possibility for it is there, then it's only a matter of

11 time before it occurs and the only thing standing between

12 you and that is frequent training and exposure to scenarios

13 that try to simulate that stress and force people to

14 confront it. But if you never do and then it happens, that

15 mistake gets made because in potential it was always there.

16 MS LE ROUX: Mr De Rover, in paragraph 77

17 of your first statement FFF11, the final sentence there

18 you're dealing with scene 1. It says, "I do see evidence

19 in the scene for what is called associative threat

20 perception, i.e. officers firing because others were,

21 without necessarily having perceived that threat

22 themselves."

23 My first question on associative threat

24 perception is do you limit it to what you see for scene 1,

25 or do you also think there was some evidence of what you

Page 37139

1 call associative threat perception in scene 2 based on the
 2 interactions you've had with members of scene 2? Do you
 3 limit it to scene 1?
 4 MR DE ROVER: I see it particularly at
 5 scene 1 and I think if you take some of the stills, or if
 6 you would freeze frame on some of the images of yesterday,
 7 it's worth to have a look at that and you can see that,
 8 that some people are responding because others are, but I
 9 don't necessarily think because they saw a threat
 10 themselves, and it's probably also why you get that cascade
 11 that mounds like a bell curve and then comes back down.
 12 It's a serious worry because it also, this has to do with
 13 experience and exposure to this type of incident and
 14 scenario and the problem is that now we're talking very
 15 dangerous scenarios, how can you train them, and actually
 16 I'd like a reality where you don't need to train those.
 17 MS LE ROUX: Mr De Rover, my question was
 18 do you see, do you have a view that there is associative
 19 threat perception operating at scene 2 as well?
 20 MR DE ROVER: There is, I think there is,
 21 especially –
 22 MS LE ROUX: And why do you say that?
 23 MR DE ROVER: Well, speaking to people on
 24 the southern side that were brought there by General
 25 Naidoo, some of the K9 members, I asked them what were you

Page 37141

1 within the koppie because for where they are placed they
 2 can't have been placed by shots from the police.
 3 CHAIRPERSON: Ms Le Roux, I'm proposing
 4 to take the tea adjournment in a minute when it's
 5 convenient for you to do so, but can I ask you in relation
 6 to associative threat perception, is there literature on
 7 it? I don't expect you to tell us now, but can you perhaps
 8 give us a list of books or articles that deal with that,
 9 those that you find particularly helpful?
 10 MS LE ROUX: Chair, in response to our
 11 interrogatories Mr De Rover provided the HRC with an
 12 article that describes the phenomenon in US shooting. We
 13 can provide that –
 14 CHAIRPERSON: That will be good.
 15 MR DE ROVER: That was just to
 16 illustrate, because you have had for one and a half years
 17 at the evidence leaders there are three binders that
 18 actually contain far more. I just used it to say look,
 19 here's just one example of what's contained in those
 20 folders. It's not the only one. There's a raft of
 21 articles that I put in there. The problem is that I had to
 22 select.
 23 CHAIRPERSON: If the articles are with
 24 the evidence leaders and we can look at them after, we'll
 25 get them from them.

Page 37140

1 shooting at and why, and two of them talk about an
 2 individual darting in and out with a handgun, and we found
 3 on the day, but it's useless because on the day where one
 4 of those officers was lying and there was no cover where he
 5 had to go down because he said shots were fired at me, I
 6 had to fall down in the grass, and there's a rock in front
 7 of him and it has a strike mark on it that was confirmed is
 8 a bullet strike mark, but that's in March 2013. I can't
 9 say when that strike mark happened, but it sort of then, on
 10 face value it supports his contention and the ballistic
 11 experts that were there admitted they missed that one.
 12 They didn't see it because they, their efforts were very
 13 much focussed on recording the shots that had gone in, but
 14 not necessarily on identifying the shots that had gone out,
 15 and the same happened on the western side where Captain
 16 Kidd is. There's a rock that shows at least six strike
 17 marks of bullets that were never recorded. Problem is now
 18 I can't say they happened, they were made on the 16th of
 19 August. So it's, but –
 20 CHAIRPERSON: Can you say which direction
 21 they came from?
 22 MR DE ROVER: Sorry?
 23 CHAIRPERSON: Can you say which direction
 24 those strike marks came from?
 25 MR DE ROVER: They would have come from

Page 37142

1 MR DE ROVER: Yes.
 2 CHAIRPERSON: Can we take the adjournment
 3 now, or do you want to round off the point –
 4 MS LE ROUX: Chair, if I could just round
 5 off associative threat perception. Mr De Rover, so given
 6 your definition of it that it's essentially firing because
 7 others are firing, even if you don't perceive a particular
 8 threat, you would agree with me that that doesn't provide a
 9 lawful basis or any justification –
 10 MR DE ROVER: No.
 11 MS LE ROUX: - for that use of live
 12 force, correct?
 13 MR DE ROVER: But that – ja, that is
 14 essentially the problem, that it exists and I think there
 15 is, you know the hard thing is if you ask a scientist he'll
 16 so no, it doesn't exist, because you can't prove it. You'd
 17 have to think of a way that you can establish a simulation
 18 where you could prove that element to be true, but it is a
 19 recurring theme in a lot of articles that talk about
 20 multiple officers using their firearms and the reasons for
 21 which they used it, and just taking that example of the K9
 22 on that side, there is that claim of a person darting in
 23 and out and shouts being made to others, and the problem is
 24 that the rules of international law simply talk about a
 25 requirement of an imminent threat to life or serious

<p style="text-align: right;">Page 37143</p> <p>1 injury. It doesn't say that if you feel that your 2 colleague is firing at something that poses a threat you 3 just take fire in that same general direction and you take 4 by proxy the threat to life to also – 5 CHAIRPERSON: Is it a voluntary act? 6 MR DE ROVER: Sorry? 7 CHAIRPERSON: Is it a voluntary act? I 8 can understand if my colleague is firing and if the fact 9 he's firing makes me involuntarily fire then you wouldn't 10 have a conscious act. 11 MR DE ROVER: Well, it's, ja it's more 12 like panic spreads in a crowd. If someone starts to yell 13 fire here now others might, you know, when we see smoke 14 might take that up and all of us start to scramble for the 15 door, and it's been compared to that, you know, that there 16 is a panic reaction, if you will, that all of a sudden now 17 a police officer is firing, there must be a reason for 18 that, a rationale, and others, without having properly 19 appreciated what that is, do the same thing. 20 I think it's much more readily visible in armed 21 combat. There is much more footage available of it too 22 where you can see a patrol, one soldier perceives a threat, 23 he's not going to say guys, there's a threat on that side, 24 he opens up fire and the immediate response of the others 25 is to do in the general direction the same thing until they</p>	<p style="text-align: right;">Page 37144</p> <p>1 actually ascertain what it is they are shooting at, and I 2 see that replicated in law enforcement in instances. 3 CHAIRPERSON: Yes, I see. Ms Le Roux, is 4 it convenient – 5 MS LE ROUX: Yes, Chair. 6 CHAIRPERSON: - for us to take the tea 7 adjournment – 15 minutes. 8 [COMMISSION ADJOURNS COMMISSION RESUMES] 9 [12:07] CHAIRPERSON: The Commission resumes. 10 You're still bound by your oath, Mr De Rover. Ms Le Roux? 11 CEES DE ROVER: (s.u.o.) 12 CROSS-EXAMINATION BY MS LE ROUX (CONTD.): 13 Thank you, Chair. Mr De Rover, I do want to just take us 14 back to your suggestion that the V2 video be further 15 annotated with what we call sort of the commander fields of 16 view so that we can see what the commanders could have 17 seen. I just want to confirm that the reason you think 18 that will assist us is that it could potentially explain 19 why those commanders were mistaken in terms of what they 20 perceived to be the intentions of the strikers or the 21 movement of the strikers. Is that what you're trying to 22 explain? 23 CHAIRPERSON: Sorry to interrupt you. It 24 could work the other way too, of course. It could indicate 25 the opposite. I understand a Nyala will be available, I</p>
<p style="text-align: right;">Page 37145</p> <p>1 think we were told that, weren't we? There will be a Nyala 2 available at the inspection on Monday and, if so, I don't 3 know whether someone's going to be there with a video 4 camera but there probably will be, the media houses may be, 5 so we could even fix it up then, provided it doesn't take 6 too long. 7 MR DE ROVER: But without preference for 8 any narrative I'd actually say that it would give you an 9 opportunity, if you did it, to see whether an incident 10 that's captured by a camera is actually within the field of 11 view of a commander and you'd have a point for an 12 interrogatory – 13 MS LE ROUX: And then we could make 14 submissions based on, well, this commander wouldn't have 15 been able to see – 16 MR DE ROVER: Ja, because – 17 CHAIRPERSON: Or alternatively - 18 MS LE ROUX: - or that they did see it. 19 MR DE ROVER: Ja. 20 CHAIRPERSON: When I said we'll do it, I 21 was not expressing myself with my customary precision or 22 perhaps some would say I was expressing myself with my 23 customary lack of precision, but it can be done. There 24 will be a Nyala there on Monday and provided someone is 25 there with a video camera, presumably what is suggested can</p>	<p style="text-align: right;">Page 37146</p> <p>1 be done. You and I don't have to supervise it, Ms Le Roux. 2 MS LE ROUX: Except, Chair, we may have 3 difficulty with establishing precise commander positions 4 but we can sort that out. Chair, we also must of course 5 somehow manage on Monday the community's perception that 6 we're not sort of re-enacting anything with Nyalas rocking 7 up and water cannons and the like. 8 CHAIRPERSON: That's correct. 9 MS LE ROUX: We really must manage – 10 CHAIRPERSON: That's correct. 11 MS LE ROUX: I'm sure the evidence 12 leaders have anticipated that. 13 CHAIRPERSON: Before you carry on, 14 there's a question I meant to ask the witness earlier. It 15 doesn't relate to what you're dealing with now, it deals 16 with a matter you dealt with earlier. I'd just like to ask 17 it now quickly and get it over with. When you spoke to the 18 Provincial Commissioner about the decision to act on 19 Thursday, remember we discussed that before, did she 20 mention to you that it was a factor which weighed either 21 with her alone or with the National Management Forum that 22 it was important to get in before Mr Malema arrived on the 23 scene because on a previous occasion with one of the other 24 platinum mines, Mr Malema had come and in fact spoken to 25 the strikers and brought the strike to an end and that she</p>

Page 37147

1 perceived that that was something that shouldn't be allowed
 2 to happen at Marikana. Did she mention that to you at all?
 3 MR DE ROVER: Not at all.
 4 CHAIRPERSON: Not at all?
 5 MR DE ROVER: Not at all.
 6 CHAIRPERSON: Didn't mention Mr Malema's
 7 name at all?
 8 MR DE ROVER: No, not at all, Chair.
 9 This is the first time that I hear that.
 10 MS LE ROUX: Mr De Rover, I'm not sure if
 11 you're familiar with the cross-examination by my learned
 12 friend Mr Semenya of Mr White where they dealt with this
 13 question of the dust cloud obscuring the strikers at the
 14 kraal.
 15 MR DE ROVER: Mm.
 16 MS LE ROUX: Are you familiar with that?
 17 MR DE ROVER: Not in detail but I –
 18 MS LE ROUX: But broadly that that –
 19 MR DE ROVER: I can see where your
 20 question would go, so -
 21 MS LE ROUX: Right. So I'd like you to
 22 assume that there are approximately 30 people coming around
 23 the kraal. I'd like you to assume that according to the
 24 evidence of Mr X but just assume, regardless of its source,
 25 that at the time these 30 come around the kraal they intend

Page 37149

1 and if I put international legal requirements – there would
 2 obviously be an issue with a difficulty to be able to
 3 identify that threat. So I hear what you are saying and
 4 that I think is a part that I would hold would be taken
 5 into account when you rule whether, first of all whether a
 6 threat existed and then, second, whether at a time that an
 7 individual shoots, as you contend, into a cloud that's
 8 effectively obscuring that shooter's view as to what he is
 9 shooting at, whether that is then still justified because
 10 three, you know, like a second before or two seconds before
 11 the threat was visible and the fact that sand obscures it,
 12 it's still there. So I – ja, I'm not a lawyer and
 13 fortunately not a judge, so I don't have to judge on that
 14 but I see the problem you refer to and international law
 15 doesn't deal with dust clouds, it simply states there needs
 16 to be an imminent threat to life or serious injury.
 17 CHAIRPERSON: That's the common law too
 18 but I'd like to ask you another question based upon what
 19 Adv Le Roux said. I had the impression, I must look at the
 20 videos again but my impression is that before the dust
 21 cloud comes up you could actually see some of the people
 22 falling.
 23 MR DE ROVER: Ja.
 24 CHAIRPERSON: The question I want to ask
 25 you is this, assuming you, a mob are coming at you to

Page 37148

1 to attack the police. I want you to assume that the
 2 intention of the individuals within that crowd changed
 3 after they saw the first few of their colleagues begin to
 4 fall. Mr X says that's because they realised the muti
 5 wasn't working and they started to turn to run away but
 6 just assume the fact that the intention of some of the
 7 individuals in the crowd changes and they turn to run away.
 8 Would you agree with me that if that change of intention
 9 and the effort to run away is happening where there is a
 10 dust cloud and therefore the police are obscured in being
 11 able to see that crowd or what they're doing then it would
 12 not be justified to shoot at that moment in time into the
 13 dust cloud.
 14 MR DE ROVER: I think you need to make
 15 that part of the investigation because again I can only, I
 16 know that you have your national law applying first so
 17 section 49, I think, of the Criminal Procedure Act –
 18 CHAIRPERSON: [Microphone off, inaudible]
 19 – applies to arrests, they weren't arrested –
 20 MR DE ROVER: But –
 21 CHAIRPERSON: Common law applies here.
 22 MR DE ROVER: Okay. So, but –
 23 CHAIRPERSON: Which is essentially the
 24 same as international law.
 25 MR DE ROVER: Okay, but if I take that

Page 37150

1 attack you and you fire a couple of shots and the first few
 2 people fall, are you now – I mustn't ask you a legal
 3 question but would it not be appropriate for a reasonable
 4 policeman in those circumstances to wait to see whether the
 5 fact that the front line have been already shot and have
 6 fallen, does have some effect on those behind because I –
 7 anyway, let me not say - I've asked you the question, you
 8 give me the answer.
 9 MR DE ROVER: Well, Chair, I gather now
 10 with what we saw yesterday the contention now is whether
 11 that lasted eight seconds or 12 and I'll leave that and
 12 take it for what it is. I think at a technical level, I
 13 think your proposition is reasonable in that force should
 14 cease when you achieve our objective but if you never
 15 allow for a moment to see whether what you do sought the
 16 effect you are after, then that in itself can't be the
 17 basis on which you justify continuing it.
 18 CHAIRPERSON: It obviously depends on the
 19 distance of the front group from the shottist.
 20 MR DE ROVER: Ja.
 21 CHAIRPERSON: But if there's – and I can
 22 understand there's a possibility even of the fact that the
 23 first lot, the first line have fallen, that the others can
 24 come on, some sort of kamikaze kind of attack and if they
 25 are so close to you that you'd better act immediately, you

<p style="text-align: right;">Page 37151</p> <p>1 won't have another chance, that would be one thing but if 2 they're sufficiently far away for you to stop to see 3 whether the first, the falling of the first lot has had any 4 influence on the rest, then I take it you'd be obliged to 5 hold fire for a moment at least to see what impact that has 6 had on those following. Would that be right?</p> <p>7 MR DE ROVER: The problem is, Chair, that 8 if I take the worst possible to be true, that it in fact 9 lasted for 12 seconds, then there was only those 12 10 seconds. The contention I, at least until yesterday 11 afternoon, is that it was actually only eight and that 12 whilst I agree with that principle it is again, can you 13 make it practicable? Can you actually then apply it in 14 that time frame that was available because it was done and 15 finished then essentially, barring that additional shot 16 that we see fired and that I had no knowledge of until 17 yesterday.</p> <p>18 CHAIRPERSON: We might have to see from 19 the video, the timing of it and so on –</p> <p>20 MR DE ROVER: Ja.</p> <p>21 CHAIRPERSON: - what the time lag is 22 between the falling, the visible falling of the first 23 group. I understand the dust cloud came later actually, 24 that was my impression.</p> <p>25 MR DE ROVER: Ja.</p>	<p style="text-align: right;">Page 37152</p> <p>1 CHAIRPERSON: The visible falling of the 2 front line or some of the people in the front line and the 3 end of the firing.</p> <p>4 MR DE ROVER: Ja.</p> <p>5 CHAIRPERSON: And it obviously –</p> <p>6 MS LE ROUX: Chair, my recollection is 7 that the dust cloud is obscuring strikers about four 8 seconds into the volley. That's my recollection.</p> <p>9 CHAIRPERSON: Anyway, we can look at it 10 but the point is, my recollection, which may be faulty, was 11 you can see people in the front line falling and –</p> <p>12 MS LE ROUX: That's in the first four 13 seconds, because it's by four seconds -</p> <p>14 CHAIRPERSON: That's right, then comes 15 the dust cloud. The dust cloud wouldn't be an excuse if 16 the falling of the first line was already visible and not 17 obscured by the dust cloud. It's then a question of, 18 you've got to take things like reaction time and so on into 19 account and you can then measure with a stopwatch the time 20 lag between the visible falling of the first line, the 21 front line, and the end of the firing. That's the point.</p> <p>22 Mr Semenya?</p> <p>23 MR SEMENYA SC: Chair, one of the 24 difficulties we had with this video tape and the narrative 25 is that there are things in the video which are not</p>
<p style="text-align: right;">Page 37153</p> <p>1 consistent with a theme the narrator wants and it's not 2 mentioned as part of the narrative. Now I'm making this 3 statement to allude to the next one. Even in the outline 4 you give, Chair, after the first person falls there are 5 still others who are coming and –</p> <p>6 CHAIRPERSON: No – no, I understand that. 7 In fact I wasn't even thinking of looking at this video 8 because I know there's a caveat which you entered 9 yesterday, you may remember, but even on the videos you've 10 got already, it's something that one can look at. I 11 understand there may be arguments about it and one of the 12 factors would be whether there's enough reaction time for 13 the police to assess whether the falling of the front line 14 has any effect on those behind, one factor. And the other 15 factor you make is that even if they did that and they saw 16 the people still advancing, that would neutralise the 17 point. I think these are all matters that can be argued, 18 can't they, at the appropriate time. Am I right?</p> <p>19 MR SEMENYA SC: It can, Chair. The 20 trouble I had was if the entire narrative is not given to a 21 question, as the Chair says, posterity will had that 22 excerpt as though it was an answer to a complete picture 23 when it was not.</p> <p>24 CHAIRPERSON: Of course Adv Le Roux was 25 dealing with the dust cloud, her question is, should you</p>	<p style="text-align: right;">Page 37154</p> <p>1 shoot if it's a dust cloud? My question is a different 2 one, should you shoot if before the dust cloud you see the 3 front line falling, but anyway I think the witness has 4 given an answer. If he wishes to amplify or expand on his 5 answer he can do so, then we can move on.</p> <p>6 MR DE ROVER: Judge, maybe just one 7 addition if –</p> <p>8 COMMISSIONER HEMRAJ: Sorry, can I just 9 add something to that? If you're taking a moment to see 10 who has fallen and who has not, don't you run the risk of a 11 potential attacker being closer to you then, if you're at 12 close quarters –</p> <p>13 CHAIRPERSON: From a distance.</p> <p>14 MR DE ROVER: Chair, the –</p> <p>15 COMMISSIONER HEMRAJ: That's why I said 16 at close quarters.</p> <p>17 MR DE ROVER: The issue is that it's 18 either eight or 12 seconds that that confrontation from 19 first shot fired to people observing the cease fire, so 20 there's a very limited time frame. I would just contend 21 that as a basis the international principles say, and I 22 think it's embodied in the principle of necessity, you 23 don't inflict more harm than you have to, than is 24 absolutely required and justified by the circumstances. I 25 understand Ms Le Roux's question to go to that nature and</p>

<p style="text-align: right;">Page 37155</p> <p>1 that is the question, so the standard is there. I think 2 the standard of necessity is embodied in that. Now the 3 question is, can you make it operational in the context 4 there? Was it, like are they aware of that standard? I'd 5 hope so. And are they able to act on that standard? Is 6 there time to act and is it reasonable to hold them to that 7 standard in those circumstances? 8 CHAIRPERSON: The close quarters problem 9 we can work out the answer to on Monday, we can measure the 10 distance actually between the TRT line and the place where 11 – 12 COMMISSIONER HEMRAJ: Mr Chaskalson's 13 measured it - 14 MR CHASKALSON SC: Chair – 15 CHAIRPERSON: He can measure it on his 16 Google Earth, I'd like to measure it on the ground. 17 MR CHASKALSON SC: No, no, no. 18 Chairperson, we will have grave difficulty, that landscape 19 has changed dramatically. So there are no markers that one 20 can see from the original time period that are still in 21 existence other than the kraal itself and I can foresee a 22 great deal of debate between parties if we try to pin down 23 the exact position. We will do our, we'll make our best 24 attempt. 25 CHAIRPERSON: Ja.</p>	<p style="text-align: right;">Page 37156</p> <p>1 MR CHASKALSON SC: But I do foresee 2 difficulties. 3 CHAIRPERSON: We'll cross that bridge 4 when we have to. 5 COMMISSIONER HEMRAJ: Didn't you give us 6 a measurement of 12 metres? I think it was for – 7 MR CHASKALSON SC: It was 12 to Warrant 8 Officer Kuhn and – 9 COMMISSIONER HEMRAJ: That's right. 10 MR CHASKALSON SC: 18 to the – 11 COMMISSIONER HEMRAJ: To the TRT line. 12 MR CHASKALSON SC: To the TRT line. 13 COMMISSIONER HEMRAJ: Yes. 14 MS LE ROUX: Mr De Rover, if I can then 15 move on to scene 2 and I don't intend to spend any 16 significant amount of time on it but on e aspect of scene 17 that I wanted to canvass with you is, do you accept that as 18 a point of principle that a law enforcement officials 19 should consider retreat before using lethal force? 20 MR DE ROVER: If that is practicable, 21 yes. 22 MS LE ROUX: And are you aware of the 23 evidence of Lieutenant-Colonel Scott – Chair, the reference 24 is say 141, page 15293 lines 17 to 25 – there Lieutenant- 25 Colonel Scott was asked to comment about what had happened</p>
<p style="text-align: right;">Page 37157</p> <p>1 at scene 2 and he said that he agreed with the approach 2 that, "the whole operation should have been slowed down, 3 police officials should have backed away to a safe distance 4 and negotiations should have been reignited or reinitiated, 5 trying to speak to them and giving the opportunity and, 6 simultaneously with that negotiation happening, there would 7 have been a full reorganisation of what would have had to 8 be a sweep through in that case should it have been 9 necessary." Are you aware that Lieutenant-Colonel Scott 10 expressed his preference for perhaps not a retreat but an 11 attempt to contain the situation at scene 2 without using 12 lethal force? Are you aware of that evidence? 13 MR DE ROVER: I'm aware of a plan that 14 never envisaged scene 2 the way it unfolded. What was 15 meant to happen that TRT and POP were to approach from the 16 east and north side and leave the south and western sides 17 open so that people actually have a pathway out of koppie 18 3. So the base design was there and I've said from the 19 beginning, and you'll find the reference in my first 20 statement, the operation should have been halted after 21 scene 1. 22 MS LE ROUX: And given that you've 23 accepted as a point of principle that a law enforcement 24 official should consider retreat before using lethal force, 25 putting the two together, do you agree with Lieutenant-</p>	<p style="text-align: right;">Page 37158</p> <p>1 Colonel Scott's view that one it was clear the strikers had 2 holed themselves up in koppie 3, that the police had legal 3 obligation or had a – 4 CHAIRPERSON: No, no, no, he can't say 5 what the legal obligations were. 6 MS LE ROUX: Chair, let me rephrase. Do 7 you agree with Lieutenant-Colonel Scott's view that once it 8 was clear that the strikers had holed themselves up in 9 koppie 3, it would have been preferable to retreat rather 10 than firing 295 live rounds into the koppie? 11 MR DE ROVER: Absolutely. 12 MS LE ROUX: If we can then move on to, 13 in your second statement FFF11A and Chair, it's page 29 14 paragraph 62 of that statement, you're setting out your 15 conclusion on the koppie 3 deaths and the second sentence – 16 sorry, the first sentence concludes by saying, "I believe 17 that the deaths of nine protesters at koppie 3 referred to 18 above," that's where you've set out your account of the 19 events, "were incidental and not intentional." Am I 20 correct that by incidental and not intentional you mean 21 that they were the result of shots that were not aimed or 22 intended to hit the person that it hit? Is that what you 23 mean? 24 MR DE ROVER: Chair, I think when I went 25 there that was a – the emotional experience I had on the</p>

<p style="text-align: right;">Page 37159</p> <p>1 spot was not just to have the police there but to actually 2 realise and I think that factor has not been emphasised 3 here a lot but there were, when that police action happened 4 there were 300 people there. Now you go there on Monday, 5 you just walk around there and tell me where those 300 6 people are going to be and where they can find cover. So 7 whilst listening and just listening and hearing policemen 8 say that there was something of a threat and they shot at 9 that threat and missed, I now picture these rounds 10 travelling through that area and you, on Monday, the 11 foliage there is distinctly different although the 12 ballistics report will give you an idea but the ballistics 13 report also shows you the evidence of how far and 14 penetrating those rounds were. Now, there is a very 15 unfortunate term in humanitarian law that calls situations 16 like that collateral damage and I'm loathe to employ that, 17 but from the stories and the reality and the geography on 18 the ground, the fact is that shots were fired allegedly in 19 self-defence. That remains to be seen and tested, whether 20 that is true. Those shots missed and then continue on 21 their path. 22 [12:27] And the worst part of it is that in that centre 23 area of koppie eventually you have shots from four 24 directions travelling through, and I can't remember the 25 exact number I said, but that might have been in excess of</p>	<p style="text-align: right;">Page 37160</p> <p>1 150. Now put 300 people there, because that would have 2 been the most likely spot where they would have thought 3 themselves safe; you have sight cover and fire cover, but 4 you do not have fire cover for fire from all directions. 5 You'd have it at best for two, but not for four, and that's 6 why I'm saying that tragic as that is, I'm mindful of the 7 fact that the number because then of what you have there, 8 at least 150 rounds flying through and there are nine 9 deaths there that can't be linked to an individual shooter, 10 that could have been much higher, and I think that the 11 position in which people were found and the injuries they 12 suffered, my reading is that that – and I'm not an expert 13 on that, so please discount if you disagree, but there 14 would have been normal interactions going on. So we are 15 facing each other. I'm bending to pick something up and at 16 that moment a round strikes the top of my head, and I 17 realised that standing there and that took my breath away. 18 It's terrible. 19 MS LE ROUX: Mr De Rover, in your 20 statement where you determine that nine of the deaths were 21 incidental and not intentional, we haven't seen which nine 22 individuals you ascribe that judgment to. Would you be 23 able to provide us with that information? 24 CHAIRPERSON: Forgive me for a moment. I 25 know you're running out of time. Mr De Rover, would you</p>
<p style="text-align: right;">Page 37161</p> <p>1 like an adjournment for five minutes? I can see you're 2 very moved by what you've just said. Five-minute 3 adjournment? Can we sit till 5 past 1, Mr Semenya? 4 [COMMISSION ADJOURNS COMMISSION RESUMES] 5 [12:34] CHAIRPERSON: The Commission resumes. 6 Are you able to continue now, Mr De Rover? 7 MR DE ROVER: Sure. 8 CHAIRPERSON: I understand your response 9 to the previous evidence. Yes, Ms Le Roux. 10 MS LE ROUX: Thank you, Chair. Mr De 11 Rover, two housekeeping points occurred to me before we 12 finish. Well not that I'm finished, Chair. Advocate 13 Budlender yesterday was asking you about the contingency 14 plan that you identified or mentioned in that testimony. 15 Have you been able to locate the specific document you were 16 referring to? 17 MR DE ROVER: Not yet. To be honest I 18 had other things I looked at last night including the 19 exhibit that you showed yesterday afternoon, I looked at it 20 again. I haven't given it any – 21 MS LE ROUX: Well we'll follow up through 22 the SAPS legal team. 23 MR DE ROVER: Okay. 24 MS LE ROUX: And then if I could ask you 25 just again, JJJ178.10 which was the response we got from</p>	<p style="text-align: right;">Page 37162</p> <p>1 SAPS on points of disagreement in June. I just wanted to 2 clarify from yesterday's evidence, did you have input into 3 that document? 4 MR DE ROVER: Can you give me the 5 reference again? 6 MS LE ROUX: It's JJJ178.10. It's 7 attached to Mr White's statement. It's up on the screen, 8 Mr De Rover. I don't know if we can scroll it for you so 9 you can familiarise yourself with it, if you recognise it. 10 Do you recognise this document? 11 MR DE ROVER: No. 12 MS LE ROUX: Not. Okay what we'll do 13 then is follow up through the SAPS legal team to establish 14 whether you had input into this document. So when it 15 refers to we response, we repeat, we do this, we do that 16 whether that includes yourself or whether that was the SAPS 17 legal team alone. 18 MR DE ROVER: I definitely did not write 19 this. 20 MS LE ROUX: Okay, we'll then establish 21 how it was prepared with the SAPS legal team. 22 MR DE ROVER: You asked for the 23 identification of the nine on scene 2, do you still want an 24 answer to that? 25 MS LE ROUX: Yes, but again we can</p>

Page 37163

1 facilitate it through the SAPS legal team. Mr De Rover, in
 2 your second statement FFF11A and specifically page 12 of
 3 that statement, paragraph 21 here you're dealing with a
 4 section entitled The SAPS Doctrine of Maximum Force. And
 5 paragraph 21 at page 12 states "I'm aware of incidents in
 6 recent SAPS history that have given rise to the belief that
 7 a doctrine of maximum force does exist within the
 8 organisation. My own review of these incidents leaves me
 9 to contend that they were indeed isolated incidents and do
 10 not provide evidence or even strong indication of an
 11 organisational breakdown within SAPS with regard to the use
 12 of force and firearms culminating in the systemic and
 13 deliberate use of lethal force against civilians."

