

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 31 19 DECEMBER 2012 PAGES 3284 TO 3399

HELD AT

CIVIC CENTRE, RUSTENBURG, NORTH WEST PROVINCE



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<p style="text-align: right;">Page 3284</p> <p>1 [PROCEEDINGS ON 19 DECEMBER 2012] 2 [09:35] CHAIRPERSON: The Commission resumes. 3 Brigadier, I must remind you, you're still under oath. Mr 4 Bizos, I understand you have some more questions for the 5 witness. Are these documents on the desk that we've 6 received from you, Mr Semenya? 7 MR SEMENYA SC: Indeed, Chair. 8 CHAIRPERSON: Would you like to tell us 9 shortly before you – or you can do it later if you like – 10 would you like to tell us shortly before Mr Bizos restarts 11 his cross-examination to what they are, or will you prefer 12 to do it later? 13 MR SEMENYA SC: Chair, there are three 14 sets of documents that ought to replace annexure SS3. 15 CHAIRPERSON: SS3. 16 MR SEMENYA SC: Indeed. 17 CHAIRPERSON: I see. 18 MR SEMENYA SC: I mean exhibit SS3. 19 CHAIRPERSON: Yes, yes. Alright, thank 20 you. 21 MR SEMENYA SC: They would be document in 22 relation to the 10th, the 13th and the 16th of August 2012. 23 CHAIRPERSON: Thank you very much. 24 MR BUDLENDER SC: Chair, I'm sorry to – 25 could I just ask in what sense they replace SS3? Is it</p>	<p style="text-align: right;">Page 3286</p> <p>1 the page numbered 10, which is about 15 pages, or 20 pages 2 from the end, at the right-hand foot of the page there's a 3 page number 10. I don't know whether you're able to find 4 it, Chair. 5 CHAIRPERSON: That page starts with what 6 looks like a slide number 19, starting, "The tasking table 7 to follow were compiled for the Commission briefing." 8 MR BUDLENDER SC: Yes. 9 CHAIRPERSON: Which indicates that they 10 appear to be compiled after the 16th of August for the 11 benefit of this Commission. 12 MR BUDLENDER SC: Yes, so that – 13 CHAIRPERSON: But I take it that when 14 Colonel Scott gives evidence – sorry, Lieutenant-Colonel 15 Scott gives evidence, he will explain all this and these 16 matters will be clarified. In the meanwhile the documents 17 are before us and can be referred to for purpose of 18 elucidating the evidence that's currently being presented. 19 Does that satisfy you? 20 MR BUDLENDER SC: I have no problem, as 21 long as it's understood that part appears to be a 22 subsequent reconstruction rather than a part of the plan 23 that was prepared at the time. 24 CHAIRPERSON: If you read the first line 25 that I read out, it's quite clear there's no pretence that</p>
<p style="text-align: right;">Page 3285</p> <p>1 that SS3 are not genuine documents, or they're incomplete, 2 or what is the nature of those documents? 3 MR SEMENYA SC: SS3, Chair, was compiled 4 by the attorney. What Colonel Scott did was then to take 5 the various plans that were drawn on the 10th and the 13th 6 and the 16th and compile to what we now have as the true 7 documents reflecting the plans as they progressively 8 improved over the days. 9 CHAIRPERSON: Do I understand correctly 10 that all the documents in the original SS3 are here, but 11 there are extra documents, so that we now have a complete 12 set of documents dealing with the matters to which you've 13 referred? 14 MR SEMENYA SC: But for the photographs 15 in SS3, which are not properly there. 16 CHAIRPERSON: Yes, which I didn't find 17 very clear either, frankly, but I thought if they are 18 necessary we'll call for proper, you know, Technicolor 19 versions of them, not just the black and white copies, but 20 anyway, that's not relevant at this stage. Anyway, thank 21 you very much. 22 MR BUDLENDER SC: Chair, I had a look at 23 these documents overnight and I do want to simply note, I 24 assume that the last 15 or so pages were not part of the 25 plans, they've been compiled subsequently. If one goes to</p>	<p style="text-align: right;">Page 3287</p> <p>1 this was an original 16 August document. On its face as it 2 were it confesses that it's a subsequent document. Mr 3 Bizos, I take it you were given a set of these documents 4 before, were you, or did you only get them this morning? 5 MR BIZOS SC: - gone through them. I 6 don't think that it is necessary for us for the purposes of 7 this witness. We're waiting for Lieutenant-Colonel Scott 8 to deal with the matter. So I don't think that will 9 interfere with our – 10 CHAIRPERSON: We don't have to spend any 11 further time on this aspect of the matter. You will 12 proceed with your cross-examination now. 13 MR BIZOS SC: Thank you, Mr Chairman. 14 CHAIRPERSON: Thank you. 15 MR BIZOS SC: Brigadier, we will continue 16 putting to you what Colonel Hendrickx's views are in 17 relation to what happened at Marikana, and what he says is 18 this. The levels of violence need to be factored into any 19 plan. Would you as a planner and as an advisor agree with 20 that statement? 21 MR HANABE: Can you repeat that, Senior 22 Counsel? 23 MR BIZOS SC: The levels of violence need 24 to be factored into any plan. As it stands probably, would 25 you agree with that statement?</p>

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1 BRIG MKHWANAZI: Counsellor, it is
 2 correct that to be able to compile an operational plan,
 3 definitely you must know exactly at what level it is and
 4 you can be able to draft it properly. However,
 5 Chairperson, through you, I'm starting to have a problem;
 6 maybe I should voice it out, not to keep quiet, that the
 7 issue of Mr Hendrickx starts to be a problem to me because
 8 I was going to be happy if he has already given evidence
 9 here to say this is what he said, but what I'm learning is
 10 what he will say.
 11 Now what if he doesn't say, what if he doesn't
 12 appear here? And I'm having a problem on that. I'm not in
 13 liberty to say I understand exactly the approach of
 14 everything, but I'm feeling strongly that this point as
 15 point number 1, Sir – I've got two points to address, after
 16 I've answered this question. This issue of –
 17 CHAIRPERSON: - interpose for a moment.
 18 I understand from what Mr Bizos said and what we were told
 19 earlier that his clients were proposing to call a Public
 20 Order Policing expert from Belgium. He's now disclosed
 21 that this will be Colonel Hendrickx; that's the witness
 22 they're going to call, and they told us who he is and his
 23 background. I haven't seen it, but I understand that a
 24 summary has been prepared of his evidence, which is in the
 25 hands for example of the evidence leaders, and I presume

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1 that's the document which Mr Bizos is reading to you. It
 2 sometimes happens of course in a trial that –
 3 MR BUDLENDER SC: Sorry, Chair, there's
 4 been a misunderstanding. I don't have a summary of his
 5 evidence in the sense of which one usually uses that term.
 6 What I have from the LRC is a note of their consultation
 7 with Mr Hendrickx.
 8 CHAIRPERSON: I see. There's no summary
 9 strictly so-called, but it summarises what he is going to
 10 say. Now it often happens in a trial that an earlier
 11 witness, it's put to him or her what a later witness will
 12 say and is asked to comment, and then sometimes later
 13 witness doesn't come, which I take it isn't a problem we
 14 have here, or the later witness does come and says
 15 something different, which is normally a great source of
 16 embarrassment to the side who calls him, but it means of
 17 course that comments that are made by the earlier witness
 18 relating to what it was said the later witness would say,
 19 which he doesn't say, then fall away. But the way trials
 20 work is you can't say to an earlier witness we're going to
 21 tell you that a later witness is coming and you'll have to
 22 come back afterwards because we have to first see what he
 23 says. Sometimes counsel would like to do that, but they're
 24 not allowed to. So in this case you must just assume, as I
 25 will and my colleagues will, that this is what Colonel

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1 Hendrickx is expected to say and which he probably will
 2 say, and any comments that you make on evidence where he
 3 falls short of saying what they propose calling him to say,
 4 any comment you make about that will be irrelevant. I
 5 think that's an answer to the question you put. I hope
 6 that deals with it satisfactorily.
 7 Mr Bizos, my colleague Commissioner Hemraj makes
 8 a point which I think is one which I should put to you, and
 9 that is that normally when experts give evidence, and this
 10 witness is effectively giving evidence as an expert,
 11 summary is given of the evidence that each expert will give
 12 beforehand so that the expert witnesses on the other side
 13 as it were, can study the summary of what their colleagues
 14 to be called by the other side will say. Now this hasn't
 15 happened on this occasion and the question arises to
 16 whether it wouldn't be fairer to the witness for him to see
 17 in written form beforehand, before he testifies further,
 18 what your witness is going to say by way of expert
 19 testimony. I understood you had a second point you wanted
 20 to raise, Brigadier. Would you like to mention that as
 21 well so when he replies to what I put to him, he can deal
 22 with that point as well?
 23 BRIG MKHWANAZI: Thank you, Chairperson.
 24 The other point I want to actually get into it, maybe it
 25 can be not okay, but I think I'm not young, I'm a grownup

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1 person and if something is not alright with me I must say
 2 clearly that I'm not okay with this. I came in the police
 3 1986, is the first, Chairperson, but I was not happy with
 4 the way the senior counsellor started his, maybe cross-
 5 examination with me, where he referred to issues of
 6 apartheid.
 7 Chairperson, you know very well everybody sitting
 8 here who's black and sitting there as a black person or
 9 Africans, we are not orchestrators of apartheid in this
 10 country, and if now I'm going to sit here and be given a
 11 situation in a sense of as if I enjoy, I benefited in seven
 12 years under Internal Stability, for me is totally not
 13 acceptable. I was there; I was part of that. I had
 14 nothing to do, I had to my job as I joined the police force
 15 at that time, but for me, Chairperson, to sit here and have
 16 this type of question that clearly indicates that as a
 17 person who came in the police during the time of apartheid,
 18 this is how I benefited, this is how things went, and all
 19 that. For me, Chairperson, I don't think this Commission
 20 deserves to have this type of a situation. I feel strongly
 21 that it is not okay because I tried even yesterday to
 22 listen from senior counsellor from the leading evidence
 23 team that there were little bit of sarcastic words as he
 24 was going, but you protected me on that and I appreciate
 25 that.

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1 But on the issue of this one of apartheid coming
 2 in, apartheid coming in, you know we talk about my own
 3 grand-grandparents, you know, they were victims of
 4 apartheid and I was a victim of apartheid, and I cannot
 5 allow a situation whereby I'm going to sit here and have a
 6 person telling me about apartheid. It's like opening a
 7 wound that is healing slowly and slowly on me. I
 8 understand very well what apartheid deal with me. There's
 9 no time as a black person in this country, I stood up, I
 10 put a board that is written non-white and white. I only
 11 manage that board because I have no choice to do that, and
 12 I think strongly that, Chairperson, through you, I may be
 13 out of order but I'm saying if I don't fight for what I am
 14 as a being, as a person, definite, nobody will fight for me
 15 and for me to sit here and be reminded about apartheid,
 16 apartheid, apartheid, I must say, Senior Counsellor, I
 17 can't accept it.

18 I want just to, last point, Chairperson. The
 19 senior counsel spoke about me having seven years working
 20 under Internal Stability. I want to indicate, in seven
 21 years working for Internal Stability my white colleagues at
 22 that stage were, before '94, were officers, were
 23 lieutenant-colleagues. I was still a non-commission
 24 officer. I was still a sergeant. I benefited nothing in
 25 that time of apartheid and I never orchestrated and I will

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1 never, never sit and accept that position here that I'm
 2 reminded with apartheid as if I enjoyed apartheid.
 3 Apartheid killed a black person.

4 CHAIRPERSON: I must confess, Brigadier,
 5 that I protected you against the sarcasm. I didn't think
 6 you needed protection in respect of Mr Bizos' questions,
 7 and I'll tell you why, but I want to make it clear that if
 8 I detect a lack of courtesy on the part of any counsel to
 9 any witness, or vice versa, I won't hesitate to deal with
 10 it as vigorously as I can. What Mr Bizos was leading up
 11 to, as I saw it, was that a number of people who were
 12 members of the Internal Stability section, didn't stay on
 13 after '94. They left the force, and he in fact indicated,
 14 as I understand his questions, that you were regarded as
 15 one of the – if I can use the word in quotations – one of
 16 the good people and you were kept on in the force because
 17 of the fine qualities that you had and that you had
 18 displayed in your work. That is my understanding of the
 19 way the questions were put. So I didn't understand him to
 20 be making the suggestions that you thought he was making
 21 and I must say that if I had understood that I would have
 22 come down on him as vigorously as I could. But it was also
 23 clear to us that before '94 you were a non-commission
 24 officer, you were not an officer. You only were promoted
 25 to the rank of officer after '94, after you had been kept

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1 on in the force for the reasons which Mr Bizos put to you.
 2 But anyway, that's my understanding of the matter. If you
 3 felt at the time that I wasn't protecting you as you were
 4 entitled to be protected, I can only say I'm sorry, I
 5 didn't see the need to protect you, but I'm alert to the
 6 aspect from now on and if there's any further difficulty in
 7 that regard I will deal with it. Mr Bizos, is there
 8 anything further you wish to say before you proceed with
 9 your cross-examination? You can see the witness is hurt
 10 and if one doesn't – I'm sure that knowing you as I do, you
 11 didn't intentionally set out to hurt him, but perhaps you'd
 12 like to say something to deal with this matter before you
 13 proceed with your cross-examination.

14 [09:55] Yes, may I say, Mr Chairman, that I did not
 15 intend either by implication or certainly not directly to
 16 say anything or put anything to the witness which was
 17 judgmental against his personal integrity throughout his
 18 career, including the period that he served as a non-
 19 commissioned officer. But I can understand that he wanted
 20 to put this on record in order to avoid any
 21 misunderstanding. I want to assure him that in my personal
 22 capacity and certainly as counsel, having taken part in the
 23 reconciliation process, I don't intend to hold anybody
 24 responsible for the sins of apartheid when he was a non-
 25 commissioned officer in the police force, and please, I ask

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1 him to accept that that was not in my intention. I don't
 2 think that I said anything which indicated that, and that's
 3 all I want to say in relation to his second – but may I
 4 return to the question of the expert.

5 Yes, this is, because the rules in civil
 6 procedure say that the reports have got to be exchanged and
 7 there are time limits and they are exchanged and attempts
 8 are to be made so that the experts can possibly do a joint
 9 report in order to avoid – but I don't know that that rule
 10 needs to be applied here in the particular circumstances.
 11 We have a witness who is not in the country. Fortunately
 12 the new technology of this world makes it possible for us
 13 to communicate with him and get instructions. We haven't
 14 got a complete statement to serve either on the, or to put
 15 it in the hands of the evidence leaders or to put it before
 16 the Commission before we have personal consultations, and I
 17 would submit that that rule in relation to civil
 18 proceedings should not be applied here, that I should be
 19 allowed to put to him what we have been instructed. It's a
 20 simple question, the levels of violence need to be factored
 21 into any plan. This is a principle with which he as an
 22 expert can agree or disagree with. The fact that I say
 23 that this does not come from me but from an expert is
 24 something that I am entitled to put to him, lest he thinks
 25 that I'm making the rules. So I don't think that I should

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1 be prevented from actually putting these questions to the
 2 witness because there haven't been expert reports
 3 exchanged, and I ask to be allowed to persist in the
 4 question. There will be similar questions and I think,
 5 with respect, that the witness has read too much into the
 6 question. He's not at any disadvantage. He's an expert;
 7 he can either agree or disagree with it.

8 CHAIRPERSON: Obviously the civil rules
 9 don't apply to this Commission, but what does apply to the
 10 Commission is the need to be fair, procedurally fair at all
 11 times, and the question is whether in the case of an expert
 12 it's fair to put a whole series of questions to him based
 13 on what another expert says without him having a chance to
 14 see it beforehand and think about it as well. But anyway,
 15 that's a matter I take it Mr Semenya is going to address me
 16 on because I saw he turned his microphone light on a moment
 17 ago.

18 MR SEMENYA SC: Chair, we also record
 19 that we have not even been favoured with the notes from
 20 which my learned colleague is quoting from.

21 CHAIRPERSON: What do you want me to do
 22 about it? Mr Bizos is quite correct in saying that the
 23 ordinary rules applicable to civil litigation don't apply,
 24 but he will be the first to concede that the basic rules of
 25 fairness do apply, must apply. The question that arises is

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1 whether it's fair – and the witness seems to suggest it
 2 isn't because he raised the point, his first point – the
 3 question is whether it's fair, or perhaps put differently,
 4 whether it would be fairer if he were to be given a chance
 5 to read the main points that are going to be put to him
 6 upon which his expert testimony is sought, before the
 7 cross-examination continues. That's basically the question
 8 before us at the moment. Do you have any submission that
 9 you wish to make in regard thereto?

10 MR SEMENYA SC: Yes Chair, I'm merely
 11 buttressing that all rules of fairness would also require
 12 that we have the benefit of that document. We would have
 13 precognised the witness around it as well so that he can
 14 competently comment on the propositions being put to him.

15 CHAIRPERSON: There's a further point
 16 that I propose is to be considered by both you, Mr Semenya,
 17 and Mr Bizos, and everybody else for that matter, and that
 18 is if the witness isn't given opportunity to think at least
 19 before he gives evidence on these matters to what Colonel
 20 Hendrickx has said, he's answering almost off the top of
 21 his head, very much, you know, impromptu and ex tempore,
 22 and that might affect the weight to be given at the end to
 23 the opinions he expresses and particularly might affect the
 24 value of any admissions that he makes, because it could be
 25 argued that well, he conceded that point - not admission,

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1 concessions – concessions he made, he conceded that but he
 2 didn't have an opportunity to think about it properly
 3 beforehand because this was sprung on him when he was
 4 giving evidence. So that's another aspect. Anyway, I'm
 5 interrupting you, Mr Semenya. I don't know whether you
 6 want to continue.

