

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 69 28 MARCH 2013 PAGES 7357 TO 7436

HELD AT

CIVIC CENTRE, RUSTENBURG, NORTH WEST PROVINCE



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Page 7357

1 [PROCEEDINGS ON 28 MARCH 2013]
 2 [09:36] CHAIRPERSON: The Commission resumes.
 3 You're still under oath National Commissioner. Mr Bizos
 4 you may proceed with your cross-examination.
 5 CROSS-EXAMINATION BY MR BIZOS SC (CONTD.):
 6 Thank you Mr Chairman. Mr Chairman we handed in an article
 7 by Mr Nicolas Haysom yesterday FFF and I think it's going
 8 to be FFF19 but subject to the confirmation by our learned
 9 friend. Is it 19?
 10 MS PILLAY: That's correct, Chair, it's
 11 FFF19.
 12 MR BIZOS SC: Thank you. Now
 13 Commissioner I want to refer you to an article by Mr
 14 Nicolas Haysom, a lawyer, called "Licence to Kill Part One.
 15 The South African Police And The Use of Deadly Force." Have
 16 you got a copy in front of you?
 17 GENERAL PHIYEGA: Yes, I do.
 18 MR BIZOS SC: I want to read the first
 19 paragraph which is headed The Problem. "In the execution
 20 of their duties South African Police use firearms and
 21 inflict deadly force too readily and in unacceptable
 22 circumstances. The use of firearms including shotguns on
 23 crowds and gatherings in unrest areas has become a
 24 disturbing feature of police crowd control and township
 25 policing. The use of firearms in these situations has led

Page 7358

1 to the violation of the most precious of all the human
 2 rights, the right to life. The practice of recruiting
 3 policemen on township patrols with SSG shot and combat
 4 rifles serves as an effective illustration." Have you any
 5 comment to make in relation to the present situation of the
 6 South African Police, is it still the problem that Mr
 7 Haysom addresses?
 8 GENERAL PHIYEGA: I think I'd like to
 9 first ask a question. What's the age of this document?
 10 MR BIZOS SC: No I'll give you that, I'll
 11 give you that.
 12 CHAIRPERSON: It's written after the
 13 Kannemeyer Commission Report was handed down, 1987. In the
 14 period before democracy arrived in '94 and describes the
 15 situation as it was some years before that.
 16 GENERAL PHIYEGA: Okay.
 17 CHAIRPERSON: Particularly as I said in
 18 relation to the Kannemeyer Commission Report which related
 19 to an incident near Uitenhage where a number of people were
 20 killed by the police.
 21 MR BIZOS SC: Sorry. Commissioner, you
 22 have a right to ask the question that you did but do you
 23 believe that this problem may have been a problem then but
 24 it is not a problem now? Is that why you asked the
 25 question?

Page 7359

1 GENERAL PHIYEGA: Yes it was important
 2 for me to understand the age because I think -
 3 MR BIZOS SC: No you're quite right to
 4 want to deal with the age but the principle that is
 5 enunciated by Mr Haysom is that a principle which you, the
 6 present head of the police, accepts that it is still a
 7 problem.
 8 GENERAL PHIYEGA: No, I don't because the
 9 situation, the circumstances that prevail now are
 10 different.
 11 MR BIZOS SC: Do you say that the problem
 12 that he is dealing with did not exist during the last year?
 13 GENERAL PHIYEGA: I would look at it
 14 differently during the last year.
 15 MR BIZOS SC: Sorry, I didn't hear your
 16 complete answer, please speak up.
 17 GENERAL PHIYEGA: I would look at it
 18 differently during the last year.
 19 MR BIZOS SC: Do you say that the problem
 20 that he poses did not exist in 2012?
 21 GENERAL PHIYEGA: I have said I'd look at
 22 it differently because it is different circumstances.
 23 MR BIZOS SC: Does the problem exist or
 24 not?
 25 GENERAL PHIYEGA: In my opinion it does

Page 7360

1 not.
 2 MR BIZOS SC: It does not exist?
 3 GENERAL PHIYEGA: Yes.
 4 MR BIZOS SC: Very well. I now want to
 5 turn to page four. The first paragraph on that page "The
 6 use of R1 and R4 rifle. Do you see the paragraph?
 7 GENERAL PHIYEGA: Yes, I see that.
 8 MR BIZOS SC: I'll read it. "The use of
 9 R1 or R4 rifles in crowd control or indeed any law
 10 enforcement duties is equally disturbing. These rifles are
 11 weapons of war, to discharge high velocity unstable bullet
 12 which tends to tumble upon striking the target and
 13 accordingly produces very severe injuries. A shot in the
 14 leg or an arm of an adult victim may well result in death,
 15 usually through the loss of blood and the damage to the
 16 bone, muscle and arteries of the victim is severe. An
 17 independent forensic consultant Doctor D Klatzow who tested
 18 the effect of R4 bullet on a pig's head concluded that it
 19 could never be justified in crowd control." I want to skip
 20 the middle portion with question and answer of Professor
 21 Bunge. "This revealing evidence of the effect of R4 rifles
 22 on adult victims must indicate that the use amounts to
 23 intentional killing." Now never mind the date, in August
 24 last year were R1's and R4's used by the police on the
 25 crowd?

Page 7361

1 GENERAL PHIYEGA: I've indicated
 2 yesterday that the equipment, the nature of equipment that
 3 was used will be answered by my commander.
 4 MR BIZOS SC: We are entitled and choose
 5 to ask you whether such arms were used last year? You as
 6 the head of the police. Don't tell me what I must ask your
 7 commanders. We know what to do if and when they come. I
 8 am asking you do you agree that R1's and R4's were used
 9 last year which had deadly effect on the people that were
 10 shot at? What do you say, what do you say? I'm not
 11 interested at this stage what your commanders may say.
 12 CHAIRPERSON: Mr Bizos you don't have to
 13 give the witness a lecture, you asked her a question, let's
 14 get her to answer. If she doesn't answer directly I will
 15 take it up with her.
 16 MR BIZOS SC: Thank you Mr Chair.
 17 CHAIRPERSON: But there's no reason to
 18 think she won't give you a direct answer to that question
 19 so let her - give her a chance to do it, don't give her a
 20 lecture as well, that's not necessary.
 21 MR BIZOS SC: Yes.
 22 GENERAL PHIYEGA: I've given you my
 23 answer and I'm not able to answer the question if that
 24 answer is insufficient.
 25 CHAIRPERSON: Would you mind giving me

Page 7362

1 the answer again? Give me the answer again.
 2 GENERAL PHIYEGA: My answer was that type
 3 of question will be better answered by those who
 4 commissioned the firearms, who knew what was used, who had
 5 the expertise to do so. I'm not able to answer you on that
 6 one and I am saying if that is not acceptable, Judge, then
 7 I'm not able to answer that question.
 8 CHAIRPERSON: Commissioner I think you'll
 9 forgive me if I say it's not as easy as that. The fact is
 10 you are the head of the police service -
 11 GENERAL PHIYEGA: Yes I am.
 12 CHAIRPERSON: The use of those particular
 13 weapons is to some extent a policy matter, it's the policy
 14 of the police service to equip some of its members with
 15 those weapons for use in certain circumstances so that's
 16 where the question comes from. Now the question was simply
 17 a factual one as I understand it, were such weapons used by
 18 the police during 2012 and the answer to that I take it has
 19 got to be yes. Isn't that so?
 20 GENERAL PHIYEGA: I do not know, Judge.
 21 CHAIRPERSON: Well we know from Marikana
 22 that - from all the facts about Marikana, Exhibit L, the
 23 briefing that you would have got, the information we have
 24 is that certain members of the service who were on the
 25 scene and fired, fired R1's, R4's and R5's so that's a fact

Page 7363

1 that we know. If you don't that then you must tell us but
 2 I think you'll forgive me if I say that you certainly know,
 3 at least by hearsay, even if you haven't physically seen
 4 people using R1's and R4's and R5's, you do know that on
 5 that basis don't you, R4's have been used?
 6 GENERAL PHIYEGA: That, Judge, I would
 7 agree with but the question that is being asked to me is
 8 whether those things were used - if I read that sentence
 9 "indicate that their use amounts to intentional killings" I
 10 think that was where I am saying I cannot judge whether it
 11 was intentional or whatever but on the records what I've
 12 seen, what you've seen those types of arms may have been
 13 used.
 14 CHAIRPERSON: It's not may have been used
 15 -
 16 GENERAL PHIYEGA: Or were used.
 17 CHAIRPERSON: They were used and we also
 18 know that the use of those weapons did lead to the death of
 19 some of the protestors.
 20 GENERAL PHIYEGA: Correct.
 21 MR SEMENYA SC: Chair, for what it is
 22 worth it is one R1 that was used and R5's, not the R4's,
 23 for what it is worth.
 24 CHAIRPERSON: Thank you, no it is - thank
 25 you for the correction.

Page 7364

1 MR SEMENYA SC: - it's a range of these.
 2 CHAIRPERSON: I'm trying to point - I
 3 must confess I was under the impression that there were
 4 R4's used as well. I'm informed now that I was under a
 5 misconception and I'm pleased to be corrected so - but
 6 anyway let's not waste further time on this. Please move
 7 on.
 8 MR BIZOS SC: When did you learn that the
 9 sort of arms that were used were deadly arms? When did you
 10 learn that?
 11 MR MAHLANGU: The sort or the short of
 12 arms? The sort of arms.
 13 GENERAL PHIYEGA: Before I even joined
 14 the police.
 15 MR BIZOS SC: Before?
 16 GENERAL PHIYEGA: I even joined the
 17 police.
 18 MR BIZOS SC: Before you even joined the
 19 police. Did you know on the 17th when you made the
 20 statement praising the police and the 20th August when you
 21 again praised the police that such arms were used by the
 22 police against the crowd?
 23 GENERAL PHIYEGA: Yes.
 24 MR BIZOS SC: Now that you know that they
 25 were used in August and we will show that a number of the