14 So we were interested, given that you said my own
 15 review of the incidents, we were interested in the review
 16 that we thought you had conducted. So in GW4A, the
 17 annexure to Mr White's statement we asked you to please
 18 identify which incidents you had reviewed and then in GW4B
 19 we got the response that "Mr De Rover did not examine – the
 20 incidents referred to are those raised in cross-examination
 21 by various parties to claim a doctrine of maximum force
 22 within SAPS. Mr De Rover did not further examine those.
 23 He rather went down the path to explain basic law
 24 enforcement structures and practises with regards to use of
 25 force and firearms." So I just want to be clear, in your

Page 37165

1 actively using it. And again it's not a – it doesn't give
 2 you a certainty that there wasn't a case of abuse or a
 3 criminal offence. But at least when you look over a period
 4 of a year or five years you get a fair indication of
 5 whether force is systematically abused. So if, for
 6 example, you get an indicated that as happened in Jamaica,
 7 that the number of civilians killed as compared to police
 8 killed is 75 times higher and that the percentage of police
 9 killings, of civilians is virtually 25% of the homicide
 10 statistic for that country. I would say on prima facie
 11 indication I'd want to have a serious talk with and I've
 12 actually been to Jamaica and tried to have a serious talk
 13 with them about they employ force. And those methods help.
 14 Now if you look at the realities for South Africa then
 15 you're actually doing on that count marginally better than
 16 the USA. So I would then at least content you don't appear
 17 to have an issue with systemic abuse of force and firearms.
 18 And I'm told to be acknowledging that you do have incidents
 19 of abuse of force and firearms here that obviously need
 20 follow up and investigation. But not the extent that I
 21 would say there is also a need to look at the system that
 22 is SAPS. The way it's governed, the way it's structured
 23 and managed. It appears to be at a level of application
 24 and that triggers a control question, but it doesn't
 25 trigger a systemic one. That was the push of those

Page 37164

1 statement you say my own review of these incidents, you
 2 didn't actually review any incident.

3 MR DE ROVER: Well I did look into a few
 4 of them. The Tatane case comes back to mind from that time
 5 and without qualifying that further I did not see a reason
 6 to equate that to an organisational or a systemic breakdown
 7 within SAPS.

8 MS LE ROUX: But beyond that research you
 9 didn't – those are the incidents in recent SAPS history
 10 that you're referring to and only those.

11 MR DE ROVER: Yes but I think what you
 12 read out there in my statement should probably be preceded
 13 by the study that I did that seeks to establish how often
 14 does the police use lethal force. How many police
 15 officials get killed in the line of duty every year and
 16 what percentage does that represent of the total number of
 17 homicides in the country. And because I'd be loathe to use
 18 one or two incidents to elevate that to a norm or a
 19 standard which seemed to have happened before the
 20 Commission. Now again that particular methodology is used
 21 or was used by a previous special repertoire on arbitrary
 22 and summary execution, Mr Philip Olson and I can refer you
 23 to the exact document and paragraph where it's set out that
 24 he's using that. So it's not just something that I
 25 developed and kept to myself but others are actually

Page 37166

1 paragraphs.

2 CHAIRPERSON: Perhaps you could put it in
 3 terms that I can understand. Are you saying then that
 4 these statistics are - at least circumstantial evidence
 5 indicates that the unfortunate remarks made by the Deputy
 6 Minister, a former deputy minister I think around about
 7 2008 do not appear to have led to what you call an
 8 institutional breakdown within the SAPS culminating in the
 9 deliberate use of lethal force against civilians in
 10 circumstances where it wasn't justified. Would that be a
 11 fair summary of what you're saying?

12 MR DE ROVER: I think that that is true
 13 and I'd be disappointed if it was different because again I
 14 say police officials are public officials that swore an
 15 oath and I would say that many of them want to be in the
 16 police and want to be police officials. And then there are
 17 people who do not deserve to be there because in your
 18 selection process you do happen to turn away people that
 19 you should have accepted but worse is that you end up
 20 accepting people that you should have turned away. And I
 21 think SAPS is struggling with that reality to remedy that,
 22 that you've got your rotten apples in the basket and that
 23 you need to try and get rid of them. But I know that
 24 quote, I've even heard it because I found a video where it
 25 is being said. I know of others, previous police

<p style="text-align: right;">Page 37167</p> <p>1 commissioners who made statements to similar effect, I'm 2 just glad to see that my conclusion still is that obviously 3 the individual officer is aware of his duties and 4 responsibilities that have to be in accordance with the law 5 and that there hasn't been an organisational following of 6 what was indicated almost as a blank cheque to run wild. 7 And it is important to note that South Africa loses, you 8 know, I think it's between 2008 and 2013 close to 800 9 police officials in the line of duty and that is a serious 10 count because I think Holland maybe loses one every 10 11 years. 12 MS LE ROUX: Mr De Rover, I'm sure you'll 13 pleased to know I'm onto my final topic which is to ask you 14 whether you agree with me that reasonable expert witnesses 15 can disagree on substantial matters, but that disagreement 16 doesn't indicate that one or other of the experts is 17 lacking objectivity or impartiality. Do you agree with 18 that? 19 MR DE ROVER: The term expert is not a 20 protected one, nor is it linked to a training that you can 21 do. So you know I think show me an argument and I'll show 22 you 20 that go the other way. I think that that's a given. 23 I've tried to offer this Commission not more of the same, 24 but something different and I hope it assists the 25 Commission. I'm fully conscious that at times it may not</p>	<p style="text-align: right;">Page 37168</p> <p>1 help your argument and that obviously you're keen on 2 getting specifics that assist you. And then I just have to 3 admit that's not why I'm here. I'm not here to help you, 4 I'm here to help the Commission. 5 MS LE ROUX: Mr De Rover, my question was 6 whether despite disagreements between experts, as a matter 7 of principle, that disagreement doesn't mean either one 8 lacks objectivity or impartiality does it? 9 MR DE ROVER: No. 10 MS LE ROUX: Reasonable experts can 11 disagree without becoming in any way partial. 12 MR DE ROVER: I had a business teacher 13 who once pointed out to class in one of the first sessions 14 that the moon in Turkey looks different from the moon in 15 Holland because in Turkey you see a lying banana and in 16 Holland a standing one. He said you better not forget that 17 you're both looking at the moon. So at times I think it's 18 perspectives that differ. If you come from a certain angle 19 you look at an issue, you come with findings and you base 20 them on your honest, expert opinion. An expert comes from 21 another angle and picks up something different. That 22 doesn't have to bite each other, totally not, there can be 23 expert disagreement. The unenviable tasks rests with this 24 Commission to say where their preference lies. 25 MS LE ROUX: And my assumingly unenviable</p>
<p style="text-align: right;">Page 37169</p> <p>1 task is to get you to agree with me that you can disagree 2 without becoming partial. 3 MR DE ROVER: Sure. 4 MS LE ROUX: Okay. You'd also agree with 5 me that it's very serious to allege that an opposing expert 6 lacks impartiality or objectivity without a sound factual 7 basis for making that allegation. That if you're going to 8 allege that an expert lacks objectivity and impartiality 9 you need a basis to do so. 10 MR DE ROVER: Yes. 11 MS LE ROUX: Now in your June response to 12 our interrogatories, Chair, it's UUUU1.3. In the first 13 paragraph of that response you are recorded to state "The 14 pejorative and highly emotional language of Mr White's 15 statement call into question for me his status of an 16 impartial and objective expert witness. Examples include 17 reference to anticipation of an attack by police which in 18 my view is unusual language to refer to a possible police 19 operation coming from an experienced police official and 20 regular use of words such as reckless, excessive and 21 shambolic." I'd like to start with the first where you say 22 that Mr White used the phrase "anticipation of an attack by 23 police." Now we've been unable to find that phrase in any 24 of Mr White's statements or submissions to the Commission. 25 Can you explain why you've attributed that phrase to Mr</p>	<p style="text-align: right;">Page 37170</p> <p>1 White, an attack by police? 2 MR DE ROVER: I think it was in response, 3 it was a question put to me whether – 4 MS LE ROUX: It was a question put to you 5 by the legal team. 6 MR DE ROVER: Sorry. 7 MS LE ROUX: It was a question put to you 8 by the legal team that that phrase does not appear in 9 anything authored by Mr White. 10 MR DE ROVER: The question put to me was 11 and I took that that question was a question from Mr White 12 and so if I'm now erring on the path that in fact he did 13 not write that question because the way it was presented to 14 me was these are the questions of Mr White directed at you. 15 And I took it that he would have drafted those. So in one 16 of those questions it was asked and I can't exactly 17 remember whether I said that something was to the left 18 whether it couldn't have been as much an indication of an 19 intended or anticipated attack by the police. Attack is a 20 military term, it comes from situations of conflict, an 21 attack is well defined in international law. So of course, 22 I took exception because attack is not an acceptable term 23 in law enforcement. 24 MS LE ROUX: And if you accept that – 25 CHAIRPERSON: I understand that, but</p>

Page 37171

1 apparently we now know, we're now told and we must accept
 2 it.
 3 MR DE ROVER: I accept that, so that
 4 obviously I was mistaken in the identity of the author so
 5 then humbly I apologise and I think there is then sense no
 6 need to continue because I was reading something that was
 7 written by Mr White.
 8 MS LE ROUX: Okay so if you accept that
 9 it was an error made by the legal team that that should not
 10 in any way be a basis to accuse Mr White of being un-
 11 objective or impartial or partial.
 12 MR DE ROVER: No absolutely. So I
 13 totally –
 14 MS LE ROUX: Now the second example that
 15 you put up as a basis for attacking Mr White's impartiality
 16 and objectivity in what you call his regular use of the
 17 words and first one is reckless and then excessive and
 18 shambolic. Now with respect to excessive we have managed
 19 to find that he used it twice as a qualifier for the use of
 20 force. I did a similar exercise in the second edition of
 21 your book To Serve And Protect and excessive appears there
 22 17 times and excessive use of force appears five times. So
 23 if Mr White can be accused of highly emotional and
 24 pejorative language because he uses the word excessive
 25 twice would you accept that To Serve And Protect similarly

Page 37173

1 to you about that. I understand that's the way you thought
 2 and I'm not criticising you for that, but I just need to
 3 know whether the point you make is a sound one. If you
 4 want to say someone used too much force, excessive is a
 5 perfectly permissible adjective. It expresses precisely
 6 what you want to say isn't that so?
 7 MR DE ROVER: But it is at a point that
 8 you haven't yet made that decision.
 9 CHAIRPERSON: No, his opinion, I haven't
 10 looked at the cases where he used it, but I take it as
 11 where he said too much force is being used in his opinion
 12 based on the evidence. Now if he says too much force do
 13 you quarrel with that and if he's saying too much then as a
 14 matter of English isn't excessive a perfectly permissible
 15 synonym? Is that right, do you agree?
 16 MR DE ROVER: I'm only expressing my
 17 personal opinion on it and –
 18 CHAIRPERSON: That doesn't make him
 19 impartial and lacking in objectivity.
 20 MR DE ROVER: I've already said in
 21 regards to that that was to the previous question and that
 22 obviously I was mistaken as to who was the author.
 23 CHAIRPERSON: Now let's go to reckless.
 24 Reckless, I don't know whether you use the word in Holland,
 25 it's a Latin expression. We use the word dolus eventualis

Page 37172

1 suffers from pejorative and highly emotional language?
 2 MR DE ROVER: If the base contention is
 3 that you can compare apples and oranges then I would have
 4 to agree with you, but To Serve and To Protect seeks to
 5 explain concepts in an international setting and then it
 6 is, of course, necessary and required that you explain what
 7 excessive force is without a quality judgment. Now my base
 8 attitude is that it may hamper the Commission that you
 9 attach that qualification to it although I can see why he
 10 made it. And it was more along those lines that to me and
 11 I'll say that on a personal level, that those few
 12 qualifiers, shambolic is the other one, just took away from
 13 the quality of his analysis. And I found it a shame,
 14 that's just what I thought, that I thought if those had not
 15 been there I'd regard that I held for his analysis and I
 16 tried to make amends here, publicly, by acknowledging that
 17 I agree with that analysis. And that my not addressing
 18 them didn't meant that I didn't see a need to, I just
 19 didn't want to do more of the same. So his work is solid,
 20 I just think that those few moments that have that what
 21 can't be anything else but a subjective qualifier to it
 22 make it, ja difficult. At least I thought that was worth
 23 mentioning.
 24 CHAIRPERSON: Mr De Rover, is the point
 25 that you're making now a valid one? Let me put my problem

Page 37174

1 in South Africa. It means foresight of possibility and not
 2 caring as to whether that possibility will eventuate.
 3 That's our legal term for recklessness. Now if he thought
 4 the conduct of the police, again I don't know the specific
 5 context, the context of the police indicate that – he
 6 thought there were consequences which they foresaw as being
 7 possible. And he thought they proceeded nevertheless,
 8 regardless as we would say. Again the word reckless would
 9 be the appropriate expression to convey that, would it not?
 10 Now let's go to shambolic. Shambolic is more of a
 11 [12:54] Shambolic is more of a slang work, I am not sure
 12 it is anything other than that. But the word shambles is a
 13 word one uses to indicate there's a lack of organisation,
 14 there's a lack of method, regularity about a situation.
 15 Shambolic is the – and he thought that at certain points
 16 particularly at scene 2, I think, things weren't proceeding
 17 according to plan at all.
 18 MS LE ROUX: No, Chair, Mr White uses the
 19 word "shambolic" once –
 20 CHAIRPERSON: In what context?
 21 MS LE ROUX: And it's with respect to the
 22 rollout of the barbed wire –
 23 CHAIRPERSON: Oh, I see.
 24 MS LE ROUX: - in that it was not
 25 simultaneous, it –

<p style="text-align: right;">Page 37175</p> <p>1 CHAIRPERSON: Alright, okay. 2 MS LE ROUX: - that we had evidence of 3 the members involved who didn't understand what it needed 4 to be used for and that Brigadier Calitz was unaware of all 5 of these issues relating to barbed wire. He uses it in 6 that context once. 7 CHAIRPERSON: Shambolic is the adjective 8 for shambles. A shambles is, things go awry rather badly. 9 Would that be not an appropriate word to use? Possibly one 10 you wouldn't use but can one criticise somebody who uses 11 that English word, the adjective of shambles, to describe a 12 shambles in the sense I've endeavoured to define? 13 MR DE ROVER: Chair, with the 14 qualifications you give I'm happy to accept that and to 15 apologise if that causes distress because I think it 16 distracts from what we are trying to do. The other thing 17 is, I do need to point out I'm not a native English 18 speaker, I'm still learning. 19 CHAIRPERSON: But you do very well, if I 20 may say so. No, the reason I raise this with you is it 21 seems to me that Mr White who is also in the field now as a 22 retired police officer giving professional advice all over 23 the world and a suggestion that he's not an impartial and 24 objective expert witness is something which, if it stands 25 un-withdrawn, could cause him some harm I would have</p>	<p style="text-align: right;">Page 37176</p> <p>1 thought. So I take it you - are happy to withdraw that? 2 MR DE ROVER: Chair, I'm more than happy 3 to withdraw that and to add to it that we've actually 4 exchanged business cards and are fully intending to be in 5 touch, so I do not see that problem occurring. 6 CHAIRPERSON: You wouldn't have done that 7 if you'd not regarded him as someone who is, now regard him 8 as someone who is impartial and objective, is that fair? 9 MR DE ROVER: Sure. 10 MS LE ROUX: And Chair, you just stole my 11 last question, so I have no more questions for Mr De Rover. 12 CHAIRPERSON: I'm sorry to have done that 13 but I'm pleased – one question I want to ask. It won't 14 require a very long answer but you gave us a document in 15 Dutch, a report prepared in respect of some action by some 16 people who were described by "hooligans" which I take it 17 means the same in Dutch as it does in English. I think 18 it's actually an Irish word but we haven't got Mr White to 19 tell us whether that's correct. An incident at the Hoek 20 van Holland. 21 MR DE ROVER: Ja. 22 CHAIRPERSON: Where some hooligans 23 behaved very badly. 24 MR DE ROVER: Yes. 25 CHAIRPERSON: And where the police</p>
<p style="text-align: right;">Page 37177</p> <p>1 appeared to have had inadequate equipment to deal with the 2 situation. Now can you tell us precisely what that, in a 3 sentence or two what that document shows and I'm going to 4 read it, I've tried reading bits of it already and 5 fortunately written Dutch is not very different from 6 written Afrikaans. If it's read aloud then we have 7 difficulty. It's easier in some ways than Afrikaans to 8 English speakers because the Dutch use more English words 9 than the Afrikaners do, but what exactly in that document 10 that you gave us to read must we look out for and what does 11 it teach us that can help us here? 12 MR DE ROVER: It is, in short, an 13 incident of a concert that was held on the beach in Holland 14 at [indistinct] 30 000 people come just to enjoy that and 15 at the same time 80 soccer hooligans decide that that is a 16 nice opportunity to simply cause problems, so they enter 17 that sphere, they identify people that they reckon belong 18 to a rival soccer club and then fights erupt and it's a 19 group of 80 that cause tremendous problems there. And as 20 happened here, there's problems with police communications, 21 there's problems with deployment but the thing is that in 22 that incident the police fire more than 200 rounds nine 23 millimetre. One protester dies, five are seriously 24 injured, several police sustain injuries and what happens 25 subsequent, and this is why I use that it shocks public</p>	<p style="text-align: right;">Page 37178</p> <p>1 conscience, the next day this triggered a response from the 2 Queen in Holland on TV and it triggered a response from 3 politics where the actions of that group, whatever their 4 motive, were condemned and where the police were given by 5 government, because of the fact that it was an incident 6 that shocked the conscience of the nation and that had 7 serious implications for safety and security in the 8 country, the police were given the order to pursue this as 9 a matter of the highest priority and part of that pursuit 10 was the subsequent investigation because obviously the 11 policing operation had serious flaws in it and I think that 12 report will line those out and give you an insight in 13 those. 14 CHAIRPERSON: Thank you very much. 15 Sorry, Mr Bizos? We've run out of time. 16 MR BIZOS SC: Mr Chairman, we wish to 17 place on record that we consider this an important witness 18 and we have what we believe to be vital questions to put to 19 him. 20 CHAIRPERSON: You didn't apply for leave 21 to cross-examine him, did you? 22 MR BIZOS SC: I beg your pardon? 23 CHAIRPERSON: You didn't apply for leave 24 to cross-examine him, did you? 25 MR BIZOS SC: This is correct –</p>

<p style="text-align: right;">Page 37179</p> <p>1 CHAIRPERSON: I have a suggestion to 2 solve your problem. 3 MR BIZOS SC: Yes. 4 CHAIRPERSON: I take it that Mr De Rover 5 will be happy to provide written answers to any 6 interrogatories that you may wish to address to him in 7 relation to matters which you regard as of great importance 8 where you think his answers may well be of assistance to 9 the Commission. I take it I'm correctly expressing what 10 your attitude would be - 11 MR BIZOS SC: Well - 12 CHAIRPERSON: - Mr Bizos? 13 MR BIZOS SC: I am glad but I did want to 14 indicate that I do not wish to lay blame on anyone but I 15 would ask you, Mr Chairman, to indicate to the witness that 16 the interrogatories are to be answered by him and not after 17 consultation with our colleagues or members of the police. 18 We are entitled to the right - 19 CHAIRPERSON: If you'd asked him the 20 questions here when he's sitting at the witness table he 21 would have given his answers without that. Now you're 22 asking for the same thing, in effect, and I'm quite sure - 23 I'm not going to tell him to do that because I think I'd be 24 insulting him if I told him to do that because I'm sure he 25 is going to do that anyway.</p>	<p style="text-align: right;">Page 37180</p> <p>1 MR BIZOS SC: I just thought that 2 although he seems to be quite versed with legal principles, 3 that he may not have known of the rules of our profession 4 and what is expected of a witness. 5 CHAIRPERSON: Yes, no, as I've said I am 6 not going to ask him to do that. I think I'd be insulting 7 him if I did, I don't think it is necessary. I am sure he 8 will behave in the way you have suggested he should, okay. 9 MR BIZOS SC: Thank you, Mr Chairman. 10 CHAIRPERSON: Thank you, Mr De Rover, 11 you're excused. Oh sorry, Mr Semenya, I beg your pardon, 12 your light is on. 13 MR SEMENYA SC: Chair, directly arising 14 out of the cross-examination by my learned colleague Ms Le 15 Roux in relation to justification of each and every bullet 16 fired, I think my request for a ruling is now imminent and 17 I must place it on record because we will fail to discharge 18 that legal hurdle in the time available. 19 CHAIRPERSON: [Microphone off, inaudible] 20 the ruling you want me to give? 21 MR SEMENYA SC: The ruling couched as we 22 possibly agreed with - 23 CHAIRPERSON: Oh, I remember what it is 24 now. I did indicate to you in chambers, as I indicated to 25 some of the other parties, I think, that we do not consider</p>
<p style="text-align: right;">Page 37181</p> <p>1 it necessary and we communicated that to you and it's on 2 the strength of that that you adopted a particular attitude 3 to the leading of evidence here, that we didn't consider it 4 necessary for every single shottist to come and explain why 5 he shot. The view we took and it's the view we hold is 6 that it was sufficient to have representative people from 7 different groups, different situations, explaining the 8 situation as they saw it and explaining why in particular 9 cases they fired. After all, the test would be on e of 10 reasonableness and if it was reasonable for witness A to 11 shoot then it would be reasonable for someone in the same 12 group as he was, witness C, to do the same. If it was 13 unreasonable for witness A, the same would apply to witness 14 C and that was the ruling that I indicated to you in 15 chambers. It was on the strength of that that you made the 16 decision not to call every shottist. 17 MS LE ROUX: Chair - 18 MR SEMENYA SC: I am indebted to you, 19 Chair. 20 CHAIRPERSON: Alright. Yes, Ms Le Roux? 21 MS LE ROUX: And Chair, of course that 22 approach will still be the subject of submissions by other 23 parties in connection with as to whether that - 24 CHAIRPERSON: Well, you can make - ja, 25 that's the ruling I gave. If you want to attack it then</p>	<p style="text-align: right;">Page 37182</p> <p>1 obviously you're free to do so. If you have 50 people who 2 fire and you've got, representative come and say why they 3 fired, the likelihood that any one of the others would have 4 some particular factor operating in his mind is something 5 that one will have to consider as and when it arises as a 6 possibility or as a non-possibility but anyway - 7 MS LE ROUX: Chair, we would certainly - 8 CHAIRPERSON: If you want to address 9 submissions to us at the end on the matter, obviously you 10 can do so. 11 MS LE ROUX: When was the ruling given? 12 CHAIRPERSON: [Microphone off, inaudible] 13 the ruling now. I communicated to Mr Semenya that was my 14 attitude. If I hadn't said that, we would be here until 15 the - well, if we had enough time - till sometime towards 16 the end of next year with every single shottist coming to 17 give evidence, which would have been, in my view shared by 18 my colleagues, would have been unnecessary in the 19 circumstances. You have obviously never had experience of 20 faction fighting cases. If you call every member of each 21 faction, those cases would go on forever. The procedure 22 followed is the one that I've indicated. Anyway, if you 23 want to make submissions to us on the point you may do so. 24 MS LE ROUX: We will, Chair. 25 CHAIRPERSON: Thank you, Mr De Rover. I</p>

1 take it you're leaving our country soon. Thank you for the
2 evidence you've given us and we wish you bon voyage on your
3 return home. We will now adjourn. We resume at 10 o'clock
4 on Monday morning at forward holding area A –

5 COMMISSIONER HEMRAJ: One.

6 CHAIRPERSON: I'm sorry.

7 COMMISSIONER HEMRAJ: Forward holding

8 area 1.

9 CHAIRPERSON: Ja, Adv Pingla says it's

10 because we started at half past eight. We will resume at

11 forward holding area 1 at 10 o'clock on Monday at Marikana.