7 MR SEMENYA SC: Yes Chair, that's
 8 precisely the submission we're making, that proper rules of
 9 fairness would have had the witness firstly read the
 10 opinions, internalise them, and make sure whether when he
 11 differs with them he gives his answers on a considered
 12 basis.

13 CHAIRPERSON: What do you suggest should
 14 be the way forward?

15 MR BIZOS SC: Are you calling on me or on
 16 Mr Semenya?

17 CHAIRPERSON: He's addressing me, as I
 18 understand. Let him put up what he suggests then you can
 19 reply. You may accept what he says; you may not; you may
 20 make an alternative suggestion, but let's first hear what
 21 Mr Semenya's suggested way forward is.

22 MR SEMENYA SC: That the witness be
 23 afforded the opportunity to look at those notes and read
 24 them and if he's comfortable that he can deal with them,
 25 then we can proceed, Chair.

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1 CHAIRPERSON: I don't know in what form
 2 the notes are that Mr Bizos has before him, but would it
 3 help if we took a short adjournment to enable Mr Bizos and
 4 Mr Semenya to discuss the matter, because –

5 MR BIZOS SC: Mr Chairman, with the
 6 greatest respect, I don't know what our learned friend
 7 expects from us. He put up the witness. He consulted with
 8 him. He asked him for opinions relating to the matter and
 9 he is complaining that I should not put to him what another
 10 expert is going to say. What is the basis of it?

11 CHAIRPERSON: No, no, no Mr Bizos, he's
 12 not saying that. He's saying that considerations of
 13 fairness require that the witness should have an
 14 opportunity before you put these points to him when he's
 15 giving evidence, given an opportunity to look at a summary
 16 of what the witness is going to say so that he can think
 17 about it and not have to answer just off the top of this
 18 head ex tempore. I understand that to be Mr Semenya's
 19 point. Clearly if he were to suggest that you're not
 20 allowed to put these points, then I would disallow his
 21 objection, but that's not the basis of what he's saying to
 22 us.

23 MR BIZOS SC: What our learned friend did
 24 was not to put an expert report for us to study and prepare
 25 our cross-examination. We were given a three-page piece of

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1 paper in which the witness's career was set out, but he was
 2 led, or he was asked questions by the court, which
 3 dependent upon his expertise. He now says that we must not
 4 cross-examine the witness that he has called without making
 5 what our instructions are. There are instructions which
 6 are made electronically. The colonel, our expert witness
 7 happens to be in the Congo, but we communicate with him.
 8 He makes suggestions and counter-suggestions and we ask
 9 questions, but there are certain things that we have picked
 10 out that I am entitled, with the greatest respect, to put
 11 to this witness who admits to be an expert. It's a simple
 12 question. It's a simple question. That you must take into
 13 consideration the levels of violence before you factor any
 14 plan. What is the problem with the question?
 15 CHAIRPERSON: I would be surprised of the
 16 witness is objecting to that question, and I'm sure the
 17 answer he'll give to that – perhaps not using the word I
 18 use, but the gist of what he says in reply to that is
 19 probably yes. But it's the questions that flow thereafter.
 20 What was put yesterday was that the plan was fundamentally
 21 flawed. Now I take it the only – you're not suggesting
 22 that the only flaw was that the levels of violence were not
 23 factored in. Obviously you're going to elaborate on that
 24 point by putting other flaws to him, and the sole concern
 25 that I have is to ensure, well actually sole concern is

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1 wrong. There are two concerns I have. The first concern
 2 is that he be dealt with fairly. The second point is that
 3 if he makes concessions – because you're obviously out to
 4 get concessions, if you don't get concessions the point I'm
 5 making falls away, but any concessions that he makes should
 6 not have their weight affected by the circumstances in
 7 which the questions were put. So that's why I would like
 8 to suggest that we adjourn for a short while. You and
 9 those assisting you can prepare a short little document, it
 10 needs to be a handwritten document, setting out the flaws,
 11 presumably a page or two, not more than that. The witness
 12 can then look at that, think about it for a while and then
 13 your cross-examination can continue. That seems to me to
 14 be the fair way of dealing with the matter. I'm not
 15 suggesting that you proceeded in a deliberately unfair way,
 16 but in view of the fact that the point's been raised and
 17 I've had to think about it, that seems to be the sensible
 18 way forward. I don't think that prejudices anybody. On
 19 the contrary, it would remove any prejudice that could
 20 otherwise be complained of by the witness and would in
 21 fact, it would actually be to your benefit in the sense
 22 that if you are able to obtain concessions from him, those
 23 concessions would have more weight than would be the case
 24 otherwise.
 25 MR BIZOS SC: We take your proposal and

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1 agree to it, and I think we may be able to come to some
 2 arrangement. I will give notice to my learned friend.
 3 I've got the cross-examination and I will indicate it to
 4 him, I'll indicate to him the issues and he can consult
 5 with the witness if he wants to. I don't know whether that
 6 would be the proper –
 7 CHAIRPERSON: Can he consult with the
 8 witness while the witness is under cross-examination? I
 9 suppose he can do so with your consent. So you're
 10 consenting to it.
 11 MR BIZOS SC: Well, I trust my learned
 12 friend and I –
 13 CHAIRPERSON: Your learned friend is an
 14 eminent counsel, chairman as I understand of the GCB at the
 15 moment.
 16 MR BIZOS SC: Yes.
 17 CHAIRPERSON: I'm quite sure if there's
 18 anyone we can trust to consult with his witness under
 19 cross-examination, it's Mr Semenya. So alright, okay -
 20 MR BIZOS SC: Yes, I accept that, Mr
 21 Chairman, and I think that either the witness has answers
 22 or he won't have, or I may cross-examine him on his answers
 23 or whatever they may be. So let us take the adjournment –
 24 CHAIRPERSON: Alright, so we'll take the
 25 adjournment and when you're ready to proceed and your

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1 learned friend is ready to allow you to proceed, we'll then
 2 carry on.
 3 [COMMISSION ADJOURNS COMMISSION RESUMES]
 4 [11:12] CHAIRPERSON: The Commission resumes.
 5 The evidence leaders obviously weren't informed that we
 6 were going to resume and in the interest of procedural
 7 fairness I suppose we'd better not proceed in their
 8 absence. Mr Fischer, have you got any views on that
 9 matter?
 10 MR FISCHER: Chair, I have no views on
 11 that particular matter, but I do have views on the matter
 12 that has been discussed before and perhaps when there's an
 13 appropriate opportunity I can share those with you.
 14 CHAIRPERSON: We have been given, I don't
 15 know whether you've been favoured with it but we've been
 16 given a document headed "Eddie Hendrickx" and then the
 17 subheading "Public Order Policing applicable theoretical
 18 propositions," and then "Operation Platinum of the plan,"
 19 and then the implementation, and then there's some other
 20 matters on the last page. I don't know whether you've seen
 21 that document, but that's been given, we understand, to Mr
 22 Semenya and to the evidence leaders and to us. I don't
 23 know whether you got it also. If you didn't, I suggest you
 24 make representations to the appropriate quarters.
 25 MR BIZOS SC: - made copies, Mr Chairman.

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1 They should have a copy.
 2 CHAIRPERSON: Has Mr Fischer got one, the
 3 Human Rights Commission –
 4 MR BIZOS SC: I don't know, but if he
 5 hasn't, we'll make on available.
 6 CHAIRPERSON: He's got one now. As you
 7 were speaking a copy was handed to him.
 8 MR BIZOS SC: May I say, Mr Chairman,
 9 that we decided in view of –
 10 CHAIRPERSON: Do me a favour, don't say
 11 this in the absence of the evidence leaders because you'll
 12 have to repeat again when they come.
 13 MR BIZOS SC: I see, we'll wait.
 14 CHAIRPERSON: If they come.
 15 SPEAKER: They said they will be here in
 16 two minutes.
 17 CHAIRPERSON: I presume they're in their
 18 office, thinking that we are still –
 19 MR BIZOS SC: Yes, I'm sorry I didn't
 20 notice –
 21 CHAIRPERSON: No, I didn't notice they
 22 weren't here.
 23 MR BIZOS SC: I didn't notice that they –
 24 CHAIRPERSON: - think it's probably best
 25 for us to adjourn until the evidence leaders come and they

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1 should be here soon.
 2 [COMMISSION ADJOURNS COMMISSION RESUMES]
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 20 that document, but that's been given, we understand, to Mr
 21 Semenya and to the evidence leaders and to us. I don't
 22 know whether you got it also. If you didn't, I suggest you
 23 make representations to the appropriate quarters.
 24 MR BIZOS SC: - made copies, Mr Chairman.
 25 They should have a copy.

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1 CHAIRPERSON: Has Mr Fischer got one, the
 2 Human Rights Commission –
 3 MR BIZOS SC: I don't know, but if he
 4 hasn't, we'll make on available.
 5 CHAIRPERSON: He's got one now. As you
 6 were speaking a copy was handed to him.
 7 MR BIZOS SC: May I say, Mr Chairman,
 8 that we decided in view of –
 9 CHAIRPERSON: Do me a favour, don't say
 10 this in the absence of the evidence leaders because you'll
 11 have to repeat again when they come.
 12 MR BIZOS SC: I see, we'll wait.
 13 CHAIRPERSON: If they come.
 14 SPEAKER: They said they will be here in
 15 two minutes.
 16 CHAIRPERSON: I presume they're in their
 17 office, thinking that we are still –
 18 MR BIZOS SC: Yes, I'm sorry I didn't
 19 notice –
 20 CHAIRPERSON: No, I didn't notice they
 21 weren't here.
 22 MR BIZOS SC: I didn't notice that they –
 23 CHAIRPERSON: - think it's probably best
 24 for us to adjourn until the evidence leaders come and they
 25 should be here soon.

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1 [COMMISSION ADJOURNS COMMISSION RESUMES]
 2 [11:16] CHAIRPERSON: Now that we are quorate,
 3 the Commission can proceed. Mr Bizos, are you going to
 4 speak now or Mr Semenya first?
 5 MR BIZOS SC: I wish to place on record,
 6 Mr Chairman, that in view of our learned friend's concerns
 7 about a document, we wish to place on record that we made
 8 available to the SAPS representatives and everyone else
 9 concerned a draft note of an initial consultation held with
 10 our witness over a month ago, prior to further evidence,
 11 testimony and documents being made available to the
 12 Commission. We consider it our duty to cooperate and
 13 assist the Commission and the evidence leaders, and it was
 14 for this reason that we made the notes available and our
 15 witness available to the leaders.
 16 In discussions it would appear that our learned
 17 friend Mr Semenya has some reservations about the
 18 correctness of our action in handing over the document to
 19 the evidence leaders and concern about the evidence leaders
 20 receiving it and making use of it for the cross-examination
 21 of the witness by our learned friend, Mr Budlender. I
 22 don't know what the real concern is. I merely wish to
 23 place on record that we consider it our duty to cooperate
 24 with the evidence leaders, consult with them, make
 25 information available for them to decide what they may want

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1 to do, or to suggest to them what we think they as evidence
 2 leaders should lead.
 3 So insofar as there is any suggestion that there
 4 was any wrongdoing of any kind either by us in handing the
 5 notes over, or in the evidence leaders accepting it and
 6 making use of the notes in cross-examination, we reject
 7 that we had any motive other than assisting the evidence
 8 leaders to prepare themselves and the Commission thereby.
 9 We believe that it is not for us to approach the Commission
 10 directly. We have consultations, as we are entitled to do,
 11 with the evidence leaders and to exchange information with
 12 them.
 13 CHAIRPERSON: Thank you, Mr Bizos. Is
 14 there anything you wanted to say in this regard, Mr
 15 Semenya, before Mr Bizos continues with his cross-
 16 examination, or I call on the now present evidence leaders
 17 to comment on this aspect also?
 18 MR SEMENYA SC: Yes Chair, we do. Chair,
 19 the concern we want to express is this, that in the first
 20 place the protocol agreed by everyone here was that all
 21 documents by various parties would be given to the evidence
 22 leaders. Once that has been done, the evidence leaders
 23 would then circulate the document to the other parties.
 24 What this document, we are told it is consultation notes by
 25 the Legal Resources Centre that have been given to the

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1 evidence leaders a month ago, and –
 2 MR BIZOS SC: No, we said notes were
 3 taken a month ago. We didn't say we handed them over a
 4 month ago, Mr Chairman.
 5 MR SEMENYA SC: My mistake. I would
 6 correct it. That the evidence leaders would obviously have
 7 had it for some time. The document was not given to us.
 8 It clearly informed part of the cross-examination of the
 9 witness. When we approached the evidence leaders to say
 10 can we have the document, we were told no, we cannot have
 11 it; it was given to them on the understanding that it is
 12 notes not to be shared, can only be given to us with the
 13 consent of Mr Bizos. That we found difficult to
 14 appreciate. Put another proposition to the evidence
 15 leaders whether they also have other documents by various
 16 parties to which we are not privy. I could not get an
 17 unequivocal answer that that is not the case.
 18 Chair, Commissioners, if we look for instance at
 19 this document and we go to the last page, there is a second
 20 paragraph 2 about what we need. The LRC says to the
 21 evidence leaders under paragraph 2, a detailed map of the
 22 area with a detailed second-by-second movements of the
 23 police and the crowd. We need to do this with the help of
 24 evidence leaders.
 25 CHAIRPERSON: Do we know whether that was

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1 done?
 2 MR SEMENYA SC: I don't know, Chair. I
 3 don't know if that's the only thing that was done, and we
 4 just said we should place it on record, this to us raises a
 5 concern whether there are other documents or exchanges of
 6 information or exchanges of strategy which is shared with
 7 the evidence leaders and not with the rest of us.
 8 CHAIRPERSON: Mr Bizos, before I call on
 9 you to reply, I suppose I should give the evidence leaders
 10 – as I said who are now with us – opportunity to respond.
 11 Mr Madlanga?
 12 MR MADLANGA SC: Thank you, Mr Chairman,
 13 Commissioners. But for the fact that we had to come back
 14 here prior to any interaction with my learned friend, I
 15 would have loved to talk to him and perhaps with the
 16 explanation that I'm going to give now he might have
 17 understood, and that I would have done because my learned
 18 friend there approached me during the adjournment and
 19 raised the issues that he's raising now. Chairman –
 20 CHAIRPERSON: I'm sorry, I assumed that
 21 you were here, which is why I didn't want to waste anymore
 22 time, which is why we came back to the auditorium. If I
 23 had realised that there were still matters outstanding,
 24 we'd obviously have waited until this –
 25 MR MADLANGA SC: No, I'm not complaining,

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1 Mr Chair. In fact, I should be the one apologising that we
 2 were not here when the commissioners walked in. Mr
 3 Chairman, Commissioners, regarding the protocol that my
 4 learned friend refers to, what I would like to draw to the
 5 attention of the Commission is that yes, the protocol does
 6 exist, but what has been happening, and with one party in
 7 particular, the South African Police Service, is that we
 8 have received documents which are in draft form. In fact
 9 we have volumes and volumes of such documents from SAPS
 10 which are in the form of draft statements, unsigned.
 11 Looking at those we are of the mind or belief that they are
 12 probably a transcription of the statements from the IP
 13 docket, but we cannot claim to be sure of that at all. The
 14 short point is that those statements are in draft form. We
 15 are keeping those statements with us; we have not
 16 circulated them with the other parties and that has nothing
 17 to do with there being collusion between us and SAPS; it's
 18 purely because those statements are in draft form, and we
 19 have as a result from time to time been approaching SAPS
 20 and asking them can we release this particular document,
 21 and we would then proceed and circulate that document upon
 22 getting a nod from SAPS. I'll just by way of example, I
 23 can refer to an email dated the 12th of November, sent to –
 24 I don't know whether it's Rensia or Rentia – Ms Rentia
 25 Engels – from Ms Kameshni, who is the person who actually

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1 receives and circulates documents on our behalf –
 2 CHAIRPERSON: I think Ms Kameshni is
 3 actually Ms Kameshni Pillay, for those who have to read the
 4 record later. For interest of clarity we must indicate,
 5 otherwise people will say there's another lady who's
 6 mentioned, who somehow appears and we don't know her.
 7 MR MADLANGA SC: My most sincere
 8 apologies, both to the Commission and to Ms Pillay. Ms
 9 Pillay, who handles, or rather who receives documents on
 10 our behalf and who also circulates documents on our behalf,
 11 on that date, or the date that I've just mentioned, she
 12 wrote an email actually seeking SAPS' permission to release
 13 a particular document. As I say, and because there's a
 14 measure of importance on this aspect, I will repeat myself,
 15 this does not suggest that there is collusion between SAPS
 16 and us, not at all. Not at all. So my understanding is
 17 that what happened here with regards to the statement of
 18 the expert Mr Hendrickx is exactly the same thing. This is
 19 a document which is in similar form, received from the LRC
 20 in similar form as the documents that we have received from
 21 SAPS and which we have not released, and for that reason we
 22 have not released this one as well.
 23 Now regarding the question of whether or not what
 24 is raised in paragraph 2, there is a need for help from the
 25 evidence leaders, whether or not any request for assistance