<p style="text-align: right;">Page 7365</p> <p>1 people that were killed were killed by such arms, would you 2 have praised them if you knew that? 3 CHAIRPERSON: Mr Bizos, wouldn't it have 4 depended on the circumstances under which those weapons 5 were used and whether they were really used for purposes of 6 self or private defence or for some other purpose? So I 7 think the question in the generalised form without some 8 kind of qualification isn't helpful. 9 MR BIZOS SC: If you knew that such 10 weapons were used did you consider them appropriate weapons 11 to be used against the crowd? 12 GENERAL PHIYEGA: It absolutely depends 13 on the circumstances under which those weapons were used. 14 MR BIZOS SC: Let me go a bit forward 15 because during the course of this morning we will give you 16 the details of where the wounds were and what the nature of 17 the wounds were. I want you to assume for the purposes of 18 my next question that the majority of the people that were 19 killed were shot in the back or on the side and they were 20 deadly shots. Please assume that I have correctly 21 summarised what is on the medical reports before the 22 Commission and in your counsel's possession. Please accept 23 that as a fact for the purposes of the question. You can't 24 possibly believe that bullets can turn around can you? 25 GENERAL PHIYEGA: I don't know, you've</p>	<p style="text-align: right;">Page 7367</p> <p>1 table that's been drawn up there's six or seven out of 34 2 that were shot from the back. 3 MR BIZOS SC: How many? 4 MS HEMRAJ SC: Six or seven that I've 5 counted out of 34. 6 CHAIRPERSON: If you look at Annexure C 7 perhaps if you can refer to it - 8 MR BIZOS SC: I'll come to those details. 9 CHAIRPERSON: And then give the exhibit 10 numbers. FFF20 is it? Yes thank you. Now if you look at 11 that a medical legal report Marikana Mine Deaths, it has an 12 annexure, a number of annexures at the end actually. One 13 of the annexures is annexure, I'm not sure if it's 14 annexures or annexure but whichever it is, it's Annexure C, 15 Table of Autopsy Findings Summarised and there are lists of 16 deceased persons on whom autopsies were performed and in 17 the column headed (iv), that's a Roman four, there is the, 18 what's described as Reconciled Main Cause of Death, Main 19 Injury and one works through that document you'll see that 20 there are in all, as to be expected, 34 autopsies done. 21 And if one counts up those that are shots from the rear or 22 the main injury is from the rear I don't think you get a 23 majority. Then in Annexure D there's a summary of Selected 24 Aspects of Autopsy Findings and if you look against the 25 number eight in that annexure you'll see number shot from</p>
<p style="text-align: right;">Page 7366</p> <p>1 asked me a question, do you want me to answer? 2 MR BIZOS SC: Please make an assumption 3 of what I am telling you before I put the question. Are 4 you prepared for the purposes of the questions I'm about to 5 ask you to accept that the majority of the people that were 6 killed were shot in the back by hard ammunition. Are you 7 prepared to accept that for the purposes of the question 8 that will follow? 9 [09:57] GENERAL PHIYEGA: I'm not able to accept 10 it, I haven't seen it, I haven't been briefed, it is 11 unfair. 12 MR BIZOS SC: You're not prepared to 13 accept the assumption that the people were shot in the back 14 and they were shot by hard ammunition, why are you not 15 prepared to accept that hypothesis for the purposes of your 16 evidence? 17 GENERAL PHIYEGA: I am just saying that 18 because I haven't seen it, I haven't been briefed, I don't 19 know about that report, so it's unfair for me really to say 20 I accept. 21 COMMISSIONER HEMRAJ SC: Mr Bizos, are 22 you relying on this medical legal report for putting that 23 question? 24 MR BIZOS SC: Yes. 25 MS HEMRAJ SC: Because if you look at the</p>	<p style="text-align: right;">Page 7368</p> <p>1 the rear of the body is seven. So according to this 2 document - I don't want to stop you asking the question but 3 I want to stop you asking the question on the basis that's 4 a majority. You can say to the witness according to this 5 document seven out of 34 which is approximately 20% were 6 shot from the rear that in itself is a significant number 7 and you can ask her to comment but you can't put it on the 8 basis of the majority because that is not in accordance 9 with your own document. 10 MR BIZOS SC: Yes. Thank you, Mr 11 Chairman, for the correction, it is my fault. I have added 12 the back and the side and I will amend the question that 13 the majority, the majority were shot in the back or the 14 side. Sorry that I assumed that in using the word "the 15 back." I should have said and I do now put that the 16 majority were shot either in the back or on the side. 17 CHAIRPERSON: Correct because Annexure D 18 again, item seven, says number shot from one or both sides 19 of the body is 21, so that 21 over 34 is - 20 MR BIZOS SC: 70%. 21 CHAIRPERSON: No, no 21 over 34 in fact 22 is three over five which is about 60% but that's a 23 majority. 24 MR BIZOS SC: The majority. Let me 25 repeat the question as corrected by members of the</p>

Page 7369

1 Commission. If the evidence of the experts is that 60% or
2 more of the victims that died were shot either in the back
3 or on the side, if you accept that for the purposes of the
4 question, do you agree that people who attack policemen
5 don't finish up being shot dead unless they are face to
6 face with a policeman?
7 MR SEMENYA SC: Objection. It doesn't
8 follow, Chair.
9 MR BIZOS SC: Do you - prepare to accept
10 that the evidence of the entry of the wound of those who
11 died was not in their faces or their chests or their legs
12 or the front part of their body, accept that please.
13 MR SEMENYA SC: That's not the evidence,
14 Chair.
15 CHAIRPERSON: I think it might help if
16 you turned your machine on, your microphone on, Mr Semanya,
17 then what you say will be on record.
18 MR SEMENYA SC: Yes.
19 CHAIRPERSON: Please proceed.
20 MR SEMENYA SC: That is not the evidence,
21 Chair. That proposition can't be put like my learned
22 colleague is putting it.
23 MR BIZOS SC: We will do the medical
24 stuff, the medical matters in detail -
25 CHAIRPERSON: No, Mr Bizos, the position

Page 7370

1 is you're perfectly entitled to put general questions along
2 the lines, on the lines you're putting them to the witness,
3 asking her to make an assumption which is going to be backed
4 up yes by the report. Mr Semanya's complaint is the
5 assumption you're asking her to make isn't going to be
6 backed up by the only evidence you're going to put so all
7 the evidence has been lead so far but if it's a matter that
8 in a sense to which you may have to go back to the drawing
9 board and you can deal with it later in the cross-
10 examination then that might be a sensible way to do it.
11 But at the moment the complaint is that what you're putting
12 isn't in accord with your own medical legal report which
13 Exhibit FFF20. Whether that's correct or not is something
14 we can sort out later but I suggest have a look at it and
15 unless it will interfere with the flow and the structure of
16 your cross-examination but if that's not a problem -
17 MR BIZOS SC: Let's do it after we have
18 done the other topics -
19 CHAIRPERSON: Yes the other topics that
20 you want to -
21 MR BIZOS SC: We have a lot to put before
22 the Commission and the witness in relation and it may make
23 it easier. What I want to ask you is this, is there a
24 structure in the police force that studies the criticisms
25 of police actions?

Page 7371

1 GENERAL PHIYEGA: Not a particular
2 structure but it depends on what the criticism is and it
3 will be dealt by the respective environment.
4 MR BIZOS SC: Is there any structure in
5 the police which takes regard to what the judges of the
6 Constitutional Court or the Court of Appeal or the
7 provincial divisions say about police conduct?
8 GENERAL PHIYEGA: As I've said the
9 various environments that are affected by the comment would
10 deal with the comment.
11 MR BIZOS SC: I'm sorry I didn't hear,
12 please speak up.
13 GENERAL PHIYEGA: I have said the various
14 environments that are affected by the comment will actively
15 deal with the comment that has been raised.
16 MR BIZOS SC: That's not very clear to
17 me. Is there any particular body that actually looks at
18 the judgments of the courts, the articles written by
19 lawyers or academics? Is there such a body that says those
20 who are entrusted to interpret the Constitution and the
21 laws of the country say that this police practice is wrong.
22 Is there such a body?
23 CHAIRPERSON: I think you must define the
24 body more precisely. I understand the point you're making,
25 various criticisms are made of the police by courts and

Page 7372

1 writers of articles and presumably enters the newspaper,
2 all sorts of possible sources of complaints and criticism.
3 I understand your question that is there a dedicated
4 section as it were in the police whose job it is to keep an
5 eye open for complaints and criticism of various kinds
6 which can then be referred to the relevant section for the
7 necessary action. Is that your question?
8 MR BIZOS SC: Yes.
9 CHAIRPERSON: I think you could put it a
10 bit more clearly. I take it the witness now understands
11 what the question is or do you want me to repeat it?
12 GENERAL PHIYEGA: Ja, Judge, I am saying
13 the number of those judgments are diverse, if a judgment is
14 given on how we have handled for instance a procurement
15 matter, when it comes to my office I will ask the CFO, the
16 head of administration to look at that and tomorrow when an
17 issue such as this one that you're raising comes I'll look
18 at it and it will go to ORS. The executives they will have
19 to deal with it. So there isn't any sitting structure, the
20 only sitting structure would be legal alerting me to the
21 issues and I will direct them to the respective
22 environments to deal with them. That's the answer I am
23 giving you.
24 CHAIRPERSON: Didn't you ask whether
25 there was a special section in the police force, sorry, I

Page 7373

1 beg your pardon, the police service whose job it was to
 2 look out for complaints and criticisms and then -
 3 MR BIZOS SC: An ombudsman.
 4 CHAIRPERSON: No it wouldn't necessarily
 5 be an ombudsman and then refer them presumably if necessary
 6 to the National Commissioner herself so that they can then
 7 be dealt with by the appropriate section. I thought that
 8 was the question you've asked but anyway even if I'm wrong
 9 perhaps that question might -
 10 MR BIZOS SC: No, no that is the
 11 question.
 12 GENERAL PHIYEGA: I'll again say it, we
 13 have a legal department, we have a legal department that
 14 would advise me on any matter related to legal but because
 15 I work with diverse environments if it's a matter that has
 16 got to do with DNA issues that have been ruled by the court
 17 I will take it to the forensic services to look into. If
 18 it is a matter such as this one I'll take it to ORS. If
 19 it's a matter that relates to tenders and all those things
 20 I'll take it to the CFO, so I don't have just a unit
 21 looking, it's not only this, I deal with diverse, multiple
 22 expertise environments in the police.
 23 MR BIZOS SC: Have you yourself looked
 24 into the question when you assumed office of any criticisms
 25 of police conduct and in relation to their conduct and

Page 7374

1 respect for human life? Did you study anything, did you
 2 read any judgements, did you ask to be advised what they
 3 ought to do and what they ought not to do?
 4 GENERAL PHIYEGA: I'm being advised on
 5 many things including that, advocate.
 6 MR BIZOS SC: In paragraph 75 of the
 7 affidavit of Mr De Rover, he says "in my discussions with
 8 SAPS we arrive at the conclusion that following Marikana
 9 the reassessment of the employment of 5.56 calibre weapons
 10 in crowd management situation is urgent and must be
 11 effected without delay." Was that opinion of your expert,
 12 Mr De Rover, brought to your attention?
 13 GENERAL PHIYEGA: I will repeat the
 14 question, the answer that I gave yesterday. That this is
 15 expert input to the Commission by the an expert and the
 16 outcomes of this Commission. You are going to look at
 17 everything, at this point in time it is his opinion, it is
 18 his expert position and we would have a post commission
 19 period as the SAPS to look at all the recommendations that
 20 we'll be coming across. At this point in time no.
 21 CHAIRPERSON: Mr Bizos I'm sorry, I think
 22 it's paragraph 89.
 23 MR BIZOS SC: 89 yes -
 24 CHAIRPERSON: I think you had the wrong
 25 number.