12 [COMMISSION ADJOURNED]

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abandon 37047:17	accountability 37124:3	37144:8 37161:4	37167:14,17 37169:1	annexure 37108:3,9
ability 37062:3	accountable 37072:11	administer 37129:11	37169:4 37172:4,17	37163:17
37113:12 37135:16	accuracy 37133:19	admission 37031:24	37173:15	annotated 37144:15
abject 37057:25	37135:16	37127:17	agreed 37034:24	annoying 37106:2
able 37027:16	accuse 37123:2	admit 37127:3,4	37157:1 37180:22	annual 37072:20
37030:17 37033:17	37171:10	37168:3	agreement 37087:18	answer 37043:2,11
37047:22 37052:17	accused 37171:23	admitted 37127:7	37088:19	37044:19 37045:1,25
37057:21 37063:8	achieve 37150:14	37134:20,25	ah 37129:7	37046:23 37049:13
37066:15 37070:1	achieved 37087:24	37140:11	ahead 37035:18	37058:16 37069:17
37098:22 37102:3	acknowledge 37094:19	adopted 37181:2	37044:13 37064:17	37070:10,17
37103:8 37126:9	37112:13 37133:17	Adv 37059:15 37061:2	37076:7,18 37082:15	37071:24 37072:2
37133:15 37145:15	acknowledgement	37101:15 37149:19	ahs 37058:18	37074:10 37075:5
37148:11 37149:2	37131:6	37153:24 37183:9	Aidid 37095:22	37076:12 37077:18
37155:5 37160:23	acknowledging	advance 37106:13	aimed 37057:16	37083:23,24 37084:2
37161:6,15	37165:18 37172:16	37112:19	37116:15 37158:21	37084:19 37087:10
absence 37109:14	acoustical 37106:10,11	advanced 37059:12	alert 37032:1	37088:16,18
absent 37040:19	act 37074:14 37076:25	advancing 37153:16	align 37126:7	37091:16 37100:6
absolute 37057:21	37077:15,16,17	adversarial 37096:22	alignment 37092:19	37123:14 37127:17
absolutely 37154:24	37091:2 37095:2,9	advice 37080:9	alive 37031:8	37134:25 37135:9
37158:11 37171:12	37102:23 37104:17	37175:22	allegation 37031:18,22	37137:4 37150:8
abundantly 37085:8	37130:23 37135:24	advise 37032:10	37073:10 37169:7	37153:22 37154:4,5
abuse 37165:2,17,19	37143:5,7,10	37085:15 37123:25	allegations 37030:4	37155:9 37162:24
abused 37165:5	37146:18 37148:17	advised 37123:4,5	allege 37169:5,8	37176:14
acceleration 37114:24	37150:25 37155:5,6	37131:5	alleged 37038:21	answered 37129:24,25
accept 37028:23	acting 37135:23	adviser 37032:16	37118:7	37179:16
37034:22 37036:7	action 37041:16	Advocate 37161:12	allegedly 37159:18	answering 37045:18
37037:11 37039:22	37046:3,19 37064:15	aerial 37115:1	allow 37030:19	37070:14 37101:9
37039:24 37040:2	37065:6 37080:19	affidavits 37033:15	37097:20 37136:11	answers 37068:14
37041:10 37043:20	37082:13 37099:11	affiliated 37089:18	37150:15	37081:18,20
37048:21 37058:25	37103:5 37106:12	affirmation 37027:3	allowed 37125:16	37083:12 37179:5,8
37064:5 37071:12	37116:25 37159:3	affirmed 37027:6	37147:1	37179:21
37084:9 37087:14	37176:15	afraid 37101:16	allude 37153:3	anticipated 37050:4
37094:2,9 37107:22	actions 37030:12,24	Africa 37080:23	allusion 37049:21	37098:1 37146:12
37108:23 37110:17	37086:5 37123:23	37102:10 37165:14	aloud 37177:6	37170:19
37110:20 37111:19	37178:3	37167:7 37174:1	alright 37055:10	anticipation 37051:19
37113:25 37114:5	active 37136:5	African 37061:18,20	37092:11 37175:1	37051:22 37169:17
37119:3 37127:1	actively 37075:19	37062:3,6 37080:4	37181:20	37169:22
37130:17 37135:4	37165:1	37092:24 37106:5	Alston 37131:3	anybody 37042:13
37156:17 37170:24	actors 37091:12	Afrikaans 37049:6	alternative 37094:10	37096:15
37171:1,3,8,25	actual 37039:14	37177:6,7	alternatively 37145:17	anymore 37087:6
37175:14	37106:15 37130:19	Afrikaners 37177:9	alternatives 37093:19	anyway 37049:6
acceptable 37170:22	acute 37066:8	aftermath 37031:1	37094:1	37050:21 37077:5
acceptance 37057:2	add 37061:13 37068:13	afternoon 37074:22	AMCU 37095:2	37083:4 37101:21
37080:1 37092:6	37088:21 37154:9	37094:11 37151:11	amends 37172:16	37121:13 37150:7
accepted 37040:6	37176:3	37161:19	American 37106:12	37152:9 37154:3
37042:9 37078:7	added 37078:11	agent 37123:18	Americans 37096:1	37179:25 37182:6,22
37109:22 37113:5	addition 37099:17	agents 37072:10	amidst 37125:18	Apologies 37121:6
37157:23 37166:19	37135:15 37154:7	aggression 37060:5	ammunition 37059:2	apologise 37097:5
accepting 37040:15	additional 37151:15	37095:12	37068:7,25 37069:8	37171:5 37175:15
37082:11 37166:20	address 37100:8	aggressive 37059:20	37069:14	apparent 37114:20
accepts 37098:16	37179:6 37182:8	37060:1,17	amount 37065:10	apparently 37079:8,13
access 37061:10	addressed 37034:13	ago 37084:4 37109:14	37105:4,5 37156:16	37171:1
37090:22	addressing 37172:17	37109:18 37112:9	amplify 37154:4	appear 37057:7
accidental 37128:11	adequate 37029:7	37135:13	analysis 37058:25	37165:16 37166:7
accommodate 37121:7	37136:2	agree 37032:11	37113:19 37130:12	37170:8
37121:10	adequately 37129:7	37040:3,15,25	37130:17 37131:8	appearance 37050:10
accompli 37042:2	adjective 37173:5	37053:8 37060:25	37172:13,15,17	appeared 37056:16
accomplishing 37050:3	37175:7,11	37069:25 37078:17	angle 37168:18,21	37177:1
accord 37037:24	adjourn 37183:3	37087:21,22	animation 37100:18	appears 37130:15
37108:11	ADJOURNED	37088:11 37091:24	37108:5,9	37165:23 37171:21
account 37090:23	37183:12	37092:4 37093:7	animations 37097:21	37171:22
37101:11 37124:2	adjournment 37089:25	37109:1,23 37119:18	37100:14	apples 37172:3
37134:22 37149:5	37096:24 37141:4	37126:24 37127:10	Annandale 37028:4,11	application 37165:23
37152:19 37158:18	37142:2 37144:7	37134:3 37142:8	37044:2 37045:6	applies 37049:17
	37161:1,3	37148:8 37151:12	37049:1 37081:12	37056:10 37104:25
	ADJOURNS 37097:1	37157:25 37158:7	37083:10 37104:5	37120:13 37148:19

<p>37148:21 37166:22 apply 37032:4 37045:17 37049:16 37060:24 37151:13 37178:20,23 37181:13 applying 37148:16 appointed 37088:10 appointment 37027:22 appreciate 37061:6 appreciated 37102:22 37143:19 appreciating 37085:25 appreciation 37027:10 37066:8 37118:17 approach 37050:8 37062:23 37065:17 37157:1,15 37181:22 approached 37050:1 37050:19,20 approaches 37107:4 37131:8 approaching 37108:7 37108:17 appropriate 37064:3 37090:8 37150:3 37153:18 37174:9 37175:9 appropriateness 37066:9 approve 37134:13 approximately 37147:22 arbitrary 37164:21 arbitrators 37088:7 arc 37039:11,12,15,17 37039:18 37099:16 37101:12 arcs 37097:24 37100:17 area 37046:21 37057:1 37106:17,17,19 37159:10,23 37183:4 37183:8,11 Aren't 37092:23 argue 37070:20 37088:9 argued 37065:14 37153:17 arguing 37087:8,9 argument 37098:18 37167:21 37168:1 arguments 37153:11 arises 37182:5 arising 37180:13 armed 37056:17 37067:4 37082:8 37092:13 37117:17 37132:13 37143:20 arming 37107:2 arms 37047:16,18 37050:17 37051:7 37060:16 37079:12 37096:14 arranged 37068:25 arrest 37036:12</p>	<p>37037:12 37052:5 arrested 37050:1 37148:19 arresting 37098:11 arrests 37148:19 arrive 37031:2 arrived 37074:21 37096:13 37146:22 arriving 37058:7 article 37054:18 37055:16,17 37141:12 articles 37141:8,21,23 37142:19 ascertain 37144:1 ascribe 37160:22 asked 37031:6 37039:20 37043:3,12 37046:12 37068:4 37070:16 37074:5,9 37077:10,18 37081:3 37082:4 37084:16 37099:13 37126:20 37139:25 37150:7 37156:25 37162:22 37163:17 37170:16 37179:19 asking 37036:11 37037:3 37064:24 37071:20 37075:5 37118:12 37119:1 37131:25 37161:13 37179:22 aspect 37058:17 37124:2 37135:22 37156:16 aspects 37066:18 assess 37153:13 assessing 37040:21 assessment 37034:17 37040:16,20 37043:19,21,25 37044:18 37045:9,20 37045:21 37049:11 37051:8 37062:8 37064:21 37065:4,12 37090:12 assessments 37034:14 37041:21 37065:25 assigned 37045:3 37125:18 assigning 37045:8,19 assist 37050:3,13 37102:3 37122:25,25 37125:6 37131:7 37133:11 37144:18 37168:2 assistance 37031:3 37179:8 assisted 37125:3 assists 37128:17 37167:24 associated 37043:18 associative 37138:19 37138:23 37139:1,18 37141:6 37142:5</p>	<p>assume 37040:2 37113:19,20 37147:22,23,24 37148:1,6 assuming 37041:7 37149:25 assumably 37168:25 assured 37032:24 ate 37097:4 atmosphere 37089:21 37096:21 attach 37085:2 37172:9 attached 37044:8 37076:4 37162:7 attack 37058:11 37059:21 37098:16 37098:25 37148:1 37150:1,24 37169:17 37169:22 37170:1,19 37170:19,21,22 37181:25 attacked 37030:25 attacker 37154:11 attacking 37059:24 37171:15 attempt 37038:20 37060:12 37061:24 37064:18 37155:24 37157:11 attempting 37109:20 attempts 37086:12 37091:10 attend 37089:3 attending 37053:19 attention 37103:6 37138:7 attested 37107:7 attitude 37088:22 37172:8 37179:10 37181:2 37182:14 attributed 37056:6 37169:25 audible 37105:11 auditable 37035:4 37110:3 37118:24 37119:5 August 37033:19 37034:2 37035:19 37056:23 37067:1,16 37069:22 37070:3 37090:14 37094:11 37109:6 37113:14 37129:25 37130:2 37140:19 Australia 37033:9 author 37171:4 37173:22 authored 37170:9 authorised 37064:16 authorising 37063:23 authorities 37123:16 authority 37054:11 37076:11 authors 37055:17 auto 37137:22 37138:5 automatic 37134:9,17</p>	<p>37134:20,21 37135:9 37137:1,20,21 37138:1,3 automatically 37134:4 avail 37123:4 available 37027:24 37033:14 37053:12 37055:18 37067:15 37085:14 37099:14 37103:3 37107:5 37108:25 37109:15 37129:15 37143:21 37144:25 37145:2 37151:14 37180:18 average 37131:16 37133:5 averages 37130:18 37133:4,17 averaging 37130:20 avoid 37090:16,18 37091:18 37093:8 37117:4 avoiding 37093:20 aware 37033:16,23 37034:2,9,11 37039:6 37039:16,18 37064:6 37065:5,15 37070:25 37072:5 37076:17 37090:19 37091:4 37099:22 37111:9 37112:16,20 37118:2 37132:12 37135:14 37135:18 37155:4 37156:22 37157:9,12 37157:13 37163:5 37167:3 awry 37175:8 axe 37065:11</p> <hr/> <p style="text-align: center;">B</p> <hr/> <p>back 37035:4,8 37052:17 37058:1 37064:23 37065:1,3 37067:25 37069:10 37069:14 37075:2,12 37081:11 37082:13 37087:20 37090:10 37092:10 37096:2 37098:19 37128:13 37132:7,8 37139:11 37144:14 37164:4 backed 37078:2 37157:3 background 37077:19 backlog 37128:7 bad 37095:5 badly 37175:8 37176:23 ballgame 37124:5 ballistic 37140:10 ballistics 37121:2 37159:12,12 BALOYI 37039:5 banana 37168:15 barbed 37039:12,15,17 37099:8 37108:7</p>	<p>37174:22 37175:5 bargain 37094:24 bargaining 37094:25 37096:7,9 barrier 37098:7 37116:19 37117:4,11 barring 37151:15 base 37110:3,5 37125:9 37131:23 37132:25 37133:18 37137:16 37137:17 37157:18 37168:19 37172:2,7 based 37044:19 37048:15 37075:6,7 37139:1 37145:14 37149:18 37173:12 basic 37127:17 37137:6 37163:23 basically 37123:2 basing 37073:12 basis 37039:1 37040:24 37045:1 37071:20 37073:14 37093:3 37103:14 37142:9 37150:17 37154:21 37169:7,9 37171:10 37171:15 basket 37166:22 bat 37128:25 beach 37177:13 bear 37073:11 37094:8 bearers 37095:5 Bearing 37103:21 becoming 37168:11 37169:2 beef 37108:18 beer 37087:1 beg 37055:6 37178:22 37180:11 beginning 37027:4 37074:9 37097:22 37157:19 behalf 37095:15 behave 37057:11 37063:2 37136:18 37180:8 behaved 37048:13,13 37176:23 behaviour 37056:7 belief 37047:13 37067:7 37163:6 believe 37031:12 37051:4,5,5,18 37076:9 37097:16 37158:16 37178:18 believed 37050:21,22 37050:24 37069:23 bell 37139:11 belong 37135:6 37177:17 belonged 37118:8 bend 37114:25 bending 37102:24 37160:15 beneficial 37102:24 benefit 37100:10</p>
---	--	---	--	--

<p>37101:1 best 37044:4 37095:20 37109:15 37126:17 37155:23 37160:5 better 37045:15 37061:13 37085:18 37129:12 37150:25 37165:15 37168:16 beverage 37081:10 beyond 37062:13 37064:12 37076:5 37097:8 37164:8 big 37065:23 37080:3 37093:5 37128:13 bigger 37092:1,2,2 biggest 37131:13 binders 37141:17 bishop 37090:21 37091:4 37093:24 37096:13 bit 37045:23 37085:13 37086:19 37088:17 37097:3 bite 37168:22 bits 37070:16 37177:4 Bizos 37178:15,16,22 37178:25 37179:3,11 37179:12,13 37180:1 37180:9 blame 37048:3 37179:14 blank 37167:6 blanket 37135:9 blatant 37067:24 block 37040:12 37061:11,19 bloodshed 37065:12 blowing 37116:9 board 37125:18 bodily 37128:12 boekdele 37049:5 boggles 37132:23 bon 37183:2 book 37038:10,12 37124:15 37171:21 books 37038:9 37141:8 bottle 37137:12 bound 37027:3,6 37101:6 37144:10 Brazil 37131:5 breach 37108:8 break 37050:7 37055:21,21 37115:24 breakdown 37163:11 37164:6 37166:8 breaking 37065:2 breath 37160:17 breathing 37131:20 breeze 37116:9 bridge 37156:3 brief 37115:1 briefed 37064:6,20 37113:7 briefing 37037:17 37039:8 37041:12</p>	<p>37042:20 37081:6 37112:19 Brigadier 37042:23 37043:1 37049:1 37069:3,3,9 37098:9 37100:23 37104:1 37175:4 bring 37094:7 37095:1 37096:19 37137:19 bringing 37124:19,20 37129:5 broadly 37147:18 broken 37049:25 brought 37046:14 37057:10 37073:11 37139:24 37146:25 budgetary 37102:1 Budlender 37036:11 37161:13 build 37046:5 37053:5 37063:16 Building 37062:2 built 37074:16 bulk 37129:22 bullet 37140:8 37180:15 bullets 37046:20 37050:23 37051:4 37077:8 37140:17 bulls 37060:18 bunch 37130:7 burner 37128:13 burnt 37053:1 burst 37134:21 37138:1 business 37168:12 37176:4 busy 37053:18 37073:2 37124:23</p> <hr/> <p style="text-align: center;">C</p> <p>C 37181:12,14 Calitz 37028:11 37043:1 37069:3,3 37098:9 37104:1 37175:4 Calitz's 37100:24 call 37028:25 37041:15 37075:15 37085:8 37093:21 37098:23 37100:12 37112:13 37123:24 37130:12 37139:1 37144:15 37166:7 37169:15 37171:16 37181:16 37182:20 called 37033:21 37039:9 37054:18,23 37067:24 37079:5,14 37080:12 37087:16 37097:15 37134:16 37138:19 calls 37080:12 37105:1 37107:23 37111:11 37159:15 call-up 37028:12,17,18</p>	<p>37029:1,6,22 calm 37091:10 CALS 37111:7 37129:24 camera 37100:15,15,19 37100:21,23 37102:17 37103:9,12 37145:4,10,25 cannon 37110:4 37111:5,8,22 37112:23 37113:6,8 37113:10,12 cannons 37108:23,24 37146:7 canon 37046:20 37109:6,7,9,19,24 37110:19 canvass 37156:17 canvassed 37046:2 can't 37046:7 37048:3 37082:19 37086:7,7 37087:17,18 37096:7 37114:1 37118:19 37119:18 37123:7 37125:16 37134:25 37135:8,24 37140:8 37140:18 37141:2 37142:16 37159:24 37160:9 37170:16 37172:21 capabilities 37057:13 37058:21 capable 37051:2 37136:20 capacity 37072:22 Captain 37140:15 capture 37038:20 37117:25 captured 37145:10 car 37092:12 37132:22 cards 37176:4 care 37095:22 careful 37049:14 caring 37174:2 carried 37066:17 carry 37040:13 37056:1,3 37059:13 37059:16 37061:4 37132:1 37146:13 cartridge 37119:23 37120:1,4,12,14 cartridges 37120:3,8 cascade 37139:10 case 37098:21 37099:1 37120:14 37125:17 37130:2,3 37157:8 37164:4 37165:2 cases 37056:22 37107:7 37120:12 37128:12 37173:10 37181:9 37182:20,21 catastrophe 37093:4 catch 37134:17 caught 37103:12 cause 37045:22 37094:21 37106:16</p>	<p>37175:25 37177:16 37177:19 caused 37051:13 causes 37114:12 37115:15 37175:15 causing 37048:20 cautioned 37043:17 caveat 37153:8 cease 37105:1,14 37107:19,20,21,23 37150:14 37154:19 CEES 37027:7 37097:11 37144:11 central 37063:21 37064:19 37127:23 centralised 37063:12 centre 37058:11 37104:2 37159:22 certain 37051:2 37063:1 37066:18 37086:5 37168:18 37174:15 certainly 37068:15 37077:6 37101:17 37102:5,11 37182:7 certainty 37041:5 37165:2 chain 37033:10 Chairman 37178:16 37179:15 37180:9 challenged 37058:13 chambers 37180:24 37181:15 chance 37061:4 37070:18 37090:24 37091:14 37092:2 37100:5 37102:19 37104:7,9 37131:21 37133:24 37151:1 chances 37132:8 change 37064:1 37109:6 37123:24 37124:19 37148:8 changed 37055:5 37148:2 37155:19 changes 37124:5 37148:7 changing 37046:8 channel 37061:11 37125:7 characteristics 37053:11 37058:4 37062:1 charge 37092:17 Chaskalson 37101:22 37101:24 37155:14 37155:17 37156:1,7 37156:10,12 Chaskalson's 37155:12 check 37035:13 37134:19 checked 37100:11 checking 37032:18 cheque 37167:6 chief 37053:10,22 chip 37096:7,9</p>	<p>chips 37094:25 choice 37137:21 choices 37080:7 choreographed 37062:23,25 circumstances 37048:9 37049:11 37077:20 37124:13 37127:5,9 37129:3 37133:25 37134:1 37136:3 37150:4 37154:24 37155:7 37166:10 37182:19 circumstantial 37166:4 cited 37130:14 civilians 37163:13 37165:7,9 37166:9 claim 37111:1 37142:22 37163:21 claimed 37110:25 claims 37030:25 37120:8 clam 37124:7 clarification 37030:22 37039:6 37059:15 37061:3 clarifications 37086:2 clarify 37130:17 37162:2 clarity 37072:4 class 37136:13 37168:13 clear 37041:20 37085:7 37085:8,11 37088:25 37093:6 37158:1,8 37163:25 Clearly 37110:5 clinical 37133:25 close 37052:13 37128:4 37150:25 37154:12 37154:16 37155:8 37167:8 closer 37154:11 closes 37114:12 closing 37058:20 cloud 37133:1 37147:13 37148:10 37148:13 37149:7,21 37151:23 37152:7,15 37152:15,17 37153:25 37154:1,2 clouds 37133:5 37149:15 club 37177:18 clue 37130:5,5 clued 37125:19 coffee 37081:10 coincidence 37031:19 coincidences 37031:20 coincides 37118:18 collateral 37159:16 colleague 37078:14 37121:10 37143:2,8 37180:14 colleagues 37057:23 37078:13 37148:3</p>
---	--	---	---	--

<p>37179:17 37182:18 collection 37120:5 collective 37071:25 Colonel 37028:15 37038:15 37039:4 37042:1 37044:11 37047:6 37068:23 37069:2 37099:22 37156:25 37158:1 combat 37143:21 combined 37119:1 come 37031:10 37035:4 37046:7 37053:3 37058:13 37068:20 37070:25 37082:13 37085:10 37087:20 37088:7 37094:15 37099:6 37100:11 37102:2 37103:7 37110:20 37114:24 37117:22 37123:13 37123:25 37124:15 37129:2 37132:21 37140:25 37146:24 37147:25 37150:24 37168:18,19 37177:14 37181:4 37182:2 comes 37030:15 37058:16 37062:7 37071:5,8 37092:25 37131:12 37139:11 37149:21 37152:14 37164:4 37168:20 37170:20 comfort 37055:21 comfortable 37052:6 coming 37031:5 37085:7 37095:6,6 37117:8,8 37147:22 37149:25 37153:5 37169:19 37182:16 command 37063:15,21 37076:19 37100:13 37101:2 37107:20 37136:8 commander 37103:14 37104:15,16 37144:15 37145:11 37145:14 37146:3 commanders 37028:16 37042:23 37063:9,23 37064:5,14,20 37100:16,18 37101:5 37102:16 37103:22 37114:10 37115:10 37144:16,19 commander's 37104:14 commencement 37112:19 37113:10 comment 37094:1 37101:11 37156:25 commission 37027:2 37030:2,16 37031:17 37035:20 37036:8,19</p>	<p>37037:7 37038:14 37049:22 37055:22 37061:25 37066:13 37066:22 37070:6 37080:11 37082:18 37085:1,16,19 37086:12 37087:3 37090:13 37092:25 37097:1,1 37100:9 37101:19 37109:22 37113:5 37125:3,6,21 37125:24 37127:3 37128:15,18 37130:18 37133:6,11 37144:8,8,9 37161:4 37161:4,5 37164:20 37167:23,25 37168:4 37168:24 37169:24 37172:8 37179:9 37183:12 Commissioner 37042:3 37049:4 37055:4,11 37061:7,17 37062:5 37062:16,19 37073:6 37073:25 37074:4 37076:20 37077:1,14 37079:9 37080:10 37081:25 37083:21 37084:24 37085:12 37089:17 37097:13 37100:4 37102:11 37103:21 37121:8 37128:19 37136:24 37146:18 37154:8,15 37155:12 37156:5,9 37156:11,13 37183:5 37183:7 commissioners 37073:6 37073:8,24 37077:22 37078:4,21 37167:1 committee 37036:20,20 common 37092:3 37148:21 37149:17 communicated 37088:3 37181:1 37182:13 communicating 37058:7 communication 37041:17 37104:3 communications 37177:20 communities 37080:5 community 37057:6 community's 37146:5 compare 37172:3 compared 37143:15 37165:7 comparing 37059:18 37089:5 comparison 37059:18 37105:11 comparisons 37086:3 competence 37032:17 competing 37123:16 37126:2 compile 37127:25</p>	<p>compiled 37110:5 37118:9,10 complement 37061:15 complements 37041:5 complete 37153:22 completely 37086:20 37087:10 completing 37039:15 complex 37037:16 complexity 37063:14 complimentarity 37130:23 component 37135:18 37135:21 compounded 37057:17 comprehend 37086:5 comprehensive 37097:19 computer 37106:14 conceded 37047:6 concept 37035:22 37036:20 concepts 37086:2 37172:5 concern 37031:21 37061:25 37130:24 concerned 37037:1 37038:10 37041:7 37056:2 37113:12 37118:20 37125:22 37133:16 concerns 37136:1 concert 37177:13 conclude 37044:19 concludes 37158:16 conclusion 37158:15 37167:2 condemned 37062:15 37178:4 conditioned 37046:17 conditions 37034:4 37096:11 conduct 37048:9 37066:25 37067:9 37103:20 37174:4 conducted 37096:11 37163:16 conducting 37125:14 conduit 37095:2 confess 37105:25 confidence 37136:18 configuration 37039:9 37039:14 37057:18 confine 37090:6 confined 37035:7 confirm 37105:15 37144:17 confirmed 37140:7 conflict 37067:4 37087:12 37170:20 confront 37058:20 37138:14 confrontation 37049:20 37051:10 37051:11,14 37067:5 37154:18</p>	<p>confrontational 37056:15 37091:20 confrontations 37062:9 37062:10 confronted 37051:21 37082:17 37117:7,17 37118:15 37128:5 37132:13 confronts 37136:19 confused 37110:8 37125:13 confusion 37095:8 37127:22 connection 37136:13 37181:23 conscience 37057:8 37178:1,6 conscious 37111:15 37137:1 37143:10 37167:25 consecutively 37099:8 consequence 37128:15 consequences 37076:4 37082:17 37093:17 37123:7 37124:7 37135:9 37174:6 consider 37044:7,13 37045:19 37049:10 37056:21 37070:17 37090:13 37091:17 37094:14 37124:2 37125:20 37156:19 37157:24 37178:17 37180:25 37181:3 37182:5 consideration 37075:7 considered 37125:17 37126:6 considering 37117:2 consistent 37090:15 37153:1 consistently 37113:23 consists 37073:4,5 conspire 37063:19 Constable 37133:9,10 37133:10 constables 37124:5 constitute 37043:19 37123:23 constitutes 37031:23 Constitution 37076:25 constitutional 37092:25 constructive 37091:11 37091:22 consult 37029:10,11,13 37029:16 consultation 37179:17 consultations 37029:24 consulted 37028:3,10 37029:9 contact 37117:4 contacted 37104:5 contain 37058:18 37108:15 37111:24 37141:18 37157:11</p>	<p>contained 37030:1 37033:14 37038:12 37141:19 containment 37057:16 CONTD 37027:8 37097:12 37144:12 contemporaneous 37037:22 37040:1,24 contemporary 37057:2 37080:1 contend 37111:4 37133:4 37134:24 37149:7 37154:20 37163:9 content 37165:16 contention 37066:20 37107:2 37115:15 37119:7,10 37121:25 37131:24 37140:10 37150:10 37151:10 37172:2 contentions 37107:18 contested 37049:19 context 37032:4 37102:20 37155:3 37174:5,5,20 37175:6 contextualise 37070:18 contingency 37161:13 continue 37093:24 37094:21 37159:20 37161:6 37171:6 continued 37027:23 continuing 37150:17 contradict 37126:5 contradiction 37063:11 contrary 37059:23 37113:1 contribute 37113:13 control 37051:23 37055:17 37062:14 37063:12,21 37064:19,19 37076:6 37076:23 37124:21 37137:15 37165:24 controlled 37062:13 convened 37079:16 convenient 37141:5 37144:4 conversation 37033:4 37044:1 37096:22 37121:7 convey 37122:14,16 37174:9 convince 37046:20 37122:8 cordon 37061:11 37094:6 core 37091:21 corner 37097:24 37114:12 corners 37032:16 corporate 37095:9 correct 37028:11 37059:6 37062:23 37088:21 37108:20 37109:22 37113:20</p>
---	--	---	--	---