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1 was made, no request whatsoever was made in this regard,
 2 and therefore we never did what is referred to therein.
 3 But having said that, I should not be understood to be
 4 suggesting that had we been approached, we would not have
 5 done that. We assist the parties on a number of matters
 6 that they approach us in respect of. We assist them, and
 7 there would have been nothing untoward - if we could have
 8 been able to assist the LRC with the detailed map, second-
 9 by-second movements, and so on and so on, we would have
 10 done that, and in fact I can be open here before the
 11 Commission and say that some of the information that we
 12 have requested from a variety of parties, yes I will say in
 13 particular from SAPS, we were approached by some of the
 14 parties, saying that they would like this information and
 15 we incorporated that into requests that we ourselves were
 16 making. We believe that that is something that falls
 17 within the purview of our functions. We see nothing
 18 improper with it whatsoever, and with respect to my learned
 19 friend, we would not be apologetic about it whatsoever. My
 20 learned friend Mr Budlender will deal with the question of
 21 how exactly this particular statement from the expert Mr
 22 Hendrickx came to be in his possession, but before he does
 23 that I'll just like to quickly whisper to them.
 24 MR BUDLENDER SC: Chair, just to clarify
 25 the position with regard to Mr Hendrickx himself, the

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1 position is that the evidence leaders have been considering
 2 whether to call an expert witness on Public Order Policing.
 3 I asked the LRC representatives whether they intended to
 4 call any expert witnesses - I also asked other parties –
 5 and the LRC told me that they intended to call Mr
 6 Hendrickx. Mr Hendrickx was a person who had been
 7 mentioned to me by other people whom I had consulted, and I
 8 asked whether I could, whether they would allow me to meet
 9 Mr Hendrickx and to see what he was going to say, what his
 10 views were. They enabled me to have a meal with Mr
 11 Hendrickx, which I did, and I discussed with him the
 12 matters before the Commission and they thereafter gave me a
 13 copy of the notes of the consultation, which is the
 14 document the members of the Commission have. It seems to
 15 me, with the greatest respect, that's perfectly proper that
 16 we're required to cooperate with the parties and the
 17 parties are required to cooperate with us, and what I was
 18 seeking to do was to find out whether the evidence leaders
 19 should call an expert, and I can say that having read what
 20 Mr Hendrickx will apparently say, and having had the
 21 benefit of meeting him, we currently don't intend to call
 22 an expert witness. It seems to be unnecessary. So I used
 23 it as a general background to inform my understanding of
 24 Public Order Policing, and I don't think anybody who heard
 25 my cross-examination can seriously suggest that it was

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1 based on what Mr Hendrickx said, but it was consistent with
 2 his broad approach, and I didn't put to the witness
 3 anything that Mr Hendrickx was going to say, to say
 4 Hendrickx will say this, what do you say about that. So
 5 what I was trying to do and what the LRC kindly assisted me
 6 in doing was ensuring that adequate evidence was placed
 7 before the Commission of an expert nature relating to
 8 Public Order Policing. I think seeing what Mr Hendrickx
 9 was apparently going to say, it seemed to me that that need
 10 of the Commission would be covered.
 11 Finally, just as to the paragraph 2 on the last
 12 page, Mr Semenya, with respect, is not correct in saying
 13 that this is what the LRC says to the evidence leaders.
 14 This is the LRC speaking to itself, saying these are the
 15 things they need. They need the SAPS organogram, they need
 16 a detailed map, for example they say paragraph 5 they need
 17 a consultation with Fivaz, Sakkie Van Rensburg, and
 18 [inaudible] Armstrong. That's what they need, not what
 19 they're telling us to do. Similarly paragraph 5, they need
 20 Hendrickx' paper on Law and Order. That's what they're
 21 saying they want. It's not what they're telling us to do,
 22 nor did they ask us to do it, and I have to say that I'm
 23 taken aback by the complaint. We have tried to cooperate
 24 in good faith with all of the parties to make sure that all
 25 of the evidence that will be relevant is placed before the

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1 Commission, and to ensure that suitable evidence – and we
 2 have tried at every opportunity to assist any party which
 3 has approached us at any time to ensure that proper
 4 evidence is placed before the Commission. That was the
 5 context of my engagement with the LRC on Mr Hendrickx.
 6 CHAIRPERSON: Alright, before I ask Mr
 7 Bizos to continue with his cross-examination, I understood
 8 Mr Fischer indicated that he wanted to say something. I
 9 don't know whether this is the stage at which you wish to
 10 say what you want to say, Mr Fischer.
 11 MR FISCHER: Chair, I'm grateful. I only
 12 wish to indicate that the issue that's arisen today in
 13 respect of this witness not having an opportunity to see
 14 the LRC's witness statement in advance, applies equally of
 15 course to the Human Rights Commission's evidence that will
 16 be brought by an expert witness. That evidence won't be
 17 available until the 21st of January and we won't have a
 18 statement to show this witness until that date, and for
 19 those reasons it's even more important, Chair, that you
 20 gave the indication that we would be able to recall this
 21 witness if necessary at a later date.
 22 CHAIRPERSON: Right, these points have
 23 been put on record. We must really move forward, but one
 24 thing I'd like to say, and that is that I understood that
 25 the arrangement was that there would be an exchange of

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1 expert summaries. Now I know this witness didn't start out
 2 as an expert witness, but he became one at a certain stage
 3 in his evidence when it was apparent he was an expert who
 4 could assist on issues before the Commission.
 5 [11:36] But I would hope that in future, certainly when
 6 we resume next year, that expert summaries of, summaries of
 7 the opinions of experts who are to be called, will have
 8 been exchanged by the parties so this kind of problem won't
 9 arise again. I understand this particular problem arose
 10 because of the circumstances in which the witness was
 11 called upon to give expert evidence, but that's not likely
 12 to be a situation that will occur again, and so the kind of
 13 problem that we've been dealing with for the last time this
 14 morning, we won't have to deal with again either. Mr
 15 Bizos, would you wish to say something or do you wish
 16 merely to carry on with your cross-examination?
 17 MR BIZOS SC: - merely, Mr Chairman, to
 18 draw attention on the last page of the document that we
 19 made available. Those, we have a habit of actually
 20 discussing what ought to be done. This is not what we
 21 asked the evidence leaders to do necessarily. It's really
 22 a note, because of the size of our team, to note what ought
 23 to be done and to allot functions to the various people.
 24 They were clearly internal notes which were not needed for
 25 public scrutiny, but merely to say that any suggestion that

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1 there was any questionable motive in this whole affair is
 2 not well-founded, Mr Chairman. We are particularly careful
 3 to act within the rules relating to commissions in our
 4 profession, and that's all I wish to say, Mr Chairman.
 5 CHAIRPERSON: Thank you. Next question
 6 for us to consider is whether it's necessary or appropriate
 7 to give this document an exhibit number. I imagine it
 8 would have to be because it's before us. So Ms Pillay, can
 9 you please give us the next exhibit number?
 10 MS PILLAY: Chair, it would be QQ1.
 11 CHAIRPERSON: QQ?
 12 MS PILLAY: Yes. QQ1. Sorry –
 13 CHAIRPERSON: I thought we'd advanced
 14 further in the alphabet than Q.
 15 MS PILLAY: Excuse me, UU1.
 16 CHAIRPERSON: UU1. Alright, I have so
 17 marked it. Exhibit UU1. Brigadier, you're still under
 18 oath. Did you have a chance to peruse the document during
 19 the time that we've been standing adjourned?
 20 BRIG MKHWANAZI: Yes, I did.
 21 CHAIRPERSON: Mr Bizos, would you like to
 22 –
 23 MR BIZOS SC: I'll repeat the question –
 24 CHAIRPERSON: - continue with your cross-
 25 examination?

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1 MR BIZOS SC: Brigadier, the levels of
 2 violence need to be factored into any plan. Would you
 3 agree with that general proposition?
 4 BRIG MKHWANAZI: I do agree. As I've
 5 said, it assists to plan properly.
 6 MR BIZOS SC: You agree, but?
 7 BRIG MKHWANAZI: I agree, because it
 8 assists to plan properly, to have a proper plan.
 9 MR BIZOS SC: Yes. Then Colonel
 10 Hendrickx says, "South Africa is a particularly violent
 11 society and this needs to be taken into account in our
 12 Public Order Policing."
 13 CHAIRPERSON: You're referring, I see, Mr
 14 Bizos, to para 10 at the foot of the first page? You've
 15 got a differently numbered document from the one that we've
 16 got.
 17 MR BIZOS SC: Yes.
 18 CHAIRPERSON: Is that right? Is your
 19 copy of the document –
 20 BRIG MKHWANAZI: Yes, number 10, yes.
 21 CHAIRPERSON: - contains that [inaudible]
 22 in para 10.
 23 BRIG MKHWANAZI: Continues, yes.
 24 CHAIRPERSON: Then you and I have
 25 advantage over Mr Bizos.

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1 MR BIZOS SC: My notes are based on the
 2 document, Mr Chairman, but not – “South Africa is a
 3 particularly violent society and this needs to be taken
 4 into account in our Public Order Policing.” Do you agree
 5 with that?
 6 BRIG MKHWANAZI: Senior Counsel, I will
 7 have a problem on a point to say South Africa is
 8 particularly violent, as particularly having a violent
 9 society. I must say I, on my experience I have gatherings
 10 or marches that are violent, equally to marches that, or
 11 marches and gatherings that are actually peacefully as
 12 well. I haven't met a situation to say everything is
 13 violent, whatever people were there, they are violent. I
 14 have a problem with that, unless if somebody can prove to
 15 me to say really how the South African society is violent.
 16 I'm not sure about that one.
 17 MR BIZOS SC: Whatever Mr Hendrickx may
 18 have meant, but I think that it's clear on the context, you
 19 yourself –
 20 CHAIRPERSON: I take it he's referring,
 21 he's comparing South Africa with countries with Belgium,
 22 where he comes from, where they probably have trouble with
 23 football crowds, occasionally with Flemings and Walloons
 24 having a disagreement, but it's not the same kind of mix
 25 that we have in this country with the kind of escalations

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1 and difficulty that we've sometimes encountered in the
 2 past. That's probably all he means. It seems a fair
 3 reading, wouldn't you say?
 4 BRIG MKHWANAZI: Chairperson, if it's in
 5 comparison in that way I won't have a problem. As I said
 6 yesterday to say a crowd in South Africa won't be the same
 7 as compared to other country, but if it is in that
 8 comparison, I don't have a problem, but I will have as well
 9 to say I will need to have an understanding to that
 10 country, how is their, the behaviour of the crowd compared
 11 to South Africa. Then I can sum up and say the paragraph
 12 here in place is correct to say South Africa is a violent
 13 society.
 14 MR BIZOS SC: Comparatively, as I –
 15 BRIG MKHWANAZI: Comparatively, yes.
 16 MR BIZOS SC: You yourself, at least two
 17 or three times during your cross-examination by Mr
 18 Budlender and me, drew a distinction between Belgium and
 19 South Africa. Why did you choose Belgium?
 20 BRIG MKHWANAZI: That's correct,
 21 Counsellor. I made that example because of the involvement
 22 of Belgium in South Africa immediately after '94 with the
 23 transition, whereby we need to change our ways of policing,
 24 and as a result more of our lectures, if you can see they
 25 are more on peaceful gatherings as well as marches, that

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1 our training actually dealt with that because we were
 2 moving from the method we were using before, compared to
 3 this present moment.
 4 MR BIZOS SC: Thank you for that answer,
 5 but the next question is, may I remind you that Mr, or
 6 Colonel Hendrickx was a Belgium, or is a Belgium? Did you
 7 know that?
 8 BRIG MKHWANAZI: Yes, Sir, Counsellor, we
 9 spoke right on the beginning and I indicated that I know
 10 about the situation that he is from Belgium, that he's in
 11 South Africa –
 12 MR BIZOS SC: He's from Belgium.
 13 BRIG MKHWANAZI: That's correct, Sir.
 14 MR BIZOS SC: Were there members of the
 15 police force in 1994 or during the period that Mr Hendrickx
 16 was here, trying to reform the apartheid regime's police's
 17 attitude to the people at gatherings, popular with
 18 everybody in the force or were there some who were
 19 protesting that Mr Hendrickx is from Belgium and this is
 20 not Belgium? Have I got those facts right?
 21 BRIG MKHWANAZI: Senior Counsellor,
 22 before me I never came across that comment and it never
 23 came to me attention. Really, I never knew about it. It's
 24 my first time to hear now.
 25 MR BIZOS SC: Are you suggesting that it

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1 was just a coincidence that you chose Belgium and not
 2 France or the United Kingdom or Germany or the United
 3 States, and that it's origin in your mind was not what the
 4 opponents of the police reforms were talking about at that
 5 time?
 6 BRIG MKHWANAZI: Maybe if the question
 7 was which countries we benchmark our crowd management
 8 training and all that, I was going to have maybe more than
 9 one answer, but yes, why I chose Belgium, really it's
 10 because we work with their techniques, with their training,
 11 since after '94, and for us even now we can feel like we're
 12 biased to their technique as we still utilise as definitely
 13 it works well for us, even though, yes, after their
 14 training they gave to us we have to work on that technique
 15 that it must suit South Africa, and it worked very well for
 16 us. I think this is the reason because even if you can
 17 talk to anybody from Public Order Policing who have been
 18 around for some time, that person will quote for you
 19 Belgium as quick as possible because of that reason.
 20 MR BIZOS SC: In using the expression,
 21 “this is not Belgium,” did you by any chance intend to
 22 convey that South African lives are less important than
 23 Belgium lives, that because it's a more violent country,
 24 violence by the police against crowds should be more
 25 acceptable? Surely you didn't mean that?

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1 BRIG MKHWANAZI: That's totally
 2 incorrect, Senior Counsel. What I meant is clear, is to
 3 say in comparison, as we spoke just recently, totally there
 4 is a difference, if one will look at it in any country, in
 5 any place, you will have a different how the crowd behaves
 6 in different types of marches, how they do it. It actually
 7 comes to South Africa as well to say the NUM, the way they
 8 handle their things, it will be totally different in their
 9 march compared maybe to SATAO, the way they do it, it would
 10 be different as well. But compare now with another
 11 country, it will totally differ at all. There's no way
 12 that I mean their life is less compared to them.
 13 MR BIZOS SC: Would you agree that having
 14 regard to the possible truism that South Africa is a more
 15 violent country, what is indicated is that greater care
 16 should be taken that the conduct of the police should not
 17 provoke in any way the crowd into violent action?
 18 CHAIRPERSON: Mr Bizos, there's a problem
 19 with that question. It's unclear. You said based on the
 20 premise that South Africa is a more violent country. You
 21 didn't say more than what other country. So it's difficult
 22 for the witness, I would think, to answer the question
 23 phrased in that way. I think you should rephrase it in a
 24 manner that removes that difficulty.
 25 MR BIZOS SC: Yes, it surely was not

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1 meant that the South African Police putting a plan together
 2 should have regard to that South Africa may be more
 3 violent, say than the Belgium, that greater care should be
 4 taken that the crowd is not provoked in any way, that we
 5 should be even more careful than the other countries where
 6 there is less violence, that we do not provoke a crowd?
 7 BRIG MKHWANAZI: It's correct,
 8 Counsellor, if you remember we spoke right from the
 9 beginning. I think we actually spoke with this part as
 10 well, if I'm correct, that our situation of appropriateness
 11 must be to solve the problem, but not to create the bigger
 12 one, and it's obvious really that if we are going to
 13 intervene we must intervene with an objective to solve the
 14 problem, but not to cause a problem. In other words,
 15 provoking, it can be another position to say what actually
 16 will cause the crowd to be violent which is actually
 17 contributed by the police when actually they appear before
 18 the crowd, but our main purpose every time whenever we deal
 19 with the crowd management, we need to make sure that we
 20 solve the problem, we don't cause the problem at that
 21 position, everything is sorted properly.
 22 MR BIZOS SC: And that the police
 23 involved should not be trigger happy in using their arms.
 24 BRIG MKHWANAZI: Senior Counsellor, it is
 25 a standard to say members of Public Order Policing, or

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1 members of SAPS, especially in a crowd management situation
 2 they will actually conduct themselves with command in each
 3 and every situation. That's why we have tactical
 4 commanders in each and every section, can be a section
 5 commander, can be a tactical commander, who will take care
 6 of the situation, ensuring that members are not acting in a
 7 wrong way. That includes trigger happy, as you explain,
 8 Senior Counsel.
 9 MR BIZOS SC: Colonel Hendrickx would
 10 agree with you that to shoot or not to shoot is not an
 11 individual decision by a single policeman, but a command
 12 has to be given by the commander before any shooting takes
 13 place. Is this what you teach?
 14 BRIG MKHWANAZI: That's correct, on the
 15 Public Order Policing there will be instruction given
 16 because everything must be done orderly.
 17 [11:56] MR BIZOS SC: And you would expect the
 18 planning to be done on the basis of other safer and more
 19 effective options available to them, such as for example to
 20 prevent the people from gathering, disarm smaller groups on
 21 the way to the mountain in this case, and when the crowd
 22 was small. Would you agree with that?
 23 BRIG MKHWANAZI: It is correct, because
 24 it will depend whether are we dealing with two groups, if
 25 maybe they come together there will be conflict, and all