Page 7375

1 MR BIZOS SC: It was brought to my
 2 attention and I was going to ask for a correction, Mr
 3 Chair. You have repeatedly said that the matter is before
 4 the Commission. Does that mean that the police force is
 5 not prepared to take heed to what has been happening before
 6 the Commission and taking urgent action? But is it just
 7 sitting back and saying well we will do nothing until the
 8 Commission has finished?
 9 GENERAL PHIYEGA: I have not said so.
 10 MR BIZOS SC: Well for instance have you,
 11 as soon as this advice from Mr De Rover came to your
 12 notice, say SAPS is immediately instructed to stop using
 13 5.56 calibre weapons, did you do that?
 14 CHAIRPERSON: It is not what Mr De Rover
 15 said, Mr De Rover said, there must be a reassessment and
 16 what he said was the reassessment was urgent and should be
 17 effected without delay. The reassessment wouldn't
 18 necessarily lead to the conclusion that in all cases these
 19 calibre weapons, 5.56 calibre weapons shouldn't be used.
 20 So I don't think the question is entirely accurate, but
 21 perhaps you can reformulate it and put it correctly.
 22 MR BIZOS SC: I will reword it. Thank
 23 you, Mr Chairman. I'll put the question in this form. Do
 24 you agree that Mr De Rover, with Mr De Rover that the use
 25 of these weapons in crowd control must be urgently

Page 7376

1 reviewed?
 2 GENERAL PHIYEGA: We shall reassess.
 3 MR BIZOS SC: I beg your pardon.
 4 GENERAL PHIYEGA: We shall reassess.
 5 MR BIZOS SC: You haven't done anything
 6 about it.
 7 GENERAL PHIYEGA: No.
 8 MR BIZOS SC: Do you consider it an
 9 urgent matter?
 10 GENERAL PHIYEGA: I do say we shall
 11 reassess and we'll reassess many recommendations that we
 12 are going to be getting including this one.
 13 MR BIZOS SC: The question was do you
 14 consider it an urgent matter?
 15 CHAIRPERSON: Mr Bizos, please don't
 16 raise your voice like that, it's not necessary.
 17 MR BIZOS SC: It's because I'm hoping
 18 that she will speak up a little so that I can hear her Mr
 19 Chairman and it -
 20 [10:17] CHAIRPERSON: I'm not sure that she has
 21 the same problems with respect that you have -
 22 MR BIZOS SC: That I have but I will try
 23 -
 24 CHAIRPERSON: But we have sympathy for
 25 this problem and I'm sure she's doing her best to speak up

Page 7377

1 but if you raise your voice the way you do it might be
 2 construed as having an intimidatory effect which is not
 3 desirable. I'm sure you don't intend to do that.
 4 MR BIZOS SC: Thank you, Mr Chairman.
 5 CHAIRPERSON: Mr Operator, is it possible
 6 to amplify your equipment in such a way that the answers
 7 given, Mr Bizos seems to be raising his voice himself
 8 without artificial amplification but if you can amplify the
 9 answers of the witness it might help Mr Bizos and also the
 10 rest of us.
 11 MR BIZOS SC: Thank you, Mr Chairman. Mr
 12 Chairman, we have placed before you another document.
 13 CHAIRPERSON: - document.
 14 MR BIZOS SC: That is so.
 15 CHAIRPERSON: That will be FFF21, Ms
 16 Pillay?
 17 MS PILLAY: That's correct, Chair.
 18 CHAIRPERSON: Thank you.
 19 MR BIZOS SC: Is it 20?
 20 CHAIRPERSON: 21, 20 was the previous
 21 document. The legal deaths report is 20, FFF20 and this is
 22 FFF21 and this is a presentation portfolio committee on
 23 police of the 26th March which was two days ago.
 24 MR BIZOS SC: Have you got a copy of it
 25 in front of you?

Page 7378

1 GENERAL PHIYEGA: No I don't have. You
 2 didn't give me.
 3 MR BIZOS SC: Mr - tells me that he put a
 4 copy on your desk.
 5 GENERAL PHIYEGA: Okay.
 6 MR BIZOS SC: If it isn't -
 7 MR SEMENYA SC: Okay.
 8 MR BIZOS SC: Have you got it?
 9 MR SEMENYA SC: We've got it yes.
 10 CHAIRPERSON: Mr Bizos, do you think it
 11 would be fair to give the witness an opportunity to read
 12 the document or perhaps she's aware of it already in view
 13 of the fact that it was a presentation -
 14 MR BIZOS SC: I will deal with only -
 15 well I just want to ask her whether she knows anything
 16 about the document and I she doesn't have to read the whole
 17 document, Mr Chairman, with respect. I'm going to question
 18 her on only one aspect.
 19 CHAIRPERSON: It may be said that she
 20 doesn't have to read the whole document now but I think she
 21 should possibly read the whole document fairly soon in the
 22 course of her professional duties if she hasn't done so
 23 already.
 24 MR BIZOS SC: Yes. Could I put my
 25 question about it?

Page 7379

1 CHAIRPERSON: You can put it to her but I
 2 don't want her to be ambushed, so I wanted to give her an
 3 opportunity, if she needs it, to study the passage, if
 4 there's a particular passage - perhaps the way to do it is
 5 this, is there a particular passage you want to rely on -
 6 MR BIZOS SC: Yes.
 7 CHAIRPERSON: You might tell her now what
 8 that is, give her a chance during the tea adjournment to
 9 read it and then question her about it afterwards.
 10 MR BIZOS SC: Yes, well I will tell you
 11 that I think you know about this document because you
 12 yourself I think went to Parliament if I [inaudible] I'm
 13 corrected, you were there the day after. It doesn't matter
 14 whether you were there or not but on page three you see the
 15 heading "Does the SAPS have a problem with abuse of power."
 16 Will you please read that and this is what I am going to
 17 ask you questions about. I now turn to the final medical
 18 legal report and the report will be an evaluation of
 19 clinical records of survivors by Doctors Steve Naidoo and
 20 Doctor Reggie Perumo? -
 21 CHAIRPERSON: I'm sorry to interrupt you,
 22 Mr Bizos, the second document to which you refer, the
 23 report on evaluation of clinical records of survivors has
 24 not got an exhibit number. It's obviously a separate
 25 document. The medical legal report on the deaths is FFF20

Page 7380

1 now this one will have to be 22 I think.
 2 MR BIZOS SC: Yes.
 3 CHAIRPERSON: So the report on the
 4 evaluation of clinical records of survivors is Exhibit
 5 FFF22.
 6 MR BIZOS SC: 21 and 22. Thank you Mr -
 7 CHAIRPERSON: No, no, no 21 is the
 8 warning light one which you've - which we've already marked
 9 so unless you want for convenience to make them 20 and 21
 10 in sequence but we've already marked the warning light one
 11 20. We should be capable of handling a 20 and 22. Right.
 12 MR BIZOS SC: I want to ask you -
 13 CHAIRPERSON: And the same point applies
 14 of course. I don't want anything in the nature of an
 15 ambush. If there's a passage that you want to refer to and
 16 it's a fairly lengthy one I think we must give the witness
 17 an opportunity to read it beforehand but I don't know how
 18 you're going to use this document for cross-examination but
 19 at least bear that point in mind.
 20 MR BIZOS SC: I will, Mr Chairman. Do
 21 you know whether the police conducted a forensic
 22 investigation into the nature of the injuries sustained by
 23 survivors of the massacre?
 24 GENERAL PHIYEGA: I think IPID could do
 25 that, not the police.

<p style="text-align: right;">Page 7381</p> <p>1 MR BIZOS SC: I beg your pardon. 2 GENERAL PHUYEGA: The police would not be 3 expected to do that but maybe IPID. 4 MR BIZOS SC: Do you know whether that 5 body has done it or not? 6 GENERAL PHUYEGA: I don't know because 7 I'm not part of it. 8 MR BIZOS SC: In order to decide whether 9 or not people were injured in self defence or wanton as a 10 punishment the nature of the injuries of those who had 11 survived were of some importance including to you to decide 12 whether or not the so-called self defence story was true. 13 CHAIRPERSON: Microphone light is on, do 14 you want to say something? 15 MR SEMENYA SC: Yes, Chair, as a matter 16 of law if a death like this results out of police conduct 17 it is a different legal entity that takes over to do the 18 pathologies. It cannot be expected of the police to do it 19 themselves. 20 MR BIZOS SC: I'll change the question 21 slightly in order to get on. The nature of the injuries, 22 those wounded but lived would be useful evidence to decide 23 whether or not the police shot in self defence or not. 24 What is your answer? 25 GENERAL PHUYEGA: I didn't hear an</p>	<p style="text-align: right;">Page 7383</p> <p>1 CHAIRPERSON: We'll hear whether the 2 modification is of the nature you've described. 3 MR BIZOS SC: Do you know that 84 people 4 were injured? 5 GENERAL PHUYEGA: Yes, I do. 6 MR BIZOS SC: They went to hospitals. 7 GENERAL PHUYEGA: Correct Counsel. 8 MR BIZOS SC: Records were kept to the 9 nature of their injuries. 10 GENERAL PHUYEGA: Yes. 11 MR BIZOS SC: Where those injuries were 12 on what part of the body, what side of the body would be of 13 importance in deciding for all us including the 14 Commissioner whether the shots were fired in self defence 15 or as a matter of aggression against those people. Not a 16 question of expert opinion, if they were shot at the back 17 you and I can draw an inference and if they were shot in 18 front you and I can draw an inference. If they were shot 19 on the side another possible inference. Please answer the 20 question. 21 CHAIRPERSON: Now the time has come to 22 ask the question. Ask the question in a form which as you 23 obliges the witness to answer it. 24 MR BIZOS SC: Yes. Did you take any 25 steps to ascertain before judging the police what those</p>
<p style="text-align: right;">Page 7382</p> <p>1 answer, I heard a statement. 2 CHAIRPERSON: That was an implied 3 question, is it correct or do you agree? 4 GENERAL PHUYEGA: Yes I'm just asking for 5 that. 6 CHAIRPERSON: He did make a statement but 7 by implication he was saying do you agree. So assuming 8 that that implied question was expressed are you able to 9 answer it? 10 GENERAL PHUYEGA: Judge, I'm going to ask 11 to be asked that question again because I would like to 12 answer something I understand. 13 MR BIZOS SC: The nature of the wounds on 14 the injured would be of importance to decide whether the 15 police shot in self defence or wanton shooting in order to 16 punish people. Those injuries were they relevant to decide 17 whether the police acted in self defence or not? 18 GENERAL PHUYEGA: I do not know. 19 MR BIZOS SC: Why don't you know? 20 MR SEMENYA SC: Chair, that also is a 21 matter expert field by various scientifically trained 22 people. 23 MR BIZOS SC: With respect I disagree. I 24 will repeat the question slightly more defined so that the 25 witness is obliged to answer it. May I proceed?</p>	<p style="text-align: right;">Page 7384</p> <p>1 injuries were and their nature? 2 GENERAL PHUYEGA: No because at that time 3 you would know that it was on the 17th and it was on the 4 20th and the processes you are talking about were still 5 rolling out. 6 MR BIZOS SC: But why would you take the 7 say-so of the police that they acted in self defence 8 without examining the evidence that may have contradicted 9 it? 10 GENERAL PHUYEGA: There are other 11 circumstances that informed that decision. 12 MR BIZOS SC: What circumstances were 13 those. 14 GENERAL PHUYEGA: The attack of the 15 police. 16 MR BIZOS SC: The police version of what 17 happened. We close our eyes to all other evidence. 18 CHAIRPERSON: There was other evidence 19 that was visible to her in respect of which she could close 20 her eyes which is an assumption that you're making with the 21 question but the other factor is of course, I take it you 22 had a briefing from the police. Had you seen the video 23 footage that was broadcast or some of it? 24 GENERAL PHUYEGA: We had seen some of it, 25 some of it was on the news.</p>

Page 7385

1 MR BIZOS SC: I must disclose, Mr
 2 Chairman, that we have 61 records and not 84 because some
 3 of them could not be found as a result - despite our
 4 efforts in respect of the people that are wounded. I want
 5 to put this to you in regard to the injured miners. In 61
 6 of the recorded cases of gunshot wounds 33 cases or 64% of
 7 those injuries were sustained by regular gunshots firing
 8 sharp ammunition. 33 cases of the 64 of the injuries were
 9 sustained by regular gunshots firing sharp ammunition and
 10 you will find that, Mr Chairman, in clinical reports -
 11 CHAIRPERSON: I found it, it's on page
 12 two.
 13 MR BIZOS SC: Page two.
 14 CHAIRPERSON: A D1 type of injury.
 15 MR BIZOS SC: Only 7% of the injuries
 16 were caused by rubber bullets. I will ask you to accept
 17 the correctness of this. Are the police expected, if they
 18 must use fire as a last resort in terms of the orders, to
 19 use rubber bullets and not sharp ammunition, in terms of
 20 the Standing Orders which you yourself wrote Exhibit S
 21 about.
 22 GENERAL PHIYEGA: Maybe before I answer
 23 let me ask another question so that I can contextualise my
 24 answer. What I've heard you say, you've given me some
 25 number of people who were - whose deaths have been found to

Page 7386

1 be of rubber bullets and others of other forms of -
 2 MR BIZOS SC: Sharp ammunition.
 3 GENERAL PHIYEGA: Okay. What may assist
 4 us is also to understand that the other six how many rubber
 5 bullets were shot because it will give me a context?
 6 MR BIZOS SC: We can have a look at that
 7 but on the face of it, on the face of the injuries do you
 8 agree that if the figures are correct much less rubber
 9 bullets were used than sharp ammunition.
 10 GENERAL PHIYEGA: I don't know but I'm
 11 asking the question. Okay how many rubber bullets were
 12 shot?
 13 CHAIRPERSON: Mr Semenya, you've turned
 14 on your microphone did you wish to say something?
 15 MR SEMENYA SC: Again the question is
 16 misleading, Chair. One cannot on the face of injuries
 17 compute that less type ammunition was used than the other.
 18 MR BIZOS SC: Commonsense would show, Mr
 19 Chairman, with respect, common sense would show that the
 20 number of injuries would in all probability correspond to
 21 the percentage of bullets or -
 22 [10:37] CHAIRPERSON: It would depend on a number
 23 of factors including the ability of those who fire rubber
 24 bullets to hit the target compared with the ability of
 25 those who used sharp ammunition to hit some kind of target.