37116:2 37120:10 37142:12 37146:8,10 37158:20 37176:19 37178:25 corrected 37068:24 correctly 37039:3 37125:16 37179:9 correlation 37128:4 correspondence 37053:19 corridor 37031:11 corroborate 37033:17 cost 37072:20 37100:12 costing 37072:23 costs 37090:16 37093:9 couched 37180:21 couldn't 37043:6 37089:7 37090:22 37170:18 counsel 37055:22,23 count 37165:15 37167:10 countenance 37046:2 37065:20 counter 37058:18,19 37076:15 37107:13 countries 37080:17 37082:9 37128:4 country 37032:6 37071:2 37084:10 37092:8,14,15 37131:4 37164:17 37165:10 37178:8 37183:1 couple 37087:19 37088:1 37150:1 course 37027:4 37029:22 37031:16 37033:11 37038:4 37039:14 37052:13 37052:16 37053:5 37058:25 37069:21 37073:22 37074:8 37075:6 37077:9 37078:12 37081:19 37082:20 37086:21 37098:14 37108:23 37110:16 37111:11 37111:16,17,20 37112:5 37113:15 37115:3 37120:13 37121:1 37126:16 37128:25 37133:8 37144:24 37146:4 37153:24 37170:21 37172:6 37181:21 court 37122:15 courts 37087:12 cover 37140:4 37159:6 37160:3,3,4 covered 37036:11 37120:24 co-ordinate 37036:6 37037:13 co-ordinated 37040:1 crash 37111:11,16,20	37112:5 create 37061:11 37063:10 37129:8 37136:6 created 37038:6,20 37091:7 crew 37110:4 37112:23 37113:8 crime 37032:7,8 criminal 37123:23 37132:13 37148:17 37165:3 critical 37104:12 37114:11 critically 37052:8 criticise 37175:10 criticising 37173:2 criticism 37063:4 37078:13 cross 37061:4 37156:3 cross-examination 37027:8 37043:16 37059:12 37097:6,12 37108:3 37121:15 37144:12 37147:11 37163:20 37180:14 cross-examine 37178:21,24 crowd 37054:18 37055:17 37057:17 37108:25 37115:18 37143:12 37148:2,7 37148:11 crucially 37057:16 cuff 37115:22 culminating 37163:12 37166:8 cup 37081:10 current 37057:13,18 37058:21 currently 37132:9 curve 37098:3 37139:11 customary 37145:21,23 cuts 37097:24 D daadwerklike 37102:6 37102:8 damage 37105:24 37159:16 damaging 37106:2 damndest 37091:17 danger 37122:7,11 dangerous 37065:19 37067:17 37139:15 darting 37140:2 37142:22 data 37130:19 date 37031:25 37044:25 day 37031:14,18 37033:3 37052:24 37056:10 37068:11 37076:13 37078:16 37116:9 37136:3	37140:3,3 37178:1 days 37068:10 37077:14 37080:10 37087:20 37091:9 DDA 37098:23 dead 37031:13 37059:2 deal 37047:22 37051:20 37057:19 37057:21 37058:22 37061:18,21 37072:16 37079:25 37097:3 37098:24 37135:8 37141:8 37149:15 37155:22 37177:1 dealing 37040:25 37059:17 37065:13 37076:1 37138:18 37146:15 37153:25 37163:3 deals 37109:5 37146:15 dealt 37039:11,12 37048:11 37146:16 37147:12 death 37044:23 37045:4,22 37048:20 37049:17 37051:12 37051:14 37062:15 37066:24 37067:24 37070:2 37080:6 37107:8 37127:18 deaths 37158:15,17 37160:9,20 debate 37077:5 37088:13 37090:11 37098:20 37101:22 37114:23 37155:22 deceased 37031:8 decentralise 37063:15 decibel 37105:13 37107:13,16 decibels 37105:4,6,23 37106:16 decide 37046:9 37050:25 37062:1 37069:4 37071:4,11 37075:25 37093:16 37102:22 37177:15 decided 37042:4,5 37066:2 37074:14 37091:6 37098:15,15 decides 37062:11 deciding 37053:6,6 37076:3 decision 37034:1 37048:23 37049:3 37063:24 37064:8 37070:7 37071:5 37072:6 37075:18,24 37076:11 37078:14 37078:20 37081:5,16 37081:23,24 37082:1 37090:10,14 37094:13 37137:1 37146:18 37173:8 37181:16	decisions 37063:15 37064:16,23 37104:12 decline 37067:18 defend 37060:6,10,15 37060:16 37098:25 defending 37050:14 37060:7 define 37175:12 defined 37170:21 definitely 37059:10 37071:3 37075:21 37092:20 37162:18 definition 37136:15 37142:6 definitions 37037:12 definitive 37075:5 degree 37063:7 delay 37094:13 37124:13 deliberate 37163:13 37166:9 deliberately 37138:3 delivered 37069:1,9 demands 37067:19 democracies 37082:12 democratic 37071:1 37075:17 37076:8 37091:13 demonstrate 37041:9 37041:24 demonstrated 37057:25 37071:22 37119:9 demonstration 37092:15 demonstrators 37116:20 denial 37106:17,20 denied 37050:24 denies 37069:3 deny 37061:10 dependent 37116:8 depends 37116:5,6,7 37150:18 deploy 37037:20 37091:19 37116:11 deployment 37036:2 37039:13 37099:8 37115:25 37177:21 deputy 37071:24 37073:6 37166:5,6 derails 37087:9 describe 37029:25 37030:6 37034:19 37035:6 37054:23 37089:6 37121:20 37175:11 described 37030:24 37034:14,17 37135:12 37176:16 describes 37112:4 37141:12 describing 37088:18 37122:16 description 37029:7	37120:18 37127:2 deserve 37166:17 design 37157:18 designed 37137:24 37138:4 desire 37063:21 desperately 37096:18 despite 37168:6 destruction 37034:6 detail 37036:5,13 37039:24 37040:17 37040:19 37058:15 37114:18,20 37121:21,23 37122:5 37123:1 37127:9 37130:6,6 37133:15 37147:17 detailed 37035:21 37127:14 detailing 37036:12 details 37127:4 detectives 37127:24 determine 37066:15 37160:20 determined 37034:7 develop 37114:7 developed 37164:25 develops 37095:12 device 37106:10,11 dialogue 37091:11,23 37094:22 37096:6 Dicks 37111:16,20,24 37112:5,13,17 dictate 37064:13 didn't 37042:3,12 37043:3,23 37044:13 37086:10 37088:14 37088:15 37095:22 37115:17 37119:16 37121:9,14 37140:12 37164:2,9 37172:18 37172:18,19 die 37132:14,14 died 37067:2 dies 37177:23 differ 37092:5 37168:18 difference 37102:13 37115:19 differences 37056:13 37115:6 different 37030:6 37036:5,10,16 37037:9 37039:25 37040:17 37044:25 37060:4 37063:11,20 37064:15,20 37075:8 37091:11,12 37098:6 37099:15 37100:24 37129:4 37130:22 37154:1 37159:11 37166:13 37167:24 37168:14,21 37177:5 37181:7,7 differentiate 37107:4 differently 37082:10
--	--	--	---	---

<p>differs 37128:23 difficult 37040:19 37048:21 37116:10 37127:6 37129:8 37132:6 37172:22 difficulties 37102:1 37152:24 37156:2 difficulty 37101:25 37146:3 37149:2 37155:18 37177:7 dimensions 37071:4 diminish 37132:9 diplomatic 37083:24 37084:1,2,19,20 direct 37064:19 directed 37095:12 37170:14 direction 37077:2 37079:23 37085:24 37101:12 37103:6 37114:19 37115:17 37115:19,20 37116:8 37116:24 37140:20 37140:23 37143:3,25 directions 37080:7 37159:24 37160:4 directly 37180:13 dirty 37131:9 disagree 37034:25 37087:22 37088:12 37091:25 37160:13 37167:15 37168:11 37169:1 disagreement 37162:1 37167:15 37168:7,23 disagreements 37168:6 disappear 37058:11 disappointed 37166:13 disarm 37036:12,25,25 37050:9,19,20 37052:5 37060:12 37065:9,11 37068:4,7 disarmament 37044:22 disarmed 37048:12 37050:1 37060:11 disarming 37098:11 discharge 37180:17 discharged 37113:22 37117:20 discharging 37121:23 disclose 37128:21 discount 37160:13 discouraged 37088:25 37089:3 discuss 37030:4 37039:2 37042:10 37049:8 37075:25 37079:9,12,18 37089:14 37102:2 discussed 37038:18 37079:13 37087:20 37094:17 37146:19 discussing 37065:7 discussion 37042:19 37043:1,22 37044:5 37056:19 37059:10</p>	<p>37065:8 37071:7 37074:6 37080:11 37082:7 37084:4 37087:18 37089:8,12 37093:15 discussions 37055:22 37082:23 37083:9 37084:24 37087:5,6 dispersal 37041:16 37046:19 37049:24 37103:5,8 37114:17 37117:6 disperse 37036:12,25 37052:5 37068:3 dispersed 37048:12 dispersing 37098:10 dispute 37068:22 37069:22 disputed 37047:11 37052:22 disregard 37067:9 disrupted 37097:15,16 disruption 37098:6,17 37098:20,22 37099:7 37099:21 37100:1 dissimilar 37120:19 distance 37057:16 37107:1 37131:20 37132:14 37135:14 37150:19 37154:13 37155:10 37157:3 distinct 37053:4 37126:4 distinction 37056:12 distinctly 37159:11 distinguishing 37052:19 37135:17 distracted 37132:25 distracts 37175:16 distress 37175:15 distribute 37096:20 distributed 37095:20 diverge 37098:1 diverting 37102:25 divulge 37084:18 divulged 37081:7 dockets 37125:8 doctrine 37066:8 37137:16,17 37163:4 37163:7,21 document 37027:24 37036:4 37040:1 37161:15 37162:3,10 37162:14 37164:23 37176:14 37177:3,9 documentation 37037:8,22 37040:24 documented 37041:4 37043:20 37058:1 documents 37038:5,7 37055:19 doesn't 37042:18 37044:4 37094:16 37119:14 37128:19 37130:19 37132:16 37134:4 37135:10</p>	<p>37137:19 37142:8,16 37143:1 37165:1,24 37167:16 37168:7,22 37173:18 doing 37028:5 37040:16,18 37043:4 37048:3 37050:9 37062:4 37075:20 37092:16 37094:20 37095:4,15,16 37115:21 37124:22 37126:11 37148:11 37165:15 dolus 37173:25 don't 37041:25 37045:15 37047:4 37048:22 37050:4 37052:7 37084:14 37086:20 37087:7 37088:6 37089:2 37090:6 37091:8 37092:10,12 37114:9 37114:23 37115:7 37116:20 37118:19 37120:12 37124:8 37125:4 37127:4 37128:24 37129:14 37130:4 37132:25 37134:13,19,19 37136:1,6 37137:4 37139:9,16 37141:7 37142:7 37162:8 37165:16 37173:24 37174:4 door 37143:15 doors 37092:11 double-handed 37137:9 drafted 37170:15 dramatically 37132:3,9 37155:19 draw 37052:9 37103:10 37131:13 37136:9 drawn 37072:1 drills 37063:1 drinking 37081:11 drives 37100:21 drop 37132:3 37136:10 due 37126:16 dust 37147:13 37148:10,13 37149:15,20 37151:23 37152:7,15 37152:15,17 37153:25 37154:1,2 Dutch 37043:10 37102:6,9 37176:15 37176:17 37177:5,8 duties 37167:3 duty 37164:15 37167:9 dwaalspoor 37078:25 37079:19 dying 37095:23</p>	<p>eardrums 37105:24 earlier 37052:21 37081:4 37111:25 37146:14,16 earliest 37099:10,13 early 37027:10 37068:19 37074:13 37074:23 37077:10 37080:10 37122:3 Earth 37036:1,21 37037:19 37039:7 37155:16 eases 37059:10 easier 37177:7 east 37031:5 37157:16 easy 37096:10 economic 37072:19 37080:4 economical 37071:3 edition 37171:20 educated 37057:11 37085:18 education 37124:6 effect 37036:24 37114:3 37124:25 37150:6,16 37153:14 37167:1 37179:22 effectively 37035:1 37057:21 37078:8 37106:20 37113:13 37116:11 37124:21 37149:8 effort 37100:10 37125:22 37148:9 efforts 37140:12 Egypt 37062:10,14 eight 37096:1 37150:11 37151:11 37154:18 37183:10 eighth 37068:1 eight-round 37119:16 either 37029:9,18 37032:7 37042:12 37044:14 37086:13 37098:15 37118:20 37124:10 37137:20 37137:22 37146:20 37154:18 37168:7 elaborate 37057:14 37122:15 elected 37123:9 electrified 37092:12 element 37031:16 37064:13 37142:18 elements 37063:19,20 37075:21 37136:2 elevate 37164:18 elicit 37067:22 Embassy 37106:5 embodied 37154:22 37155:2 emotion 37122:17 emotional 37065:25 37122:10 37158:25 37169:14 37171:23 37172:1</p>	<p>emotions 37067:4 emphasis 37061:23 emphasised 37159:2 employ 37159:16 37165:13 empowers 37091:2 enables 37065:10 37104:18 encirclement 37039:10 37094:4 encounter 37033:20 37046:8 37127:23 endangering 37064:8 endeavoured 37090:20 37175:12 ended 37073:21 37079:8 endorse 37077:25 37081:24 endorsed 37074:8 enforcement 37076:20 37092:16 37122:12 37123:18 37135:10 37137:25 37144:2 37156:18 37157:23 37163:24 37170:23 engage 37032:2 37086:10,13 37088:24 37091:14 37093:2 37096:16 37123:10 engaged 37028:17 37065:7 37080:13,15 37091:3 37104:22 37130:13 engagement 37055:1,3 37055:7 37086:14,25 engine 37105:9 English 37173:14 37175:11,17 37176:17 37177:8,8 enjoy 37177:14 ensure 37048:1 37064:7 entail 37035:23 entails 37076:18 enter 37084:17 37087:8 37109:20 37177:16 entered 37153:8 enterprise 37080:3 37095:9 entire 37055:14 37153:20 entirely 37066:22 entirety 37038:12 entities 37064:20 entitled 37091:13 37121:12 37163:4 37179:18 entity 37072:10 entrusting 37041:11 37042:11,11 environment 37061:13 37061:14 37105:9 envisaged 37157:14 equally 37031:22</p>
E				
e 37156:16 37181:9				

<p>37056:10 equate 37100:16 37164:6 equipment 37048:5 37108:25 37177:1 equipped 37058:22 equivalent 37128:1 erring 37170:12 erroneous 37131:24 error 37171:9 erupt 37177:18 escalated 37072:14 escalation 37034:5 escorted 37059:25 especially 37083:1 37095:4 37115:14 37131:12 37137:1 37139:21 essence 37091:25 essential 37061:12 37092:5 essentially 37030:3 37034:18 37076:3 37142:6,14 37148:23 37151:15 establish 37125:1 37133:12 37142:17 37162:13,20 37164:13 established 37027:23 37030:15 37125:24 establishing 37146:3 euphemisms 37107:6 evasive 37084:21 evening 37073:18 event 37050:5 events 37033:10 37114:7 37158:19 eventualis 37173:25 eventually 37051:17 37159:23 eventuate 37091:8 37174:2 everybody 37079:15 everybody's 37101:2 exact 37155:23 37159:25 37164:23 exactly 37030:15 37037:2 37073:3 37095:23 37170:16 37177:9 examination 37061:5 examine 37163:19,22 examining 37080:25 example 37030:16 37038:8 37058:6,14 37062:9 37077:8 37120:6 37133:4,9 37141:19 37142:21 37165:6 37171:14 examples 37132:21 37169:16 exception 37170:22 excerpt 37153:22 excess 37105:23 37159:25</p>	<p>excessive 37169:20 37171:17,18,21,22,24 37172:7 37173:4,14 exchanged 37176:4 excuse 37152:15 excused 37180:11 executed 37030:3 execution 37164:22 executions 37055:16 executive 37071:9,18 37071:22 37072:11 37073:12 37075:20 37078:20 37080:20 37081:14 37084:19 exercise 37034:17 37044:18 37045:8 37076:6 37101:16 37103:20 37104:19 37104:22 37115:9 37133:11 37171:20 exert 37063:21 exhausted 37034:8 exhibit 37054:9,9,14,24 37055:9,25 37099:17 37100:9,10 37101:1,4 37101:8 37102:15 37103:10 37104:17 37108:15 37121:2,3 37161:19 exhibits 37028:21,22 37099:14 exist 37075:13 37107:1 37123:16 37142:16 37163:7 existed 37122:18 37149:6 existence 37035:24 37134:6 37155:21 exists 37106:19 37142:14 expand 37154:4 expect 37036:13 37046:9 37079:23 37085:13 37088:6,10 37107:3,20 37113:9 37127:15 37141:7 expectation 37049:23 37080:16 37122:14 expected 37064:17 37085:13 37091:13 37112:24 37115:25 37116:2 37180:4 expecting 37112:18 experience 37046:13 37052:2 37056:24 37082:8 37093:3 37122:11 37139:13 37158:25 37182:19 experienced 37077:21 37078:4 37169:19 experiences 37044:20 37044:24 expert 37032:5 37058:15 37085:1 37087:6,12,23,23 37089:4 37133:15</p>	<p>37160:12 37167:14 37167:19 37168:20 37168:20,23 37169:5 37169:8,16 37175:24 expertise 37087:15 experts 37078:14 37085:19,23 37086:11,13,25 37087:14,16,17,19 37088:7,10 37101:7 37130:22 37140:11 37167:16 37168:6,10 explain 37086:4 37094:16 37121:22 37131:17 37144:18 37144:22 37163:23 37169:25 37172:5,6 37181:4 explained 37039:1 37079:18 explaining 37181:7,8 explanation 37088:22 37122:22 37135:3 exploring 37106:9 exposure 37082:9 37138:12 37139:13 express 37027:9 37057:7 37084:24 expressed 37157:10 expresses 37173:5 expressing 37085:3 37145:21,22 37173:16 37179:9 expression 37079:2 37102:6 37173:25 37174:9 extend 37032:18 extensively 37046:11 extent 37078:21 37165:20 extra 37068:25 37069:8 37069:13,17 extracts 37038:9,11 extraordinary 37073:16,20 37075:12 37078:19 37079:6,15,16,18 extreme 37056:24 extremely 37102:15 eyewitnesses 37083:14 e-mails 37080:12</p> <hr/> <p style="text-align: center;">F</p> <p>face 37061:23 37071:10 37071:12 37072:4 37085:5 37126:18 37127:13 37134:2 37140:10 faced 37051:1 37075:21 facie 37048:6,17 37050:10 37127:7 37165:10 facilitate 37063:9 37163:1 facilitators 37095:2</p>	<p>facing 37125:12 37160:15 fact 37040:9 37041:9 37041:23 37046:6 37048:24 37055:24 37057:18 37066:15 37067:10 37069:25 37077:15 37083:15 37083:25 37087:2 37095:12 37099:6,7 37102:16 37103:15 37110:18,24 37112:8 37114:11 37115:16 37118:7,16 37119:9 37119:13 37120:14 37123:5 37125:11 37128:5 37133:5 37143:8 37146:24 37148:6 37149:11 37150:5,22 37151:8 37153:7 37159:18 37160:7 37170:12 37178:5 faction 37182:20,21 factor 37050:15 37052:19,20 37053:6 37093:16 37102:12 37102:20 37105:9 37121:12 37122:19 37146:20 37153:14 37153:15 37159:2 37182:4 factors 37047:9 37069:16,18 37077:6 37092:19 37104:11 37116:6 37153:12 facts 37049:7 37069:23 37078:10 37102:21 37119:25 factual 37169:6 fail 37180:17 failed 37041:21 37095:13 37104:17 failure 37057:25 37071:25 fair 37078:25 37165:4 37166:11 37176:8 fairly 37040:5 fairness 37053:16 37078:9 37105:2 fait 37042:2 fall 37122:21 37140:6 37148:4 37150:2 fallen 37150:6,23 37154:10 falling 37149:22 37151:3,22,22 37152:1,11,16,20 37153:13 37154:3 falls 37153:4 false 37111:4 familiar 37052:4 37147:11,16 familiarise 37162:9 far 37044:5,9 37056:2 37098:14 37118:23</p>	<p>37122:21 37129:21 37134:19 37141:18 37151:2 37159:13 fashion 37063:3 faster 37058:8 fatalistic 37094:13 faulty 37152:10 fear 37122:17,18 37138:8 feasible 37050:2,11 February 37027:20 37056:23 feedback 37032:25 feel 37087:7 37106:23 37143:1 feeling 37051:24 37088:18 felt 37070:4 fence 37092:12 FFF11 37117:15 37130:10 37138:17 FFF11A 37108:6 37158:13 37163:2 field 37042:22 37065:18 37145:10 37175:21 fields 37144:15 fifth 37067:11 fifthly 37094:7 fight 37047:18 37050:18,20 37051:6 37067:19 fighting 37091:24 37182:20 fight 37177:18 figured 37099:14 figures 37131:13 37132:12 final 37138:17 37167:13 finalise 37054:15 financial 37077:19 find 37064:14 37073:2 37076:9 37087:9 37092:3 37122:13 37126:16 37131:17 37141:9 37157:19 37159:6 37169:23 37171:19 finding 37049:10 findings 37125:6,20 37126:4,5 37128:18 37168:19 fine 37075:22 fine-tuned 37097:5 finger 37136:25 37137:6,10,12,16,17 finish 37046:23 37161:12 finished 37151:15 37161:12 fire 37048:19 37052:18 37105:1,14 37107:19 37107:20,21,23 37127:10 37131:15</p>
---	--	---	--	---

37131:22 37134:3 37135:10 37137:19 37143:3,9,13,24 37150:1 37151:5 37154:1 37160:3,4,4 37177:22 37182:2 firearm 37119:20 37120:7 37134:8 37135:13,15 firearms 37067:13,14 37117:15 37118:6,8 37119:8,9,11,22,25 37120:23 37121:12 37121:13 37131:12 37137:6 37142:20 37163:12,25 37165:17,19 fired 37069:8 37104:23 37114:18 37117:18 37117:21 37119:19 37119:24 37120:9,11 37120:19 37121:21 37122:1,7 37127:17 37130:19 37132:19 37132:22 37133:9,10 37133:10 37134:21 37140:5 37151:16 37154:19 37159:18 37180:16 37181:9 37182:3 fires 37137:24 firing 37136:25 37138:20 37142:6,7 37143:2,8,9,17 37152:3,21 37158:10 first 37030:7 37031:19 37034:4,22 37044:13 37044:19 37047:7 37048:10 37055:21 37063:25 37066:25 37070:23 37072:11 37085:10 37089:25 37094:2 37099:7,20 37100:1 37113:6 37114:8,20 37119:2 37123:11 37124:15 37124:17,17 37130:10 37132:4 37138:17,23 37147:9 37148:3,16 37149:5 37150:1,23,23 37151:3,3,22 37152:12,16,20 37153:4 37154:19 37157:19 37158:16 37168:13 37169:12 37169:21 37171:17 Firstly 37047:24 five 37067:2 37119:16 37134:22 37138:4 37161:1 37165:4 37171:22 37177:23 Five-minute 37161:2 fix 37145:5 fixation 37137:6 flashpoint 37092:21	flaws 37178:11 flow 37121:14 flush 37106:24 flying 37160:8 focus 37034:1 37133:1 37133:2 focused 37104:2 focusing 37100:23 focussed 37140:13 focussing 37091:25 folders 37141:20 foliage 37159:11 follow 37028:2 37063:2 37128:6 37161:21 37162:13 37165:20 followed 37030:13 37182:22 following 37045:4 37087:21,22 37088:11 37094:3 37151:6 37167:5 follows 37129:1 follow-up 37032:24 food 37095:20,24 37096:20 foot 37089:19 footage 37117:1,19,24 37118:14 37119:24 37143:21 footing 37085:25 37131:1 force 37031:24 37034:8 37062:13 37066:16 37067:1,8 37068:17 37071:4 37072:16 37076:3 37090:16 37093:9,12,20 37094:5 37136:16 37138:13 37142:12 37150:13 37156:19 37157:12,24 37163:4 37163:7,12,13,21,25 37164:14 37165:5,13 37165:17,19 37166:9 37171:20,22 37172:7 37173:4,11,12 forced 37106:3 37132:16 forces 37075:16 37115:16 37132:10 forcible 37044:22 forensics 37124:22 foresaw 37047:20 37069:12,12 37099:9 37174:6 foresee 37070:1 37155:21 37156:1 foreseeable 37066:23 37074:25 foreseen 37048:6,7 foresight 37066:13 37174:1 forever 37085:5 37092:5 37182:21 forget 37168:16 forgive 37046:23	37065:3 37105:17 37160:24 form 37038:22 37043:19 37058:2 37085:15 37091:10 formal 37124:20 37125:25 formally 37125:24 former 37053:3 37166:6 forming 37061:10 forms 37056:24 37057:2 37080:1 37092:6 forth 37038:19 37048:16 fortiori 37060:24 fortunately 37149:13 37177:5 forum 37065:6 37070:22 37071:7 37073:3,4,17 37075:15,25 37077:7 37078:10,15 37081:5 37081:15,23 37146:21 forward 37101:23 37183:4,7,11 found 37058:12 37090:21 37119:23 37120:13,14 37140:2 37160:11 37166:24 37172:13 four 37068:19 37078:4 37092:9 37110:11 37132:22 37152:7,12 37152:13 37159:23 37160:5 Fourie 37111:10 37112:2 fourth 37067:9 fourthly 37094:5 frame 37038:4 37139:6 37151:14 37154:20 frames 37102:18,18 framework 37085:24 frankly 37050:4 37053:16 37086:7 free 37092:18 37182:1 freedom 37077:1 freeze 37102:18 37139:6 frequency 37106:21 frequent 37138:12 frequently 37133:23 Friday 37074:13 37078:6 friend 37147:12 friends 37095:10 front 37031:4 37055:1 37113:22 37114:25 37140:6 37150:5,19 37152:2,2,11,21 37153:13 37154:3 frustrating 37130:7 full 37119:12 37134:17	37137:22 37138:1,3,5 37157:7 fully 37064:6 37134:3 37167:25 37176:4 function 37056:2 37136:20 funeral 37068:19 37069:13 37077:9 further 37033:6 37039:2,5 37052:17 37088:2 37090:12 37094:6 37101:22 37116:22 37138:6 37144:14 37163:22 37164:5 futile 37091:23 <hr/> G <hr/> gain 37104:19 gap 37058:20 gaps 37041:6 gather 37094:5 37150:9 gatherings 37029:23 gear 37058:9 general 37033:4,5 37043:17 37044:2,2,2 37044:3 37045:6 37049:16 37065:8,9 37065:24 37082:4 37083:9,9,18 37095:22 37104:5 37120:7 37122:5 37123:13 37139:24 37143:3,25 generalised 37046:13 generally 37107:5 generate 37105:5,5 generates 37105:22 generic 37030:18 genuinely 37088:11,12 geography 37159:17 German-made 37137:23 gesture 37107:24 getting 37091:10 37100:5 37124:18,23 37124:23 37168:2 give 37028:22 37033:21 37053:21 37055:25 37061:4 37066:20 37075:10 37076:25 37077:12 37083:11 37085:25 37086:4,17 37092:18 37098:9 37101:4,8 37106:23 37123:13 37124:4 37125:5 37127:4 37128:17 37131:1 37132:1 37133:18 37141:8 37145:8 37150:8 37153:4 37156:5 37159:12 37162:4 37165:1 37175:14 37178:12 37180:20 37182:17	given 37032:24 37038:5,11 37058:18 37070:18,19,20 37071:14,17 37079:19 37082:15 37090:17 37109:2 37110:15 37122:4,20 37122:22 37123:8 37126:23 37128:14 37128:16 37129:9 37130:8 37133:24 37142:5 37153:20 37154:4 37157:22 37161:20 37163:6,14 37167:22 37178:4,8 37179:21 37182:11 37183:2 gives 37041:5 giving 37085:21 37087:15 37102:15 37115:12 37157:5 37175:22 glad 37073:1 37167:2 37179:13 glory 37131:6 go 37034:16 37035:8,17 37042:19,22 37044:13 37047:5 37054:2 37055:24 37062:8 37064:12 37065:1,3,20 37071:5 37074:20 37076:7 37078:25 37079:19 37082:15 37087:5,19 37091:6 37093:14 37095:7 37098:2,15 37105:13 37106:11 37114:13 37135:21 37137:4,8 37138:6 37140:5 37147:20 37154:25 37159:4 37167:22 37173:23 37174:10 37175:8 37182:21 goes 37028:7 37076:21 37137:25 going 37028:22 37037:10,11 37041:12 37042:4,6 37043:18,22 37047:16,17,18 37050:6 37052:1 37053:21,21 37060:10,13,15,16,21 37064:17 37067:3 37069:7 37071:11 37074:18,19 37076:18 37078:5,23 37089:22 37091:11 37093:19 37094:10 37098:9,10,11,13 37101:24 37104:4 37105:2,3 37113:19 37118:18 37126:3,12 37143:23 37145:3 37159:6 37160:14
--	--	--	---	---