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1 that. So we need just to make sure that it doesn't happen
 2 that they come together and they cause that type of a
 3 situation. If maybe we refer to the situation we are
 4 having at this moment, as well we'll have to look at that,
 5 but at the main time is to say were the procedures followed
 6 properly to be able to deal with the whole situation
 7 properly.
 8 MR BIZOS SC: People who came to the
 9 gathering place came in small groups from early morning.
 10 At 9 o'clock, according to the evidence, and I want you to
 11 assume that the evidence is correct, there were not more
 12 than 300 people on the mountain, the main koppie.
 13 MR SEMENYA SC: Can we know what day
 14 we're referring to, Chair?
 15 MR BIZOS SC: I beg your pardon?
 16 MR SEMENYA SC: Can we know what day –
 17 CHAIRPERSON: Mr Semanya wants to know
 18 what day you're referring to.
 19 MR BIZOS SC: We are talking about the
 20 16th. I'm sorry. On the 16th, the evidence is that there
 21 were no more than 300 people at 9 o'clock in the morning.
 22 According to the occurrence book, I'll give you the times
 23 and the number of people, it's in IPID 192, page 614, at
 24 8:50 the situation report says that there were about a
 25 hundred people and others were on the way. If those facts

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1 are correct, why were they not surrounded and disarmed
 2 before 9 o'clock in the morning, if that was –
 3 CHAIRPERSON: Mr Bizos, I'm not sure the
 4 witness can answer that question. He wasn't involved in
 5 the operation.
 6 MR BIZOS SC: I'll put it in a
 7 hypothetical –
 8 CHAIRPERSON: I think you should put it
 9 differently.
 10 MR BIZOS SC: Yes. On proper policing
 11 principles, shouldn't the police that were there have
 12 disarmed and arrested the less than 100 people?
 13 BRIG MKHWANAZI: Senior Counsellor, it
 14 will depend to the situation. As you say, we are making an
 15 example that there are hundred people, why we should
 16 intervene and arrest them. It will depend to the
 17 situation. I don't think that always the technique will be
 18 just to arrest, but it will depend to the situation what do
 19 we want to achieve. If really that is the position that
 20 people need to be disarmed, we will have to do that because
 21 hundred is affordable, it can be done. But I would like to
 22 have more example to say what situation we have, why we
 23 should take that type of a direction to arrest that
 24 hundred.
 25 MR BIZOS SC: I want you to make the

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1 following assumption, that the plan called for the
 2 disarming of the people that were gathering on the koppie,
 3 you've made that assumption. If that was the plan, would –
 4 BRIG MKHWANAZI: Yes, but – ja, okay.
 5 MR BIZOS SC: - you have expected in the
 6 implementation of that plan to try and disarm those hundred
 7 early in the morning and not wait for R3 500 at 1 o'clock?
 8 I'm sorry, 3 500 people.
 9 CHAIRPERSON: - mercenaries, are you?
 10 MR BIZOS SC: Because we deal in
 11 thousands in – I'm sorry for the mistake.
 12 BRIG MKHWANAZI: Yes, Counsellor, if I –
 13 MR BIZOS SC: But you know, Brigadier,
 14 I've given you the premise which you have to accept that
 15 that was the plan, and I'm asking you that the proper
 16 conduct of any police officer that you have trained would
 17 have said here is our opportunity to disarm the hundred
 18 people.
 19 BRIG MKHWANAZI: Senior Counsel, I do
 20 understand the question. However, I have a little bit of a
 21 problem, but you are giving me a scenario that it's hundred
 22 people, members are trained; the plan is to disarm and
 23 arrest. However, I'm worried because these are the
 24 question I have from the previous senior counsellor from
 25 the evidence side that at the end I find myself as a person

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1 who have answered the question in regard to Marikana. But
 2 I would say again that if definitely it's that situation,
 3 the plan is, it says that must be done at that time, and
 4 it's only about that hundred people that need to be
 5 actually disarmed and arrested, and you've got sufficient
 6 police official to execute that task, you will definitely
 7 look at that if it is definitely achievable, because we
 8 talk about armed people here, and if you're going to just
 9 go to hundred as they are armed, may happen that you put
 10 your members into danger and we can have people killed into
 11 that. So in other words we have to look to other means,
 12 like we spoke yesterday to say is it appropriate maybe to
 13 execute an arrest later if it is possible, but if you're
 14 going to just go at the same time in that hundred and you
 15 don't have sufficient means to deal with that, you may have
 16 a problem.
 17 MR BIZOS SC: Subject to that
 18 qualification, assume that the evidence will show that
 19 there were a substantial number of officers available who
 20 met at 6 o'clock in the morning and they were ready to deal
 21 with the situation of the day.
 22 BRIG MKHWANAZI: Senior Counsel, I do
 23 understand. I'm just only looking to the consequences in
 24 that position. As I've said, if they're armed it's
 25 possible that we can have the problem that there will be

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1 some confrontation between the police as well as the people
 2 who are armed. No matter how big the group is, and the,
 3 really, I feel strongly that it can be dangerous and the
 4 only way, as I've said previously, that I can look to other
 5 means or other ways to say should we do it late in the
 6 evening where they stay, cordon the place, search the
 7 place, or maybe at the same time do the same thing, maybe
 8 disperse them, make them a smaller group and arrest them.
 9 The only part you are not indicating is to say you will
 10 disarm and arrest, but if maybe I disperse them first, even
 11 the hundred as they are, we need to be able to manage them
 12 because if we're going to actually definitely have a
 13 confrontation with the participants, with the people,
 14 obviously there will be definitely some confrontation. At
 15 the same time we can have the loss of life along the line
 16 in that position.
 17 MR BIZOS SC: The occurrence book shows
 18 that from before 9 onwards the numbers increased by 50 to a
 19 hundred every 15 minutes to half an hour. Isn't it obvious
 20 that if the plan of dispersing, disarming and arresting was
 21 agreed upon, it would have been very much easier to achieve
 22 that objective earlier, than waiting at 10 to 4 in the
 23 afternoon when the crowd was 3 500? Why don't you want to
 24 admit the obvious, Brigadier?
 25 MR SEMENYA SC: Chair, I think -

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1 CHAIRPERSON: Before you answer the
 2 question, Brigadier, Mr Semenya has an objection which we
 3 must hear first, and if I allow the objection you won't
 4 have to answer the question. Yes, Mr Semenya.
 5 MR SEMENYA SC: Chair, I think again the
 6 context must be explained of the evidence. The police had
 7 been told they were going to disarm at 9 o'clock on the 16th
 8 in the morning. So I don't understand the proposition that
 9 they ought to have been stopped and arrested as a group of
 10 hundred in the morning.
 11 CHAIRPERSON: That's an answer the
 12 witness could have given, but I'm not sure that the
 13 question itself is unfair. Anyway, you made your point and
 14 you've given the witness the point which he probably would
 15 have thought of himself in any event. Brigadier, did you
 16 know that according to the evidence which is going to be
 17 led, and some of the evidence we've had already, it was
 18 suggested that the police thought or believed that there
 19 was at least a reasonable prospect of the people on the
 20 koppie laying down their arms and dispersing peacefully
 21 after 9 o'clock? Did you know that?
 22 BRIG MKHWANAZI: That's correct,
 23 Chairperson. I got that information.
 24 CHAIRPERSON: You got that information,
 25 then you can answer Mr Bizos' question, which he'd better

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1 repeat because you've probably forgotten the exact wording
 2 of it while we had this exchange.
 3 BRIG MKHWANAZI: Yes.
 4 MR BIZOS SC: It would appear from the
 5 occurrence book that from 9 o'clock onwards the crowd
 6 increased by between 50 to a hundred every 15 minutes to
 7 half an hour. Wouldn't it have been in accordance of a
 8 properly prepared plan to disarm them and, if need be, to
 9 arrest them, when they were coming in small groups, rather
 10 than waiting for the late afternoon when there were 3 500
 11 and using water canon, gas, rubber bullets, in other to
 12 disperse them into small groups?
 13 BRIG MKHWANAZI: Counsellor, I have
 14 answered this question, I think last week, whereby I
 15 indicated that I won't be sure why they took that decision,
 16 but what is my opinion, my thinking, is that with the point
 17 that was made that there was an agreement that there will
 18 be the laying down of arms in that morning, then I think
 19 there was a little bit maybe of a change to say maybe they
 20 gave that opportunity, because we're talking about why
 21 there was a gap –
 22 MR BIZOS SC: You know, that was what we
 23 will describe as a possibly evasive answer. In fact, the
 24 documents show that there was intelligence that if any
 25 undertaking had in fact been given, it was clear that they

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1 would not lay down their armed.
 2 CHAIRPERSON: Mr Bizos, I don't think
 3 that's a fair question. Look at exhibit TT4 –
 4 MR BIZOS SC: I've got it, Mr Chairman.
 5 CHAIRPERSON: To paragraph 2.3, look at
 6 the third unnumbered paragraph in 2.3 from which it appears
 7 that one of the factors taken into account at the JOC was
 8 that the, I think that the assurance had been given by Mr
 9 Mathunjwa that the members, well I think that word should
 10 be "probably," not "properly," would probably lay down
 11 their arms at 9 o'clock, and it continues, "It was however
 12 agreed contingency must be in place if the call to lay down
 13 arms failed." So it appears it's correct that the Crime
 14 Intelligence was as set out in 2.1 –
 15 MR BIZOS SC: Yes.
 16 CHAIRPERSON: But 2.3 indicates that
 17 there was this other piece of information which was
 18 factored in, and those at the JOC then agreed that if that
 19 doesn't happen, in other words the laying down of the arms
 20 doesn't occur at 9 o'clock, then there must be contingency
 21 in place. So I think that to phrase the question simply
 22 based on paragraph 2.1 is in the circumstances not fair to
 23 the witness.
 24 MR BIZOS SC: Well, I'm mindful, Mr
 25 Chairman, of that possibility, but what was reported in 2.1

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1 was very clear, that they would not –
 2 [12:16] CHAIRPERSON: That was clearly the
 3 intelligence, but it does appear from TT4 that those at the
 4 JOC didn't accept that that was a certainty, that what was
 5 contained in the intelligence wasn't a certainty is what
 6 would happen. They took this other factor into account and
 7 decided that only at, after 9 o'clock or after it was clear
 8 that the assurance given by Mr Mathunjwa wasn't going to be
 9 complied with.
 10 MR BIZOS: Yes.
 11 CHAIRPERSON: Now it's against that
 12 background that they put the question as starkly as you do
 13 to the witness, I don't think is fair but anyway. The
 14 point has been made. He has heard it, you have heard it.
 15 I suggest you carry on.
 16 MR BIZOS: Do you want to try and answer
 17 the question or do you want it to be put again?
 18 BRIG MKHWANAZI: Counsellor, my answer
 19 will be I think the thing that has maybe caused them not to
 20 intervene as early as that time is because there was an
 21 agreement on the previous day that people will lay down
 22 their arms. Hence people who are going to lay down their
 23 arms, I think for them to act prior to that, maybe was
 24 going to be in contrary with the agreement they have or
 25 they made to each other. Because I even spoke about it

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1 before that if there is trust, you start to trust other
 2 with the leaders who are leading that particular
 3 organisation it assists to say both of you stick to that
 4 and there must be that issue of give and take to say then
 5 we will stop whatever and do whatever you agreed upon. So
 6 I believe that was the situation that has caused me to say
 7 they cannot act as quick as possible.
 8 MR BIZOS SC: Would you persist in that
 9 belief if there is evidence that much earlier than the
 10 dispersal would have been carried out, there were high
 11 ranking officials saying that this was hours before it
 12 happened, that this was D-day?
 13 BRIG MKHWANAZI: Senior counsellor, I'm
 14 not sure about that one. Hence I was not around where it
 15 was said and how it was actually uttered and on what, what
 16 was the purpose of that I'm not sure unless I can have a
 17 clear indication why was it was said, and what is the
 18 meaning of that you know I'm not sure, because if we talk
 19 about D-day, it can mean a lot of things. Today is the day
 20 -
 21 CHAIRPERSON: Once again I don't think
 22 that question is fair in the circumstances. If you look at
 23 slide 153 and 154 of Exhibit L, you will see that the media
 24 briefing to which you referred was given at 9:30, that I
 25 think was when, sorry it doesn't appear here in terms from

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1 the slides, as far as I can recall the actual media
 2 briefing which is 155, which of course we haven't got
 3 because it's a video clip. That was the one where D-day
 4 was spoken about. And it does say if you look at 154, it
 5 refers to the engagement where it would be the laying down
 6 of the weapons at 9 o'clock and then it goes on, should the
 7 commitment not be honoured the police would need to act.
 8 So in those circumstances I don't think it's fair to put to
 9 the question as starkly as you have.
 10 MR BIZOS SC: Well Mr Commissioner, I
 11 would like to put to him what the North West Provincial
 12 Commissioner and others said.
 13 CHAIRPERSON: Exactly at what time did
 14 they say it? Well the point I was putting to you was
 15 according to the slides which I referred you, Exhibit L the
 16 media briefing was at 9:30.
 17 MR BIZOS SC: Yes.
 18 CHAIRPERSON: If you are putting
 19 something that occurred prior to 9 o'clock and you can do
 20 so, but you must be sure that it was proper to 9 o'clock I
 21 would say.
 22 MR BIZOS SC: Yes. Well without having
 23 readily available the times when these statements were made
 24 during the course of the day, but obviously some time
 25 before the action was taken I want to read to you what the

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1 North-West Provincial Commissioner General Mbombo told the
 2 BBC, "today we are ending this matter." The point was
 3 reiterated by the spokesperson Dennis Adrio, "today is
 4 unfortunately D-. It is an illegal gathering. We have
 5 tried to negotiate and we will try again. But if that
 6 fails we will obviously have to go to tactical phase." Now
 7 does that not indicate to you that it was cut and dried
 8 that it was going to happen this day that the third phase
 9 was going to be brought in?
 10 BRIG MKHWANAZI: Counsellor, as I have
 11 said that I'm not sure what was the meaning of the words
 12 that were given. I understand some of the lines you have
 13 read that support the first part that is indicated but at
 14 the same time I'm not sure are we talking about the 16th,
 15 are we talking about what time, and all that? I was I'm
 16 still having a problem to say I cannot comment on that
 17 position really. This is the statement by the Provincial
 18 Commissioner that is indicating with me there if you say.
 19 I'm not sure really, for me to comment in that position is
 20 totally difficult really.
 21 MR BIZOS: Colonel Hendrickx will say
 22 that communication with a crowd at all times is of absolute
 23 importance. Do you agree to that?
 24 BRIG MKHWANAZI: Definitely I have
 25 indicated from the beginning that there must be some

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1 dialogue, discussion with the leaders most of the time to
 2 understand what's going to happen at one time.
 3 MR BIZOS SC: There is also another type
 4 of communication. Informing the people in the crowd what
 5 you are going to do if they do not do this that or the
 6 other, that sort of communication. It is very important.
 7 The crowd should be apprised of what is happening and what
 8 the police intend doing in the near future.
 9 BRIG MKHWANAZI: I think it's normal,
 10 Senior Counsellor, that there definitely will be some
 11 discussion, negotiations which actually will lead to say
 12 what is going to happen the following day if definitely the
 13 leaders are talking with the police to say what they are
 14 going to do. It will be possible that they will know
 15 what's going to happen in future.
 16 MR BIZOS SC: Would you have expected the
 17 police to have loud hailer and to say there was a promise
 18 that you would surrender your arms, you haven't. Please do
 19 so and if you don't this is what is going to happen. That
 20 is the sort of communication that I think Colonel Hendrickx
 21 refers to. Would you agree that that would be a proper
 22 procedure to follow?
 23 BRIG MKHWANAZI: Senior Counsellor, in a
 24 normal situation always would be a warning given to people,
 25 in anything that is going to happen people would be warned

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1 and we spoke about that with the previous senior counsellor
 2 about it to say what happens if people breach and all that,
 3 it disrupted the whole thing. But I want to go direct to
 4 your question to say yes there will be a warning given to
 5 people, then it will depend what happened after that but a
 6 warning will have to be given to people to say especially
 7 if they are going to be dispersed.
 8 MR BIZOS SC: There is no evidence that
 9 anybody told the crowd that we are going to use razor wire
 10 and close you, kraal you. It's apparently, although it
 11 sounds a word with a K, we have seen it in print with a C.
 12 That trying to kraal any group of people in itself has very
 13 serious dangers.
 14 MR SEMENYA SC: Again in fairness, there
 15 was no evidence that the crowd was going to be kraaled.
 16 CHAIRPERSON: Mr Bizos explained that by
 17 kraal or corral I suppose to put the engineer word, he
 18 meant hemmed in by the deployment of barbed wire and the
 19 question then really is, was any warning given to the
 20 people that they were going to be, that barbed wired was
 21 going to be deployed and they therefore were going to be
 22 fenced in as it were by the barbed wire? I think that's
 23 the question.
 24 MR BIZOS SC: That's the question.
 25 CHAIRPERSON: I disallow the objection,

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1 you can carry on.
 2 BRIG MKHWANAZI: Senior Counsellor, my
 3 understanding to deploy barbed wire was to protect the
 4 media and other VIP's if they are around as well as members
 5 of SAPS and at the same time what I'm told was that after
 6 deploying the barbed wire they were going to give a warning
 7 to the people, of which it never happened. Hence the
 8 moment they tried to deploy then it was breached. So I
 9 would say really to give warning before deploying, it was
 10 not done. That's the true facts.
 11 MR BIZOS SC: I want you to assume the
 12 correctness of the evidence in certain statements taken by
 13 the police independent unit, that many people thought that
 14 they were going to be encircled by the barbed wire and when
 15 they saw a gap in it, far from going through the gap for
 16 purposes of attacking any police, they were really trying
 17 to escape from being enclosed.
 18 BRIG MKHWANAZI: My understanding,
 19 Counsellor, is that when the barbed wire was deployed and
 20 some of the people tried to breach, they were already some
 21 of the people as well who were leaving the koppie without
 22 being interfered to by the police or stopped by the police.
 23 They were moving and there was no problem on that. So I'm
 24 not sure if really the barbed wire caused that situation.
 25 However I won't protest that part, I was not there but I'm