Page 7387

1 I mean that's one point it occurs to me. I'm not sure that
 2 it is quite as straightforward as you suggest to the
 3 witness but perhaps you can reformulate the question in a
 4 way which puts the nub of your point to the witness.
 5 MR BIZOS SC: Yes.
 6 CHAIRPERSON: Without incurring the
 7 objection which prima facie is -
 8 MR BIZOS SC: Having regard to the number
 9 of injuries 64% with sharp ammunition and only 7% with
 10 rubber bullets can we infer that the police used many more
 11 sharp ammunition to, against the crowd than rubber bullets?
 12 MS PHIYEGA: I'm not able to, because
 13 really it is important for me to have the base line facts,
 14 what shots were fired of the sharp ammunition, of the
 15 rubber bullets, that inference will then start making sense
 16 to me. At this point in time I'm not able to make it.
 17 MR BIZOS SC: Even, if one may make some
 18 allowance in the comparison that not on the number of
 19 rubber bullets because rubber bullets may not leave an
 20 injury, but nevertheless do the figures not show to you
 21 that the favoured weapon of the police were sharp
 22 ammunition?
 23 MR SEMENYA SC: Chairperson, objection.
 24 CHAIRPERSON: Before, Mr Semenya, makes
 25 his point. Mr Bizos, I'd like to say something about the

Page 7388

1 question you are asking. I think you should look at slide
 2 211 of exhibit L and compare it with sort of, and also
 3 slide 257, what those two slides indicate, this is not a
 4 question of inference from injuries of people but actual
 5 facts apparently of munitions expended at the two scenes.
 6 According to 211 533 less then lethal, what they call
 7 munitions were expended at scene 1 of which 522 were rubber
 8 bullets or balls or whatever the correct expression is. As
 9 far as the lethal ammunition is concerned if one includes
 10 both warning and shots fired by way of warning shots and
 11 shots fired actually towards people the total is 284. As
 12 far as these, as far as this information is concerned it
 13 would appear to indicate, if correct, that 533, sorry 522
 14 rubber bullets or balls were fired compared with 284 sharp
 15 point ammunition of which 175 were fired at people as
 16 opposed to 109 as warnings. Then if one turns to 257 one
 17 moves there to scene 2, there the figures tend to support
 18 you because there were 30, out of total of just over 300 so
 19 called munitions and there were only 30 rubber balls fired
 20 compared with 120 fired towards people and 148 by way of
 21 warning. Now that I would suggest is a more, is a safer
 22 basis for asking the kind of questions you want to ask
 23 rather than this other basis you're proceeding on which is
 24 subject I would think -
 25 MR BIZOS SC: Thank you, Mr Chairman, I

Page 7389

1 will modify the question and I was about to say that it may
 2 well be that the numbers may be effected because rubber
 3 bullets do not usually, may not leave a mark on the target.
 4 CHAIRPERSON: Depending I think at the
 5 distance they're also fired.
 6 MR BIZOS SC: Yes, the distance.
 7 CHAIRPERSON: I presume the short way
 8 there'd be a bruise but at a further range -
 9 MR BIZOS SC: I will take both and thank
 10 you very much for drawing our attention. I will combine
 11 the two and change the question which I think respect will
 12 satisfy my learned friend, Mr Semenya. We have figures of
 13 how many people, how many people were injured by sharp
 14 ammunition and how many shots were made with sharp
 15 ammunition and we have similar figures for rubber bullets
 16 ammunition. Taking them both together it would appear that
 17 most of the people that were injured were injured with
 18 sharp ammunition, will you accept that please?
 19 CHAIRPERSON HEMRAJ: Mr Bizos, would it
 20 not be most of the people that are part of this data base
 21 on which this analysis was done, that there might have been
 22 other people shot by rubber balls that didn't actually go
 23 to hospital and don't form part of the database?
 24 MR BIZOS SC: Well we can make allowance
 25 for that as well, as a part of the possibilities of the

Page 7390

1 lesser number of evidence shots but we cannot overcome the
 2 fact that I want the witness to assume that most of the
 3 people injured and that did not die were injured by sharp
 4 ammunition. Were you prepared to assume that?
 5 MS PHIYEGA: Not quite -
 6 MR BIZOS SC: But why?
 7 MS PHIYEGA: Particularly because of the
 8 point that has just been raised.
 9 CHAIRPERSON: Yes.
 10 MR BIZOS SC: In 29 of the 34 deceased
 11 miners were shot by high velocity firearm ammunition. That
 12 will be found on page 8 of FFF20, Mr Chairman.
 13 CHAIRPERSON: Thank you.
 14 MR BIZOS SC: And there are six cases of
 15 rubber bullets. Are you prepared to assume that? Have you
 16 answered?
 17 MS PHIYEGA: No, I haven't answered.
 18 MR BIZOS SC: Are you still looking it.
 19 MS PHIYEGA: I haven't answered because
 20 I'm busy moving around pages with you. I haven't seen this
 21 report.
 22 CHAIRPERSON: National Commissioner, it
 23 is the document medical legal report.
 24 MS PHIYEGA: Okay.
 25 CHAIRPERSON: Marikana mine deaths which

Page 7391

1 is FFF20.
 2 MS PHIYEGA: Yes.
 3 CHAIRPERSON: And at the beginning it
 4 says a report by Doctors Naidoo and Fahrumu followed by
 5 annexures and in the report part that's near the front of
 6 the certificate -
 7 MS PHIYEGA: Chairperson, can I say
 8 something -
 9 CHAIRPERSON: A ten page section on page
 10 8.
 11 MS PHIYEGA: Ja.
 12 CHAIRPERSON: Is the passage that is
 13 being, you're being referred to and I think counsel, is in
 14 fact referring to paragraph 2 which is at the top of page
 15 8, is that right, Mr Bizos?
 16 MR BIZOS SC: Yes.
 17 CHAIRPERSON: Give the witness a chance
 18 to read it first before you pepper her with questions.
 19 MR BIZOS SC: Well I am informed that the
 20 document was available to her in the - it doesn't matter -
 21 MR BIZOS SC: Yesterday.
 22 CHAIRPERSON: Yes I'm sure she has got a
 23 lot of other things to look at, not only documents relating
 24 to our commission but ongoing matters relating to her
 25 office. So we would give her a chance.

Page 7392

1 MS PHIYEGA: Chairperson, I want to say
 2 something here. This is very intricate and technical
 3 report. I need time to read it. The anecdotal approach
 4 you are taking to these issues that are being raised are
 5 compromising the quality of my responses and I would appeal
 6 to be given time to read this report.
 7 CHAIRPERSON: - provided for, just
 8 looking at a section of the warning lights document during
 9 the tea adjournment, perhaps we can, and as you've probably
 10 got other calls in the time during the tea adjournment to
 11 deal with urgent problems arising in the office but, and
 12 also drinking tea which is necessary as well. But perhaps
 13 we can give her an opportunity to look at this document.
 14 If she's not ready by the end of the scheduled time for
 15 ending the tea adjournment we can give her some extra time
 16 because as I told you before I don't think we must allow
 17 cross-examination by ambush and putting a document to
 18 someone and saying look at this passage, you haven't read
 19 the rest, please answer can have that effect. I'm not sure
 20 - I'm not suggesting you're doing it deliberately but it's
 21 something that happens. So perhaps if we can do it that
 22 way we will meet the request by the witness, that she be
 23 dealt with fairly but also not hamper you in putting the
 24 points to her that you wish to put.
 25 MR BIZOS SC: We'll be giving -

Page 7393

1 CHAIRPERSON: We can take the tea
 2 adjournment now if you like, that might solve the problem.
 3 It's a bit early but -
 4 MR BIZOS SC: Yes.
 5 CHAIRPERSON: I'm in your hands, you must
 6 tell me what you consider appropriate.
 7 MR BIZOS SC: Yes and I want to be fair
 8 to her, by putting the question that I would want her to
 9 answer.
 10 CHAIRPERSON: Alright.
 11 MR BIZOS SC: So that she can apply her
 12 mind to it. What I, what all this is about and you can
 13 look at the document and prepare your answer. That it is
 14 abundantly clear that non lethal ammunition, that is rubber
 15 bullets played a minor role in the operation as evidenced
 16 by the injuries of, on the people that lived, scene 2 and
 17 more particularly in scene 2.
 18 CHAIRPERSON: That's your question and to
 19 some extent what you say is backed up already by the
 20 passage in exhibit L that I referred you to.
 21 MR BIZOS SC: Yes.
 22 CHAIRPERSON: But all these matters can
 23 be put and discussed after the tea adjournment and if,
 24 National Commissioner, if you don't have enough time during
 25 the ordinary, more or less quarter of an hour for tea and

Page 7394

1 you need a little bit more time just let us know, I know
 2 you also are sometimes troubled with problems that arise at
 3 your head office that you have to deal with as a matter of
 4 urgency. So if you need a bit more time please let us
 5 know. We'll now take the tea adjournment. What we'll do,
 6 we'll take it till quarter past, that's a little bit longer
 7 than usual but that's gives the, National Commissioner, a
 8 chance I hope to read what she has to read and deal with
 9 such other fires that are burning in her office at the
 10 moment. We will now adjourn for tea.
 11 [COMMISSION ADJOURNS COMMISSION RESUMES]
 12 [11:26] CHAIRPERSON: The commission resumes.
 13 National Commissioner, you're still under oath.
 14 MS PHIYEGA: Yes, I am.
 15 CHAIRPERSON: Mr Bizos?
 16 MR BIZOS SC: I want to ask the witness
 17 whether she has had an opportunity of reading exhibit
 18 FFF21, that's the one that was handed in this morning,
 19 Commissioner. Did you have an opportunity of reading it?
 20 MS PHIYEGA: I have FFF20, that's what I
 21 was asked to read.
 22 MR BIZOS SC: Only on the numbers. You
 23 haven't read this document, does the SAPS have a problem
 24 with abuse of power?
 25 MS PHIYEGA: No -