37169:7 37177:3 37179:23,25 37180:6 good 37027:10,12 37062:24 37063:3,4 37089:6 37104:7 37141:14 Google 37030:11 37036:1,21 37037:19 37039:7 37106:11 37155:16 governed 37165:22 government 37057:7 37071:19 37072:17 37076:22 37077:3 37082:14,16 37092:23 37178:5 go-ahead 37082:15 grab 37137:8,12 grabbing 37137:14 grass 37140:6 grateful 37097:18 grave 37155:18 great 37070:5 37126:6 37155:22 37179:7 Greece 37062:10 grenade 37116:1,2 37118:18 grenades 37113:17,21 37113:24 37114:1,4 37114:19 37115:11 37116:3,14,18 grievous 37128:12 ground 37063:23 37064:2,5,21 37075:8 37078:16 37086:5 37092:3 37096:18 37099:11 37114:10 37124:24 37155:16 37159:18 group 37034:6 37049:18,20,24 37050:8 37051:20 37056:11,15 37058:19 37068:3 37095:10 37108:10 37109:21,24 37110:20 37111:6 37113:23,23 37114:2 37114:12 37115:1,20 37117:17,18,21 37118:3,7 37121:21 37150:19 37151:23 37177:19 37178:3 37181:12 groups 37049:25 37181:7 guarantees 37124:14 guard 37137:17 guerrilla 37058:10 guidance 37075:20 37076:10 guided 37075:19 guidelines 37027:22 gun 37085:4 37117:21 37119:24 gunfire 37105:13	guns 37117:18 37118:2 gunshots 37114:9 guy 37085:9 guys 37143:23 GW4A 37163:16 GW4B 37163:18 G20 37106:13 <hr/> H <hr/> hadn't 37093:22 37116:23 half 37038:3 37039:11 37039:17,17 37070:24 37092:8 37106:14,22 37109:13 37141:16 37183:10 halted 37157:20 hamper 37172:8 hand 37050:3 37079:11 37101:10 37126:12 37137:8,13 handed 37055:12 37074:18 handgun 37117:20 37140:2 handguns 37118:2 handle 37052:3 hands 37042:8 37095:21 hang 37042:21 37044:11 happen 37041:20 37042:4,12 37044:4 37044:14 37051:11 37060:13 37063:18 37082:18 37086:5 37088:13,15 37089:9 37102:5 37110:6 37124:11,12 37147:2 37157:15 37166:18 happened 37035:2 37038:8 37044:9 37051:22 37057:4 37063:17 37072:3,3 37073:3,23 37077:8 37082:6 37088:4 37098:14 37110:7 37121:17 37123:1 37124:11 37125:2,23 37128:2 37140:9,15 37140:18 37156:25 37159:3 37164:19 37165:6 37177:20 happening 37075:7 37090:19 37148:9 37157:6 happens 37087:19 37099:7 37103:12 37132:23,23 37138:14 37177:24 happy 37057:13 37093:13 37096:12 37175:14 37176:1,2 37179:5 hard 37076:9 37142:15	harm 37128:12 37154:23 37175:25 hasn't 37125:18 37126:6 37167:5 haste 37076:13 haven't 37112:3 37117:2 37160:21 37161:20 37173:8,9 head 37074:1 37077:23 37160:16 headlines 37092:22 hear 37082:10 37086:8 37094:17 37104:24 37105:16 37125:13 37147:9 37149:3 heard 37031:16 37070:22 37073:13 37081:4 37108:17 37119:18 37166:24 hearing 37159:7 hearses 37068:19 37069:13 37077:10 heart 37087:4 37091:5 heavily 37076:15 37117:17 heavy 37058:9 Heckler 37137:23 held 37030:6 37038:9 37041:12 37043:8 37073:17 37075:12 37075:23,24 37080:11 37108:20 37123:12 37172:15 37177:13 help 37032:23 37039:1 37075:10 37106:5 37122:24 37165:13 37168:1,3,4 37177:11 helpful 37097:21 37124:10 37141:9 helpfully 37059:11 helping 37081:21 helps 37083:15 Hemraj 37055:4,11 37059:15 37061:2,7 37061:17 37062:5,16 37062:19 37101:15 37102:11 37103:21 37128:19 37136:24 37154:8,15 37155:12 37156:5,9,11,13 37183:5,7 Hendrickx 37046:11 37088:20 here's 37141:19 hey 37043:3 he'll 37142:15 he's 37029:14 37031:13 37070:13 37074:11 37131:7,15 37143:9 37143:23 37164:24 37173:13 37175:23 37179:20 HHH37 37111:10 hide 37133:17 high 37032:23 37033:1	37063:7 37066:17,23 37067:5 37069:7 37075:6 37132:20 higher 37076:11 37160:10 37165:8 highest 37178:9 highly 37169:14 37171:23 37172:1 hill 37095:11 Hippos 37052:25 hire 37085:4 37089:7 history 37163:6 37164:9 hit 37131:22,23 37132:8 37135:16 37158:22,22 Hlongwane 37133:10 Hoek 37176:19 hold 37063:6 37072:5 37078:6 37108:17 37123:22 37137:5 37149:4 37151:5 37155:6 37181:5 holding 37183:4,7,11 holds 37027:22 holed 37158:2,8 Holland 37057:5 37079:3 37127:20 37128:23 37132:11 37167:10 37168:15 37168:16 37173:24 37176:20 37177:13 37178:2 home 37092:9 37095:7 37183:3 homelands 37053:3,3 homicide 37165:9 homicides 37164:17 honest 37161:17 37168:20 honestly 37087:8 hooligans 37176:16,22 37177:15 hope 37065:3 37072:9 37072:13 37095:19 37101:19 37105:25 37155:5 37167:24 hoped 37087:24 37088:13 horribly 37132:20 hose 37064:23 hot 37084:17 37106:24 37106:24 hour 37074:6 37079:14 hours 37127:21,25 house 37092:12 housekeeping 37027:16 37097:3 37161:11 houses 37145:4 HRC 37141:11 HRC's 37054:14 huge 37057:6 37102:12 human 37055:22 37066:5,12,21 37090:13 37092:24 37093:1 37100:9	37101:18 humanitarian 37159:15 humbleness 37133:14 humbly 37171:5 hurdle 37180:18 hybrid 37124:22 <hr/> I <hr/> icons 37036:2 37037:19 idea 37065:20 37074:22 37133:18 37159:12 identification 37162:23 identified 37161:14 identify 37100:13 37103:17 37149:3 37163:18 37177:17 identifying 37140:14 identity 37171:4 ignorance 37105:17 illustrate 37141:16 illustrated 37097:23 image 37036:1,3,21 37037:19,20 37039:7 37039:16 images 37039:20 37046:14 37139:6 imagine 37049:6 37065:14 37080:6 37082:14,19 imagined 37065:22 immediate 37143:24 immediately 37077:15 37150:25 imminence 37122:19 imminent 37122:9 37134:6 37142:25 37149:16 37180:16 impact 37151:5 impartial 37087:14 37169:16 37171:11 37173:19 37175:23 37176:8 impartiality 37167:17 37168:8 37169:6,8 37171:15 implement 37071:9,13 37074:15 implementation 37035:5 implemented 37040:19 37074:13,24 37076:13 37094:3 implementing 37042:14 implications 37178:7 implying 37041:18 importance 37080:4 37179:7 important 37056:21 37067:23 37079:21 37081:20 37102:20 37103:1 37106:8 37107:19 37108:24 37114:6 37115:13
---	--	--	---	--

<p>37126:1 37131:10 37146:22 37167:7 37178:17 importantly 37047:25 imposed 37048:24 impossible 37116:21 37138:2 impression 37149:19 37149:20 37151:24 improve 37131:18 improvisation 37063:9 improvise 37063:8 improvising 37062:25 37063:5 inaccuracy 37038:25 inadequate 37129:11 37177:1 inadvertent 37135:3 inadvertently 37134:21 37137:13 inaudible 37028:19 37062:21 37099:4 37106:4 37148:18 37180:19 37182:12 incident 37051:17 37057:4,8 37071:2 37072:13 37080:2 37127:22 37128:14 37128:24 37129:3,7 37129:11 37131:2 37139:13 37145:9 37164:2 37176:19 37177:13,22 37178:5 incidental 37158:19,20 37160:21 incidents 37033:19 37051:3 37075:14 37137:11 37163:5,8,9 37163:15,18,20 37164:1,9,18 37165:18 inclined 37040:25 37078:17 include 37030:24 37128:20 37169:16 included 37066:19 37101:3 includes 37162:16 including 37067:19 37161:18 incorrect 37108:21 37109:23 incredible 37122:10 incredibly 37106:24 indebted 37181:18 independence 37077:1 independent 37076:22 independently 37045:17 indicate 37037:20 37144:24 37167:16 37174:5,13 37179:14 37179:15 37180:24 indicated 37027:18 37060:20 37107:23 37111:7 37165:6</p>	<p>37167:6 37180:24 37181:14 37182:22 indicates 37049:6 37060:4 37108:10 37166:5 indication 37092:16 37099:10 37102:25 37163:10 37165:4,11 37170:18 indistinct 37177:14 individual 37030:17 37050:8 37136:23 37140:2 37149:7 37160:9 37167:3 individuals 37049:25 37092:23 37130:20 37134:25 37148:2,7 37160:22 induced 37127:22 industrial 37072:18 ineffective 37114:2 ineptitude 37134:24 inevitably 37091:19 infect 37154:23 influence 37032:17 37073:11 37151:4 informal 37084:8 information 37032:19 37032:22 37033:14 37033:18 37047:19 37047:20 37048:10 37048:16 37060:9,15 37067:12 37075:10 37078:2 37079:10,10 37079:21 37081:13 37083:4,15 37085:14 37109:15 37110:3 37118:11 37120:22 37125:8,9 37129:18 37129:21 37133:15 37133:22 37160:23 informed 37057:10 37085:22 37111:8 inherent 37093:10 initial 37039:10 37075:14 37127:23 initially 37127:19 37129:10 37138:5 initiate 37034:10 37086:12 initiated 37031:25 37032:2 injured 37177:24 injuries 37052:15,18 37160:11 37177:24 injury 37044:22 37045:4,22 37048:21 37049:13,16 37051:12,15 37066:23 37070:1 37080:6 37106:16 37107:8 37122:9 37127:18 37134:6 37143:1 37149:16 input 37162:2,14 inquire 37133:7</p>	<p>inquiry 37074:9 37125:11 37128:15 37133:6 inside 37103:22 37104:6 insiggewend 37043:10 insiggewende 37043:11 insight 37178:12 inspection 37097:4 37145:2 instances 37144:2 institutional 37166:8 instructed 37088:24,24 37119:22 instructing 37082:22 37083:7 instruction 37086:16 37089:17 37128:16 instructions 37114:10 instructor 37136:11 insufficiently 37064:22 insulting 37179:24 37180:6 integrity 37085:6,10 37124:16 intelligence 37047:15 37050:15 37060:10 37067:15 37094:6 intend 37034:18 37046:3,4 37121:9,14 37147:25 37156:15 intended 37036:3 37037:20 37098:6 37114:3 37115:20 37158:22 37170:19 intending 37176:4 intends 37066:13 intent 37117:3 intention 37035:5 37095:18 37116:7 37148:2,6,8 intentional 37128:11 37158:19,20 37160:21 intentions 37038:6 37095:20 37144:20 interactions 37064:12 37139:2 37160:14 interacts 37136:8 interest 37046:1 37087:4 37126:7 interested 37030:7,8 37047:2 37088:22 37163:14,15 interesting 37043:2 37069:15 interests 37080:3 interference 37125:17 intermediary 37095:15 internal 37125:14 international 37071:14 37080:3 37085:19,24 37088:7 37123:17 37126:24 37128:8 37142:24 37148:24 37149:1,14 37154:21</p>	<p>37170:21 37172:5 interpret 37109:21 interrogation 37105:21 interrogatories 37044:16 37045:18 37101:5 37129:24 37141:11 37169:12 37179:6,16 interrogatory 37034:14 37034:20 37045:14 37057:3 37110:13 37111:7 37145:12 interrupt 37070:14 37073:20 37078:24 37121:14 37144:23 interrupted 37046:23 37079:20 interview 37128:1 interviews 37121:20 invariably 37082:13 inverse 37115:3 37138:4 inversely 37076:7 investigate 37075:9 investigated 37031:25 investigation 37125:5 37125:15 37148:15 37165:20 37178:10 investigations 37128:17 invincibility 37047:14 37067:10 invincible 37050:22 37051:4 37067:7 invite 37087:16 invoke 37104:13 involuntarily 37143:9 involve 37037:2 involved 37037:9 37065:21 37080:15 37081:1 37128:23 37175:3 involvement 37049:23 37072:18 37122:23 37124:1 involving 37124:13 invulnerability 37047:13 IPID 37122:4 37124:1 37124:14,19,20,23 37125:4,15,17 37126:5,6,10,13 37127:14,15 37128:2 37128:16 37129:5,6 37129:15 IPID's 37122:23 37128:7 ipsissima 37084:2 Irish 37176:18 irrespective 37087:16 isn't 37120:16 37136:14 37137:2 37173:6,14 isolate 37115:10,14 37118:20 isolated 37163:9</p>	<p>issue 37048:6 37058:14 37080:13 37081:19 37081:20,20 37149:2 37154:17 37165:17 37168:19 issued 37076:16 issues 37052:6 37069:4 37076:3 37091:14 37126:5 37175:5 issuing 37124:23 items 37118:5 I'd 37044:25 37045:13 37045:16 37046:22 37053:16 37054:6 37084:10 37096:18 37101:10 37115:10 37121:18 37123:8 37130:5 37139:16 37164:17 37165:11 37166:13 37169:21 37172:15 I'll 37028:7,24 37068:24 37134:10 37150:11 37167:21 37172:11 I'm 37041:18 37043:5 37047:1 37048:7 37053:18 37086:10 37086:15,17 37088:14,22 37089:24 37090:19 37091:2,8 37093:13 37094:12 37096:12 37096:14 37111:14 37113:18 37115:21 37115:22,22 37116:25 37117:2 37121:6 37125:13,19 37128:2 37130:25 37135:10 37136:17 37137:14,15 37141:3 37160:6,6,12,15 37161:12 37163:5 37165:18 37167:1,12 37167:13,25 37168:3 37168:3,4 37170:12 37173:2,16 I've 37028:23 37032:15 37032:22 37042:4 37083:8 37084:9 37085:11 37086:2,2,3 37088:17 37089:17 37090:17 37091:20 37092:8 37108:17 37111:24 37114:17 37117:1 37119:13,18 37120:16 37121:18 37122:5,21 37126:18 37126:18,20 37128:3 37128:23 37131:5 37132:18 37135:5 37150:7 37165:11 37166:24 37167:23 37173:20 ie 37064:21 37138:20</p>
---	--	--	--	--

<p>J</p> <p>ja 37033:11,23 37037:14 37038:1,14 37038:17,23 37064:10 37066:10 37073:22 37074:3 37077:2 37079:4,22 37081:8 37082:3 37083:1,5,13 37084:22 37103:24 37104:25 37107:25 37112:15,16 37113:15 37121:5 37142:13 37143:11 37145:16,19 37149:12,23 37150:20 37151:20 37151:25 37152:4 37155:25 37172:22 37176:21 37181:24 37183:9</p> <p>Jamaica 37165:6,12</p> <p>jargon 37134:16</p> <p>jeans 37058:8</p> <p>jeopardising 37064:8</p> <p>JJJ178.10 37161:25 37162:6</p> <p>job 37040:8</p> <p>JOC 37064:18 37069:1 37089:19</p> <p>JOCCOM 37034:22 37035:20,24 37036:1 37036:20 37037:7,17 37039:8 37043:15 37044:6,9 37045:12 37048:23</p> <p>JOCOM 37068:2</p> <p>Johannesburg 37113:5</p> <p>judge 37085:22 37118:20 37122:18 37129:14 37136:11 37136:21 37149:13 37149:13 37154:6</p> <p>judges 37087:13</p> <p>judging 37104:12</p> <p>judgment 37030:21 37135:17,18,22 37136:5 37160:22 37172:7</p> <p>judicial 37062:14 37076:6,10 37128:25</p> <p>judiciary 37080:20,24</p> <p>jump 37041:15 37103:5 37132:1</p> <p>jump-off 37114:16</p> <p>June 37162:1 37169:11</p> <p>justice 37057:10 37072:12 37086:22</p> <p>justices 37080:25</p> <p>justifiable 37132:24</p> <p>justification 37133:2 37142:9 37180:15</p> <p>justifications 37124:12</p> <p>justified 37148:12 37149:9 37154:24</p>	<p>37166:10</p> <p>justify 37086:3 37127:5 37127:9 37130:24 37133:8,13 37134:4 37150:17</p> <hr/> <p>K</p> <p>kamikaze 37150:24</p> <p>keen 37168:1</p> <p>keep 37098:7 37117:4</p> <p>keeping 37049:2</p> <p>keeps 37100:23</p> <p>kept 37164:25</p> <p>key 37092:5</p> <p>keys 37092:11</p> <p>kicked 37120:4</p> <p>Kidd 37140:16</p> <p>killed 37052:15 37053:4 37095:25,25 37164:15 37165:7,8</p> <p>killing 37127:3,7</p> <p>killings 37165:9</p> <p>kind 37042:19 37048:11,14 37075:14 37079:24 37080:17 37150:24</p> <p>kindly 37055:25</p> <p>KKK23 37120:18</p> <p>knew 37047:10,14 37052:2 37066:14 37113:11 37121:11</p> <p>knife 37136:9,11</p> <p>knowing 37066:14 37078:15 37116:16 37116:17</p> <p>knowledge 37075:7 37104:16,16 37109:14 37124:6 37151:16</p> <p>known 37066:2,3 37069:23 37077:7 37103:18 37180:3</p> <p>Koch 37137:23</p> <p>koppie 37039:10 37047:17 37050:17 37059:25 37060:8 37067:14 37074:22 37075:2 37094:22 37098:7,8 37141:1 37157:17 37158:2,9 37158:10,15,17 37159:23</p> <p>kraal 37097:24 37110:20 37114:12 37116:23 37117:22 37147:14,23,25 37155:21</p> <p>Kruger 37111:16,19,24 37112:5,12,17</p> <p>Kuhn 37156:8</p> <p>Kumar 37133:9</p> <p>K9 37139:25 37142:21</p> <hr/> <p>L</p> <p>L 37108:15</p> <p>label 37049:17 37052:3</p>	<p>lack 37145:23 37174:13,14</p> <p>lacking 37167:17 37173:19</p> <p>lacks 37168:8 37169:6 37169:8</p> <p>lag 37151:21 37152:20</p> <p>lamentable 37051:15</p> <p>landscape 37155:18</p> <p>language 37081:24 37169:14,18 37171:24 37172:1</p> <p>languages 37098:13</p> <p>laptop 37042:25</p> <p>large 37106:20</p> <p>largely 37057:15 37088:19</p> <p>larger 37129:22</p> <p>lasted 37150:11 37151:9</p> <p>lately 37089:18</p> <p>Latin 37173:25</p> <p>law 37071:14 37076:20 37092:16 37122:12 37123:17,18 37135:10 37137:25 37142:24 37144:2 37148:16,21,24 37149:14,17 37156:18 37157:23 37159:15 37163:23 37167:4 37170:21,23</p> <p>lawful 37142:9</p> <p>lawyer 37149:12</p> <p>lay 37047:16 37179:14</p> <p>lead 37049:24 37093:3 37108:10 37109:21 37109:24 37110:19 37111:6 37113:22</p> <p>leader 37052:25</p> <p>leaders 37034:15 37044:16 37045:18 37053:12 37055:23 37102:2 37109:18 37141:17,24 37146:12</p> <p>leading 37181:3</p> <p>leaning 37101:23</p> <p>learned 37038:3 37147:11 37180:14</p> <p>learning 37175:18</p> <p>learnt 37052:7</p> <p>leave 37028:7 37029:11 37031:21 37046:21 37055:7 37072:16 37084:12 37092:11 37115:7 37150:11 37157:16 37178:20 37178:23</p> <p>leaves 37110:11 37124:25 37163:8</p> <p>leaving 37183:1</p> <p>led 37166:7</p> <p>left 37030:10,14 37032:22 37057:23 37073:24 37079:8</p>	<p>37080:18 37082:15 37100:22 37129:17 37170:17</p> <p>left-hand 37056:5 37059:16 37061:19</p> <p>legal 37027:19,25 37028:2 37032:1,23 37083:2,4 37089:13 37089:18 37123:4 37126:23,24 37149:1 37150:2 37158:2,5 37161:22 37162:13 37162:17,21 37163:1 37170:5,8 37171:9 37174:3 37180:2,18</p> <p>lengthy 37083:8 37106:3</p> <p>lesson 37131:10,13</p> <p>lessons 37052:7</p> <p>lethal 37031:24 37062:13 37107:6 37108:24 37113:13 37156:19 37157:12 37157:24 37163:13 37164:14 37166:9</p> <p>letter 37027:20,21</p> <p>let's 37028:24 37042:10,14,21 37044:12 37049:8,9 37054:4 37056:8 37077:5 37078:25 37079:9,12,19 37080:24,25 37127:21 37173:23 37174:10</p> <p>level 37032:23 37033:1 37041:19 37072:18 37105:13 37106:2 37150:12 37165:23 37172:11</p> <p>levels 37072:23</p> <p>lie 37085:10</p> <p>lies 37168:24</p> <p>Lieutenant 37039:3 37156:24 37157:25</p> <p>Lieutenant-Colonel 37031:20 37034:3,10 37035:25 37037:18 37039:7 37044:12,12 37045:6 37067:3,21 37099:9 37156:23 37157:9 37158:7</p> <p>Lieutenant-General 37068:5 37073:7</p> <p>Lieutenant-Generals 37077:24</p> <p>life 37048:2 37049:13 37051:16 37122:7,9 37122:11 37128:11 37134:6 37138:9 37142:25 37143:4 37149:16</p> <p>lift 37132:1</p> <p>light 37030:6 37031:18 37049:7 37060:23 37068:11 37069:17</p>	<p>37069:24 37070:25 37099:6 37109:9 37111:4 37180:12</p> <p>liked 37089:20</p> <p>likelihood 37049:16 37051:7 37053:7 37090:12 37094:5 37182:3</p> <p>limit 37033:18 37105:4 37138:24 37139:3</p> <p>limitation 37117:24</p> <p>limited 37038:4 37057:18 37058:25 37086:14 37112:14 37113:8 37120:15 37124:6 37130:14 37154:20</p> <p>line 37030:15 37052:16 37052:17 37061:10 37061:16 37067:25 37076:19 37085:6 37090:21 37095:1 37100:17,24,25 37103:7,13,14 37108:8,17 37109:20 37110:24 37114:25 37115:16 37124:17 37125:11 37150:5,23 37152:2,2,11,16,20 37152:21 37153:13 37154:3 37155:10 37156:11,12 37164:15 37167:9 37178:12</p> <p>lines 37100:16 37101:3 37101:20 37102:5 37103:11 37156:24 37172:10</p> <p>linked 37160:9 37167:20</p> <p>list 37028:12,17,19,22 37028:25 37029:1,6 37029:22 37054:17 37066:19,21 37094:15 37141:8</p> <p>listen 37106:3,15</p> <p>listening 37159:7,7</p> <p>literature 37141:6</p> <p>little 37045:23 37086:19</p> <p>live 37059:2 37068:6 37079:24 37142:11 37158:10</p> <p>lives 37080:5</p> <p>loathe 37159:16 37164:17</p> <p>locate 37027:16 37161:15</p> <p>lock 37092:11</p> <p>logical 37128:15</p> <p>London 37058:6 37059:1</p> <p>long 37033:3 37070:15 37084:3 37091:21,23 37097:19 37101:20 37106:10,11 37145:6</p>
--	--	--	--	--

37176:14 longer 37064:3 37122:23 Lonmin 37072:18 37094:8 37095:6 Lonmin's 37072:20 look 37035:2,22 37042:14,21 37051:7 37052:8 37054:4 37055:9,13 37057:20 37064:14 37077:18 37078:5 37085:13 37087:14 37089:2 37090:23,24,25 37092:6 37102:14 37103:11,13 37133:14 37134:2 37139:7 37141:18,24 37149:19 37152:9 37153:10 37164:3 37165:3,14,21 37168:19 37177:10 looked 37038:5 37161:18,19 37173:10 looking 37034:18 37052:22 37055:8,8 37059:4,6,7,16 37061:24 37064:11 37091:8 37096:18 37099:5 37100:19 37102:19 37104:3 37107:25 37115:6 37117:2 37131:8 37153:7 37168:17 looks 37168:14 loosely 37043:5 loot 37058:10 loses 37167:7,10 loss 37048:2 37049:12 37051:15 lost 37095:3 lot 37038:3 37048:13 37069:8 37070:24 37074:25 37078:10 37080:11 37087:25 37115:20 37124:9 37127:2 37142:19 37150:23 37151:3 37159:3 lower 37094:4 lowlands 37027:5 lucky 37089:5 lurch 37057:23 lying 37031:7 37140:4 37168:15	Major-General 37049:1 making 37028:6 37064:8 37072:6 37153:2 37169:7 37172:25 Malema 37146:22,24 Malema's 37147:6 man 37027:5 manage 37050:7 37129:7 37146:5,9 managed 37094:25 37103:17 37165:23 37171:18 management 37044:20 37065:6 37070:22 37071:7 37073:3,4,17 37077:7 37078:10 37081:5,15,23 37135:7 37146:21 managing 37075:14 mandate 37091:2 37092:25 manifest 37115:19 manifestation 37099:13 manifestly 37071:15 manner 37089:22 maps 37030:11 March 37027:23 37029:19 37108:15 37120:4 37140:8 marginally 37165:15 Marikana 37036:5 37037:10 37046:15 37058:3 37065:17 37071:25 37072:14 37072:21,23 37076:4 37082:14 37090:18 37104:4 37109:8 37130:12 37147:2 37183:11 mark 37054:16 37056:21 37140:7,8,9 markers 37155:19 market 37107:5 marketed 37107:5 marks 37100:2 37140:17,24 Masemola 37033:4 match 37119:24 37134:1 matched 37058:14 material 37115:14 Mathunjwa 37074:21 matter 37049:19 37075:8 37078:22 37087:21 37101:21 37104:13 37123:17 37128:8 37138:10 37146:16 37168:6 37173:14 37178:9 37182:9 matters 37065:7 37153:17 37167:15 37179:7	maximum 37163:4,7 37163:21 Mbombo 37033:5 37043:17 37044:3,3 37074:5 37081:12 37082:4 Mbombo's 37068:5 mean 37060:14 37061:8 37063:1 37077:7 37078:4 37084:20 37087:13 37105:19 37109:21 37158:20,23 37168:7 meaningful 37040:20 means 37034:9 37074:14 37096:17 37107:4 37109:3 37135:23 37174:1 37176:17 meant 37086:3 37100:4 37131:17,18 37146:14 37157:15 37172:18 measure 37152:19 37155:9,15,16 measured 37105:6 37155:13 measurement 37156:6 measures 37113:14 media 37058:7 37145:4 mediator 37095:4 medical 37031:2,9 medics 37031:10 meeting 37030:7 37032:2 37048:25 37070:22 37073:21 37075:16 37079:7,7 37082:6 37084:16 meetings 37084:8 meets 37040:23 member 37030:3 37033:17 37089:15 37182:20 members 37028:13,17 37050:2 37051:25 37052:17 37067:1,24 37073:4 37082:6 37116:19 37120:25 37121:20 37122:3 37123:9 37139:2,25 37175:3 37179:17 memory 37055:14 mentally 37136:21 mention 37146:20 37147:2,6 mentioned 37043:24 37050:14 37052:20 37093:19,23 37100:2 37121:4 37153:2 37161:14 mentioning 37172:23 Merafi 37028:11 37068:23 37069:2 mere 37055:24 message 37046:3 met 37067:19	method 37174:14 methodology 37130:25 37164:20 methods 37047:21 37086:2 37105:21 37165:13 metres 37105:14 37107:1 37131:23 37156:6 microphone 37028:19 37062:21 37099:4 37101:23 37106:4 37148:18 37180:19 37182:12 microwave 37106:20 middle 37056:20 mightn't 37048:8 mildly 37130:9 militant 37068:3 military 37170:20 millimetre 37106:22 37118:9 37119:23 37137:5,24 37177:23 million 37072:21 37092:13 mind 37041:20 37042:11 37045:17 37046:13 37047:3 37051:16 37083:3 37103:21 37104:19 37132:23 37164:4 37182:4 mindful 37067:22 37160:6 minds 37046:5 mindset 37067:10 mine 37110:14 mines 37146:24 mineworkers 37067:17 mining 37056:25 minister 37072:12,12 37166:6,6 minute 37141:4 minuted 37079:14 minutes 37049:2,3 37074:6 37096:25 37103:2 37144:7 37161:1 missed 37091:14 37093:4,5 37140:11 37159:9,20 missing 37035:15 37119:12,14 mistake 37118:16 37134:16,18 37138:15 mistaken 37110:23 37144:19 37171:4 37173:22 mistakes 37138:9 misunderstood 37035:10,13 37096:3 Mm 37036:17,22 37059:22 37060:2 37069:5 37147:15 mob 37149:25	mobile 37056:16 37058:19 37106:19 mobilising 37034:6 mobility 37058:14,17 mode 37137:19 37138:7 modern 37082:12 Molotogai 37133:10 moment 37041:13 37074:16 37081:1 37097:23,25 37099:15 37101:17 37103:2 37127:21 37135:13 37148:12 37150:15 37151:5 37154:9 37160:16,24 moments 37136:11 37172:20 Monday 37035:2,5 37047:15 37051:2,13 37051:17 37056:8,15 37057:4,22,24 37059:19,19 37060:6 37060:14,23,24 37093:23 37097:4 37104:4,19,22 37118:8 37145:2,24 37146:5 37155:9 37159:4,10 37183:4 37183:11 money 37072:24 37100:13 months 37092:9 mood 37060:1 moon 37168:14,14,17 mopping 37047:24 morning 37027:10,12 37043:5 37044:1 37068:20 37074:13 37074:23 37077:9,10 37078:7 37079:12 37090:5,11 37094:3 37130:21 37131:2 37183:4 motivation 37082:1 motive 37178:4 mounds 37139:11 move 37034:1,6 37041:14,15 37046:16 37090:10 37090:14 37093:8,11 37106:25 37114:22 37115:15 37116:1,4,6 37116:21 37117:6,14 37154:5 37156:15 37158:12 moved 37099:21,24 37113:23,24 37114:3 37116:23 37161:2 movement 37101:12 37108:4,12 37114:13 37114:24 37144:21 movements 37101:13 moves 37062:23,25 moving 37034:4 37041:14 37103:4
M				
magazine 37119:12,17 mailed 37027:19 maintain 37079:22 37091:22 37094:22 37096:5,6 maintaining 37093:21 37116:15 majority 37046:15				