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1 talking about what I'm told that as the moment it was
 2 deployed, some people tried to breach but there were some
 3 other people as well who were leaving without any being
 4 interfered to as they were going wherever they wanted to
 5 go.
 6 MR BIZOS SC: Such an act of putting out
 7 razor wire would be ambiguous wouldn't it? Some people
 8 would say let's try and get out of here or some of the
 9 armed people may say well this is war, we better do
 10 something else. Would an explanation as to why the razor
 11 wire was being put up by a loud hailer, possibly have
 12 avoided any misunderstanding?
 13 BRIG MKHWANAZI: Senior Counsellor, as I
 14 have indicated what I'm told they were going to give
 15 warning with, I mean sorry the moment the barbed wire has
 16 been deployed and such plan was not finalised and they
 17 breached on that.
 18 MR BIZOS SC: The question -
 19 BRIG MKHWANAZI: I understand your point
 20 is a person sitting there may have thought otherwise, maybe
 21 now this is what's going to happen let's get out and let's
 22 move out. What I'm told is that those who tried to breach
 23 there were those who moved away from the scene without
 24 being interfered to.
 25 MR BIZOS SC: The question is shouldn't

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1 the warning have been given before it was employed, the
 2 barbed wire option?
 3 [12:36] BRIG MKHWANAZI: This question was asked
 4 before, Counsellor and my answer was procedurally if you
 5 utilise barbed wire you deploy barbed wire prior before
 6 even people can come to that particular area because mainly
 7 the purpose is to channel participant to a certain
 8 direction. In that way you deployed and as they pass by,
 9 you protect a certain structure. However on the day in
 10 question, the barbed wire was deployed for the purpose of
 11 protecting media and other people as well as the SAPS
 12 members. That was the only difference. So in this way
 13 really, it's difficult for me to talk on that position
 14 specific to say what was supposed to be. Was they supposed
 15 to give a warning to say we are now deploying barbed wire?
 16 But the purpose was not intended to encircle the
 17 participants sitting on the koppie, that is information I'm
 18 giving.
 19 MR BIZOS SC: If that was the purpose and
 20 if it was sent to the crowd over by loud halers, would not
 21 have been a possible misunderstanding, that we are doing
 22 this for the protection of our vehicles and for the press.
 23 We want to separate them.
 24 BRIG MKHWANAZI: Counsellor, I do
 25 understand, the only problem is that is it a threat, you

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1 know, is it a threat that really the people wanted at that
 2 time to move out because the barbed wire is deployed? I'm
 3 having a problem on that, the only thing what I'm having as
 4 referred to me is that they wanted to breach the barbed
 5 wire and others move away on their own.

6 CHAIRPERSON: I think the question is put
 7 to you on this basis, that you ask to assume that what some
 8 people have said in their IPID statements, Independent
 9 Police Investigation Directorate statement, they were, they
 10 breached the barbed wire because they were afraid of being
 11 hemmed in, fenced in, and wanted to get to the informal
 12 settlement. You're asked to assume that that's correct, is
 13 that correct, Mr Bizos?

14 MR BIZOS SC: Yes.

15 CHAIRPERSON: And on the basis of that
 16 you're asked to comment, whether it would have been
 17 appropriate and sensible in the circumstances to have given
 18 a prior warning explaining what the purpose of the
 19 deployment of the barbed wire was to avoid a
 20 misunderstanding of that kind. I understand you have
 21 difficulty in accepting that what is said in the IPID
 22 statements is correct, and you may be right in that, but on
 23 the assumption that that's correct, would it have been
 24 appropriate? That's Mr Bizos' if I've correctly –

25 BRIG MKHWANAZI: Senior Counsel, I do

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1 understand your question whether was it appropriate maybe
 2 as the best thing to warn the people that police are going
 3 to deploy the barbed wire before deploying it. From my
 4 side, I want to see the truth from where I'm sitting
 5 really. It's difficult for me to say they were supposed to
 6 do that, because I don't know the circumstances except the
 7 information I've got now I've been trying to answer on it.
 8 To go beyond that is really difficult for me to say, yes,
 9 they were supposed to first warn the people. Yes, if we
 10 look to reality, if maybe definite it was going to cause a
 11 problem that the deployment of the barbed wire before
 12 telling them the purpose why it is deployed if they were
 13 informed. Yes, it can maybe make things better maybe if
 14 somebody understand differently. But the purpose, I'm
 15 told, was not to encircle them, that is a different thing.
 16 That's how I understand it.

17 CHAIRPERSON: May I ask you this, as a
 18 matter of sound public order policing, the sort of
 19 activities that you've been engaged in yourself, operations
 20 you've been engaged in yourself, is it the practice where
 21 barbed wire is deployed to give a prior warning that this
 22 will be done?

23 BRIG MKHWANAZI: My understanding,
 24 Chairperson, is that the real purpose to have barbed wire
 25 in a situation is whereby you protect a structure. It must

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1 be deployed prior that. And in that way police can only
 2 protect if there's a position where people can break
 3 through and get to the structure and damage the structure.
 4 In this position the purpose was totally different because
 5 there's no time whereby in our operations whereby we'll
 6 deploy the barbed wire and give the warning, you know, and
 7 do whatever we're supposed to do. Here the only purpose of
 8 the barbed wire was only different because it was about
 9 protecting certain people and be able to take action, give
 10 the warning and disperse the people, that was the
 11 different, we don't do it in that way really.

12 MR BIZOS SC: Were you at the Ellis Park
 13 on the day that they were, the deaths at the overbooked
 14 soccer match?

15 BRIG MKHWANAZI: That's correct, Sir.

16 MR BIZOS SC: In the findings are you
 17 aware that the absence of the use of loud hailer was a
 18 contributed factor to the tragedy?

19 BRIG MKHWANAZI: I remembered very well,
 20 especially in the inner perimeter inside where people were
 21 supposed to be warned.

22 MR BIZOS SC: If the platoon commander
 23 had a loud hailer and said, "relax, don't worry, we will
 24 solve the problem, you don't have to knock each other out"
 25 and that sort of thing, the tragedy may have not happened

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1 or may have been lessened?

2 BRIG MKHWANAZI: Maybe we refer to the
 3 different side of the stadium. My understanding we talk
 4 about the inner part whereby the stadium management,
 5 actually they were, the people who were supposed to look to
 6 those issues because we talk about the loud hailer, the
 7 loud hailer, the system must be there in the stadium
 8 itself. You go in the jock, you talk from the JOC, and
 9 people can actually get the information what they are
 10 supposed to do. But in sporting events like that that a
 11 platoon commander right there outside where people are
 12 entering, then it's a different thing, but on my
 13 understanding with the finding and everything was based on
 14 the loud hailer, or system that were not actually
 15 operative on that time in the inner part of the stadium,
 16 from the side of the stadium management.

17 MR BIZOS SC: The, you as a trainer of
 18 the public order police, must have taught people, and
 19 particularly platoon commanders that they must keep proper
 20 control over their members?

21 BRIG MKHWANAZI: It's part of the
 22 training, Sir.

23 MR BIZOS SC: And the loud hailer, where
 24 there are platoons all over the, maybe platoons all over,
 25 is a very important tool to have.

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1 BRIG MKHWANAZI: It depends to the size
 2 of the operation because we talk of a platoon commander, we
 3 talk of an operational commander, depending to the size of
 4 the operation, there is an operation the platoon commander
 5 will definitely be in charge of the operation because it's
 6 not a big operation, but in a big operation is where you're
 7 going to have an operational commander, like we refer to
 8 sporting events, maybe in a bigger gathering, that's when
 9 now we have an operational commander, that's where it comes
 10 to say who does what at what stage and all those things.
 11 And the issue of these hailers, they will come into being
 12 if definitely there will be a need to make use of it
 13 because obviously if you're going to disperse people, you
 14 will have to do that.

15 MR BIZOS SC: I want you to assume that
 16 we have not seen any evidence of there being any loud
 17 hailers either by platoon commanders or the commanded
 18 officers in order to control the crowd. I assume that that
 19 is correct. We have not seen any evidence. Would that
 20 have been an important omission?

21 BRIG MKHWANAZI: Counsellor, carrying of
 22 loud hailers, it will be determined by the situation. As
 23 I've indicated I think yesterday to say not all crowd
 24 management or crowd involved, as participants in a crowd
 25 are violent. Others you'll find that its peaceful. So

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1 there's no need now to come in any place you must have a
 2 hailer because it is the crowd. And the situation will
 3 build up into that, there will be a need to say, must I
 4 make use of a hailer, a loud hailer because I must disperse
 5 the people? If it comes to that really, there must be some
 6 sort of like a warning given. And normally some time if it
 7 happens in a situation, we will have to use other means.
 8 The vehicles we've got, we can do their loud system, loud
 9 haler, we make use of them, we can be able to warn people
 10 through that as well. It can work as well into that
 11 position. But I agree if you say you haven't seen, but it
 12 will depend if we are talking about marches that are taking
 13 place every time. But my point I'm making is, is not to
 14 say all marches must have loud hailer.

15 CHAIRPERSON: Mr Semenya, you want to say
 16 something, but before he does I'd like to refer you to
 17 slide numbers 163 and following in exhibit L. But Mr
 18 Semenya wants to say something.

19 MR BIZOS SC: My associate has shown me
 20 those pictures. I withdraw the question in relation to not
 21 seeing any loud hailers. Thank you, Mr –

22 CHAIRPERSON: Mr Semenya in the
 23 circumstances withdraws his objection. Carry on to the
 24 next question.

25 MR BIZOS SC: Now as a public order

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1 police trainer, would you agree that crowd management is
 2 primarily the function of the public order police?
 3 BRIG MKHWANAZI: Crowd management is a
 4 primary function for public order policing at this stage,
 5 of course.

6 MR BIZOS SC: It is not a function for
 7 which the TRT, the SDF and the NIU units have had any
 8 special training?

9 BRIG MKHWANAZI: I mentioned I think last
 10 week that some of the members only in National Intervention
 11 Unit, that is NIU are having training, the old members,
 12 which was actually helped by the career pathing because
 13 they were taking more members from public order policing.
 14 They have that but all three of them, public order policing
 15 is not their primary task.

16 MR BIZOS SC: Public order police are
 17 trained that an individual cannot start shooting at a crowd
 18 without a proper order from the person in command?

19 BRIG MKHWANAZI: That's correct.

20 MR BIZOS SC: Would you agree that where
 21 the public order police are involved and other units are
 22 for known or unknown reasons brought in, that there is an
 23 absolute necessity that there should be clarity as to who
 24 is in command?

25 BRIG MKHWANAZI: That's correct, once

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1 it's become an integrated operation the commander must be
 2 clear who's an operational commander, who is an overall
 3 commander.

4 MR BIZOS SC: And would you agree that
 5 who is the commander must be crystal clear to all the
 6 people that are participating in the situation?
 7 [12:56] BRIG MKHWANAZI: It's correct, as I've
 8 said, but Counsellor, I would like us to handle it on
 9 stages properly, especially in an operation like that that
 10 will have overall commander, operational commander and it
 11 goes to the tactical commanders as well and all that must
 12 be clear.

13 MR BIZOS SC: Yes, but it's got to be a
 14 commander to give a command to shoot if it becomes
 15 necessary, it's got to be a commander, it can't be left to
 16 any ordinary officer that has a gun to start shooting?

17 BRIG MKHWANAZI: Counsellor, I think I
 18 answered this question before in relation to say, I have a
 19 problem with the term 'shoot'. You know, we don't have to
 20 work like that in SAPS to say we're going to shoot people.
 21 If I'm going to stand in front of the members and say,
 22 shoot, we're going to shoot, all that, it would be a wrong
 23 message to get to the subordinates if – but I agree, Senior
 24 Counsel, if you say there must be somebody in charge of the
 25 operation who will definitely be the person who give

<p style="text-align: right;">Page 3352</p> <p>1 commands when action has to be taken. I agree on that. On 2 the part of shooting, it's a problem to me. 3 MR BIZOS SC: And would you agree that 4 the individual policemen or two that find themselves 5 involved in investigating armed robbery, or else, they can 6 use their discretion as to when their life is in danger and 7 they can defend themselves? 8 BRIG MKHWANAZI: Counsellor, it's 9 obvious, if one's life is in danger, we'll definitely have 10 to do something, as you say, private defence. 11 MR BIZOS SC: Yes. Now Mr Chairman, we 12 need to make arrangements in order to show a couple of 13 photographs. 14 JUDGE FARLAM: It's now nearly 1 o'clock. 15 So if you're moving for an adjournment to enable you to 16 show photographs after 2 o'clock, I grant the application. 17 MR BIZOS SC: Thank you, Mr Chairman. 18 [COMMISSION ADJOURNS COMMISSION RESUMES] 19 [13:59] CHAIRPERSON: The commission resumes. 20 Brigadier, you're still under oath. Mr Bizos. 21 MR BIZOS SC: Thank you. 22 CHAIRPERSON: Have you got your 23 photographs with you? 24 MR BIZOS SC: Chairman, you will have 25 handed three photographs. Perhaps commissioning.</p>	<p style="text-align: right;">Page 3354</p> <p>1 UU2(2) and UU2(3), but then you were going to give us some 2 other reference numbers, is that right? 3 MS PILLAY: That's correct, Chair, just 4 for the benefit of parties who don't have copies of the 5 photographs in front of them. UU2.1 is SAPS external hard 6 drive\photos\Thursday16\Lieutenant Colonel 7 Vermaak16th\4541. And then UU2.2 is the same pathway but 8 it's image 4542. UU – 9 CHAIRPERSON: Sorry, what was the 10 [inaudible] of the first one? 11 MS PILLAY: It's 4541. 12 CHAIRPERSON: Thank you. And UU2(3)? 13 MS PILLAY: UU2.3 is SAPS external hard 14 drive\photos\Thursday 16\IMG01518-20120816-1559. It's 15 image 1559. 16 CHAIRPERSON: Thank you. 17 MR BIZOS SC: It's on the screen for, and 18 – 19 CHAIRPERSON: What's on the screen at the 20 moment is UU2(1)? 21 MR BIZOS SC: Yes. And if I, to be – 22 Yes, and Mr Chairman, if you could note that this 23 photograph was taken at 3:58 pm, number 1. Number 2, at 24 3:59, number 3, also at 15:59. And they have been 25 available by SAPS. Now Brigadier will you look at</p>
<p style="text-align: right;">Page 3353</p> <p>1 CHAIRPERSON: Ms Pillay, will you please 2 give us the exhibit numbers and we must identify the 3 photographs to make sure that we're all speaking, we all 4 have the same numbers on the same photographs. The first 5 one that you handed me shows the kraal on the left hand 6 side but nine vehicles and a number of people. 7 BRIG MKHWANAZI: Yes. 8 CHAIRPERSON: And that is marked "1", I 9 see it's marked "1" in the right hand corner. So what will 10 that exhibit number be? 11 MS PILLAY: Chair, that would be exhibit 12 UU2. If I could ask that it be referenced IMG4541 because 13 that's the path on the SAPS external hard drive. 14 CHAIRPERSON: We've already got UU1, 15 shouldn't we make, seeing they've got numbers on them, to 16 avoid confusion, shouldn't we call them WW1, WWW2, WWW3? 17 Will that cause trouble? 18 MS PILLAY: It's UU2, the first image of 19 U. 20 CHAIRPERSON: I understand that, but 21 they've already got numbers on them. So that's why I 22 thought it might be sensible to move onto the next. 23 MS PILLAY: No Chair, I inserted the 24 numbers just for ease of reference. 25 CHAIRPERSON: I see, alright, UU2(1),</p>	<p style="text-align: right;">Page 3355</p> <p>1 photograph number 1? Do you see a line of policemen? 2 BRIG MKHWANAZI: I see them. 3 MR BIZOS SC: Clearly? 4 BRIG MKHWANAZI: Mm. 5 MR BIZOS SC: Do you see that across the 6 road there are people who have been killed, bodies? 7 BRIG MKHWANAZI: I see that. 8 MR BIZOS SC: Will you please take note 9 of the time that it was 3:58? 10 BRIG MKHWANAZI: I see that. 11 MR BIZOS SC: Which is given as the 12 estimated time when the shooting took place at Scene 1. 13 And do you see that there are bodies on the road? 14 BRIG MKHWANAZI: I see. 15 MR BIZOS SC: Bodies on the grass next to 16 the road. Bodies next to the kraal. 17 BRIG MKHWANAZI: I see that. 18 MR BIZOS SC: What you don't see, do you, 19 Brigadier, any lonely policemen being surrounded by any 20 protestors? 21 BRIG MKHWANAZI: I see that. 22 MR BIZOS SC: Is it clear that if in fact 23 these people were killed, they were not killed by one or 24 two policemen who were threatened by the crowd? Would you 25 agree with that?</p>

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1 BRIG MKHWANAZI: I'm not clear because
 2 the first question was we don't or I don't see a crowd
 3 maybe around the police after the incident but the second
 4 question is nearly similar to that but slightly, I'm not
 5 sure whether do you still ask the same thing?
 6 MR BIZOS SC: I'm sorry, I didn't catch
 7 the first part of your answer?
 8 BRIG MKHWANAZI: Ja the first part you
 9 spoke about the police officials standing without crowd
 10 around the police. And the second question is similar to
 11 the first one, so I'm not clear whether maybe it's still
 12 the same question or what. Maybe can you repeat it again?
 13 MR BIZOS SC: No. Having regard to the
 14 time –
 15 BRIG MKHWANAZI: Repeat it again, ja.
 16 Just repeat the question?
 17 MR BIZOS SC: Having regard to the time,
 18 we have a neat row of police officers from the middle of
 19 the photograph to the right, correct?
 20 BRIG MKHWANAZI: I see it.
 21 MR BIZOS SC: And we have a number of
 22 policemen to the left.
 23 BRIG MKHWANAZI: I see that.
 24 MR BIZOS SC: And we don't see any
 25 evidence of a crowd anywhere on the picture advancing