Page 7395

1 MR BIZOS SC: You haven't read it yet?
 2 MS PHIYEGA: My homework was FFF20.
 3 MR BIZOS SC: Yes well there were two
 4 pieces of work not serious -
 5 CHAIRPERSON: Never mind the homework,
 6 it's not a very long thing. It's page 3, I won't adjourn
 7 and if you - embarrassed to read it to yourself quietly in
 8 public. If you can, we'll stop for a couple of minutes,
 9 give you chance to read it and if you when you're done so
 10 you feel yourself ready to answer such questions as Mr
 11 Bizos may ask you about it we can carry on.
 12 MS PHIYEGA: I've read it.
 13 CHAIRPERSON: Are you now ready, National
 14 Commissioner?
 15 MS PHIYEGA: Ja, thank you, Chair.
 16 CHAIRPERSON: Mr Bizos, the witness is
 17 now ready.
 18 MR BIZOS SC: Thank you, Mr Chairman.
 19 CHAIRPERSON: We may proceed.
 20 MR BIZOS SC: Yes. I want to refer you
 21 to exhibit FFF21, headed warning lights flashing policing
 22 in South Africa 2013/14 presentation to the portfolio
 23 committee on the police dated the 26th of March 2013, a few
 24 days ago by the Institute of Security Studies. I want you
 25 to please turn to page 3. The second paragraph headed does

Page 7396

1 the SAPS have a problem with abuse of power. In 2001/02 a
 2 total of 416 brutality related criminal cases were opened
 3 at the IPID against police officials. By 2011/12 this had
 4 increased by 313% to 1 722 cases or an average of 5 cases
 5 each day. Of 720 deaths reported to the IPID in 2011/12
 6 there was evidence of criminality on the part of the police
 7 in a 162 cases or one in five cases 22%. 2011/12 SAPS
 8 charged 1 050 of their own members for corruption related
 9 offences. IFS Research in 2011 identified 50 people who
 10 experienced or witnessed police abuse and only one had
 11 tried to report it. SAPS facing 841 512 civil cases,
 12 512 000 civil cases in relation to assault, rands, civil
 13 claims in relation to assault and 1.1 billion in relation
 14 to shooting incidents. Total claims have doubled in the
 15 last two years to 14.8 billion. Addition 66% of the adult
 16 population think that corruption is a widespread problem in
 17 the police (HSRC). 41% of population do not trust the
 18 police at all (HSRC). 35% of South Africans interviewed
 19 for future fact in 2012 admitted to being scared of the
 20 police. Now the Institute for Security Studies do you know
 21 about them?
 22 MS PHIYEGA: Yes I do.
 23 MR BIZOS SC: Have you any reason to
 24 doubt their competence and their sincerity in the matters
 25 on which they report?

<p style="text-align: right;">Page 7397</p> <p>1 MS PHIYEGA: I have my own reservations 2 because we've clashed in terms of data and statistics with 3 them. 4 MR BIZOS SC: I'm sorry I didn't hear 5 you. Please speak up. 6 MS PHIYEGA: I have my own reservation. 7 MR BIZOS SC: What are your reservations? 8 MS PHIYEGA: We as SAPS have clashed on 9 data and information on how it is clustered. 10 MR BIZOS SC: They make assertions of 11 fact in what I have read to you and also opinions, which 12 facts do you say they've got wrong? 13 MS PHIYEGA: I think there are a number 14 of things that we would have to look into in relation to 15 this one. You asked me about whether I trusted them, I 16 said we have had clashes in terms of data integrity or data 17 commonality. Even our stats when we announce them they 18 would respond differently to the statistics that we have 19 collected. So I first responded to that. Now you are 20 asking me about this, I would need to take this and look at 21 some of the issues that are being raised. For instance you 22 know if I just look at a very simple indicator here, they 23 talk about the growth of the brutality cases. What we are 24 not given here is also against how many arrests that we 25 have made, does it turn out to be a 0.0009 or 10% or</p>	<p style="text-align: right;">Page 7399</p> <p>1 CHAIRPERSON: Sorry? 2 MS PHIYEGA: It was post my attendance, 3 this came since I was there. 4 CHAIRPERSON: I presume, that regard 5 being had to the nature of the allegations made it's 6 something that the police service would wish to revert to 7 the portfolio committee on an answer because there's quite 8 serious allegations made. 9 MS PHIYEGA: Yes. 10 CHAIRPERSON: To the portfolio committee 11 which is a very important body and presumably you owe it to 12 the portfolio committee and you owe it to the police 13 service itself. 14 MS PHIYEGA: Yes. 15 CHAIRPERSON: To answer these allegations 16 insofar as there are inaccuracies and things stated which 17 are perhaps out of context or unfair or exaggerated, would 18 that be correct? 19 MS PHIYEGA: It is correct, Judge, and I 20 was also in a different committee, it wasn't this 21 committee. 22 CHAIRPERSON: Yes, yes I know. Now the 23 reason I asked you this question is, I understand you're 24 bit of a disadvantage in dealing with these allegations 25 here, particularly having seen the document for the first</p>
<p style="text-align: right;">Page 7398</p> <p>1 whatever. We need to, in statistical ethics you must give 2 those base lines. So that people can understand the 3 context of what is being done here. This is anecdotal. 4 MR BIZOS SC: Would you regard that any 5 of the facts stated, the number of cases for instance, the 6 number of arrests involved complaints, would you actually 7 not accept their allegations of fact - 8 MS PHIYEGA: I would - 9 MR BIZOS SC: Never mind their opinions. 10 The facts that they put down, do you have reason to 11 disbelieve any of them? 12 MS PHIYEGA: I'd like to note them as 13 their position but I really would like to test the veracity 14 of that against our own data. 15 CHAIRPERSON: May I interrupt you for a 16 moment, just to ask a question which may or may not have 17 dealt, to shorten the proceedings. You recently were 18 before the Portfolio Committee on Police yourself, weren't 19 you? 20 MS PHIYEGA: Yes. 21 CHAIRPERSON: And this presentation by 22 the Institute for Security Studies, which was made on the 23 26th of March, had that been brought to your attention 24 before you came here this morning? 25 MS PHIYEGA: It was post my attendance.</p>	<p style="text-align: right;">Page 7400</p> <p>1 time today. I presume though that some kind of fairly 2 detailed response will be prepared in due course to give to 3 the committee with, would that be correct? 4 MS PHIYEGA: I'd be happy to do so, 5 Judge. 6 CHAIRPERSON: No I take it, if I may, 7 you'll forgive me for saying it, I think it's something you 8 owe to the committee and indeed to the service, the police 9 service, isn't that right? Obviously you couldn't give the 10 necessary instructions until you knew about the document 11 yourself. But now you do know about it, I take it you'll 12 be giving those instructions that a response be prepared? 13 MS PHIYEGA: Yes, Judge. 14 CHAIRPERSON: Alright. Can you more or 15 less tell us when that's likely to be ready, I know that's 16 a difficult question, and if you can't answer it, I won't 17 be critical. But if you know more or less when it will be 18 ready and if we're still busy with our task if it could be 19 made available to us because I think that would be helpful 20 and it probably be a better response to this document than 21 kind of answers that you'll be able to give sitting, seated 22 as you are, having been faced with this document for the 23 first time today, would that be correct? 24 MS PHIYEGA: Yes, Judge, we will fast 25 track this process and try and let you have our response,</p>

Page 7401

1 the latest by mid April.

2 CHAIRPERSON: Obviously, Mr Bizos, if

3 that happens and there are points which you consider

4 relevant for our commission to which you don't agree you'll

5 get an opportunity to deal with them.

6 MR BIZOS SC: So I will leave it, I will

7 leave it at that except that I want one more question.

8 Would these allegations, are these allegations coming to

9 you as new or was there a problem long before you saw it

10 published in a document such as this?

11 MS PHIYEGA: I have read about a lot of

12 allegations in the press and yes there are other challenges

13 that we are having internally but as I have promised the

14 Judge, we will respond to this, we will contextualise, we

15 will give you our facts.

16 MR BIZOS SC: Yes.

17 MS PHIYEGA: In relation to that.

18 MR BIZOS SC: You agree, you agree that

19 there are allegations of fact which are reasonably rebutted

20 if there are incorrect, for instance the billions of money

21 that has been claimed for wrongful acts by the police,

22 that's quite easily checked?

23 MS PHIYEGA: I can tell you before I

24 respond to you, that this figure that you see here is a

25 result of a litigation report, the first litigation report

Page 7402

1 that I have requested as the national commissioner and from

2 1994 and this is not reflected here, that's why I answer

3 comprehensively and give feedback to this commission and if

4 I may just touch on the 14 billion again, again it's not

5 the money that is going to be paid. We, the formula we are

6 using to calculate the 14 billion in my report we'll talk

7 about that. When we receive any letter that says I want 30

8 million we count that as a letter, before it even becomes a

9 summons, before it even goes to court. So this is a highly

10 exaggerated number, I'll qualify it uncharacterised and my

11 report that I'm going to give to the commission will talk

12 to that because I wanted to understand as a national

13 commissioner the civil claims. I called for the litigation

14 report. I asked our legal department to do that so that I

15 can tell you that this number is a number of a report that

16 I commissioned and it is misinterpreted.

17 CHAIRPERSON: National Commissioner, may

18 I make a suggestion which I hope you won't take umbrage at.

19 We all know that people can claim anything, it doesn't

20 necessarily mean when the case is finally disposed of they

21 get anywhere near the amount they've claimed.

22 MS PHIYEGA: Yes.

23 CHAIRPERSON: So what would be a helpful

24 exercise if I may suggest it, is to take a couple of years

25 and show how much was claimed.

Page 7403

1 MS PHIYEGA: Yes.

2 CHAIRPERSON: And then how much was

3 actually paid out because you may, you will find clearly a

4 disparity between the two. But even so of course the

5 amounts paid out may well present quite a startling picture

6 and may form the basis for the kind of questions that, Mr

7 Bizos, is asking you.

8 MS PHIYEGA: Sure.

9 [11:46] CHAIRPERSON: The only point I make and I

10 think it's a point you've made, is just to look at the

11 claims themselves. I am not suggesting Mr Bizos is only

12 doing that either, but just look at the claims themselves

13 gives rise to a very misleading impression. So if you – if

14 I, maybe suggest when you respond, deal with the, over a

15 representative period, the amount claimed and the amounts

16 actually paid out, because that will give a more accurate

17 picture of the nature of the problem. My impression from

18 press reports, is it is still quite a serious problem but

19 we'll deal with that when we get there.

20 MR BIZOS SC: I agree, with respect, in

21 relation to the amount, and I know from my personal

22 experience that sometimes fantastic sums copied from other

23 jurisdictions, millions are made, but let us we deal with a

24 more closer issue. The number of people killed by the

25 police, is that something that is debatable or do you

Page 7404

1 accept the figures?

2 GENERAL PHIYEGA: Yesterday, a number was

3 bandied that 720 deaths reported by IPID were caused by the

4 police but now when we read this, we see that there was

5 evidence of criminality in 162. It's those type of

6 messages that confuses the environment, and we would like

7 to also give you our own feedback that we've got back from

8 IPID because we don't count those people, it is the report

9 of IPID but we would like to look at those, and I just

10 worry about the anecdotal information that keeps on rearing

11 its head in the media, and we are bringing it even in the

12 Commission, so I'd like to ask for an opportunity to

13 respond to each of those bullets.