37132:6,8 Mpembe 37028:11 37044:2 37065:8,9,24 37083:9 Mpofu 37071:24 multiple 37037:15 37102:17,18 37105:3 37107:7 37118:6,16 37119:9 37142:20 multi-camera 37097:20 murder 37123:3 music 37096:20 mustn't 37057:9 37150:2 muti 37047:10 37048:9 37067:6 37148:4 Myburgh 37029:9,11 37030:2 37031:6,9,18 37032:9 37033:18,21 Myburgh/Swart 37033:10	37069:8,10 37070:6 37072:2 37087:7 37091:18 37093:15 37096:7 37100:8 37110:14 37111:17 37122:18 37124:2,18 37125:8,9,9 37133:2 37134:5 37135:8 37137:18 37139:16 37148:14 37165:19 37165:21 37166:23 37169:9 37171:6 37172:18 37173:2 37175:17 needed 37124:21 37175:3 needs 37031:25 37063:22 37080:19 37103:5 37109:10 37123:16 37133:6,7 37149:15 negotiate 37093:24 37094:24 negotiation 37157:6 negotiations 37157:4 net 37124:25 neutral 37095:15 neutralise 37153:16 neutrality 37095:3 never 37032:25 37038:9 37042:11 37047:3,8 37048:11 37051:19 37065:17 37083:3 37089:21 37096:2 37098:14 37109:24 37111:18 37114:17 37126:20 37133:15 37138:14 37140:17 37150:14 37157:14 37182:19 nevertheless 37062:11 37174:7 new 37031:16 news 37031:15 37092:20 37095:5 nice 37177:16 night 37042:5 37043:7 37048:24 37058:12 37065:5,5 37078:15 37161:18 nine 37158:17 37160:8 37160:20,21 37162:23 37177:22 ninth 37068:4 NIU 37039:13 Nkaneng 37098:15 NMF 37082:1 noise 37028:6 37105:5 37105:7,9,10,12,19 37105:20,22 noises 37105:10 non-lethal 37047:21 37109:3 non-likelihood 37053:7 non-possibility 37182:6 non-threat 37135:17	non-written 37038:21 norm 37164:18 normal 37075:13 37076:8,9 37124:13 37129:4 37131:21 37160:14 normality 37092:10 north 37115:5 37116:10 37157:16 note 37049:2 37084:13 37103:1 37167:7 noted 37067:16 notes 37033:7,10 37084:6 37089:5 NUM 37095:1 number 37047:9 37054:21 37077:5,21 37088:1 37090:19 37101:4,9 37110:2 37117:7 37120:11 37132:19 37133:1 37159:25 37160:7 37164:16 37165:7 numbers 37050:8 37051:23 37054:9,14 37056:1 37134:4 nutshell 37099:1 Nyala 37041:13 37096:11 37097:24 37098:2 37099:15,21 37099:24 37100:21 37100:22,24 37102:24 37104:2,6 37104:23 37105:8 37114:11 37144:25 37145:1,24 Nyalas 37053:1 37103:23 37104:6 37146:6	observing 37154:19 obtained 37121:13 obviously 37030:7 37031:14 37033:14 37041:16 37042:16 37046:1 37048:6,15 37051:3,16 37059:1 37074:18 37078:3,7 37078:11 37079:24 37080:3 37089:3,6 37091:5 37093:15 37095:10 37100:24 37103:4 37111:3,25 37113:18 37114:7 37116:8 37118:6 37125:23 37127:21 37135:22 37137:14 37149:2 37150:18 37152:5 37165:19 37167:2 37168:1 37171:4 37173:22 37178:10 37182:1,9 37182:19 occasion 37052:16 37127:18 37146:23 occasionally 37104:3 occasioning 37128:12 occasions 37080:5 37088:1 37135:24 occupants 37103:18 occur 37051:15 37101:13 37114:9 occurred 37035:6,7 37051:14 37161:11 occurrence 37038:9,10 occurring 37176:5 occurs 37138:11 October 37031:19 offence 37095:22 37102:9 37123:23 37165:3 offer 37130:4,5 37132:24 37167:23 offers 37132:17 office 37073:7 37074:1 37077:23 37089:19 37122:24 officer 37029:9,14,15 37029:17,25 37030:2 37031:7,23 37033:16 37111:10 37112:2,12 37126:25 37127:6 37129:1 37131:15 37133:5,7,13 37143:17 37156:8 37167:3 37175:22 officers 37028:4,10 37039:15 37041:6,7 37053:2 37111:11,16 37112:17 37118:15 37118:20 37126:19 37131:24 37132:13 37132:22 37133:16 37133:22 37135:21 37138:20 37140:4 37142:20	official 37081:6 37111:17,20 37123:18 37124:15 37157:24 37169:19 officials 37041:1 37125:21 37131:19 37136:4 37156:18 37157:3 37164:15 37166:14,14,16 37167:9 offset 37057:12 37085:23 37102:16 offsetting 37132:18 oh 37046:8 37055:5,6 37082:5 37086:7 37174:23 37180:11 37180:23 okay 37033:12 37037:23 37039:22 37045:7 37055:2 37056:3,14 37089:14 37090:9 37118:14 37148:22,25 37161:23 37162:12 37162:20 37169:4 37171:8 37175:1 37180:8 old 37038:3 37070:24 Olson 37164:22 once 37030:19 37051:14 37053:13 37093:15 37105:6 37114:24 37137:5 37158:7 37168:13 37174:19 37175:6 ones 37058:3 37076:16 37110:24 37133:16 37136:7 one-off 37076:1 onset 37133:1 open 37056:22 37096:14 37114:23 37119:17 37157:17 opens 37143:24 operate 37112:11,18 operating 37113:9 37139:19 37182:4 operation 37036:6 37037:16 37043:8 37045:9,20,22,24,25 37052:1 37063:17,22 37063:22 37064:19 37066:25 37069:1 37070:2 37071:13 37094:7 37095:19 37112:20 37113:2,7 37113:10,11 37157:2 37157:20 37169:19 37178:11 operational 37077:21 37086:1 37101:5 37114:10 37155:3 operationalisation 37135:25 operationalise 37072:7 operations 37044:25
N				
Naidoo 37139:25 Naidoo's 37120:7 name 37054:22 37147:7 names 37110:25 narrative 37086:24 37122:14 37131:14 37145:8 37152:24 37153:2,20 narrator 37153:1 narrow 37031:11 narrows 37088:12 nation 37057:8 37178:6 national 37032:4 37065:6 37070:22 37071:2 37073:3,4,5 37073:7,25 37076:20 37077:7 37078:9 37079:9 37080:9 37081:5,15,23 37083:20 37084:24 37085:11 37089:17 37097:13 37100:3 37146:21 37148:16 Nations 37091:21 native 37175:17 nature 37154:25 near 37116:4 necessarily 37038:7 37119:5,14 37136:14 37138:21 37139:9 37140:14 necessary 37063:24 37101:21 37157:9 37172:6 37180:7 37181:1,4 necessitated 37122:20 37123:12 necessity 37154:22 37155:2 need 37034:16 37037:12 37046:11 37063:8,12 37064:5				
		O		
		oath 37027:5,6 37041:8 37123:19 37129:1 37144:10 37166:15 objective 37087:6 37089:22 37111:5 37150:14 37169:16 37171:11 37175:24 37176:8 objectivity 37041:5 37167:17 37168:8 37169:6,8 37171:16 37173:19 obligation 37158:3 obligations 37158:5 obliged 37129:20 37151:4 obliging 37063:24 obscured 37148:10 37152:17 obscures 37149:11 obscuring 37147:13 37149:8 37152:7 observe 37103:8,15 observed 37056:7 37108:3		

<p>37080:17 operator 37112:10 operators 37111:8,22 37113:6 opinion 37066:2 37079:23 37092:5 37103:25 37110:14 37111:21 37168:20 37173:9,11,17 opinions 37078:21 37085:15 opportunities 37091:7 37093:4 opportunity 37055:13 37071:16 37093:5 37104:8 37127:8 37145:9 37157:5 37177:16 opposing 37169:5 opposite 37115:19 37144:25 option 37030:19 37067:22 37074:8 37093:8,11 37094:14 options 37034:7 37057:19 37119:17 oral 37067:21 37068:5 oranges 37172:3 order 37034:9 37044:20 37054:19 37057:25 37064:7 37071:8,9,14,15,17 37071:19,19 37072:25 37073:12 37075:6 37076:12,15 37076:16 37077:8 37079:17 37081:14 37090:15 37115:12 37115:13 37123:13 37135:6 37178:8 ordered 37068:19,24 37069:3,13,14 ordinarily 37043:21 ordinary 37073:20 organisation 37076:22 37124:17 37129:10 37163:8 37174:13 organisational 37063:11 37129:17 37163:11 37164:6 37167:5 organised 37053:14 37056:16 37058:2 original 37099:23 37155:20 originally 37077:15 originated 37072:8 originates 37071:5 ought 37043:14 outcomes 37034:19 37044:22,24 outcry 37057:6 outline 37153:3 outpaces 37058:5 outraged 37092:24 outsider 37125:13</p>	<p>overestimation 37131:11 overlaps 37118:19 overnight 37027:17 37123:7 overwhelming 37072:4 owners 37100:8 o'clock 37044:1 o'clock 37074:17 37075:1,4 37097:9 37099:25 37183:3,11</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>page 37108:6 37117:16 37130:10 37156:24 37158:13 37163:2,5 Pakistani 37096:1 panic 37143:12,16 paper 37041:11 37042:11,18 par 37082:19 paragraph 37034:16 37044:17 37108:6 37117:16 37118:12 37118:23 37130:11 37138:16 37158:14 37163:3,5 37164:23 37169:13 paragraphs 37166:1 pardon 37027:4 37055:6 37178:22 37180:11 part 37036:10 37065:22 37072:2 37081:5,13 37088:21 37088:23 37091:17 37094:6,23 37095:8 37108:24 37112:21 37114:14 37115:6 37125:12 37127:15 37136:5 37148:15 37149:4 37153:2 37159:22 37178:9 partial 37168:11 37169:2 37171:11 partially 37050:12 participate 37084:25 37086:17 37113:2 particular 37046:3,21 37053:7,23 37087:3 37106:21 37109:14 37118:11 37136:22 37142:7 37164:20 37181:2,8 37182:4 particularly 37046:12 37056:7 37058:19 37085:1 37091:8 37097:21 37125:21 37139:4 37141:9 37174:16 parties 37087:3,14 37088:3 37095:16 37102:2 37155:22 37163:21 37180:25 37181:23 parts 37064:15</p>	<p>party 37081:9 37095:17 37100:11 pass 37030:21 passage 37047:6 passes 37064:1 passionate 37065:25 path 37123:10 37124:17 37129:4 37159:21 37163:23 37170:12 pathway 37157:17 patrol 37143:22 pause 37042:10 pay 37082:18 37138:7 peace 37075:6 peacekeepers 37095:25 peaks 37133:17 peers 37085:22 pejorative 37169:14 37171:24 37172:1 penetrates 37106:22 penetrating 37159:14 people's 37046:5 perceive 37046:7 37142:7 perceived 37095:16 37098:24 37138:21 37144:20 37147:1 perceives 37143:22 percentage 37093:13 37164:16 37165:8 perception 37138:20 37138:24 37139:1,19 37141:6 37142:5 37146:5 perceptions 37046:4 perfectly 37173:5,14 perform 37039:25 37041:10 performing 37125:19 period 37035:3 37106:3 37155:20 37165:3 permissible 37173:5,14 permission 37063:25 37064:3,17,24 permit 37100:18 permitted 37075:18 37091:18 37099:16 perpetrators 37057:9 person 37030:25 37031:3,4,7 37105:18 37122:9 37134:7 37142:22 37153:4 37158:22 personal 37051:24 37082:8 37172:11 37173:17 personally 37123:6 personnel 37031:2,9 37039:18 perspectives 37091:12 37102:12 37168:18 pertinent 37128:21 phase 37034:2,4,11 37035:23 37036:14</p>	<p>37037:10 37040:18 37045:4 37090:10,14 phases 37075:14 phenomenon 37141:12 Philadelphia 37132:21 Philip 37131:3 37164:22 Phiyega 37083:18,21 phone 37080:12 37085:8 photographs 37108:16 phrase 37111:15 37169:22,23,25 37170:8 physical 37117:4 physically 37038:9 37091:6 37116:20 37136:20 pick 37160:15 picks 37168:21 picture 37153:22 37159:9 piece 37057:15 37061:8 37061:12 37062:22 37067:6,11,15,20 37068:1,4,9 37077:11 37122:25 37125:10 37125:23 pieces 37066:21 37068:12 37069:20 37069:24 37090:11 PILLAY 37054:13,20 pin 37155:22 Pingla 37183:9 pinpoint 37030:17 pistol 37118:9 37137:8 37137:11,15,19 pity 37072:1 place 37043:25 37047:23 37060:19 37063:10,12 37075:15 37076:5 37084:10 37111:18 37124:14 37125:25 37135:10 37155:10 37178:17 37180:17 placed 37037:19 37061:21 37069:20 37117:11 37141:1,2 plain 37098:8 plan 37034:23 37035:21 37036:4 37037:8,17,21 37039:10,11,23,24 37040:17 37042:15 37044:6 37066:16,24 37074:11,15 37078:5 37094:4 37097:14,16 37098:1,19 37099:11 37099:12,23 37106:7 37157:13 37161:14 37174:17 planned 37052:10 37064:12 37098:23 planning 37037:22 37067:11 37103:1</p>	<p>plans 37038:19 platform 37093:1 platinum 37146:24 play 37096:20 37104:8 played 37051:16 37105:13 plays 37080:24 please 37028:6 37035:17 37046:25 37049:2 37054:3 37070:12 37132:25 37160:13 37163:17 pleased 37167:13 37176:13 plenty 37062:9 plot 37030:10 37104:9 plotted 37030:20 plural 37117:18 plus 37069:15 37107:1 poging 37102:8 pogings 37102:6 point 37036:16 37039:4 37039:6 37041:11,15 37042:15,16 37045:14 37051:12 37053:10,22,23 37056:19 37057:11 37059:16 37068:21 37070:7 37073:2 37077:5 37080:23 37081:18 37083:12 37084:13 37085:21 37086:6 37092:5 37098:6 37101:14 37102:24 37103:5,15 37104:1,14,20 37108:21 37110:13 37114:16 37117:5 37120:18 37121:22 37125:1 37142:3 37145:11 37152:10 37152:21 37153:17 37156:18 37157:23 37172:24 37173:3,7 37175:17 37182:23 pointed 37045:14 37101:4 37168:13 points 37031:11 37052:12 37060:24 37071:12 37076:14 37076:17 37087:22 37088:12,12 37118:17 37161:11 37162:1 37174:15 policeman 37058:9 37150:4 policemen 37052:15 37159:7 police's 37094:23 37119:10 policing 37054:19 37057:25 37080:7 37136:3 37178:11 policy 37070:7 37077:4 37080:18 polite 37105:20</p>
---	--	--	--	--

<p>politely 37034:25 political 37073:10 37076:5,10 37079:23 37080:8,9 politics 37178:3 poorly 37136:4 POP 37042:20,23 37047:21,24 37048:1 37048:7,17 37050:2,9 37050:14,18 37057:13,16,18 37058:2,21 37059:1,5 37059:6,7 37061:9 37062:23 37116:19 37157:15 pops 37061:18 37067:25 portable 37096:19 pose 37032:11 posed 37072:14 poses 37143:2 position 37047:17,19 37050:17 37051:7 37054:15 37060:6,7 37060:16 37064:22 37098:9 37099:24 37102:22 37103:14 37108:10 37127:6 37129:14 37155:23 37160:11 positions 37030:11 37146:3 possession 37067:13,17 possibilities 37064:11 possibility 37042:22 37046:2 37047:20 37086:4 37093:16 37104:18 37106:10 37110:21 37116:6 37119:8 37126:4 37135:7 37138:10 37150:22 37174:1,2 37182:6 possible 37044:22 37045:4 37052:9 37053:15 37068:17 37086:25 37089:22 37093:17,19 37096:21 37104:24 37116:22 37122:16 37134:1 37151:8 37169:18 37174:7 possibly 37053:12 37066:24 37175:9 37180:22 posterity 37153:21 potential 37031:24 37093:25 37138:15 37154:11 potentially 37032:7 37067:8 37127:7 37144:18 power 37053:10,22,23 PowerPoint 37054:23 practicable 37151:13 37156:20</p>	<p>practise 37133:24 practises 37163:24 pre 37034:3,6 37072:22 precarious 37032:12 preceded 37164:12 precedence 37126:3 precise 37146:3 precisely 37086:11 37173:5 37177:2 precision 37145:21,23 preconditions 37034:10 prefer 37129:16 preferable 37158:9 preference 37116:17 37119:2 37136:5 37145:7 37157:10 37168:24 preferred 37086:24 prefers 37057:16 prejudiced 37087:5 37097:6 prepare 37065:22 prepared 37053:9,22 37058:22 37067:19 37123:14 37136:4 37162:21 37176:15 preparedness 37065:24 37113:1 presence 37029:12 37049:21 37093:21 37096:5 present 37038:21 37042:20 37067:14 37072:5 37077:22 37122:8 37130:19 presentation 37053:22 37053:23 37054:22 37108:20 37109:5,6 37109:11,22 37113:20,21 presentations 37086:23 37100:14 37108:11 presented 37034:23 37035:25 37042:2 37075:22 37077:13 37100:25 37114:21 37119:11 37130:18 37170:13 President 37071:24 37072:13 pressure 37094:7,16 37096:17,19 presumably 37145:25 Pretoria 37062:1 Pretorius 37042:23 37049:1 37069:9 prevail 37066:1,4 prevent 37058:18 37126:13 preventing 37126:15 prevents 37126:10 previous 37044:20 37055:15 37146:23 37161:9 37164:21 37166:25 37173:21</p>	<p>previously 37094:17 pre-empted 37054:10 pre-marked 37028:20 pre-production 37072:22 price 37062:7 prima 37048:6,17 37050:10 37127:7 37165:10 principle 37091:21 37100:17 37151:12 37154:22 37156:18 37157:23 37168:7 principles 37123:17 37128:8 37154:21 37180:2 prior 37075:20 priorities 37128:10 priority 37125:5,18 37128:17 37178:9 prisoners 37105:22 private 37092:14 privy 37083:14 probabilities 37034:19 probability 37044:23 37045:2 37047:3 37048:20 37049:12 probably 37061:13 37089:9 37094:14,15 37096:16 37101:4 37104:23 37105:18 37125:3 37139:10 37145:4 37164:12 probing 37088:14 problem 37056:25 37058:6 37063:20 37064:11 37071:23 37075:22 37080:14 37082:11,21 37086:24 37092:1 37094:18,23 37110:1 37120:2 37122:3 37123:15 37125:12 37127:13 37132:17 37133:18,19 37135:25 37139:14 37140:17 37141:21 37142:14,23 37149:14 37151:7 37155:8 37172:25 37176:5 37179:2 problematic 37119:6 37120:6 problems 37065:17 37077:25 37133:19 37177:16,19,20,21 procedure 37148:17 37182:21 procedures 37032:4 37037:2 proceed 37048:23 37074:7 37098:23 proceeded 37174:7 proceeding 37074:23 37174:16 PROCEEDINGS</p>	<p>37027:1 process 37085:1,1,18 37086:11,20 37095:3 37106:9 37125:12 37128:25 37166:18 processes 37126:2,7 produce 37071:22 37107:8 37125:25 37129:13 produced 37125:8 produces 37051:12 37106:15 production 37055:24 37072:23 Prof 37054:18 profession 37041:4 37180:3 professional 37041:1 37041:19 37085:9 37122:2 37175:22 professionalism 37085:6 37124:16 Professor 37131:3 programme 37111:21 prohibits 37126:20 project 37093:2 projected 37106:25 promise 37065:2 37070:17 prompt 37129:5 proof 37134:11 proper 37040:17 37041:16 37103:8 37111:18 properly 37111:8,22 37113:6 37143:18 proportion 37136:19 proportionality 37135:23 37136:16 proportionately 37135:24 proposal 37074:7 37077:13 37078:1 37081:25 proposed 37054:14 37067:25 proposing 37089:24 37141:3 proposition 37032:12 37087:10 37096:3 37127:11 37150:13 protect 37048:1 37050:18 37051:6 37171:21,25 37172:4 protected 37167:20 protecting 37093:1 protest 37053:11 37057:2 37058:2 37062:12 37080:1 37106:13 protester 37116:1 37177:23 protesters 37067:4 37116:16 37158:17 protests 37058:4 37062:18</p>	<p>prove 37104:15 37118:22 37123:22 37134:5 37142:16,18 proven 37119:3 provide 37129:17 37133:21 37141:13 37142:8 37160:23 37163:10 37179:5 provided 37029:2 37141:11 37145:5,24 providers 37092:14 provides 37127:1 providing 37125:20 Provincial 37042:3 37049:3 37073:8,24 37074:4 37077:13,22 37078:4,21 37080:9 37081:25 37146:18 proximity 37076:24 37051:14 37052:13 proxy 37143:4 Psychology 37054:18 public 37041:7 37044:20 37054:18 37057:25 37062:17 37122:24 37124:2,3,3 37124:15 37135:6 37166:14 37177:25 publicly 37172:16 pull 37134:5,23 37137:13 pulled 37096:1,2 pulling 37134:7 punishable 37102:9 purchase 37106:10 purport 37108:16 purpose 37130:14 pursuant 37101:5 pursue 37178:8 pursuit 37178:9 push 37134:19 37165:25 pushes 37134:17 put 37034:19 37036:19 37037:3 37038:13 37040:5,9 37041:22 37041:22,23 37042:7 37042:17 37043:24 37047:7,22 37052:12 37052:20 37054:7,25 37056:20 37057:1,12 37059:14,14 37060:4 37061:16,25 37062:12 37064:22 37066:18 37068:18 37069:12,13,16 37077:6 37078:11 37081:12 37082:21 37083:17 37085:6 37091:19 37092:19 37093:25 37095:1 37099:6 37105:21 37106:13,14 37110:25 37115:15 37116:13 37120:16</p>
--	---	--	---	--