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1 against the police line or attempting to cross the road, we
 2 only see dead bodies.
 3 BRIG MKHWANAZI: That's correct.
 4 MR BIZOS SC: Now you've already told us
 5 that if the police are in a group such as is shown on this
 6 exhibit, nobody should shoot unless an order is given.
 7 MR SEMENYA SC: Chair, the witness'
 8 evidence has always been there is no such thing as an order
 9 to shoot in the police.
 10 MR BIZOS SC: I don't understand the –
 11 CHAIRPERSON: Mr Bizos, there are two
 12 points actually. The witness made two points before the
 13 adjournment today. The first one he said you never have a,
 14 or it's refuted in those terms. The second point he made
 15 was in the case of self-defence or private defence, if
 16 someone is coming at you and your life's in danger or the
 17 life of one of your comrades is in danger, you don't wait
 18 for an order before you shoot.
 19 MR BIZOS SC: Yes.
 20 CHAIRPERSON: So both of those points
 21 render the question you ask one that's subject to
 22 reformulation.
 23 MR BIZOS SC: Yes.
 24 CHAIRPERSON: But there's a further point
 25 and that is that to be fair to the witness he should be

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1 told at what time the shooting took place. Now you
 2 yourself told us that the first photograph is 3:58.
 3 MR BIZOS SC: Yes.
 4 CHAIRPERSON: Now I'm not sure whether
 5 it's been definitely proved yet, but it appears from
 6 exhibit L that the actual incident when the firing took
 7 place was round about 3:50, I think.
 8 MR BIZOS SC: 3?
 9 CHAIRPERSON: 3:50. That appears to be
 10 the case from a number of things in exhibit L. If I'm
 11 wrong on that I will be corrected, but my recollection is a
 12 moment ago I found something that said that. As far as I
 13 understand the firing took place shortly after the incident
 14 depicted on slide 206 which is 3:50 and 207 which is also
 15 3:50 where the protestors moving past the kraal during
 16 their third approach. Now the point is that this picture
 17 of yours, number UU2(1), you say, is 3:58.
 18 MR BIZOS SC: Yes.
 19 CHAIRPERSON: Now that was several
 20 minutes after the actual firing took place, as I understand
 21 the evidence. Anyway, those are the three points that I
 22 think you should bear in mind when you reformulate your
 23 question.
 24 MR BIZOS SC: According to the
 25 photographs from SAPS the shooting started at 15, some time

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1 between 15:55 and 15:58, Mr Chairman. The times are on the
 2 photographs.
 3 CHAIRPERSON: On the, I found what I was
 4 looking for. Slide 223 says that the picture, it's a
 5 photograph taken at 15:59 and it says nine minutes after
 6 the shooting at Scene 1. That is what I base my statement
 7 that the shooting was at 15:50. But that of course may not
 8 be correct, that may be contradictory, because part of the
 9 problem was that the clocks of all these, the time pieces
 10 of these cameras weren't, hadn't been synchronised. But
 11 the point is whichever way you look at it, this photograph,
 12 UU2(1) is taken minutes, how many minutes may be a matter
 13 for debate but it's taken minutes after the shooting,
 14 because the shooting was only eight seconds, the first
 15 shooting. I don't want to argue with you, I'm just
 16 suggesting to you, the points I put to you should be
 17 factored into the reformulated question.
 18 MR BIZOS SC: Yes. If in fact, if in
 19 fact the time shown on this photograph was at 3:58 and the
 20 shooting started seconds before that, if the shooting
 21 started, because we actually have photograph material which
 22 contradicts the printed version, Mr Chairman, then this was
 23 taken a few seconds after the shooting.
 24 MR SEMENYA SC: The proposition cannot be
 25 right, Chair. We know that even the people who were

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1 fleeing are gone off this picture. It couldn't be seconds
 2 after the shooting happened.
 3 MR BIZOS SC: That presupposes that there
 4 was a mass of people as the state case is. Well –
 5 CHAIRPERSON: Look, I understand that.
 6 The question has obviously got to be asked on the correct
 7 factual premise. And what we're concerned with is what the
 8 correct factual premise is.
 9 MR BIZOS SC: Yes.
 10 CHAIRPERSON: I've been trying to
 11 correlate these photographs with some of the photographs in
 12 exhibit L. Then of course one, there are problems with
 13 perspective and with, difficult to see it in the photograph
 14 what the relevant distances are. But I take it that 206
 15 was taken shortly before the shots were fired. And the
 16 same, I presume applies to 207. 208 is immediately after
 17 the shots were fired, then I assume thereafter. But
 18 perhaps you can reformulate your question which avoids the
 19 problem of possibly incorrect factual premise, but
 20 nevertheless, there's a point you want to make and I don't
 21 want to stop you from making it, I just want to be fair to
 22 the witness to make sure that you extract, that you don't
 23 extract concessions based possibly on the incorrect factual
 24 premise.
 25 MR BIZOS SC: I will confine myself to

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1 this, that at or about the time the shooting –
 2 CHAIRPERSON: Put the question on the
 3 basis that if the shooting took place a short while before
 4 –
 5 MR BIZOS SC: Seconds before this
 6 photograph was taken.
 7 CHAIRPERSON: Ja. Before UU2(1) was
 8 taken, then you can put something to him.
 9 MR BIZOS SC: Yes -
 10 CHAIRPERSON: Whether that premise is
 11 correct, may be a matter to debate.
 12 MR BIZOS SC: We can leave it, yes. On
 13 the assumption that this photograph, exhibit UU2(1) was
 14 taken seconds after the shooting took place or in a very
 15 short period before the shooting took place, does it appear
 16 that the police were in a formation?
 17 [14:19] BRIG MKHWANAZI: From what I'm seeing,
 18 Counsellor, I see a formation at the same time I see other
 19 police officials scattered on the left of the picture as
 20 well.
 21 MR BIZOS SC: Yes. If the shooting
 22 happened in the, during the time period that I have
 23 suggested to you, would you agree that in terms of the
 24 rules that you teach your pupils, nobody was entitled to
 25 shoot on his own accord, there should have been an order

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1 from someone in charge of the formation?
 2 BRIG MKHWANAZI: Counsellor, I will say I
 3 was not there. My answer won't be direct but what I know
 4 is that a police official can act or can act, sorry a
 5 police official can act on necessity or self or private
 6 defence. He can't do that, depending to the situation.
 7 Looking at this situation, I'm not sure what is happening
 8 as I was saying I'm seeing a basic line. They are standing
 9 in a line others are moving on the side and I'm not sure
 10 what is the position, what is happening there because I was
 11 not there. But police can act on a necessity self as well
 12 as on private defence.
 13 MR BIZOS SC: We know what is expected,
 14 what I am putting to you is that if the facts as they would
 15 appear on this photograph and it was taken seconds after
 16 the shooting, that the formation was there, that a command
 17 would be needed before there was any shooting.
 18 BRIG MKHWANAZI: Counsellor, it's a
 19 difficult question for me. We talk about action taken,
 20 people lost their lives. For me to say yes or no into
 21 this, it will be totally different. I will appreciate if
 22 really I was there then I can be able to say what happened
 23 at that time, as I was trying to indicate on my first
 24 answer. But that I'm going to say here they were supposed
 25 to receive a command before acting, I'm not sure what

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1 happened to those who are on the other side before they
 2 were actually shot. I'm not sure about that. So how can I
 3 be able to say what these people could have done? I cannot
 4 presume, here we talk about people's lives. I'm not going
 5 to sit here and presume and presumption, presumption. I
 6 can't do that. I can't do that.
 7 MR BIZOS SC: Brigadier is it not clear
 8 that the police were there as a unit?
 9 BRIG MKHWANAZI: Come again, as a?
 10 MR BIZOS SC: As a unit?
 11 BRIG MKHWANAZI: As a unit?
 12 MR BIZOS SC: Yes.
 13 BRIG MKHWANAZI: There were different
 14 units, sir.
 15 MR BIZOS SC: Well forming a unit from
 16 different units, but they were a unit. They were on the
 17 same line.
 18 BRIG MKHWANAZI: Counsellor, I don't
 19 disagree with you. They were standing in a line, I see
 20 that.
 21 MR BIZOS SC: In a formation?
 22 BRIG MKHWANAZI: Formation, you can call
 23 it a basic line or a formation.
 24 MR BIZOS SC: Yes and if there is going
 25 to be a shooting by anyone in a formation it has, there has

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1 to be an order?
 2 BRIG MKHWANAZI: Counsellor, I believe
 3 your answer, you're expecting me to say yes or no. In this
 4 position I cannot say, I was not there, for me to presume
 5 and say this is what they were doing, because I'm not sure
 6 whether they were finished, they came back or they were
 7 still going to do it as they are standing now. As you are
 8 saying it was a minute after, how can I ever prove that it
 9 was a minute after, Counsellor. I was not there. Unless
 10 you prove to me that it was a minute after then I can do
 11 something, but at the same time -
 12 MR BIZOS SC: Well I'm asking you to
 13 assume -
 14 BRIG MKHWANAZI: I cannot assume. This
 15 is people's lives, Counsellor, I was not there. I was not
 16 there. I cannot -
 17 MR BIZOS SC: You are not prepared to
 18 make an assumption?
 19 BRIG MKHWANAZI: It's not about I'm not
 20 prepared. I would like to talk on facts. I was not there.
 21 The only facts I can have, Counsellor, is when I was
 22 involved. Here is a very, very delicate situation, I
 23 cannot presume at all.
 24 MR BIZOS SC: Well can we say that we
 25 argue that if we are correct in relation to the timing, you

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1 are not prepared to be of any assistance to the commission
 2 as to whether an order was absolutely necessary before any
 3 shooting took place?
 4 BRIG MKHWANAZI: Counsellor, I don't know
 5 what to say now. I have made it clear that the only time I
 6 can be able to have a say in a situation like this, I must
 7 be there, I must know what had happened. People are lying
 8 down there, killed and I must be able to see what had
 9 happened in person. I cannot talk about people which at
 10 the same time yourself, you presume that it was after a
 11 minute. How can I prove that and come up and presume as
 12 well. I would like to help the commission as much as I can
 13 but in this position I can't.
 14 MR BIZOS SC: Please have a look at
 15 UU2(2). Is the same formation more or less the same?
 16 BRIG MKHWANAZI: From what I'm seeing
 17 it's just a different angle. For me it still looks the
 18 same.
 19 MR BIZOS SC: And what we see are bodies
 20 some on the road, some off the road, some against the kraal
 21 and one or two possibly behind the kraal and if this
 22 picture was taken at 3:59 one second after the first one,
 23 are you prepared to express any opinion as to whether any
 24 of the supposed attackers were near enough the line in
 25 order to be presenting a threat to the policemen in line?

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1 MR SEMENYA SC: Chairperson, I register
 2 an objection again. The question is totally unfair, at
 3 this time of the formation the shooting had happened
 4 minutes before. How can it be put to the witness that in
 5 this formation would they be close enough to pose a threat
 6 to the police?
 7 MR BIZOS SC: Mr Chairman, I submit with
 8 respect that in view of the dispute of, in relation to the
 9 time and I am sure that my learned friend will investigate
 10 or the evidence leaders will investigate, Mr Chairman, from
 11 the policemen that appeared to be on line whether there was
 12 any command given or not. So that the matter can be
 13 properly clarified, but I think that I am entitled to draw
 14 the witness's attention to the facts as they appear on the
 15 photograph for his comment and if he refuses to commit
 16 himself he gives us yet more grounds in order to submit
 17 that there is a conspiracy of silence amongst the police
 18 officers that may or may not have been there about what
 19 really happened.
 20 CHAIRPERSON: I don't even see how you
 21 can argue that, this Brigadier wasn't there at all.
 22 MR BIZOS SC: Yes.
 23 CHAIRPERSON: If you are asking an expert
 24 to express expert opinions on what he is shown is party to
 25 a conspiracy signs, anyway we will get there if you put

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1 that argument up. The photographs have been put to the
 2 witness. He has been asked to make assumptions. He says
 3 he declines to make assumptions because he is not certain
 4 if his assumptions are correct, as I understand his
 5 evidence. That may or may not be a basis for criticising
 6 his evidence but is there any point in spending any further
 7 time on it, shouldn't you move on to the next point?
 8 MR BIZOS SC: I if have persuaded my
 9 learned friend for the police and the evidence givers that
 10 at the very least detailed investigation is required for
 11 the purposes I'm prepared to leave it there, Mr Chairman.
 12 If we are assured, if we are assured that there will be
 13 evidence as to whether an order was given or not, then we
 14 will be able to leave it at that at this stage.
 15 CHAIRPERSON: - find out from Mr Semenya,
 16 is it your case that an order was given or that an order
 17 was required?
 18 MR SEMENYA: Our instruction and case is
 19 that no order was given, nor was there an order required.
 20 CHAIRPERSON: I think you have
 21 ascertained what you wanted to ascertain, Mr Bizos. Their
 22 case, the police case and they have obviously done the
 23 investigation already, no order was given and they will
 24 argue that in the circumstances no order was required.
 25 That's their case. On the basis of what has been put by Mr

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1 Semenya, you can cross-examine the witness further.
 2 MR BIZOS SC: I want to read to you what
 3 the counsel for the police said on page 17 on page 30 of
 4 their, page 17 of a document of 30 pages, their opening
 5 statement, 'the implementation of this measure was preceded
 6 by the deployment of barbed wire to send a message that the
 7 armed protestors may not cross the police line. The
 8 protestors defied this and attempted on three occasions to
 9 breach the police barbed wire. Teargas, stun grenades,
 10 water cannons and rubber bullets were used to try and stop
 11 them from breaching the police line. This did not deter
 12 them. They had protected themselves from rubber bullets by
 13 wearing numerous layers of clothing and covering themselves
 14 with blankets. We will also hear evidence that one of the
 15 leaders of the armed group of protestors in a green
 16 blanket, Mr Noki, confronted Lieutenant-Colonel Macintosh
 17 who was inside a Nyala and said we are going to kill one
 18 another today. On the third attempt within a space of five
 19 minutes, since the first attempt to breach the police line,
 20 the protestors managed to breach the police line around the
 21 kraal and came charging at police officers with dangerous
 22 sharp weapons and firearms. Officers from the tactical
 23 response team which had been deployed a support service and
 24 show of force, at virtually less than a heartbeat of
 25 charging protestors, opened fire on the advancing

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1 protestors with live ammunition without instruction from
 2 anyone in circumstances where they reasonably believed that
 3 their lives and that their members to be in imminent
 4 danger. 16 protestors died on that occasion." That is the
 5 police story. What I want to ask you as an expert is this,
 6 would you have expected if you were giving a tutorial to a
 7 class of policemen that you don't shoot to kill without
 8 firing at least a warning shot?
 9 BRIG MKHWANAZI: Counsellor, the story
 10 you read to me talks about three times the participant
 11 trying to breach the line going through the side of the
 12 police and from what we heard as we go on, that is started
 13 with the public order policing using different types of
 14 less lethal, I mean less lethal options to ensure that
 15 people don't go through. As I said it's for me, becomes a
 16 bit of a problem because that's where in this position I
 17 don't have clear facts what happened. As you talk about
 18 training, what was supposed to be done but in this position
 19 we have a situation where people have gone through as they
 20 have gone through on the third time and what we have read
 21 now would state that they believe that their lives was at
 22 imminent danger. Hence the people were armed with
 23 dangerous spears, that's what we read just now.
 24 [14:39] So, for me to draw the line within that, was it
 25 supposed to be a warning first? Was it supposed that they

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1 have actually directed their fire to the people? It's
 2 difficult, because I didn't see even what was the distance,
 3 how close they were, and all that. It's difficult. It's
 4 not to say I don't want to contribute. I would like to
 5 contribute, but it's difficult for me to assume, as you say
 6 I must presume. It's difficult, Counsellor.
 7 MR BIZOS SC: You don't have to please
 8 me, Brigadier. The Commission expects you as an expert to
 9 express a view that where there are a group of policemen,
 10 50 in number, a number of people try to breach the wire,
 11 the razor wire, wouldn't you have expected, and would you
 12 not have told your students, fire a warning shot, say over
 13 the loudhailer, another attempt, or another step may lead
 14 to you being shot dead, or possibly identifying the leader
 15 and shooting only him instead of opening a barrage that led
 16 to the death of more than 15 people?
 17 BRIG MKHWANAZI: Counsellor, in the death
 18 of a person, no matter how many are dead, the person is
 19 dead. It's a situation, we cannot that situation. One or
 20 two, it cannot be accepted. The point I'm making is, is
 21 that in this situation, that's an option we utilised and
 22 I'm not sure as they break through, how closer they were to
 23 the police, how far they were. I do not have that
 24 information. As you say, I must not try to please you. On
 25 my understanding, I was not answering the question because

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1 maybe I want to please you. I'm answering the question
 2 because you asked it. This is my answer, Counsellor. My
 3 answer is, it's not possible for me to come up with any
 4 input on this position because you need to know exactly, as
 5 I was indicating, people, members of SAPS are standing in
 6 basic line and if they are standing like this, people are
 7 lying down already, and are they still advancing or are
 8 they standing? We can't all of us say here. I need first
 9 to be able to say something, and to push myself in a
 10 position to say let me presume, is totally wrong. It's
 11 people who are dead here. I cannot just presume in that
 12 way. I can try and talk about other things, but this one,
 13 I cannot presume on it. People have been killed here. The
 14 only way I can have a proper opinion here is only, and only
 15 if I'm involved, I saw everything myself here. As I
 16 started from the beginning to say, I felt of necessity SAPS
 17 or private differs. If it's not that position, the letter
 18 you wrote now talk about the fact that the people were
 19 armed with spears and they felt that their life is in
 20 imminent danger, and as it states like that, I'm not sure
 21 how far they were. Would they still have a chance to shoot
 22 a warning or what? I cannot talk on that position, really.
 23 MR BIZOS SC: Did you tell your pupils
 24 that killing people must be a very last resort?
 25 BRIG MKHWANAZI: Counsellor, taking

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1 someone's life, for my understanding it will never be a
 2 last resort, except only, and only if it is on self-
 3 defence. If there are means of private defence, or if
 4 there are means that you can deal with that as a police
 5 official, you will have to deal with that. Like the
 6 example you gave to me, three police official going to a
 7 situation and something happen, then there is no need that
 8 they can wait for command. The situation demands them to
 9 do something because somebody is going to do something to
 10 them. That's a total different situation. But I cannot
 11 say killing somebody must be a last resort. Killing of a
 12 person will never be a song we must sing every day, because
 13 it's not part of our job.