14 CHAIRPERSON: One of the interesting

15 points that flows from this document, is the second bullet

16 here about the deaths, which Mr Bizos has read. It appears

17 from that, that it's not – it's misleading just to look at

18 the number of deaths at the hands of the police or in

19 police custody and so forth. Some of them may be

20 justifiable homicides, in fact, insofar as the facts

21 indicate that to be so. But what appears from these

22 certificates, if they are correct, is that about one in

23 five of the deaths in police custody, or regarding the

24 police, because presumably sometimes it would be someone

25 who is not yet in custody, who's been shot. One in five of

<p style="text-align: right;">Page 7405</p> <p>1 those, there's evidence of criminality on the part of the 2 police. So the startling, so if you take the number of 3 deaths, and you then look – take 20% of those, you will 4 still of course have quite a significant figure which gives 5 rise to concern, but the point I am making is, it's 6 misleading just to look at the deaths. You've got to 7 factor in the fact that some of these deaths may have 8 occurred in circumstances where there's no blame attaching 9 to the police, but this statistic is certainly for the 10 2011/2012 period, indicates that there were 162 cases which 11 in itself is quite an alarming figure but obviously nowhere 12 near as alarming as the figure of 720, which is the number 13 of deaths. But even so, we mustn't be complacent, 162 14 deaths is 162 deaths too many and that's obviously a matter 15 for concern. Would you agree? I am sure you will agree 16 with that. Yes, the point made to me by Commissioner 17 Hemraj is even the one in five may itself be misleading, 18 because evidence of criminality doesn't mean evidence that 19 is correct, unless it's accepted by a court or accepted by 20 the police when they settle a claim. But still, this is 21 the aspect that must be looked at, not just the number of 22 deaths, or even the number of deaths where there's evidence 23 of criminality in the docket, but one has to look further 24 at that figure and see whether the evidence has been 25 accepted either by the police by implication, by paying</p>	<p style="text-align: right;">Page 7407</p> <p>1 paragraphs 10 of your statement, exhibit FFF3, have you got 2 it in front of you? Sorry, page 3 of FFF3, the witness's 3 statement. Have you got it, Commissioner? 4 GENERAL PHIYEGA: I have my statement. 5 You said which paragraph? 6 MR BIZOS SC: Paragraph 10. 7 GENERAL PHIYEGA: 10. 8 MR BIZOS SC: I am sure that you wrote 9 that paragraph. Can you please read it out for the benefit 10 of all? 11 GENERAL PHIYEGA: "I lead an organisation 12 dedicated to upholding the law, to serving and protecting 13 the community and its property pursuant to the SAPS 14 constitutional mandate. I therefore discharge this mandate 15 through my leadership and operational" – 16 CHAIRPERSON: You've left out some words. 17 "I lead an organisation dedicated to upholding the law, 18 serving and protecting the community and its property 19 pursuant to the SAPS constitutional mandate." I think it 20 should be "in congruent with the bill of rights as 21 enshrined in our constitution which guarantees rights to 22 peaceful and unarmed demonstrations and/or protests." 23 GENERAL PHIYEGA: I'd agree. 24 CHAIRPERSON: Oh, I beg your pardon, I 25 was quoting from the earlier one, you were quoting from the</p>
<p style="text-align: right;">Page 7406</p> <p>1 even possibly without acknowledging liability, or where a 2 court has actually found liability. 3 GENERAL PHIYEGA: I think, Judge, what we 4 will do really, is still look at those and even maybe go to 5 history, because when you talk about evidence of 6 criminality, I think in an environment such as this one 7 that talk about being innocent until proved otherwise, I 8 would like us to look at history, and be able to look at, 9 maybe not even 2012/2011, just look maybe at the two past 10 years to say, did we get convictions and all those, and I 11 would take the advice that you've given, for us to come 12 back. 13 CHAIRPERSON: Yes, it's convictions – of 14 course, it's not necessarily convictions, in certain cases 15 one mightn't be able to identify the offender. So might 16 for example, have an inquest finding by a magistrate, who 17 finds that someone was killed by an unidentifiable 18 policeman or policewoman for that matter, and so that would 19 also be a relevant statistic to bear in mind. It isn't 20 very appropriate for us to debate this at this stage. All 21 I am saying is, the figures we get must be sufficiently 22 detailed for us to use them to make worthwhile findings. 23 Obviously, Mr Bizos and his clients will assist us in that 24 exercise as well. 25 MR BIZOS SC: I want to refer you to</p>	<p style="text-align: right;">Page 7408</p> <p>1 up to date one. So I am sorry, my fault, sorry. 2 GENERAL PHIYEGA: Okay. Can I continue? 3 CHAIRPERSON: Disregard my interruption, 4 which is irrelevant. 5 GENERAL PHIYEGA: "I therefore discharge 6 this mandate through my leadership and operational command 7 structures of men and women committed to serve with 8 professionalism, with integrity, honesty, compassion and 9 commitment to excellence and placing service to what is 10 before. There's no future in any society without law and 11 order. South Africa is a young democracy. It's highly 12 dependent on focused, deliberate and directed law 13 enforcement. Public order is the bedrock without which our 14 democracy cannot succeed." 15 MR BIZOS SC: Did you write this 16 paragraph? 17 GENERAL PHIYEGA: Yes, it is my 18 statement. 19 MR BIZOS SC: Did you draft the same 20 section number 10, as it appears on FFF2? 21 CHAIRPERSON: That's the passage that I 22 read out thinking it was the one you were reading from, it 23 was my mistake, but it is your earlier statement which you 24 did swear to on the 7th of, I think it was of March. 25 MS PILLAY: Chair, can I just point out,</p>

<p style="text-align: right;">Page 7409</p> <p>1 just to avoid confusion, that in fact you were reading the 2 correct passage from the correct statement. But Mr Bizos 3 has taken the witness to FFF3 initially, which is currently 4 now Mr Bizos is going to FFF2, which is the statement of 5 the 12th of March.</p> <p>6 CHAIRPERSON: Oh, I see, well so I 7 withdraw my apologies to those. I thought I was reading 8 the wrong statement but anyway, it doesn't matter, the 9 statement I think is signed by the witness, so both of 10 them, she acknowledges responsibility for but Mr Bizos, 11 you've heard what Ms Pillay says.</p> <p>12 MR BIZOS SC: Thank you for the 13 correction, I got the order wrong. The words that don't 14 appear in one of them, are the words "in congruent with the 15 bill of rights as enshrined in our constitution, which 16 guarantees rights to peaceful and unarmed demonstration 17 and/or protests," which is the final paragraph.</p> <p>18 COMMISSIONER TOKOTA: But Mr Bizos, you 19 referred her specifically to FFF3.</p> <p>20 MR BIZOS SC: Yes. That's what I read 21 out.</p> <p>22 COMMISSIONER TOKOTA: FFF2, that one is 23 FFF2.</p> <p>24 MR BIZOS SC: This one is 2.</p> <p>25 COMMISSIONER TOKOTA: Yes.</p>	<p style="text-align: right;">Page 7411</p> <p>1 different from ours, the statement of the 12th of March, is 2 FFF2, and that's the final statement, which the witness has 3 accepted is hers, with the exception of page 7, and FFF3 is 4 the initial statement of the 7th of March.</p> <p>5 CHAIRPERSON: We now know what the 6 numbering is, and we know what the chronological order is, 7 but what we also know, is that the witness signed both.</p> <p>8 MR BIZOS SC: The latest one.</p> <p>9 GENERAL PHIYEGA: Alright.</p> <p>10 MR BIZOS SC: Yes, my suspicion was 11 correct, Mr Chairman, that the words –</p> <p>12 CHAIRPERSON: I mean what's the 13 significance of it? It seems rather -</p> <p>14 MR BIZOS SC: Why was it left out?</p> <p>15 CHAIRPERSON: Well, you ask that 16 question.</p> <p>17 MR BIZOS SC: Why was it left out, and by 18 whom? Is the question clear, Commissioner? Why were the 19 words "in congruent with the bill of rights as enshrined in 20 our constitution, which guarantees rights to peaceful and 21 unarmed demonstration and/or protests?" That was in the 22 first one, and taken out – in FFF3 and taken out when FFF2 23 was put together. Why were those words left out?</p> <p>24 GENERAL PHIYEGA: You would know that 25 when I started giving my testimony, amendments were made to</p>
<p style="text-align: right;">Page 7410</p> <p>1 MR BIZOS SC: Which one was the first in 2 time?</p> <p>3 GENERAL PHIYEGA: What's the question, 4 let me answer.</p> <p>5 CHAIRPERSON: I didn't ask you a 6 question, but is it relevant? Both of them are statements 7 which she signed and swore to, the words which don't appear 8 in one, nevertheless appear in a statement which she signed 9 and swore to. So there may be some significance which I 10 can't quite see why the words were left out, it may have 11 been thought to be unnecessary, but the fact of the matter 12 is that she was prepared to accept responsibility for the 13 fuller version, and there's nothing wrong with the fuller 14 version, it's very – no one will quarrel with those words, 15 so I am not quite sure how the point helps her. Yes, Mr 16 Mpofo?</p> <p>17 MR MPOFU: Sorry, it's the first time - 18 I've just looked at the statements, the one of the 12th, 19 does not have the reference to the bill of rights. The one 20 of the 7th does, so I think Mr Bizos is then correct that 21 the subsequent statement is where the reference to the bill 22 of rights was removed. I think that's the gist of it.</p> <p>23 MS PILLAY: Chair, just to add to that, 24 and just to avoid confusion, if we could just – because I 25 understand that Commissioner Tokota's numbering may be</p>	<p style="text-align: right;">Page 7412</p> <p>1 the statement because I kept on saying, I signed a 2 statement, I see this other one has other things, and all 3 that, and I think in that process, problems arose. But I 4 am totally not averse to those issues that were raised. I 5 full subscribe to them.</p> <p>6 MR SEMENYA SC: Chair for the –</p> <p>7 CHAIRPERSON: Can you help us?</p> <p>8 MR SEMENYA SC: Chair, for the record, 9 the mistake is that of the legal team.</p> <p>10 MR BIZOS SC: The legal team? Well, I 11 want to know from my learned friend which member of the 12 legal teams decided to leave those words out?</p> <p>13 CHAIRPERSON: Mr Bizos, is that going to 14 help us to answer the terms of reference? There may be 15 some kind of internal disciplinary proceedings among the 16 legal team which doesn't concern us. Let's carry on with 17 material matters.</p> <p>18 MR BIZOS SC: Mr Chairman, with respect, 19 with the greatest of respect, these are vital words, they 20 are vital words which do not appear on the, what was 21 intended to be the final statement of the witness.</p> <p>22 CHAIRPERSON: Mr Bizos, the fact is she 23 actually affirmed, she actually swore to the first 24 statement on the 7th, so she was prepared to affirm those 25 words under oath. When she came here, they gave us both</p>