37122:10,11,15 37124:14,16 37128:13 37131:24 37136:14,16 37141:21 37149:1 37160:1 37166:2 37170:3,4,7,10 37171:15 37172:25 37178:18 puts 37059:9 37065:23 37080:2,5 37115:3 37136:3 putting 37036:18 37048:7 37095:14 37130:9 37157:25 puzzling 37125:14	37147:20 37149:18 37149:24 37150:3,7 37152:17 37153:21 37153:25 37154:1,25 37155:1,3 37165:24 37168:5 37169:15 37170:3,4,7,10,11,11 37170:13 37173:21 37176:11,13 questioned 37043:2 questions 37030:10,22 37034:21 37039:20 37043:12 37065:23 37074:8 37080:7 37081:17 37101:9 37170:14,16 37176:11 37178:18 37179:20 quick 37131:1,8 quickly 37058:7,9,10 37146:17 quite 37040:4 37042:1 37069:14 37106:1 37116:10 37122:13 37179:22 37180:2 quiz 37128:2 quotation 37100:1 quote 37134:3 37166:24 quoted 37110:25	37058:21 37066:1 37095:18 37107:17 37160:12 37171:6 37177:4 real 37103:3 37136:3 realise 37038:4 37085:4 37129:13 37159:2 realised 37031:6 37132:12 37148:4 37160:17 realistic 37134:1 37136:12 realities 37165:14 reality 37035:8 37051:21 37065:18 37082:15,19 37094:21 37129:8,16 37134:23 37135:8 37139:16 37159:17 37166:21 really 37042:15 37043:11 37047:2 37048:10 37049:9 37071:25 37088:4 37100:1 37123:7 37129:7,8 37146:9 reason 37032:8 37041:2 37050:10 37078:19 37081:15 37101:10 37131:2 37143:17 37144:17 37164:5 37175:20 reasonable 37045:20 37071:15 37150:3,13 37155:6 37167:14 37168:10 37181:10 37181:11 reasonableness 37049:10 37181:10 reasons 37035:1 37047:24 37074:20 37077:17 37142:20 recall 37043:15 37044:10 37053:1 37071:23 receive 37112:10,19 received 37032:25 37047:15 37052:24 37060:15 37079:17 37081:6,13 37085:7 receiving 37052:18 recite 37136:15 reckless 37135:4 37169:20 37171:17 37173:23,24 37174:8 recklessness 37174:3 reckon 37177:17 recognise 37052:6 37094:18 37095:14 37126:1 37162:9,10 recognised 37030:2 37085:23 recollection 37152:6,8 37152:10 recommendation	37133:20 recommended 37032:14 37104:5 record 37027:9 37028:12 37033:9 37097:8 37108:6 37117:16 37120:18 37127:16 37178:17 37180:17 recorded 37084:5 37109:19 37130:1 37137:11 37140:17 37169:13 recording 37140:13 recovered 37120:9 recurring 37142:19 red 37057:1 37079:25 redundant 37088:20 refer 37041:2 37095:19 37108:7 37112:8 37118:6 37126:9 37149:14 37164:22 37169:18 reference 37027:17 37126:16 37156:23 37157:19 37162:5 37169:17 referenced 37126:10 references 37072:24 referred 37110:1 37126:19 37158:17 37163:20 referring 37033:2 37109:13 37110:7,8 37110:18 37161:16 37164:10 refers 37162:15 reflect 37099:12 37109:10 reflected 37067:10 reflecting 37038:7 reflection 37136:2 reflex 37137:9 refresh 37104:7 refuse 37028:24 37071:16 37072:7 regard 37033:20 37048:8 37120:11,16 37163:11 37172:15 37176:7 37179:7 regarded 37176:7 regardless 37147:24 37174:8 regards 37033:18 37036:13 37055:23 37089:4 37163:24 37173:21 registered 37092:14 37117:24 registration 37118:14 regret 37085:5 regular 37169:20 37171:16 regularity 37080:6 37174:14 reignited 37157:4	reinitiated 37157:4 reiterate 37130:24 relate 37056:23 37146:15 related 37056:25,25 relating 37033:9 37175:5 relation 37044:8 37068:16 37069:15 37097:3 37141:5 37179:7 37180:15 relationship 37084:15 37091:22 relationships 37084:18 relative 37091:10 relevance 37069:6 relevant 37047:10 37053:6,24 37107:16 relief 37118:11 37051:25 37094:20 relieve 37096:18 relieving 37096:17 reluctance 37084:25 37086:16 reluctant 37087:7 rely 37038:10 37066:22 remain 37119:7 remainder 37039:12 remained 37082:7 remains 37159:19 remarks 37166:5 remedy 37166:21 remember 37038:2 37042:20 37044:6 37047:4 37080:10 37099:22 37100:20 37146:19 37153:9 37159:24 37170:17 37180:23 reminder 37057:12 remote 37064:18 removing 37136:25 render 37031:2 reorganisation 37157:7 repeat 37046:12 37098:12 37162:15 repeated 37086:12 repeatedly 37108:7 repertoire 37131:4,7 37164:21 repertoire's 37131:3 rephrase 37158:6 replays 37102:18 replicated 37144:2 reply 37111:1 reponsibilising 37063:23 report 37055:15 37064:23 37072:20 37074:5 37087:20 37131:3 37159:12,13 37176:15 37178:12 reporting 37064:24 represent 37164:16 representation 37089:6
Q				
qualification 37111:24 37172:9 qualifications 37126:24 37175:14 qualified 37043:15 37058:22 qualifier 37171:19 37172:21 qualifiers 37056:6 37057:20 37172:12 qualifies 37112:9 qualify 37040:24 37051:10 37072:1 37086:23 37103:9 37109:3 37126:20 qualifying 37071:25 37164:5 quality 37052:4 37172:7,13 quantitative 37045:25 quarrel 37173:13 quarters 37154:12,16 37155:8 Queen 37178:2 quest 37086:21 37125:1 question 37030:13 37032:6 37033:6 37035:10,13 37037:4 37037:5 37042:6 37043:6 37046:23 37049:7 37056:20 37059:5 37069:17 37070:11,14,16,17 37071:17,24 37074:13 37075:4 37076:12,16 37077:18 37078:12 37080:23 37081:3 37084:17 37089:7 37090:2,7,12 37091:16 37099:16 37099:20 37100:4 37103:16 37108:23 37118:1,21 37123:14 37127:18 37137:4 37138:23 37139:17 37146:14 37147:13	radio 37096:19 37104:2 37106:21 raft 37141:20 raise 37082:25 37083:6 37084:9 37175:20 raised 37073:1 37076:14 37081:19 37081:19 37101:15 37163:20 ramifications 37071:3 37072:15,17,19 37076:4 37082:12 37124:7 ran 37057:23 range 37106:10,11 37131:19 rank 37073:6 ranked 37034:20 rappporteur 37055:16 rationale 37143:18 reach 37032:17 37087:18 reacted 37047:14 reaction 37046:6 37143:16 37152:18 37153:12 reactive 37057:14 read 37072:19 37090:22 37116:25 37117:3 37122:6 37130:1 37164:12 37177:4,6,10 readily 37143:20 reading 37049:15	R		

<p>representations 37086:23 37087:4</p> <p>representative 37094:8 37181:6 37182:2</p> <p>representatives 37095:1</p> <p>represented 37039:8</p> <p>represents 37038:11</p> <p>request 37032:3 37180:16</p> <p>require 37063:14 37066:16 37127:19 37176:14</p> <p>required 37032:25 37133:20 37154:24 37172:6</p> <p>requirement 37090:15 37124:20 37128:4,6 37129:6 37136:21 37142:25</p> <p>requirements 37064:1 37149:1</p> <p>research 37164:8</p> <p>reservations 37108:18</p> <p>resisting 37067:20</p> <p>resolution 37081:24</p> <p>resolve 37034:7 37071:21</p> <p>resources 37036:2 37037:20 37124:21 37129:6,15</p> <p>respect 37036:16 37042:1 37059:18 37101:25 37117:1 37171:18 37174:21 37176:15</p> <p>respectfully 37036:9</p> <p>responding 37139:8</p> <p>response 37034:20 37044:16 37046:17 37049:15 37057:3,5 37059:5 37067:23 37085:12 37092:13 37109:17 37110:1 37111:7 37115:25 37116:3 37121:13 37122:20 37136:12 37141:10 37143:24 37161:8,25 37162:15 37163:19 37169:11 37169:13 37170:2 37178:1,2</p> <p>responses 37034:15 37058:13 37061:10 37061:12</p> <p>responsibilised 37064:15</p> <p>responsibilities 37167:4</p> <p>responsibility 37076:19 37076:19 37104:14 37129:17</p> <p>responsible 37043:8 37068:22</p> <p>rest 37115:18 37151:4</p> <p>restoration 37086:22</p>	<p>restore 37034:9 37095:19</p> <p>rests 37168:23</p> <p>result 37071:23 37074:20 37158:21</p> <p>resulted 37067:2</p> <p>results 37129:5 37132:3,15,19</p> <p>resume 37183:3,10</p> <p>resumes 37027:2 37097:1 37144:8,9 37161:4,5</p> <p>retain 37047:18,18</p> <p>retained 37032:16</p> <p>retaliation 37067:2</p> <p>reticence 37122:5</p> <p>retired 37175:22</p> <p>retreat 37156:19 37157:10,24 37158:9</p> <p>retrospectively 37038:20</p> <p>return 37108:2 37183:3</p> <p>revelation 37032:3</p> <p>review 37163:8,15,15 37164:1,2</p> <p>reviewed 37163:18</p> <p>revise 37109:8 37110:13,14 37111:21</p> <p>re-enacting 37146:6</p> <p>rid 37166:23</p> <p>ride 37118:21</p> <p>rifle 37065:11 37135:10 37137:21</p> <p>rifles 37048:5 37135:6</p> <p>right 37028:25 37030:14 37032:6 37039:3 37043:12,23 37047:1 37054:1,4 37059:8 37076:21 37097:22 37099:2 37100:20,22 37102:19 37122:13 37124:3 37126:25 37147:21 37151:6 37152:14 37153:18 37156:9 37173:15 37179:18</p> <p>rights 37032:10 37055:22 37066:6,13 37066:21 37090:13 37092:24 37093:1 37100:9 37101:18 37123:25</p> <p>riot 37058:8 37063:13</p> <p>riots 37058:6 37059:1</p> <p>rise 37101:4,9 37163:6</p> <p>risk 37034:14,17 37040:16,20,21 37043:1,4,18,19,21 37043:25 37044:3,13 37044:18 37045:9,20 37045:20 37046:18 37051:11 37062:8 37065:3,21 37066:17</p>	<p>37066:23 37067:9 37068:6 37070:1 37076:17 37080:2,5 37090:12 37093:10 37094:4 37095:14 37096:4 37138:9 37154:10</p> <p>risks 37042:10,14,14 37044:8 37053:6 37065:12 37078:6</p> <p>risky 37074:12</p> <p>rival 37177:18</p> <p>road 37040:23 37089:20</p> <p>rock 37140:6,16</p> <p>rocking 37146:6</p> <p>rocks 37031:4,12</p> <p>rogue 37063:13</p> <p>role 37039:25 37050:14 37064:6,7,21 37080:24 37096:3 37104:8 37124:15</p> <p>roles 37036:6 37064:9 37131:6</p> <p>rollout 37174:22</p> <p>room 37028:7 37060:21 37089:8 37105:18 37136:13 37136:14</p> <p>root 37043:11</p> <p>rotten 37166:22</p> <p>round 37090:4 37093:18 37133:8,13 37142:3,4 37160:16</p> <p>rounds 37068:25 37069:9,13 37104:23 37105:2,3,3 37119:12 37119:13,16 37131:16 37132:22 37133:5,9 37134:22 37137:24 37158:10 37159:9,14 37160:8 37177:22</p> <p>routes 37104:10</p> <p>routine 37063:1</p> <p>Roux's 37042:15 37061:3 37154:25</p> <p>Rover's 37028:25 37029:6</p> <p>rubber 37040:23 37046:20</p> <p>rule 37126:10,12,19,21 37149:5</p> <p>rules 37028:24 37055:1 37055:2,4,7 37125:15 37134:2 37142:24 37180:3</p> <p>ruling 37180:16,20,21 37181:14,25 37182:11,13</p> <p>rumour 37070:23 37073:13</p> <p>run 37058:8 37063:13 37080:18 37148:5,7,9 37154:10 37167:6 37178:15</p>	<p>running 37067:5 37160:25</p> <p>rural 37128:7 37131:14</p> <p>rural 37061:14</p> <p>Rustenburg 37057:1</p> <p>R5 37118:8 37134:17 37135:6</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>safe 37092:15 37096:10 37134:17 37137:18 37137:20 37138:1,5 37157:3 37160:3</p> <p>safety 37072:15 37116:19 37137:7 37178:7</p> <p>sanctioning 37080:19</p> <p>sanctions 37062:13</p> <p>sand 37120:4 37149:11</p> <p>SAPS 37028:2 37030:2 37032:1,2,23 37035:3 37044:20 37045:2,3 37045:21,24 37046:1 37046:12,19 37050:4 37051:25 37056:22 37063:10 37066:2 37067:24 37075:13 37075:17,25 37085:4 37085:8 37086:13 37089:15,18 37097:15 37100:11 37101:18 37102:25 37106:9 37108:12,14 37108:16 37116:14 37120:23 37121:20 37122:3 37123:9 37124:22 37125:14 37126:13,14,19,23 37129:14,16 37131:19 37132:10 37133:21 37135:13 37135:15 37136:1 37161:22 37162:1,13 37162:16,21 37163:1 37163:4,6,11,22 37164:7,9 37165:22 37166:8,21</p> <p>satisfied 37124:18</p> <p>save 37087:25</p> <p>saw 37038:19 37056:14 37059:17 37068:17 37074:6 37085:19,20 37097:18 37100:15 37104:15 37111:23 37121:22 37139:9 37148:3 37150:10 37153:15 37181:8</p> <p>saying 37028:24 37043:15 37044:19 37047:4 37057:24 37062:22 37073:14 37074:12 37087:20 37094:18 37096:13 37115:22,22 37117:1 37137:3 37149:3 37158:16 37160:6</p>	<p>37166:3,11 37173:13</p> <p>says 37043:16 37053:20 37069:2 37071:14 37074:7,11 37082:10 37087:23 37087:23 37138:18 37148:4 37153:21 37173:12 37183:9</p> <p>SC 37043:14 37097:7 37099:3 37101:24 37120:17 37152:23 37153:19 37155:14 37155:17 37156:1,7 37156:10,12 37178:16,22,25 37179:3,11,13 37180:1,9,13,21 37181:18</p> <p>scan 37131:1</p> <p>scared 37050:22</p> <p>scenario 37044:21,21 37044:23 37045:2,3 37050:6 37053:8 37136:17 37139:14</p> <p>scenarios 37094:10 37132:9 37136:7,12 37138:12 37139:15</p> <p>scene 37028:14 37029:5 37030:3,20 37030:24 37033:8 37074:21 37098:19 37113:17 37118:13 37118:25 37119:10 37119:22 37120:5,7 37120:12,14 37123:12 37124:22 37129:5 37138:18,19 37138:24 37139:1,2,3 37139:5,19 37146:23 37156:15,16 37157:1 37157:11,14,21 37162:23 37174:16</p> <p>scientist 37142:15</p> <p>score 37132:4,5,15</p> <p>Scott 37028:11 37035:25 37039:7 37042:1 37044:11,12 37045:6 37047:6 37099:9,22 37156:23 37156:25 37157:9</p> <p>Scott's 37034:3,10 37037:19 37038:15 37039:4 37067:3,21 37158:1,7</p> <p>scramble 37143:14</p> <p>screen 37053:13,24,25 37100:21 37111:13 37162:7</p> <p>scroll 37162:8</p> <p>scrutiny 37080:8</p> <p>search 37094:6</p> <p>second 37039:9,16 37042:21 37044:11 37067:2 37093:23 37094:15 37100:2 37101:9 37106:19</p>
--	--	--	--	---

<p>37113:6 37115:2 37131:9 37132:4 37149:6,10 37158:13 37158:15 37163:2 37171:14,20 secondly 37039:11 37047:25 37101:3 seconds 37115:2 37149:10 37150:11 37151:9,10 37152:8 37152:13,13 37154:18 second-hand 37103:25 section 37148:17 37163:4 securing 37124:22 security 37071:3 37072:15 37092:14 37178:7 see 37036:14 37041:12 37041:14 37053:17 37055:6 37057:22,24 37078:19 37082:9 37086:9 37087:18 37088:13 37093:4 37100:22 37101:8 37102:21 37103:3 37104:10,10,24 37106:12,14 37108:19 37114:14 37114:17,22,24,25 37115:4,6,9 37116:16 37116:17 37119:24 37120:19 37135:25 37138:18,24 37139:4 37139:7,18 37140:12 37143:13,22 37144:2 37144:3,16 37145:9 37145:15,18 37147:19 37148:11 37149:14,21 37150:4 37150:15 37151:2,5 37151:16,18 37152:11 37154:2,9 37155:20 37161:1 37164:5 37167:2 37168:15 37172:9,18 37174:23 37176:5 seeing 37055:24 37115:21 37118:13 37118:24 37121:17 seeking 37130:24 seeks 37164:13 37172:4 seen 37028:12 37030:9 37031:18 37033:22 37036:1 37038:8 37039:19 37085:4 37092:22 37108:4,8 37109:4,9,11 37111:25 37112:3 37117:1,10 37119:18 37122:21 37128:3 37144:17 37159:19 37160:21 sees 37117:25 seized 37118:5,13,25</p>	<p>37119:9,22,25 37120:24 select 37137:21 37138:3,8 37141:22 selection 37166:18 selector 37137:25 self-defence 37159:19 Semenya 37043:13,14 37097:7 37098:21 37099:2,3 37120:17 37121:4 37147:12 37152:22,23 37153:19 37161:3 37180:11,13,21 37181:18 37182:13 send 37031:10 37046:3 37067:23 37094:8 sends 37106:21 37129:10 senior 37053:2 37068:16 37069:12 37126:19 sensation 37106:23 sense 37088:18 37096:21 37130:7 37131:5 37132:16 37171:5 37175:12 sensible 37074:19 37078:3 sent 37069:10,14,14 37080:13 sentence 37138:17 37158:15,16 37177:3 Seoka 37090:21 37093:24 separate 37056:8 37136:13 separation 37116:15 SEPTEMBER 37027:1 sequence 37100:20 sergeant 37031:5 serious 37031:22 37048:21 37049:13 37051:12 37058:17 37060:22 37071:3 37078:6 37104:13 37117:24 37122:9 37134:6 37139:12 37142:25 37149:16 37165:11,12 37167:9 37169:5 37178:7,11 seriously 37068:2 37129:2 37177:23 serve 37045:14 37171:21,25 37172:4 service 37073:5 37092:17 session 37073:16 37075:12 37078:20 37079:6,15,17 37089:4 37123:12 sessions 37168:13 set 37037:8 37039:24 37040:2 37044:18 37053:10 37057:15 37061:8,12 37062:22</p>	<p>37087:21 37127:8 37130:11 37131:20 37158:18 37164:23 sets 37040:17 37111:10 setting 37091:18 37158:14 37172:5 seven 37132:14 seventh 37067:20 shambles 37174:12 37175:8,8,11,12 shambolic 37169:21 37171:18 37172:12 37174:10,10,11,15,19 37175:7 shame 37172:13 share 37045:21 37051:24 37083:13 37083:16 shared 37066:3 37182:17 she'd 37068:6 shocked 37178:6 shocks 37057:8 37177:25 shoot 37059:1 37132:3 37132:16 37133:22 37136:6,6 37148:12 37154:1,2 37181:11 shooter 37160:9 shooter's 37149:8 shooting 37103:2 37127:4,5 37128:24 37130:12 37131:1 37132:7 37133:20 37136:6,13 37140:1 37141:12 37144:1 37149:9 shootings 37130:16,25 37131:18 shoots 37149:7 shop 37058:10 short 37035:2 37055:21 37122:21 37177:12 shot 37030:25 37031:13 37050:23 37115:1,4 37118:15 37118:18 37119:19 37120:19 37134:3,18 37137:21,22 37138:1 37138:6 37150:5 37151:15 37154:19 37159:8 37181:5 shots 37048:20 37120:8 37120:11 37121:21 37121:25 37127:10 37130:19 37131:15 37132:19 37140:5,13 37140:14 37141:2 37150:1 37158:21 37159:18,20,23 shottist 37150:19 37181:4,16 37182:16 shottists 37130:2 shouldn't 37078:14 37101:20 37147:1 shout 37136:10</p>	<p>shouts 37107:19 37142:23 show 37038:6 37046:15 37056:4 37097:19 37100:18 37108:16 37132:20 37167:21 37167:21 showed 37041:13 37056:17,19 37161:19 showing 37036:2 37103:9 shown 37039:20 37048:13 37051:1 37108:15 37113:20 37113:25 37114:20 37118:4 shows 37042:24 37100:15 37111:5 37134:16 37138:4 37140:16 37159:13 37177:3 shy 37058:20 sick 37029:11 side 37031:12 37047:12 37048:2 37052:22 37053:5 37056:5 37059:16 37061:19 37088:9 37098:7 37116:12 37139:24 37140:15 37142:22 37143:23 37157:16 sides 37051:15 37157:16 sideways 37104:2 sight 37100:16,24,25 37101:12 37103:11 37103:13,14 37160:3 significance 37104:20 significant 37093:22 37156:16 significantly 37060:22 silence 37127:1 silly 37069:10 similar 37132:4 37167:1 37171:20 similarly 37171:25 simple 37030:13 37041:2 37042:1 37072:9 simply 37030:24 37032:18 37057:24 37058:4 37061:16 37079:6 37080:16 37091:8 37115:17 37119:16 37131:25 37142:24 37149:15 37177:16 simulate 37107:14 37138:13 simulation 37142:17 simultaneous 37174:25 simultaneously 37099:9 37157:6 sincerity 37090:25 sing 37130:4</p>	<p>single 37089:3 37103:17,18 37107:7 37134:18 37137:20 37137:22 37138:1,6 37181:4 37182:16 single-shot 37137:19 sit 37087:1 37089:8 37094:15 37105:7 37161:3 site 37129:11 sitting 37104:2,9 37179:20 situation 37032:5 37034:8 37035:8 37047:8,8,22 37048:10,11 37051:23 37057:19 37059:17 37060:22 37063:14 37064:1,13 37064:24 37065:13 37065:19 37071:21 37074:16 37078:16 37079:24 37091:4 37093:2,12 37122:3 37123:20 37135:24 37136:22 37157:11 37174:14 37177:2 37181:8 situational 37066:8 situations 37108:25 37159:15 37170:20 37181:7 six 37134:22 37140:16 sixth 37067:15 size 37120:5 skill 37133:24 skin 37106:22 skirt 37108:8 slang 37174:11 slide 37053:13,23 37054:2,5,23 37055:9 37056:3,4 37059:17 37116:13 slightly 37098:6 slowed 37157:2 smaller 37049:25 37050:8 37051:23 smarting 37107:3 smoke 37143:13 sneakers 37058:8 snippet 37118:13 soccer 37177:15,18 social 37058:7 societies 37091:13 society 37057:1 37075:17 37076:8 37092:6 society's 37080:1 soldier 37143:22 solicit 37127:14 solid 37172:19 solution 37064:2 solve 37132:17 37179:2 Somalia 37095:19 37096:2 somebody 37060:18</p>
---	---	--	---	--

<p>37068:19 37069:7 37081:7 37127:8 37175:10 someone's 37100:20 37119:4 37145:3 soon 37077:15 37089:25 37183:1 sophisticated 37136:7 sorry 37027:21 37028:7 37035:11 37046:22 37053:18 37059:13 37065:2 37066:7,7,11,11 37070:21 37073:19 37078:24 37079:20 37083:20 37087:11 37088:14 37097:2 37107:12 37126:13 37126:15 37135:11 37140:22 37143:6 37144:23 37154:8 37158:16 37170:6 37176:12 37178:15 37180:11 37183:6 sort 37098:8 37128:9 37140:9 37144:15 37146:4,6 37150:24 sought 37075:19 37130:23 37150:15 sound 37062:24 37106:15,16 37107:14 37118:19 37169:6 37173:3 sounds 37102:4 source 37105:14,15 37147:24 sources 37120:22 south 37061:18,20 37062:3,6 37080:4,23 37092:24 37102:10 37106:5 37157:16 37165:14 37167:7 37174:1 southern 37031:12 37139:24 so-called 37043:25 37068:3 37098:17 space 37089:19 speak 37032:9 37093:25 37094:8 37103:16 37123:13 37123:20,20 37129:20 37157:5 speaker 37175:18 speakers 37177:8 speaking 37095:9 37116:17 37123:7 37139:23 special 37048:9 37055:15 37131:3,4,7 37164:21 speciality 37077:20 specially 37079:16 37100:14 specific 37030:19 37122:5 37161:15</p>	<p>37174:4 specifically 37034:15 37036:11 37099:13 37116:7 37163:2 specifics 37168:2 speculating 37110:23 speculation 37045:15 speed 37125:5 spell 37037:1 spelt 37036:4 spend 37156:15 sphere 37177:17 spoke 37029:23 37120:25 37146:17 spoken 37028:15,16 37042:12 37046:10 37117:3 37146:24 spot 37159:1 37160:2 spray 37109:19 spreads 37143:12 spreek 37049:5 sprint 37131:25 square 37056:6 37079:25 37089:19 stage 37031:15 37034:23 37035:3,8 37035:22 37036:13 37039:9,14 37044:6 37046:16 37062:3 37089:7 37093:21 37126:2 37127:20 stake 37126:2 stakeholders 37091:12 stalling 37043:8 stand 37057:9 37096:22 37105:13 standard 37061:10 37155:1,2,4,5,7 37164:19 standards 37085:10 standby 37092:13 standing 37031:1 37060:6 37090:15 37135:14 37138:11 37160:17 37168:16 stands 37031:21 37175:24 start 37027:10,15 37041:16 37103:5,7 37114:16 37117:6 37127:16,19 37143:14 37169:21 started 37043:16 37069:1 37114:7 37148:5 37183:10 starting 37041:14 37050:9 37125:1 starts 37041:13 37049:24 37098:1 37099:16 37103:2 37143:12 starving 37095:21 state 37062:11,13 37072:10 37097:8 37123:19 37169:13 stated 37032:16</p>	<p>statement 37030:1 37090:23 37108:5,21 37109:7,13 37111:9 37112:1,9 37117:15 37120:18 37124:4 37127:1,14,24,25 37128:20 37130:10 37130:11 37138:17 37153:3 37157:20 37158:13,14 37160:20 37162:7 37163:2,3,17 37164:1 37164:12 37169:15 statements 37030:8,9 37033:20 37038:2 37071:1 37110:2,4,12 37110:18 37111:4,23 37112:8,22 37122:4,6 37122:21 37123:2 37124:24 37127:2 37129:19 37130:1,7 37130:15 37167:1 37169:24 states 37149:15 37163:5 static 37057:15 37131:20 37132:2 37135:13 statistic 37165:10 statistical 37130:12,15 statistics 37166:4 status 37123:25 37169:15 stay 37046:19 37119:17 stayed 37073:25 37101:17 steer 37064:19 step 37124:4 stepped 37072:16 steps 37032:1,2,14 sterile 37105:8 STF 37039:13 stick 37055:15 37093:13 stiff 37116:9 stills 37139:5 Stockwell 37041:2,5 stole 37176:10 stood 37049:4 stop 37061:3 37062:3 37062:12 37072:9 37076:20 37091:19 37091:20 37151:2 stopwatch 37152:19 stories 37159:17 story 37031:13 37033:17 37042:25 Stott 37054:18 37055:17 straight 37098:2 straightforward 37081:18 strained 37096:8 strange 37051:25 stranger 37084:16 strangers 37084:16</p>	<p>stray 37056:8 street 37092:23 strength 37118:21 37181:2,15 stress 37078:19 37105:22 37114:7 37127:22 37128:3 37131:25 37134:24 37138:8,13 stressed 37134:18 37135:14 strike 37056:25 37058:10 37140:7,8,9 37140:16,24 37146:25 striker 37030:3 37117:20 37121:22 strikers 37047:13,14 37050:16,25 37052:13,24,25 37053:5 37059:18 37063:2 37066:17,24 37067:1,6,13,23 37068:8,10 37079:11 37093:25 37094:9,22 37095:8 37098:15,25 37108:4,7,12 37109:20,21,24 37110:19 37111:6 37113:23 37114:2,3 37116:21 37117:12 37117:22 37120:23 37121:11 37144:20 37144:21 37146:25 37147:13 37152:7 37158:1,8 strikes 37160:16 strong 37136:21 37163:10 structured 37165:22 structures 37061:14 37063:10 37072:3 37075:13 37163:24 struggle 37122:13 struggling 37166:21 student 37136:12 study 37131:4 37164:13 stun 37113:17,21,24 37114:1,4,19 37115:11 37116:1,2,3 37116:14,18 37118:18 subject 37069:21 37071:7 37080:8 37115:12 37181:22 subjected 37128:1 37133:23 subjective 37172:21 submissions 37145:14 37169:24 37181:22 37182:9,23 submit 37066:13 submitted 37057:3 subsequent 37039:8 37177:25 37178:10</p>	<p>subsequently 37033:15 37033:21 substantial 37167:15 substitute 37105:6,7 successful 37047:25 sudden 37106:23 37143:16 suffered 37160:12 suffers 37172:1 sufficient 37124:14 37133:12 37181:6 sufficiently 37052:8 37076:17 37151:2 suggest 37042:18 37055:20 37067:12 37110:24 suggested 37042:9 37056:12 37101:16 37145:25 37180:8 suggesting 37107:10,13 suggestion 37042:8,13 37042:25 37044:10 37049:8 37053:2 37081:14 37088:1,3 37101:17 37144:14 37175:23 37179:1 suggestions 37042:8 37104:22 suitable 37098:8 sum 37069:19 summarisation 37039:23 summarise 37089:23 summarised 37039:3 summarising 37043:5 summary 37055:16 37088:21 37097:19 37164:22 37166:11 summoned 37042:24 superimpose 37103:13 superior 37063:25 supervise 37146:1 support 37094:6 37108:19 37123:4 supports 37066:19 37140:10 supposed 37041:18,20 37087:15 37098:2,3 37115:12 37129:9 37131:15 supremely 37104:17 sure 37040:9 37044:4 37057:6 37096:14 37097:5 37099:19 37100:11 37102:5,7 37106:5 37136:17 37146:11 37147:10 37161:7 37167:12 37169:3 37174:11 37176:9 37179:22,24 37180:7 surely 37114:1 37131:22 surprised 37075:17 surrender 37050:16,17 37067:18</p>
---	--	--	--	--