14 MR BIZOS SC: Did you tell your pupils
 15 that any injury or death must be proportionate to the harm
 16 that may be done if they do not take that final step of
 17 killing someone?

18 BRIG MKHWANAZI: It's, basically it's
 19 normal; it's how it should be. It has to be proportionate
 20 to the threat most of the time. That's why I'm having a
 21 situation of a difficult point to say how can I make any
 22 input in this position, because I'm not sure what was the
 23 position. Only what I hear, they're armed with spears,
 24 their life was in danger. It's a lot of things that one
 25 has to look at it here. Was there still, there an

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1 opportunity, or maybe a chance that they could have done
 2 something around that position? I can't say that. Of
 3 course we teach people, people know about these issues, but
 4 we have to look at one thing, that there must be necessity,
 5 there must be self or private defence that needs to be
 6 applied, especially when their life is in danger as well.
 7 For this position, I'm not sure what happened and I cannot
 8 comment in a position of this nature. As I've said, people
 9 lying down their, human beings who've lost their lives, and
 10 for me to presume, as you want me to presume, is totally
 11 difficult.

12 MR BIZOS SC: 15 people died as a result
 13 of gun wounds at this spot. Not a single policeman had a
 14 scratch. If a pupil in class asked you, Brigadier, on
 15 those facts only, would you consider it proportionate or
 16 not, what would you have said to your class?

17 BRIG MKHWANAZI: Counsellor, again I
 18 would say your question, clear as it is, but for me it
 19 becomes dangerous –

20 MR BIZOS SC: What would you say to your
 21 class?

22 BRIG MKHWANAZI: Let me explain. Don't
 23 raise your voice, please. What is important here, you are
 24 giving me a scenario, a scenario that is very close to the
 25 real situation. In other words I will say we are playing –

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1 MR BIZOS SC: Forget the real situation –
 2 BRIG MKHWANAZI: No, not correct –
 3 MR BIZOS SC: Sorry.
 4 BRIG MKHWANAZI: Not correct, Counsellor.
 5 It's not correct. Counsellor, it's not correct. I don't
 6 agree with you. By all means you want to make me to be in
 7 a certain position I don't want to be. I want to answer
 8 you properly. Counsellor, your question is, a person has
 9 been killed; police official, they are not injured, all of
 10 them, there's no scratch. That is your point. Clearly in
 11 this type of a situation I will have to ask questions what
 12 had happened, as it is an example, as you make it as an
 13 example. I will have to find out what had happened to the
 14 situation and everything, then I can make my input on that,
 15 and if possible I'll do my inspection loco as well. I will
 16 go and see where was one and where was the other person and
 17 what happened. Then I can draw my input on that. I cannot
 18 just stand in front of the class and just in front of the
 19 class and say ja, you were supposed to do 1, 2, 3. That's
 20 not correct.

21 MR BIZOS SC: You are familiar with the
 22 orders that govern the conduct of police, are you?

23 BRIG MKHWANAZI: At what circumstances,
 24 please?

25 MR BIZOS SC: Pardon?

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1 BRIG MKHWANAZI: At what situation?
 2 There are a lot of orders.

3 MR BIZOS SC: You are familiar with the
 4 orders?

5 BRIG MKHWANAZI: Counsellor, there are a
 6 lot of orders. Please be specific which orders are you
 7 talking about.

8 MR BIZOS SC: As to crowd management
 9 during the gatherings and demonstrations. That's what I'm
 10 referring to.

11 BRIG MKHWANAZI: Standing order 262, yes
 12 I'm familiar.

13 MR BIZOS SC: In 12.3 records of
 14 operation –

15 BRIG MKHWANAZI: Can I have a chance to
 16 grab it, Sir, please? Can I grab mine as well, please?

17 MR BIZOS SC: Yes, please do.

18 BRIG MKHWANAZI: Thank you.

19 CHAIRPERSON: It's on page 9 of 11, on to
 20 page 12.

21 BRIG MKHWANAZI: Yes, come again? You're
 22 saying?

23 CHAIRPERSON: It's page 9 of 11, going on
 24 to page 10.

25 BRIG MKHWANAZI: Page 9. Reporting and

<p style="text-align: right;">Page 3376</p> <p>1 recording, that's the one? What are we talking about?</p> <p>2 Yes, Counsellor, I'm at page 9.</p> <p>3 MR BIZOS SC: Page 10.</p> <p>4 BRIG MKHWANAZI: Page 10.</p> <p>5 MR BIZOS SC: For starters. Subsection</p> <p>6 3, "Records of operational plans, all reports from the</p> <p>7 execution of operations, and debriefing reports, must be</p> <p>8 filed together with and kept according to the record</p> <p>9 classification system of the service."</p> <p>10 BRIG MKHWANAZI: I see that, Counsellor.</p> <p>11 MR BIZOS SC: Yes, and in paragraph 3 of</p> <p>12 your statement, in 3.2, you are expected to monitor and</p> <p>13 evaluate the implementation and adherence to policies,</p> <p>14 standards, standing orders G262, and national instructions.</p> <p>15 That's part of your function. And subsection 3, I don't</p> <p>16 remember if I read it out to you, "Records of operational</p> <p>17 plans, all reports on the execution of operations, and</p> <p>18 debriefing reports, must be filed together and kept</p> <p>19 according to the record classification system of the</p> <p>20 service," reading not from your statement but from the</p> <p>21 standing orders themselves.</p> <p>22 BRIG MKHWANAZI: I see that, Sir.</p> <p>23 MR BIZOS SC: If you'll bear with for one</p> <p>24 moment, Mr Chairman, I just want another document. Now I</p> <p>25 want to read you an order of these orders, reported in a</p>	<p style="text-align: right;">Page 3378</p> <p>1 relating to private defence.</p> <p>2 BRIG MKHWANAZI: Yes.</p> <p>3 CHAIRPERSON: I'm not sure, and I follow</p> <p>4 the relevance of the questions you're asking –</p> <p>5 MR BIZOS SC: The judgment sets out what</p> <p>6 private defence means and when it can be justified, and</p> <p>7 this is why I'm quoting it, Mr Chair.</p> <p>8 CHAIRPERSON: Mr Semenya?</p> <p>9 MR SEMENYA SC: Might we have an</p> <p>10 opportunity to take the short adjournment to have a –</p> <p>11 CHAIRPERSON: It's 3 o'clock. I suggest</p> <p>12 we take the afternoon short adjournment and while the rest</p> <p>13 of us are having tea, Mr Semenya can study the matter and</p> <p>14 we'll deal with it again after the adjournment. The</p> <p>15 Commission will adjourn.</p> <p>16 [COMMISSION ADJOURNS COMMISSION RESUMES]</p> <p>17 [15:22] CHAIRPERSON: Let me ask Mr Semenya, are</p> <p>18 you able to tell us anything further about the matter that</p> <p>19 was discussed before we took the adjournment?</p> <p>20 MR SEMENYA SC: Chair, I think we have</p> <p>21 tidied up which excerpts of the judgment my learned</p> <p>22 colleague can deal with.</p> <p>23 CHAIRPERSON: Well Brigadier, you're</p> <p>24 still under oath. Yes Mr Bizos, carry on.</p> <p>25 MR BIZOS SC: I am informed that you have</p>
<p style="text-align: right;">Page 3377</p> <p>1 judgement to this effect, "The existing restrictions and</p> <p>2 requirements as determined by courts must be applied</p> <p>3 rigorously."</p> <p>4 BRIG MKHWANAZI: Counsellor, may I ask</p> <p>5 what are we reading?</p> <p>6 MR BIZOS SC: I'm reading you of an order</p> <p>7 appearing in a judgment of the Constitutional Court. It's</p> <p>8 a footnote, "The existing restrictions and prerequisites as</p> <p>9 determined by courts must be applied rigorously," in a case</p> <p>10 such as the one we're investigating.</p> <p>11 CHAIRPERSON: Before you answer –</p> <p>12 MR SEMENYA SC: Yes, for the purposes of</p> <p>13 helping us understand, can we be given the context of the</p> <p>14 judgment, or what judgment it is?</p> <p>15 MR BIZOS SC: It's Ex Parte Minister of</p> <p>16 Safety & Security, In re. Walters, in the Constitutional</p> <p>17 Court, dealing with the proper interpretation of 49(2) of</p> <p>18 the Criminal Procedure Act, as to when a person forfeits</p> <p>19 his life by conduct at the end of the, against a gun.</p> <p>20 [14:59] CHAIRPERSON: 49(2) doesn't deal with</p> <p>21 private defence, and I understand the witness to be dealing</p> <p>22 in the present context not with the application of section</p> <p>23 49(2) – if I'm wrong I'll be corrected – but I didn't</p> <p>24 understand you to be dealing with the application of</p> <p>25 section 49(2), but the application of the common law rules</p>	<p style="text-align: right;">Page 3379</p> <p>1 had a copy of the judgment placed before you, Mr Chair. Is</p> <p>2 that not so? It was intended to be by me but my learned</p> <p>3 friend –</p> <p>4 CHAIRPERSON: No, Mr Bizos, you've been</p> <p>5 misinformed.</p> <p>6 MR BIZOS SC: I'm sorry about that. We</p> <p>7 will make it available.</p> <p>8 CHAIRPERSON: I'm sure it's not your</p> <p>9 fault. Anyway, carry on in the meanwhile.</p> <p>10 MR BIZOS SC: Yes.</p> <p>11 CHAIRPERSON: Something's happening.</p> <p>12 MR BIZOS SC: Yes.</p> <p>13 CHAIRPERSON: Well I've only got one copy</p> <p>14 and there are three of us, but which of you two wants it?</p> <p>15 My colleague, Commissioner Hemraj says that she and Mr</p> <p>16 Tokota don't need it because they know the law so I should</p> <p>17 keep it. Carry on, Mr Bizos.</p> <p>18 MR BIZOS SC: Yes. Before I ask the</p> <p>19 question may I just indicate, Mr Chairman, that the matter</p> <p>20 raised by you, Mr Chairman and by my learned friend, this</p> <p>21 is a Section 49 case but there is a very full judgment by</p> <p>22 Kriegler J in which all the other members of the courts are</p> <p>23 concurred. And the, if you turn to page 643, Mr Chairman,</p> <p>24 there is a footnote –</p> <p>25 CHAIRPERSON: As the witness got a copy?</p>

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1 BRIG MKHWANAZI: I've got it.
 2 CHAIRPERSON: Okay.
 3 MR BIZOS SC: Yes. Page 642, there's a
 4 footnote, 1.2. "The existing restrictions and
 5 prerequisites as determined by the courts must be applied
 6 rigorously. All actions must invariably be reasonable and
 7 in agreement with the principle of minimum force." You see
 8 that in the second, in 1.3? And read together with what
 9 appears on top of 643.
 10 MR SEMENYA SC: Chair, I think –
 11 CHAIRPERSON: Mr Semenya has turned his
 12 microphone on and he wants to say something.
 13 MR SEMENYA SC: Chair, I thought we had
 14 tidied up that that excerpt relates to Section 49(2) which
 15 is not relevant. It is the other page relating to self-
 16 defence that is relevant.
 17 CHAIRPERSON: 643, footnote 66.
 18 MR SEMENYA SC: Yes, that's 49(2)
 19 environment. The other page relates to private defence.
 20 MR BIZOS SC: Mr Chairman, if you have a
 21 look at the footnote at the page of 643, the last sentence,
 22 what is material, that is that the law applies a
 23 proportionality test wherein the interest protected against
 24 the interest of the wrong-doer. These threats must now be
 25 weighed in the light of the Constitution. So the judgment

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1 does not confine itself merely to Section 49, it's really a
 2 treatise of what can be done against a wrongdoer and what
 3 can't be done against a wrongdoer. And if you have a look
 4 at the judgment as a whole, this is a treatise on the
 5 treatment of people on the other side of the gun. And what
 6 I want to draw to the witness' attention is that the
 7 existing restrictions and prerequisites as determined by
 8 our courts must be applied rigorously. This is what I want
 9 to bring to his attention, and I'm going to ask –
 10 CHAIRPERSON: Mr Bizos, that passage in
 11 footnote 62 in terms is a quotation from a general
 12 directive issued by the Minister of Safety & Security on
 13 the 11th April 1995 dealing with the then wording of Section
 14 49(2) of the Criminal Procedure Act and it reads: "The
 15 current wording of Section 49(2) of the Criminal Procedure
 16 Act is presently being reconsidered. As an interim
 17 measure, the following guidelines should be followed
 18 concerning the relevant section. "1.1 The application
 19 ought to be a series of - such as murder, armed robbery,
 20 assault with intent to inflict grievous bodily harm,"
 21 etcetera, "or where there's a reasonable suspicion that the
 22 fugitive is a danger to the public, "1.2 the existing
 23 restrictions and prerequisites as determined by the courts
 24 must be applied rigorously," that's the passage you refer
 25 to. "1.3 all acts must invariably be reasonable and in

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1 agreement with the principle of minimum force." Now the
 2 first point is it's clear that it relates to the guidelines
 3 to be followed concerning Section 49(2), it doesn't deal in
 4 terms with self-defence, which is what's dealt with in
 5 footnote 66 on page 243 which you read. So it's not
 6 correct to say that that paragraph 1.2 applies to self-
 7 defence. So I think you must step back a yard or two,
 8 sorry, a metre or two and re-approach the matter because
 9 the way you put it isn't strictly correct.
 10 MR BIZOS SC: No, Mr Chairman, with
 11 respect, if you go to note 66, at the bottom on page 643,
 12 "self-defence is treated in our law as a species of private
 13 defence. It is not necessary for the purposes of this
 14 judgment to examine the limits of private defence. Until
 15 now our law has allowed killing in defence of life but also
 16 has allowed killing in defence of property or other
 17 legitimate interest in circumstances where it is reasonable
 18 and necessary to do so, and the authority is quoted.
 19 Whether this is consistent with the present case, no sorry,
 20 whether this is consistent with the values of our new legal
 21 order is not a matter which arises for consideration in the
 22 present case. What is material is that the law applies
 23 proportionality, the proportionality test wherein the
 24 interests protected against the interest of the wrongdoer.
 25 These interests must now be weighed in the light of our

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1 Constitution.
 2 CHAIRPERSON: That statement is made in
 3 the context of the question as to whether killing, whether
 4 private defence is available not only for killings in
 5 defence of life, but also killings in defence of property
 6 or other legitimate interest. And that doesn't arise for
 7 consideration in the present case, there's a
 8 proportionality test and the interest concerned, the
 9 interest to be protected has got to be viewed in the light
 10 of the Constitution or weighed in the light of the
 11 Constitution. I'm not sure that that passage is relevant
 12 at all. But what is more helpful for you, possibly, is the
 13 quotation from Makwayani's case, which is in the text at
 14 page 642 where Chaskalson P set out the law in relation to
 15 self-defence, a passage which is probably relevant to the
 16 question you want to ask and I suggest, if I may be
 17 permitted to do so, that you read that to the witness and
 18 then ask the question.
 19 MR BIZOS SC: Yes, I will read that to
 20 him, but also more briefly in paragraph 11 of the standing
 21 orders, "The use of force must be avoided at all costs and
 22 members deployed for the operation must display their
 23 highest degree of tolerance. The use of force and
 24 dispersal of crowds must comply with the requirements of
 25 Section 9(1) and (2) of the Act. During any operation, on-