<p style="text-align: right;">Page 7413</p> <p>1 documents. They didn't conceal from us that she previously 2 said these words and had second thoughts and left them out. 3 So it doesn't look as if there were any second thoughts. I 4 won't stop you from asking the question, but I just, 5 perhaps improperly have expressed the view that I don't 6 think it's going to help us, but if I am wrong, and you can 7 persuade me that you are right, please carry on. 8 MR BIZOS SC: Well, I don't want to 9 belabour the point, Mr Chairman, but the respect of the 10 police of the "congruent with the bill of rights enshrined 11 in our constitution, which guarantees rights of peaceful 12 and unarmed demonstrations and/or protests," are absolutely 13 vital and in order to make a just decision in relation to 14 this matter, to be told that it was a mistake by the legal 15 team, is not a minor matter, it must have been a deliberate 16 action by someone. We want to know who that someone was, 17 if not the witness. 18 [12:06] CHAIRPERSON: Mr Semenya has told us it 19 wasn't the witness, it was one of his team and I am not 20 sure that it's within our terms of reference to find out 21 who it was. I don't think the President is likely to 22 appoint another Commission to find out, and I don't think 23 that will be necessary in any event. The fact is this 24 witness has already said under oath – affirmed under oath 25 by a signature what was in the first draft. We've been</p>	<p style="text-align: right;">Page 7415</p> <p>1 allegations I would like to engage the ISS on. 2 MR BIZOS SC: Finally on this point, when 3 you were asked why there is a certain attitude against the 4 police, did it occur to you that you may have given some of 5 the reasons set out by the Institute instead of just 6 calling it beautiful? 7 MR SEMENYA SC: The question is unclear 8 to us. We won't be able to follow the answer. 9 CHAIRPERSON: I think you should 10 particularise the question a bit more than you have. It is 11 a little bit on the vague side and I'm not sure whatever 12 answer we get is going to help us, so – I'm not stopping 13 you from asking the question, but I think you can 14 particularise it a bit more. 15 MR BIZOS SC: I don't know what my 16 learned friend's problem is, but I'll try and clarify it. 17 When you were asked by Al Jazeera why criminals behave the 18 way they do you might have mentioned some of the things 19 that are contained in FFF21 in the paragraph that I read 20 out. 21 MS PHIYEGA: I have already mentioned a 22 few minutes ago that I find serious problems with some of 23 the statements that are being made by ISS and therefore I 24 would not have mentioned the type of issues that they are 25 mentioning because I don't agree with some of them.</p>
<p style="text-align: right;">Page 7414</p> <p>1 told by senior counsel for the police that the omission was 2 something which was done I take it by inadvertence by a 3 member of his team, and who it was is a matter you can 4 discuss with him afterwards. Frankly I'm not interested in 5 who it is. Whoever it is may hang his or her head in shame 6 but I'm not interested in that person's identify. It 7 sounds to me like a very large storm in a very small teacup 8 and I suggest we move on to something else. 9 MR BIZOS SC: Commissioner, the paragraph 10 in either form is really something that we all would have 11 expected from the South African police, even more in its 12 original form, but that's a small matter as his lordship 13 ruled. What I want to ask is this that this paragraph 14 praising the noble function of the police is expected to 15 perform in terms of is to be welcomed. But what we are 16 dealing here with is what happened on the, particularly the 17 16th of August, and we have in the exhibit that we have put 18 today before you statements by the Institute of Security 19 Studies that purport to put facts and opinions completely 20 or substantially different to what you say the police that 21 you lead stand for. Is it a matter of concern to you that 22 the allegations made by the Institute are made 23 contradicting to what you say in your affidavit? 24 MS PHIYEGA: What helps me to respond to 25 this is that you're saying allegations, and it is</p>	<p style="text-align: right;">Page 7416</p> <p>1 MR BIZOS SC: I will go to the next 2 subject, but – 3 CHAIRPERSON: Remember that the national 4 commission has said we're going to get their response – 5 MR BIZOS SC: Yes. 6 CHAIRPERSON: Which they can give to the 7 portfolio committee to what the ISS has said, and I've said 8 to you that if there's anything in that response that you 9 feel is incorrect which this commission should know about, 10 you'll be given an opportunity to do so. 11 MR BIZOS SC: Yes. 12 CHAIRPERSON: So you're leading the 13 matter but not necessarily forever. 14 MR BIZOS SC: Yes, now, the other matter 15 that you were to go through is the document that really – 16 the documents that really say what sort of ammunition was 17 used and you asked for an opportunity to read the document, 18 particularly D3 and Exhibit FFF22 and you were given an 19 opportunity to go through. It's 20 and 22, D3. Have you 20 read them? Have you understood them? 21 MS PHIYEGA: Is it this report on medico- 22 legal? 23 MR BIZOS SC: I'm sorry? 24 MS PHIYEGA: Is it the report on the 25 medico-legal?</p>

<p style="text-align: right;">Page 7417</p> <p>1 MR BIZOS SC: Yes, no -</p> <p>2 CHAIRPERSON: It's FFF22.</p> <p>3 MR BIZOS SC: The clinical record, FFF22,</p> <p>4 D3.</p> <p>5 MS PHIYEGA: I have FFF20.</p> <p>6 MR BIZOS SC: I'm sorry, again, I didn't</p> <p>7 hear you.</p> <p>8 MS PHIYEGA: I have FFF20.</p> <p>9 MR BIZOS SC: You don't have FFF22?</p> <p>10 MS PHIYEGA: No, I don't.</p> <p>11 MR BIZOS SC: Well, it's short paragraph.</p> <p>12 I will read it to you. FFF22, D3, "Shot Directions and</p> <p>13 Trajectory", that's the paragraph.</p> <p>14 CHAIRPERSON: It's FFF22, page 3, and on</p> <p>15 that page the paragraph which begins on that page is headed</p> <p>16 "3. Shot Directions and Trajectory". That's the pages, Mr</p> <p>17 Bizos, yes?</p> <p>18 MR BIZOS SC: Yes. The record's</p> <p>19 available. May I read it to you?</p> <p>20 MS PHIYEGA: Yes.</p> <p>21 MR BIZOS SC: "The records available were</p> <p>22 not helpful in determining of direction in most cases. In</p> <p>23 just 29 cases where shot direction could be extracted the</p> <p>24 victims appear to have been shot from the rear in most</p> <p>25 cases, from the front in three cases and from the side in</p>	<p style="text-align: right;">Page 7419</p> <p>1 MR BIZOS SC: Page?</p> <p>2 CHAIRPERSON: E on page 4.</p> <p>3 COMMISSIONER HEMRAJ: And the author's</p> <p>4 remarks on the last paragraph on page 1 as well which</p> <p>5 qualified the finding.</p> <p>6 MR BIZOS SC: This is why I say</p> <p>7 "provisional", Mr Chairman, but there can be no doubt with</p> <p>8 the information available most were from the rear, but –</p> <p>9 CHAIRPERSON: What's more accurate to say</p> <p>10 is of the 61 patients who, in respect of whom information</p> <p>11 was available, it was clear – it seemed clear from 29 of</p> <p>12 those that where the shot direction was extracted, that 20</p> <p>13 of them had been, appear to have been shot from the rear.</p> <p>14 That appeared from the nursing care notes. Whether that is</p> <p>15 a sufficiently representative sample for one to draw</p> <p>16 conclusions as to overwhelming probability as to everybody,</p> <p>17 I'm not sure, but anyway, I suppose I shouldn't comment.</p> <p>18 It's for the witness to give us her views. It sounds as if</p> <p>19 there's going to be a bit of a debate between the experts</p> <p>20 on this and Mr Naidoo is going to come, I beg your pardon,</p> <p>21 Dr Naidoo is going to come on the one side and possibly</p> <p>22 your side may have someone else from the other, but in the</p> <p>23 meanwhile based on this provisional finding, are you</p> <p>24 prepared to give us some kind of provisional response?</p> <p>25 MS PHIYEGA: No.</p>
<p style="text-align: right;">Page 7418</p> <p>1 six cases. 28 cases were unspecified in respect of shot</p> <p>2 direction. The analyst believes that access to the actual</p> <p>3 notes of the doctors and operation theatre procedure</p> <p>4 records would greatly clarify the unspecified. It is</p> <p>5 further submitted that the extrapolation from the cases of</p> <p>6 non-direction would suggest that when all records are fully</p> <p>7 analysed most gunshots were likely to be found to have been</p> <p>8 shot in the rear of the victims." As provisional as the</p> <p>9 opinion may be, would you accept that the high degree of</p> <p>10 probability was that most of the people that were shot and</p> <p>11 survived were shot from the, to use the words, from the</p> <p>12 rear of the victims?</p> <p>13 MR SEMENYA SC: Chair, in all fairness,</p> <p>14 Mr Bizos must read the last paragraph appearing under that</p> <p>15 heading. It's critical.</p> <p>16 MR BIZOS SC: "That's why I say the</p> <p>17 information addition is - and define the determination of</p> <p>18 suspects such as the trajectory of missiles, of angles of</p> <p>19 attacks through the body due to meagreness of detail and</p> <p>20 lack of pure forensic observation." I have read that. I</p> <p>21 don't know that it changes because I said as provisional as</p> <p>22 the it may be –</p> <p>23 CHAIRPERSON: I'm sorry, it may also be</p> <p>24 helpful perhaps to read paragraph E on page 4 which is a</p> <p>25 disclaimer.</p>	<p style="text-align: right;">Page 7420</p> <p>1 MR BIZOS SC: We'll leave that there, Mr</p> <p>2 Chairman, but may we turn to FFF20 regarding the deceased</p> <p>3 miners on page 8? You got it?</p> <p>4 MS PHIYEGA: Yes I do.</p> <p>5 MR BIZOS SC: 21 or 62% were shot from</p> <p>6 the side and further 7 or 21% were shot in the rear. 75%</p> <p>7 of the deceased miners were shot either in the side or in</p> <p>8 the rear.</p> <p>9 MR MAHLANGU: On which page are you</p> <p>10 reading? Which page of this document?</p> <p>11 MR BIZOS SC: Page 8 point 3.</p> <p>12 MS PHIYEGA: Yes.</p> <p>13 MR BIZOS SC: Direction of shots.</p> <p>14 MR MAHLANGU: Oh, page 8.</p> <p>15 MS PHIYEGA: I was looking for the 75%.</p> <p>16 You lost me when you went to the 75%.</p> <p>17 MR BIZOS SC: Yes, it's a collection of</p> <p>18 the – both the side and the rear. Now, I want to bring to</p> <p>19 your notice that the defence version is that the deceased</p> <p>20 or members of the crowd did not rush to attack the police,</p> <p>21 but they turned away on the side when the police shot them.</p> <p>22 MR SEMENYA SC: Chair, we object. This</p> <p>23 document does not support the position at all.</p> <p>24 MR BIZOS SC: I'm not talking about this</p> <p>25 document. I am talking about the evidence. The evidence</p>