<p>surround 37050:9 suspect 37050:11 37123:3,24 37128:6 37128:24 37136:9,10 37137:15 suspects 37032:7 37123:1 sustain 37177:24 sustained 37052:14,16 Swart 37029:9,10,15 37029:16,17,25 37031:8,9,14 37033:16 Swart's 37030:23 37031:7 37033:18 sweep 37157:8 switch 37137:25 swore 37041:8 37123:19,19 37166:14 sworn 37129:1 symptomatic 37094:20 synonym 37173:15 system 37106:20 37112:11 37165:21 systematically 37165:5 systemic 37163:12 37164:6 37165:17,25 systems 37063:16 37106:18 37107:1 s.u.o 37027:7 37097:11 37144:11</p> <hr/> <p style="text-align: center;">T</p> <p>t 37039:1 37049:2 table 37044:7 37179:20 tack 37123:24 tact 37124:19 37130:22 tactic 37092:1 tactical 37034:2,4 37035:22 37037:9 37040:18 37043:18 37043:22 37045:4 37058:13 37067:22 37068:7 37069:1 37070:2 37074:7 37090:10,14 37093:8 37093:11,20 37094:10 tactics 37058:10 tag 37062:7 take 37040:23 37041:19 37048:19 37051:10 37053:8 37054:19 37055:8 37071:18 37076:7 37089:25 37094:18 37095:22 37096:23 37097:25 37101:18 37101:20 37102:24 37110:14 37124:21 37126:3,22 37129:2 37131:10 37132:4 37134:13 37135:7 37137:23 37139:5 37141:4 37142:2</p>	<p>37143:3,3,14 37144:6 37144:13 37145:5 37148:25 37150:12 37151:4,8 37152:18 37173:10 37176:1,16 37179:4,9 37183:1 taken 37032:5,14 37033:15 37047:10 37048:23 37055:25 37078:15 37082:1 37088:2 37118:7 37125:17 37126:18 37127:8,15 37149:4 takes 37092:10 talk 37030:12 37032:10 37032:11 37036:25 37060:19 37075:23 37093:4 37096:7 37101:19 37140:1 37142:19,24 37165:11,12 talked 37063:16 talking 37037:13 37051:24 37052:5 37069:11 37073:16 37077:14 37091:20 37091:24 37094:19 37104:13 37118:12 37118:25 37126:19 37139:14 talks 37096:8,9,10,12 tangibly 37099:15 tape 37152:24 target 37034:7 37131:17,20,22 37132:2,6,6,7 37135:13,16 task 37050:3 37169:1 tasking 37027:22 tasks 37125:19 37168:23 Tatane 37164:4 taught 37133:22 37135:22 tea 37081:10 37141:4 37144:6 teach 37177:11 teacher 37168:12 team 37027:19,25 37028:2 37032:1,23 37083:2,4 37089:13 37089:18 37126:23 37161:22 37162:13 37162:17,21 37163:1 37170:5,8 37171:9 teargas 37046:20 37113:17,21,25 37114:1,4,19 37115:11,25 37116:2 37116:3,8,11,14,18 technical 37150:12 technologies 37107:6 telephone 37033:4 tell 37030:11,13 37038:24 37041:8 37048:22 37054:1</p>	<p>37089:25 37090:3,7 37094:1 37098:21 37106:2 37121:11 37122:12 37123:3,11 37124:10 37125:4 37134:7 37141:7 37159:5 37176:19 37177:2 37179:23 temporarily 37035:6 tenth 37068:9 term 37105:21 37159:15 37167:19 37170:20,22 37174:3 terms 37027:16 37052:4,7 37057:21 37065:23 37118:24 37129:21 37144:19 37166:3 terrible 37160:18 territory 37052:5 test 37105:3,8 37132:5 37181:9 tested 37058:12 37065:18 37159:19 testified 37028:3,10,14 37097:14 testimony 37041:6 37070:24 37087:12 37119:4 37161:14 testing 37135:15 tests 37135:16 text 37093:5 thank 37027:9 37028:1 37028:9 37029:7 37040:14 37055:10 37062:16,19 37121:16 37144:13 37161:10 37178:14 37180:9,10 37182:25 37183:1 that'll 37075:10 theft 37128:9 theme 37142:19 37153:1 theory 37135:21 thereabouts 37099:25 there'd 37043:7 there'll 37049:12 there's 37028:5 37037:12 37040:15 37042:13,25 37048:22 37052:19 37053:23 37060:17 37060:19 37065:10 37068:21,22 37069:7 37073:9 37077:11 37078:13 37087:12 37100:21 37101:25 37117:19 37127:21 37128:4,25 37132:20 37136:7 37137:1,9,10 37140:6,16 37141:20 37143:23 37146:14 37150:21,22 37153:8 37153:12 37154:20 37174:13,14</p>	<p>37177:20,21 they'd 37044:25 37074:12 37079:10 they'll 37105:25 they're 37033:9 37051:1,4 37057:14 37057:15,15,21 37058:22 37062:24 37062:25 37063:3,4 37074:19 37087:6 37103:4 37110:8 37125:16 37130:6 37132:2 37136:4 37148:11 37151:2 they've 37112:6 37127:7,15,16,16 thing 37030:10 37035:25 37046:18 37055:8 37059:14 37065:21 37071:1 37078:3 37105:12 37119:12 37125:2 37128:22 37131:9 37137:7,7 37138:11 37142:15 37143:19 37143:25 37151:1 37175:16 37177:21 37179:22 things 37038:8 37042:17 37049:6 37056:1,2 37059:14 37073:15 37075:9 37091:20 37099:15 37100:22 37110:2 37113:11 37152:18 37152:25 37161:18 37174:16 37175:8 thinking 37091:2 37153:7 third 37067:6 37081:9 37100:3 37122:8 37125:11 thirdly 37113:9 thought 37048:16 37049:9 37050:6,21 37050:23 37053:21 37060:13 37068:2 37069:7 37085:20 37087:25 37090:18 37098:5,17 37099:20 37110:8 37122:7 37160:2 37163:16 37172:14,14,22 37173:1 37174:3,6,7 37174:15 37176:1 37180:1 threat 37034:5 37052:25 37067:14 37122:9 37131:16 37134:6 37135:17 37138:19,21,23 37139:1,9,19 37141:6 37142:5,8,25 37143:2 37143:4,22,23 37149:3,6,11,16 37159:8,9</p>	<p>threats 37052:24 37053:4 37059:21 37060:5 37068:9 37134:1 37136:2 three 37078:4 37086:13 37093:25 37094:9 37113:11 37119:22 37119:25 37126:1 37131:23 37141:17 37149:10 three-round 37138:1 thumbing 37134:16 Thursday 37059:19 37060:4,11,12,14,22 37060:25 37065:14 37068:20 37074:10 37074:15,15 37075:3 37075:3 37146:19 thwart 37063:19 ticked 37040:12 till 37074:17 37078:6 37103:2 37161:3 37182:15 time 37031:17,19 37035:3 37038:3,4 37039:23 37042:17 37044:19 37047:7 37048:10 37051:20 37052:23 37061:3 37063:17,18,18,25 37066:14 37070:19 37070:20 37071:4 37072:25 37073:13 37074:22 37075:1 37084:3,10 37087:25 37089:16 37092:9 37095:7 37097:4 37099:10,14 37100:19 37101:6,13 37103:3,3,23 37105:4 37106:3 37108:14 37109:16 37110:7,24 37111:15 37114:9 37123:9 37128:4 37131:21 37137:14 37138:11 37147:9,25 37148:12 37149:6 37151:14,21 37152:18,19 37153:12,18 37154:20 37155:6,20 37156:16 37160:25 37164:4 37177:15 37178:15 37180:18 37182:15 times 37086:22 37106:24 37108:10 37122:12,13 37165:8 37167:25 37168:17 37171:22,22 timing 37094:17 37110:9 37151:19 tired 37132:1,2 title 37054:25 told 37037:25 37038:25 37042:2,7,25 37044:3</p>
--	---	--	--	--

37051:6,19 37073:13 37081:4 37086:6 37097:10,15,25 37104:8 37108:11,13 37112:23 37114:15 37119:25 37121:18 37135:22 37145:1 37165:18 37171:1 37179:24 tomorrow 37043:4 tone 37046:8 tool 37101:7 top 37076:21 37106:21 37160:16 topic 37167:13 total 37164:16 totally 37058:22 37064:1 37134:2 37168:22 37171:13 touch 37176:5 trace 37058:1 track 37079:5 37098:19 tragic 37160:6 trail 37035:4 train 37065:20 37132:11,11 37139:15,16 trained 37037:2 37111:9,22 37113:6 37132:10 training 37063:8 37065:10 37111:18 37112:6,8,10,11,13 37131:19 37132:18 37133:23 37135:13 37135:15 37136:1,6 37137:6,16 37138:12 37167:20 trains 37131:19 translated 37098:12 transparent 37080:15 trap 37067:24 trauma 37127:22 travelling 37159:10,24 treat 37123:21 37128:5 treated 37128:24 tremendous 37177:19 tried 37030:21 37050:19,20 37073:2 37084:9 37085:25 37086:12 37123:10 37132:18,24 37165:12 37167:23 37172:16 37177:4 trigger 37035:7 37046:6 37051:13 37134:5,7,23 37136:25 37137:7,10 37137:12,13,16,17 37165:25 triggered 37056:18 37128:15 37178:1,2 triggers 37165:24 trouble 37043:7 37046:9,10 37074:21	37153:20 TRT 37030:15 37033:17 37047:23 37047:23 37048:3,5 37048:19 37049:21 37049:23 37050:2,11 37050:13,19 37052:16,17 37067:25 37068:6 37117:12 37155:10 37156:11,12 37157:15 true 37063:6 37069:24 37071:13 37105:1 37111:19 37142:18 37151:8 37159:20 37166:12 trust 37110:6,15 truth 37041:8 37086:21 37122:24 37123:21 37123:21,22 37129:19,20 try 37030:10 37046:7 37062:11 37068:7 37090:20 37091:22 37093:24 37094:21 37096:6,7,20 37115:14 37122:8,10 37122:14,16 37126:7 37131:7 37138:13 37155:22 37166:23 trying 37034:19 37061:15 37072:6 37075:9 37086:1,10 37086:15,17 37087:9 37091:17 37093:8 37094:5,7 37098:25 37102:19 37108:8 37115:9 37116:19 37117:5 37121:7 37125:10,22 37128:3 37133:12 37144:21 37157:5 37175:16 tube 37095:9 Tuesday 37077:16 tune 37123:24 37130:4 Turkey 37062:10 37168:14,15 turn 37028:6 37030:23 37050:23 37051:4 37113:16 37115:2,17 37148:5,7 37166:18 turned 37095:24 37166:20 turning 37049:18 37108:22 TV 37057:7 37096:19 37178:2 twice 37171:19,25 two 37034:3,10,21 37035:1 37038:2 37047:23 37052:11 37052:15 37057:10 37057:20 37059:14 37059:15 37060:18 37068:13 37069:17	37073:15 37078:11 37084:16 37085:19 37085:22 37093:19 37096:1 37103:2 37109:3,12 37115:6 37116:5 37118:10 37119:1,25 37120:8 37120:22 37129:10 37140:1 37149:10 37157:25 37160:5 37161:11 37164:18 37177:3 two-hour 37111:11,15 37111:20 37112:4 two-minute 37114:8 type 37061:12 37062:12 37063:22 37139:13 typical 37063:9 <hr/> U UK 37058:6,12,17 un 37095:20,24,25 37096:2 37171:10 unable 37061:18 37097:8 37169:23 unacceptable 37076:2 37128:9 37129:12 unaware 37175:4 undermining 37064:9 underpin 37080:19 underpinned 37119:4 underscore 37070:5 underscores 37127:12 understand 37033:8 37037:4,21 37039:2 37040:21 37041:3,17 37048:12 37062:22 37077:20 37080:22 37083:12 37086:1,10 37086:15,18,20 37102:13 37114:15 37115:7 37125:15 37126:8,11 37128:7 37128:10 37130:13 37130:14 37143:8 37144:25 37150:22 37151:23 37153:6,11 37154:25 37161:8 37166:3 37170:25 37173:1 37175:3 understanding 37036:10 37045:5,8 37047:11,12 37089:21,21 37101:1 37102:15 37124:6 understood 37046:4 37049:23 37052:2 37081:4 37088:2,17 37097:22 37098:21 unearth 37070:6 37072:2,25 unemployment 37085:5 unenviable 37168:23 37168:25	unfold 37050:7 unfolded 37051:17 37157:14 unfortunate 37125:2 unfortunate 37159:15 37166:5 unfurling 37046:5 uniform 37030:18 unimaginable 37065:23 Union 37062:2 unions 37072:19 unit 37030:20,21 37061:20 37064:9 United 37091:21 units 37036:5 37037:9 37037:15 37039:13 37039:25 37040:18 37062:5 37063:12,13 37117:5 unit's 37064:7 unlawful 37071:15,19 unnecessary 37182:18 unprecedented 37037:16 unpredictable 37063:3 unravelling 37063:16 unreasonable 37181:13 unresponsive 37086:14 unusual 37047:8 37169:18 un-withdrawn 37175:25 uphold 37123:19 upsetting 37031:15 urban 37061:13 37105:10 USA 37165:16 usage 37120:23 use 37030:16 37031:24 37043:9 37046:19 37054:21 37062:13 37066:16 37067:6,8 37079:2 37081:23 37090:16 37093:9,12 37093:20 37094:5 37100:17 37102:6 37104:15 37109:5,7 37110:19 37113:13 37115:11 37116:7,11 37116:14,18 37117:15 37120:7 37131:12 37136:16 37136:17 37137:6,25 37142:11 37163:11 37163:13,24 37164:14,17 37166:9 37169:20 37171:16 37171:19,22 37173:24,25 37175:9 37175:10 37177:8,25 useful 37053:13 37099:17 37102:15 37103:19 37124:10 usefully 37133:21 useless 37140:3	uses 37171:24 37174:13,18 37175:5 37175:10 utilisation 37113:17 utilised 37039:16 37052:8 utter 37134:23 utterance 37082:11 37091:5 UUUU1.3 37169:12 UUUU11 37028:13,20 37028:25 UUUU12 37054:16,17 37055:7 UUUU13 37054:22 UUUU2.5 37034:16 37044:17 UUUU2.6 37129:24 <hr/> V valid 37042:17 37087:10 37172:25 value 37040:16 37071:12 37085:2 37120:15 37126:18 37140:10 van 37176:20 various 37073:6 37163:21 vehicle 37042:24 37103:17,18 vehicles 37041:14 37100:13 37101:2 37103:4 37114:14 venture 37058:15 37096:6 ventured 37122:8 veracity 37110:15 verba 37084:2 verify 37111:2 Vermaak 37028:15 37031:20 vernacular 37098:12 versed 37180:2 version 37039:17 37098:16 37108:16 versions 37111:25 video 37058:1 37097:23 37108:9 37109:5,9 37112:11 37113:18,25 37117:19,24 37118:14 37120:20 37136:8 37144:14 37145:3,25 37151:19 37152:24,25 37153:7 37166:24 videographer 37118:17 videos 37041:13 37097:18 37108:18 37149:20 37153:9 view 37045:21 37067:3 37083:14,16,17 37085:23 37097:20 37139:18 37144:16 37145:11 37149:8
---	--	--	---	---

37158:1,7 37169:18 37181:5,5 37182:17 views 37100:15,15 37102:17 violence 37034:5 37053:4 37056:24 37057:2 37080:2 37092:7 37093:23 violent 37056:17 37067:22 virtually 37138:2 37165:9 visibility 37102:12 visible 37143:20 37149:11 37151:22 37152:1,16,20 vital 37178:18 voice 37066:1,4 37136:8 volatile 37056:18 volatility 37056:18 volley 37152:8 volume 37106:14 voluntarily 37068:3 37074:18,19 37079:11 voluntary 37143:5,7 voyage 37183:2 V2 37108:3,9 37144:14 V2A 37108:5,9 V3 37109:5 V4 37113:18 V5 37117:18	37181:25 37182:8,23 wanted 37085:14 37090:22 37095:24 37096:15 37156:17 37162:1 wants 37059:15 37061:2 37153:1 war 37095:21 warfare 37138:5 warn 37106:13 warned 37068:6 warning 37098:10 37122:4 37123:2,8 37124:4,24 37127:2 37127:24 37128:20 37128:20,21 37129:18 warrant 37029:14,15 37029:17,25 37031:7 37033:16 37110:12 37111:9,16 37112:1 37112:12,17 37156:7 warranted 37122:19 wash 37086:8 wasn't 37042:17 37130:24 37165:2 37166:10 wasn't 37060:12,21 37065:22 37070:25 37072:1 37099:22 37148:5 37153:7 watched 37113:18 37117:19 watching 37092:20 37115:23 water 37046:19 37050:24 37051:5 37108:23,24 37109:5 37109:7,8,19,23 37110:4,19 37111:5,8 37111:21 37112:18 37113:5,8,9,12 37146:7 wave 37106:21 way 37030:5 37040:8 37046:4 37047:5 37048:2,17 37051:25 37058:2,8 37059:24 37060:8 37065:13 37072:14 37074:19 37075:23 37076:1 37077:12 37079:19 37082:3 37089:5,6 37103:4 37113:8 37114:15 37119:10 37121:23 37124:12 37142:17 37144:24 37157:14 37165:22 37165:22 37167:22 37168:11 37170:13 37171:10 37173:1 37180:8 ways 37096:18 37177:7 weapon 37095:21 37121:23 37127:17 37136:10 37137:5,18	weapons 37067:17 37074:17 37076:10 wearing 37121:22 Wednesday 37065:5 37077:16,17 week 37070:23 37072:14,20 37092:10 37118:10 weeks 37084:11 37096:1 37109:18 weigh 37076:15 weighed 37146:20 welcome 37096:16 welcomed 37096:14 went 37035:3 37044:5 37049:1 37068:7 37070:2 37081:11 37085:24 37092:9 37096:2 37099:15 37111:16 37118:23 37120:3 37134:22 37158:24 37163:23 weren't 37050:22 weren't 37059:20,25 37060:6,7,11 37064:16 37074:23 37077:7 37078:12 37145:1 37148:19 37174:16 Wesley 37053:16,18 westerly 37116:24 western 37140:15 37157:16 westwards 37031:5 we'd 37093:21 we'll 37028:1 37050:25 37061:3 37111:3 37123:23,24 37126:22 37141:24 37145:20 37156:3 37161:21 37162:12 37162:20 we're 37035:15 37037:13 37052:5,6 37055:7,8 37059:24 37069:11 37073:2 37075:9 37091:23,24 37094:20 37098:10 37104:21 37139:14 37146:6 37171:1 we've 37028:12 37033:22 37056:3 37068:1 37069:20 37082:23 37090:5 37120:24 37130:13 37169:23 37176:3 37178:15 we'll 37155:23 what's 37039:9 37049:13 37054:11 37054:22,23 37097:23 37141:19 whichever 37098:16 whilst 37041:10 37096:9 37151:12 37159:7	white 37046:1,10 37058:16 37074:11 37088:19 37105:7,12 37105:19,20 37147:12 37169:22 37170:1,9,11,14 37171:7,10,23 37174:18 37175:21 37176:18 White's 37162:7 37163:17 37169:14 37169:24 37171:15 whittle 37092:4 who'd 37053:3 who's 37087:16 who've 37051:1 wild 37167:6 willing 37056:15 37058:19 37100:11 willingness 37101:21 wind 37116:8 window 37114:8 windows 37104:3 wire 37039:12,15,17 37046:6 37099:8 37108:8 37174:22 37175:5 wish 37109:8 37123:6 37178:16 37179:6,14 37183:2 wishes 37154:4 withdraw 37176:1,3 witness 37037:4 37043:24 37053:16 37053:20 37123:21 37146:14 37154:3 37169:16 37175:24 37178:17 37179:15 37179:20 37180:4 37181:10,12,13,13 witnesses 37032:7 37043:20 37083:15 37089:5 37122:23 37129:19 37167:14 wonder 37057:20 won't 37047:5 37126:9 word 37042:12 37043:10 37081:6 37087:5 37091:18 37104:16 37171:24 37173:24,25 37174:8 37174:12,13,19 37175:9,11 37176:18 words 37050:18 37122:10,13 37169:20 37171:17 37177:8 work 37027:23 37061:13 37078:5 37082:12 37087:2 37144:24 37155:9 37172:19 37174:11 worked 37054:14 37091:21 37131:5 37132:11 working 37084:18	37093:22 37148:5 workload 37128:14 works 37061:9 37130:18 world 37080:17 37175:23 worry 37098:18 37139:12 worse 37137:14 37166:19 worst 37132:15 37151:8 37159:22 worth 37139:7 37172:22 worthwhile 37103:19 wouldn't 37048:18 37083:4 37086:8,25 37093:14 37129:18 37143:9 wouldn't 37074:17 37145:14 37152:15 37175:10 37176:6 wounded 37030:25 write 37094:15 37118:11 37162:18 37170:13 writing 37035:5 37036:14 37038:20 37041:22,22,23 37137:2 written 37035:21 37036:4 37037:8,16 37070:5 37171:7 37177:5,6 37179:5 wrong 37062:22 37068:24 37079:5 37098:22 37099:23 wrong-footed 37085:17 wrote 37049:4 37070:25 37108:14 37118:23
W				
wait 37043:4 37098:11 37150:4 waited 37042:6 37094:2 waiting 37031:2,9 waives 37126:25 walk 37028:13 37029:4 37061:16 37062:2 37115:18 37124:17 37159:5 walking 37031:3,5 37115:4,5 wall 37136:8 want 37032:8,17 37035:13 37041:4 37056:4 37065:3 37074:20 37076:1,6 37078:1 37093:14 37096:5 37099:10 37100:4,5 37103:9 37104:13,15 37106:17,25 37110:13 37119:3 37130:6,6 37137:15 37142:3 37144:13,17 37148:1 37149:24 37162:23 37163:25 37165:11 37166:15 37166:16 37172:19 37173:4,6 37176:13 37179:13 37180:20				
X				
X 37147:24 37148:4				
Y				
yards 37132:15 year 37027:21,21,23 37029:19,20 37072:21 37112:9 37129:25 37164:15 37165:4 37182:16 years 37038:3 37070:24 37082:9 37092:9 37109:12,13 37118:10 37128:7 37141:16 37165:4 37167:11 yell 37105:14 37143:12 yellow 37056:6 37100:17 yesterday 37028:3 37034:13 37036:11 37038:18 37041:1,13 37042:7 37043:25 37047:7 37056:22				

<p>37063:16 37068:18 37085:4 37097:18 37100:15 37107:2 37108:18 37113:18 37114:20 37115:22 37117:2,19 37135:5 37137:4 37139:6 37150:10 37151:10 37151:17 37153:9 37161:13,19 yesterday's 37162:2 yielded 37129:4 yo 37136:9 YouTube 37106:11 you'd 37043:15 37093:13 37096:23 37107:20 37124:17 37129:15 37142:16 37145:11 37160:5 37169:4 37176:7 37179:19 you'll 37058:24 37064:4 37065:3 37092:2 37093:7 37094:2 37097:5 37108:23 37110:17 37126:24 37127:10 37130:17 37157:19 37167:12 you're 37034:11 37040:21 37043:4,12 37051:1 37059:4,5 37061:24 37065:5 37084:18 37086:1 37095:16 37101:23 37107:10,12 37116:8 37123:3,18,21 37124:18,23 37125:10 37129:1,9 37134:18 37135:18 37136:25 37138:18 37144:21 37146:15 37147:11 37154:9,11 37158:14 37160:25 37161:1 37163:3 37164:10 37165:15 37166:11 37168:1,17 37169:7 37172:25 37179:21 37180:11 37182:1 37183:1 you've 37036:1,23 37038:3 37055:5,24 37074:16 37085:22 37100:2 37105:6 37108:3,4 37109:4,7 37118:10 37129:1,9,9 37130:17 37139:2 37152:18 37153:9 37157:22 37158:18 37161:2 37166:22 37169:25 37182:2 37183:2</p> <hr/> <p style="text-align: center;">Z</p> <p>zero 37132:14 Zokwana 37065:8,9</p>	<hr/> <p style="text-align: center;">\$</p> <p>\$326 37072:20 \$64 37071:17</p> <hr/> <p style="text-align: center;">0</p> <p>000 37068:25 37069:8 37071:17 37077:8 37095:20 37177:14 08:28 37027:2 08:48 37041:10 09:08 37054:8 09:28 37068:9 09:47 37082:11</p> <hr/> <p style="text-align: center;">1</p> <p>1 37097:8 37113:17 37119:22 37120:12 37138:18,24 37139:3 37139:5 37157:21 37161:3 37183:8,11 1st 37056:23 1.2 37092:13 1.7 37034:16 37044:17 1:30 37034:22 37035:20,24 37037:7 37037:17 37039:8 37044:6 37045:12 10 37066:21 37068:12 37167:10 37183:3,11 10:07 37096:5 10:37 37097:2 10:57 37111:3 100 37056:22 37106:25 100% 37093:14 37119:18 37132:4 11 37099:25 11th 37092:20 11:17 37124:9 11:20 37099:25 11:37 37136:9 12 37055:4,6 37069:20 37069:24 37071:12 37075:21 37076:14 37076:17 37090:11 37150:11 37151:9,9 37154:18 37156:6,7 37163:2,5 12th 37092:21 12:07 37144:9 12:27 37159:22 12:34 37161:5 12:54 37174:11 120 37105:23 13 37054:21 37055:7 13th 37048:9 37052:12 37052:19 37066:25 37092:21 37121:14 138 37132:22 14th 37052:7 37090:24 37091:9 37096:13 140 37106:16 141 37156:24 15 37096:25 37131:22 37133:10 37134:4 37144:7</p>	<p>15th 37052:8 37073:17 37090:24 37091:9 37096:14 150 37160:1,8 15293 37156:24 16 37134:4 16th 37033:19 37034:2 37035:19 37045:10 37045:12 37052:10 37056:9 37067:16 37068:11 37069:22 37070:2 37077:9 37090:14 37094:11 37109:6 37113:14 37130:2 37140:18 17 37133:9 37156:24 37171:22 18 37108:6 37117:16 37130:10 37156:10 180 37062:14</p> <hr/> <p style="text-align: center;">2</p> <p>2 37028:14 37029:5 37030:3,20,24 37033:8 37093:21 37098:20 37120:7,14 37123:12 37139:1,2 37139:19 37156:15 37157:1,11,14 37162:23 37174:16 2:30 37042:22 37044:8 20 37094:16 37105:14 37136:14 37167:22 200 37177:22 2008 37166:7 37167:8 2013 37108:15 37140:8 37167:8 2014 37027:1 21 37163:3,5 22 37082:9 22nd 37027:20 24 37095:25 37133:11 25 37156:24 25% 37165:9 26th 37029:18 37120:3 37129:25 262 37090:15 37091:16 37093:5,6 27th 37029:18 29 37158:13 295 37158:10</p> <hr/> <p style="text-align: center;">3</p> <p>3 37034:11,23 37035:3 37035:8,22 37036:13 37039:14 37157:18 37158:2,9,15,17 3:30 37037:18 30 37147:22,25 37177:14 30% 37132:5 300 37061:25 37095:20 37105:3 37159:4,5 37160:1 328 37104:23 33 37108:6</p>	<p>34 37059:1</p> <hr/> <p style="text-align: center;">4</p> <p>4 37041:13 37068:25 37069:8 37077:8 37097:24 37099:16 37102:24 37114:11 48 37127:20,25 49 37148:17</p> <hr/> <p style="text-align: center;">5</p> <p>5 37027:1 37098:2 37161:3 50 37182:1 50% 37131:16 500 37107:1</p> <hr/> <p style="text-align: center;">6</p> <p>6 37099:21,24 6.18 37133:5 62 37158:14</p> <hr/> <p style="text-align: center;">7</p> <p>7 37054:2,5 37055:9 70 37082:9 75 37165:8 75% 37132:14 77 37130:11 37138:16</p> <hr/> <p style="text-align: center;">8</p> <p>8th 37108:14 80 37117:16 37177:15 37177:19 800 37167:8 85% 37072:22</p> <hr/> <p style="text-align: center;">9</p> <p>9 37044:1 37074:17,25 37075:4 37118:9 37119:23 37137:5,24</p>
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