<p style="text-align: right;">Page 3384</p> <p>1 going negotiations must take place between officers and 2 convenors or other leadership elements", which also gives 3 an expectation to, that it should be complied with by a 4 teacher of public policing situations, Mr Chairman. But if 5 you, if I am directed to read the passage which I have 6 underlined –</p> <p>7 CHAIRPERSON: You don't, I haven't got 8 the power to order you to do anything, but if you want to 9 do it you can, if you don't want to, you don't have to. 10 I'm just trying to be helpful.</p> <p>11 MR BIZOS SC: Yes, thank you. Well let 12 me read it. "Self-defence is registered by all legal 13 systems. Where a choice has to be made between the lives 14 of two or more people, the life of the innocent is given 15 preference over the life of the aggressor. This is 16 consistent with Section 33(1), the equivalent of Section 36 17 of the final Constitution. To deny the innocent person the 18 right to act in self-defence would deny the individual or 19 his or her right to life. The same is true whether lethal 20 force is used against a hostage-taker who threatens the 21 life of the hostage. It is permissible to kill the 22 hostage-taker to save the life of the innocent hostage, but 23 only if the hostage is in real danger. The law solves 24 problems such as these through the doctrine of 25 proportionality balancing the right of the aggressor</p>	<p style="text-align: right;">Page 3386</p> <p>1 Division HRD who will therefore train the members. I feel 2 strongly that the question now posed to me, if this is 3 being presented, should have been given to my other 4 Brigadier who was present here to indicate whether is it 5 there or not there. But what I know for a fact that it has 6 to be presented to members, but I'm not sure if it was. 7 But training, presenting of the training even when I was 8 there, it was the task of the Division HRD which is Human 9 Resource Development which is the national training for 10 South African Police Services. So I was extracting the 11 information, I was giving to them and they were presenting. 12 Therefore for me now to come here and say is this presented 13 now, I will be definitely not sure at this stage what is 14 the position. I left in February, at this stage I'm not 15 sure what is the position, if they are presenting it or 16 not.</p> <p>17 MR BIZOS SC: Yes, thank you. Mr 18 Chairman, may I interrupt my cross-examination on this 19 point by calling for the showing of the portion of a video 20 tape?</p> <p>21 CHAIRPERSON: I take it for the purposes 22 of the record you have to identify the video clip that's 23 being shown or possibly with her usually efficiency 24 Advocate Pillay will be able to help us to identify the 25 clip.</p>
<p style="text-align: right;">Page 3385</p> <p>1 against the right of the victim and favouring the life or 2 lives of persons or innocent over the life or the lives of 3 the guilty. But there are strict limits in the taking of 4 life, even in circumstances that have been described and 5 the law insists upon these limits being adhered to." That's 6 the end of the quotation, and then of course Judge Kriegler 7 goes on in paragraph 154, and maybe in fairness, the 8 limitations set out by Justice Kriegler are quite clear but 9 there is the proviso in sub-section I, the limitations in 10 no way detract from the rights of an arrestor attempting to 11 carry out the arrest to kill a suspect in self-defence or 12 in defence of any other person. But the underlying factor 13 in the authorities in the judgment is that it has to be 14 proportional and reasonable and what I've put to the 15 witness is that our courts have said things, and Brigadier, 16 what I am asking you, were you familiar of the limitations 17 to killing that have been prescribed by the courts? And if 18 so, did you convey this to your class?</p> <p>19 BRIG MKHWANAZI: Counsellor, maybe I 20 should try and indicate that when I arrived here, I made it 21 clear that I work in the office for specialised operation 22 or specialised units until this year February, then I was 23 appointed in Kimberley as a Provincial Head. And my point 24 was clear that when I was in the same office, my task was 25 to collate or extract the training needs, submit them to</p>	<p style="text-align: right;">Page 3387</p> <p>1 MS PILLAY: Chair, it will be UU3.</p> <p>2 CHAIRPERSON: Ja, that's just for the 3 record of the commission. But what is the clip?</p> <p>4 MS PILLAY: I know that it's a Reuters 5 clip, Chair, I don't have the pathway, unfortunately, I'll 6 provide it to the parties –</p> <p>7 CHAIRPERSON: You don't have to do it 8 now, possibly you can give it to us tomorrow morning, or.</p> <p>9 MS PILLAY: I will do so, Chair.</p> <p>10 CHAIRPERSON: Thank you. Yes, Mr Bizos?</p> <p>11 MR BIZOS SC: Could the clip be shown?</p> <p>12 [VIDEO CLIP SHOWN]</p> <p>13 MR BIZOS SC: Thank you.</p> <p>14 CHAIRPERSON: If we could see it again, 15 it doesn't take very long, just if we could see it again, 16 please?</p> <p>17 [VIDEO CLIP SHOWN]</p> <p>18 [15:42] MR BIZOS SC: There is another portion 19 that we want to show, Mr Chairman, where the person calls 20 for cease fire. I'm sorry my hearing is not as good as 21 yours. Yes. Have you seen the gun being pointed down to 22 the ground?</p> <p>23 CHAIRPERSON: What was said was not 24 recorded, the first clip we saw towards the end we could 25 hear clearly the word cease fire, cease fire repeated,</p>

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1 followed by some shots and cease fire again and then as far
 2 as I can see the fire, the shooting ceased. This is
 3 another one which is from a slightly different angle you
 4 say, which reflects the same thing but also shows the angle
 5 of a particular firearm. So I suppose we better look at
 6 this as well.

7 MR BIZOS SC: There's another portion
 8 that comes from, is it a separate clip where the gun is
 9 pointing down. That's the one that I thought that we were
 10 going to see. Is that the one? Yes, do you, what we want
 11 to draw attention to, Mr Chairman, is that the man in front
 12 that his gun is pointing down to the ground.

13 CHAIRPERSON: Actually there are two men,
 14 the cursor is indicating both of them and their firearms
 15 are pointing to the ground. There is another one slightly
 16 to the right whose firearm is also pointed to the ground,
 17 but it's at an angle of about I suppose 60 degrees.

18 MR BIZOS SC: And this is at a time when
 19 someone is shouting cease fire and is it one of the people
 20 whose guns that is pointed to the ground, that is shouting
 21 cease fire? Oh yes, no it is much better here. That the
 22 person who says cease fire, which indicates that he is
 23 calling for the cease fire but he himself is not shooting.
 24 Yes, thank you. Now what I, thank you, I will refer to it
 25 during my cross-examination of the witness, Mr Chairman.

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1 Now Brigadier, in addition to the utterances of the judges,
 2 the general provisions of orders 262 is 11a, "the purpose
 3 of offensive action start to escalate are to deescalate
 4 conflict with a minimum force to accomplish the goal and
 5 therefore the success of their actions will be measured by
 6 the results of the operation in terms of the cost, damage
 7 to property, injuries to people and loss of lives. The
 8 degree of force must be proportional to the seriousness of
 9 the situation and the threat posed in terms of situational
 10 appropriateness. It must be reasonable in the
 11 circumstances. The minimum force must be fused to
 12 accomplish the goal and the use of force must be
 13 discontinued, once the objective has been achieved. The
 14 following are prohibited or restricted during crowd
 15 management operations, the use of 37 millimetre stoppers
 16 prohibited, the use of firearms and sharp ammunition
 17 including birdshot and buckshot, prohibited and the use of
 18 rubber bullets, shotgun batons may only be used to disperse
 19 a crowd in extreme circumstances if less forceful methods
 20 prove to be ineffectively restricted. Force may only be
 21 used on the command or instruction of the CJOC or
 22 operational commander if appointed. 4, members may never
 23 act individually without receiving a command from their
 24 commander. Six, all members involved in actions must form
 25 part of a unified command structure consisting of sections,

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1 platoons or companies. Members not working in sections may
 2 not be deployed. All visible policing members for such
 3 purposes must be trained in the management of crowds.
 4 Common law principles of self defence or private defence
 5 are not affected by this order." Now did you see on the
 6 video, did you see on the video that there are three men
 7 there and some other, not very clearly seen to their right
 8 and whilst cease fire is being called for by one of them,
 9 you can still hear gunfire. We are informed, it's still to
 10 be proved, but I want you to assume that the person whose
 11 gun is facing down is an officer and he is the one who is
 12 calling out cease fire. Throughout that video you don't
 13 see a single attacker anywhere near them or any other
 14 policeman. Do you agree?

15 BRIG MKHWANAZI: Counsellor, you asked me
 16 this question, if I remember your question was do we see
 17 any crowd around the police, I indicated that there isn't.
 18 I have answered it before, yes you phrased it in a
 19 different way but we have answered it already.

20 MR BIZOS SC: If a senior officer who is
 21 said to have been shouting cease fire is the person who
 22 points his gun to the ground, how would you describe the
 23 situation? That it was a situation in which lethal force
 24 against 15 people was justified?

25 BRIG MKHWANAZI: Counsellor, you are

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1 putting words in my mouth. I never said that. My words
 2 are, I cannot be able to give any input at that position.
 3 These are people's lives, people are lying down there
 4 already. I'm not sure what had happened. I could not see
 5 anything at this moment when I'm sitting here until you
 6 show me the video and at the same time I'm saying my input
 7 was going to be very good. If I'm there, I see things
 8 myself and I went further saying, the only thing that could
 9 happen is on necessity, self or private defence. That's
 10 all what I have said.

11 In this position I only spoke about less lethal
 12 when I was talking about public order policing that were
 13 actually trying to close the barbed wire, people breaching
 14 on it. That's the only part I spoke about. Here I said I
 15 cannot comment in that position because I was not there, I
 16 could not see what is happening. Even now I see on a video
 17 it's totally difficult. There is a lot of angles you don't
 18 see and if now I'm going to just comment on this speech,
 19 I'm saying that the firearm is pointed down. Nobody knows
 20 where it was before it was pointed down. Then I cannot
 21 comment in that situation, really Counsellor, you are
 22 pushing me, pressing me in a situation to say something
 23 that is totally against my understanding of what I'm
 24 seeing. I cannot comment in that position, I was not
 25 there. It's difficult.

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1 MR BIZOS SC: You were at Potchefstroom?
 2 BRIG MKHWANAZI: That's correct,
 3 Counsellor.
 4 MR BIZOS SC: You have told us that the
 5 purpose that you were there, was what?
 6 BRIG MKHWANAZI: My purpose to be there
 7 was to look of issues of policies, standing orders as well
 8 as national -
 9 MR BIZOS SC: Jut repeat what you say, I
 10 didn't hear it.
 11 BRIG MKHWANAZI: Come again.
 12 MR BIZOS SC: Just repeat what you say
 13 the purpose was.
 14 BRIG MKHWANAZI: The purpose was to look
 15 to the issues of policies, national instructions as well as
 16 standing orders and I even went further indicating that
 17 during our stay in three days, we have to look to the final
 18 product which is here before us which is being presented by
 19 Lieutenant-Colonel Scott where I indicated that most of the
 20 issues we looked at was on terminologies, as far as how it
 21 has to be written of SAPS.
 22 MR BIZOS SC: I want to read to you the
 23 standing order 13.
 24 CHAIRPERSON: You mean paragraph or
 25 clause 13 of standing order 262?

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1 MR BIZOS SC: Paragraph, 262. I will
 2 read it out for your benefit. CJOC must ensure that
 3 debriefing take place after each event or fathering and
 4 that a record is kept. Was the meeting at Potchefstroom a
 5 debriefing exercise as envisaged by the order?
 6 BRIG MKHWANAZI: Counsellor, I think I
 7 answered this question again once more to the previous
 8 Counsellor that when I was there, my letter was based on
 9 policies on national instruction and standing orders. For
 10 the debriefing purposes I was not there for that. I went
 11 further indicating as well to say when we were there,
 12 already the commission was appointed and only what happened
 13 the people were divided into groups and they work into
 14 groups. They gave us only the product -
 15 MR BIZOS SC: You have told us that. You
 16 have told us that. What I want to ask you is this, was a
 17 debriefing as provided for in order 13 ever held or not?
 18 BRIG MKHWANAZI: Counsellor, again I have
 19 a problem the way you want me to answer. The way of saying
 20 -
 21 MR BIZOS SC: You just tell me what you
 22 know.
 23 BRIG MKHWANAZI: No, the way of saying
 24 yes or no.
 25 CHAIRPERSON: The -

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1 BRIG MKHWANAZI: Yes.
 2 CHAIRPERSON: It's not as difficult as
 3 that. Either you know or you don't know. If you don't
 4 know, you say I don't know. If you do know the answer to
 5 the question, you then answer either yes or no. It may
 6 well be that you didn't know whether this was a debriefing
 7 in terms of the standing order in which case that's the
 8 answer. If you do know whether it was intended to be a
 9 debriefing you can say so. If you know it wasn't intended
 10 to be a debriefing you can say so also. So it's not so
 11 difficult. Just answer the question.
 12 BRIG MKHWANAZI: On my understanding, no
 13 I never knew that it was in the form of a debriefing. I
 14 understood as a work session where we will look to the
 15 issues as I have mentioned, not in the form of a
 16 debriefing.
 17 MR BIZOS SC: Subparagraph 2, every level
 18 of command must be debriefed. The levels below it
 19 individually, followed by an in depth debriefing by the
 20 commanders of the operation. Afterwards a debriefing must
 21 be held with all role players to determine whether the
 22 operation was effective and whether communication with the
 23 role players was adequate.
 24 CHAIRPERSON: The question arises mainly,
 25 were you a role player on the 16th of August? Would you be

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1 affected in any way -
 2 BRIG MKHWANAZI: Not at all.
 3 CHAIRPERSON: By paragraph, by
 4 subparagraph 2 of paragraph 13.
 5 BRIG MKHWANAZI: No.
 6 MR BIZOS SC: 3, a further evaluation
 7 must be conducted and if possible video coverage must be
 8 shown. Were you there as an evaluator as to whether the
 9 standing orders, sorry. Were you there as an expert to
 10 evaluate whether the orders were complied with or not?
 11 BRIG MKHWANAZI: Definitely as I have
 12 said, we were there to check national instruction policies
 13 as well as standing orders. We were checking those parts
 14 as well as giving input on the writing of this, we did
 15 that.
 16 MR BIZOS SC: I asked you a specific
 17 question, I will repeat it. Were you asked to evaluate and
 18 were you shown any videos to evaluate? Did you take part
 19 in any evaluation proceedings about what happened when you
 20 were at Potchefstroom?
 21 BRIG MKHWANAZI: As I have said, the
 22 commission was already appointed but when we were there of
 23 course some of the videos were shown, but we were not in
 24 the position to come up and evaluate and say this was
 25 wrong, this was right. The only thing what we did there

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1 was to concentrate on the compilation of the presentation
 2 or the submission for the commission. That's what I did on
 3 that time. But to do evaluation, evaluation it's where we
 4 are going to be in position to point the wrong, the right
 5 and everything and in that stage it was not going to be
 6 successful exercise, hence already the commission has been
 7 appointed.
 8 [16:02] CHAIRPERSON: So the short answer is,
 9 this wasn't, the exercise at Potchefstroom as far as it
 10 concerned you, was not a debriefing at all when the meaning
 11 of paragraph 13, the standing order, it was actually a
 12 meeting to prepare a presentation for this commission, is
 13 that the short answer?
 14 BRIG MKHWANAZI: That's correct.
 15 MR BIZOS SC: Let me read you, all good
 16 practises as well as shortcomings must be recorded as part
 17 of a learning process to enhance good practises and address
 18 or prevent recurrences of identified mistakes. Was any of
 19 that done in Potchefstroom in your presence?
 20 BRIG MKHWANAZI: Counsellor, these form
 21 part of a debriefing. I have already indicated I was not
 22 there for debriefing and I have indicated why I was there.
 23 MR BIZOS SC: And number five -
 24 CHAIRPERSON: You are going to get the
 25 same answer to number five -

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1 MR BIZOS SC: Well we have talked about
 2 the difference -
 3 CHAIRPERSON: About pending debriefings.
 4 MR BIZOS SC: That is the difference and
 5 I want to give him an opportunity to explain.
 6 CHAIRPERSON: Oh, ask the question.
 7 MR BIZOS SC: Because he is a trainer,
 8 trainers and instructors must attend the debriefings to
 9 review actions taken by members and to rectify improper
 10 conduct by means of in service training in crowd management
 11 techniques. Did any of that happen in Potchefstroom?
 12 BRIG MKHWANAZI: No, they were not part
 13 of the, I mean of the exercise because it was not a
 14 debriefing.
 15 MR BIZOS SC: The people that asked you
 16 to go to Potchefstroom, because they thought that you may
 17 be a cognoscenti, a knowledgeable person in relation to how
 18 the document that was produced was, did anybody you being a
 19 trainer and instructor ever ask you to participate in any
 20 debriefing session, never mind in Potchefstroom or
 21 elsewhere?
 22 BRIG MKHWANAZI: Many times I have been
 23 involved in such issues whereby I will have to give my
 24 opinion, especially in debriefing as a trainer or while
 25 already I'm no more a trainer, I have been involved into

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1 that.
 2 CHAIRPERSON: That's in relation to the
 3 events of the 16th of August 2012?
 4 BRIG MKHWANAZI: Not in relation to that.
 5 CHAIRPERSON: You didn't take part in
 6 such an exercise?
 7 BRIG MKHWANAZI: Not in the one of the
 8 16th. I'm talking a different one, yes.
 9 CHAIRPERSON: Mr Bizos, it doesn't look
 10 likely that you will finish your cross-examination this
 11 afternoon. This is an appropriate stage to take the
 12 adjournment. You have come to the end of this paragraph of
 13 the standing order?
 14 MR BIZOS SC: Yes.
 15 CHAIRPERSON: May I enquire how long you
 16 think, I know subject to injury time over which you have no
 17 control -
 18 MR BIZOS SC: Yes.
 19 CHAIRPERSON: But how long do you think,
 20 the rest of your cross-examination will take?
 21 MR BIZOS SC: I will try my best to
 22 finish by tea time.
 23 CHAIRPERSON: Is that morning tea time or
 24 afternoon tea time?
 25 MR BIZOS SC: The morning tea time.

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1 CHAIRPERSON: Very well, the commission
 2 will adjourn until 9:30 tomorrow morning.
 3 [COMMISSION ADJOURNED]
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