<p style="text-align: right;">Page 7421</p> <p>1 given by the people who have given evidence that they 2 turned away from where the police were to the side in order 3 to bypass the kraal and run away. That is the evidence. 4 MR SEMENYA SC: That evidence has not 5 been tendered in this commission. 6 MR BIZOS SC: Well, my memory must be 7 failing me, but I am sure that I am correct that the two 8 witnesses that gave evidence that were part of that group 9 said what I have summarised. Let me put it another way. 10 People, if they attacked the police and the police shot in 11 self-defence must have faced the victims, must have faced 12 one another. 13 MR SEMENYA SC: Chairperson, the defence 14 is one of private defence. Even from the side if I think a 15 member is in imminent danger and I'm entitled in law to 16 shoot from the side. I'd do that. And it would be 17 justified in the example I give. The proposition which my 18 learned colleague is putting to the witness is unfair and 19 may be misleading. 20 MR BIZOS SC: - dispute. Let me try. If 21 members of the crowd attacked the police and the police 22 shot them in self-defence would you have expected the 23 injuries to occur on the back and/or the side? 24 [12:26] MS PHIYEGA: It can't be just an easy, in 25 my pedestrian view of the matter, it can't just be an easy</p>	<p style="text-align: right;">Page 7423</p> <p>1 killing them? 2 MS PHIYEGA: I will still say shooting a 3 person on the head, depend on circumstances in the issue 4 that we are dealing with. 5 MR BIZOS SC: Were the orders and your 6 own letter say that if you have to shoot, shoot the lower 7 part of the body, would anybody who deliberately shot a 8 person in the head be in violation of the order? 9 MS PHIYEGA: In all instances, even in 10 church I'm not a lawyer, circumstances are taken into 11 account. When that happens all circumstances will be 12 considered so that you can establish whether there was 13 deliberateness, whether something else happened. So those 14 circumstances are critical and I believe even what we are 15 discussing now depends on circumstances. 16 MR BIZOS SC: Can you please tell us what 17 circumstances would, in terms of the standing orders be 18 expected to be taken into consideration before shooting a 19 person in the head? What circumstances? 20 MS PHIYEGA: I'm addressing myself to 21 this situation and I'll answer your question addressing 22 myself to the situation we are discussing. I have said 23 earlier on I do not know where the head was standing, was 24 it up, was it on the floor, was it crouching, those are the 25 circumstances that will have to be taken into account when</p>
<p style="text-align: right;">Page 7422</p> <p>1 assessment of saying because I was injured on the side or 2 because when I saw the gun I turned, I don't know, I'm not 3 able to say yes or no because those that were there maybe 4 can explain that because when I face a lion and want to 5 stab the lion and if the lion jumps and I see danger I may 6 not necessarily go that way, I may turn and the lion may 7 hurt me at the back and yet I might have wanted to kill the 8 lion. So it's not an easy answer, I can't give a definite 9 answer to that. It's a very difficult one to answer. 10 MR BIZOS SC: On page FFF 20, page 8 and 11 also paragraph 8 the deceased miners or the deceased miners 12 8 of them, that is 24% of the victims died from gunshot 13 wounds to the head or face. 14 MS PHIYEGA: I see it. 15 MR BIZOS SC: You see that. Shooting 16 people at the head is a sure way of killing them. There is 17 no more delicate part of the body then the head. Do you 18 agree with that? 19 MS PHIYEGA: Again it depends, I mean we 20 saw people crouching were they shot on the head standing up 21 straight, were they trying to duck the bullets and met 22 those that were going to the ground, I don't know, I won't 23 agree because - 24 MR BIZOS SC: I didn't ask you that. I 25 asked you if shooting people in the head is a sure way of</p>	<p style="text-align: right;">Page 7424</p> <p>1 you answer a question such as this. 2 MR BIZOS SC: Why would anybody be on his 3 haunches if he was taking part in an operation of attacking 4 the police? Why would he be on his knees or so low down so 5 that he had to be shot in the head? 6 MS PHIYEGA: The few pictures I saw of 7 the approaching people in some of the instances, they were 8 not walking straight and tall as I am. Some were walking 9 like this, some were, so I say those circumstances are 10 critical. 11 MR BIZOS SC: How does a person on his 12 haunches and putting down his head, the way you indicated 13 threaten the policeman with a very efficient firearm in 14 front of him? 15 MR SEMENYA SC: Mr Commissioner, we have 16 slide exhibit L, slide 206 which shows that the group of 17 people immediately before the shooting. 18 MR BIZOS SC: Well if my learned friend, 19 is referring to 206 nobody seems to be on his knees. 20 CHAIRPERSON: I don't think she confined 21 herself on his knees, she demonstrated with her own body, 22 which something which didn't go on the record of course. 23 She first of all held herself erect, instead of standing 24 upright and then she said like this, and then she sort of 25 leant forward as some of those people do on slide 206, but</p>

<p style="text-align: right;">Page 7425</p> <p>1 I think this is the point that doesn't deserve more than a 2 couple more questions in my mind, before you move onto the 3 next one. I don't want to stop you but I just - 4 MR BIZOS SC: One only, Mr Chair. 5 CHAIRPERSON: Or you can ask two. 6 MR BIZOS SC: Would you consider shooting 7 somebody in the head under any circumstances minimum force 8 or maximum force? 9 MS PHIYEGA: In my opinion which 10 currently informs me I would say if circumstances will 11 determine whether one defines something as maximum or 12 minimum. At this point in time I would have said yesterday 13 when I answered you to say the necessary force to defend 14 oneself. 15 MR BIZOS SC: Now if you have a look at 16 FF22 and FFF20 of the report you will see only six of the 17 29 cases where people were shot could, the direction could 18 be ascertained, only 11% of them show to be shot in the 19 front of their body. F3 page 3, Mr Chair, of FF22 and FF2 20 page 8. 21 MR SEMENYA SC: The cover appearing under 22 paragraph 3 tells us there's a note. "Somebody sustained 23 several wounds of different tracks thus will show an 24 overlap of numbers in the list above." 25 MR BIZOS SC: This may be an overlap but</p>	<p style="text-align: right;">Page 7427</p> <p>1 before the commission as to how many if any of these deaths 2 were brought about in circumstances of self defence or 3 private defence but the police's version is that they all 4 as I understand it, now if they all were then the standing 5 order wouldn't have applied. If of course some of them 6 weren't in self defence then of course the standing order, 7 would well apply. But we're in the, in a controversial 8 area at the moment because we don't know at this stage 9 whether all were in self defence or none were in self 10 defence or some were and some weren't. But your question 11 doesn't cater for that complexity. 12 MR BIZOS SC: Yes. Mr Chairman, we can't 13 ignore the fact that there isn't a single video that we 14 have seen in which there is a short space between any 15 protestor and the policeman and I have that fact as an 16 incontrovertible fact and we are going to argue that this 17 idea of comparing it to a bank robber a bit away from the 18 policeman with a gun knows that he is, must get in first 19 and he shoots, if the policeman shoots him obviously it 20 would be self defence. But where we, we must not close our 21 eyes, well it's a contradiction really of the things that 22 we have not seen. We have not seen any hand to hand attack 23 or any one being in personal danger and I'm entitled - 24 CHAIRPERSON: I'm aware of that. All I'm 25 -</p>
<p style="text-align: right;">Page 7426</p> <p>1 it only shows 11 out of the 29 and in the other instance 2 only 6 of the deceased, 6 of the deceased and 6 of the 3 injured making a total of 12 and 11% were shot in front. 4 This is the overlap that I think that my learned friend, 5 speaks about. But would you, if the report is correct that 6 a very small number of the people were shot in front would 7 that negate the truth of the allegation by the police that 8 they acted in self defence? 9 MS PHIYEGA: I have said front, backside, 10 those circumstances that I mentioned earlier on still 11 persist. 12 MR BIZOS SC: May we now turn to the 13 deceased miners at, please have a look at FFF20 page 8. 14 The 34 fatal injuries were all as a result of bullet wounds 15 to the upper body. That is 100% of the people who died on 16 the 16th of August were shot in the upper parts of their 17 body. Does that indicate that the standing orders of 18 shooting in the lower part of the body negative the defence 19 of self defence or - 20 CHAIRPERSON: Mr Bizos, before she 21 answers the question. I'm not sure that's a fair question 22 because the standing orders as I understand don't deal with 23 killings in self defence. There's a general thing at the 24 end of the standing order saying this doesn't apply to self 25 defence. Now of course it's a controversial question</p>	<p style="text-align: right;">Page 7428</p> <p>1 MR BIZOS SC: I'm entitled with respect 2 to put the questions on the basis of the evidence that we 3 have, that this idea of shooting in self defence is a false 4 allegation. 5 CHAIRPERSON: That comment of yours 6 illustrates that my comment is correct. I put to you that 7 your question didn't allow for the complexity of the 8 situation. That your question was that there was a breach 9 of the standing orders and what I'm saying to you was the 10 standing orders don't provide for shooting in self defence 11 and insofar as self defence may or may not be applicable, 12 there's no question - 13 MR BIZOS SC: Yes. 14 CHAIRPERSON: - of a breach of the 15 standing order. But any way, you and I have had a debate 16 which I think will enable you to refine your question in a 17 way which will cater for the complexity of the situation. 18 MR BIZOS SC: Yes. 19 CHAIRPERSON: And elicit a meaningful 20 answer from the witness. 21 MR SEMENYA SC: Mr Chair, perhaps also to 22 take into account that in terms of Captain Mohlaki the 23 closest cartridge to body is 5.4 metres. 24 CHAIRPERSON: I suppose, Mr Bizos, has to 25 take that in account to his question. Frame your question</p>

Page 7429

1 the way you wish but endeavour to deal with the
 2 complexities so the answer we get is helpful and
 3 meaningful.
 4 MR BIZOS SC: Have you seen the videos,
 5 the video material in exhibit L?
 6 MS PHIYEGA: I have seen some of those.
 7 Exhibit L is slide –
 8 [12:46] MR BIZOS SC: Have you seen the
 9 photographs produced, reproduced in exhibit L?
 10 GENERAL PHIYEGA: Again, maybe just to
 11 take me to that slide, you said exhibit L is slide what?
 12 CHAIRPERSON: Well, it's a general
 13 question, he says, have you seen the photographs in exhibit
 14 L? I think you've said you've seen them. We can assume
 15 that you've seen the pictures, the photographs.
 16 GENERAL PHIYEGA: Yes. I've seen a
 17 number of them.
 18 MR BIZOS SC: Have you seen any
 19 photograph of a protester near enough any policeman where
 20 the policeman was in danger of being stabbed or shot by the
 21 protester? Have you seen any such joint presence, anywhere
 22 near one another?
 23 GENERAL PHIYEGA: I saw police in danger.
 24 MR BIZOS SC: No, that's a judgment. I
 25 asked you, whether you saw any photograph of a short

Page 7430

1 distance between a protester and a policeman? Please
 2 answer that question.
 3 GENERAL PHIYEGA: The proximity I saw
 4 shows police in danger.
 5 MR BIZOS SC: I ask that the witness be
 6 directed to answer the question, Mr Chairman.
 7 CHAIRPERSON: It's an answer by
 8 implication. If you say that she hasn't answered the
 9 question directly, it's a matter you can argue later. You
 10 can ask us to draw an adverse inference, perhaps. But I
 11 think she has given the answer. It stands with full right.
 12 You may be able to use it in your favour. Mr Semenya may
 13 be able to use it in his. I don't know that we can, I can
 14 push her further than that.
 15 MR BIZOS SC: Well, I am going to put to
 16 you that there is no evidence, either photographic or
 17 video, to show that any police officer was in imminent
 18 danger from any attack from any protester.
 19 GENERAL PHIYEGA: In my response, I say I
 20 do not agree.
 21 CHAIRPERSON: Mr Bizos, I think that this
 22 is a matter that can be more fruitfully, if I may say so,
 23 dealt with in argument. You may say that the answer you've
 24 been given is incorrect, you can demonstrate from videos.
 25 Mr Semenya may say that, if you read the - look at the

Page 7431

1 videos correctly, will come to a different conclusion, but
 2 it's an argument I think can better be proceeded with at
 3 that stage, rather than with this witness.
 4 MR BIZOS SC: Yes.
 5 CHAIRPERSON: Because I don't know that
 6 her answers, and I say this with great respect, one way to
 7 t'other, are really going to help us.
 8 MR BIZOS SC: I didn't really expect any
 9 different answer but I merely put the question, not as to
 10 our learned friends, that if they have such evidence, we
 11 haven't yet seen it, Mr Chairman, and we'll proceed from
 12 that. Now in IFF22 –
 13 CHAIRPERSON: I think you mean FFF22.
 14 MR BIZOS SC: FFF.
 15 CHAIRPERSON: You said IFF, I don't know
 16 an IFF.
 17 MR BIZOS SC: I am sorry, yes, the first
 18 F was a bit short of a line,
 19 CHAIRPERSON: FFF22, page?
 20 MR BIZOS SC: Yes. Annexure B, it's a
 21 table, and what it shows that six injuries were sustained
 22 to the upper body with only 25 injuries been sustained to
 23 the lower body.
 24 CHAIRPERSON: National Commissioner, I
 25 think you'll find this annexure is the last page of the

Page 7432

1 exhibit. "Analysis of selected aspects of findings of
 2 survivors." Is that correct, Mr Bizos?
 3 GENERAL PHIYEGA: Sorry, exhibit?
 4 CHAIRPERSON: The last page of the
 5 exhibit, and it's headed "analysis of selected aspects of
 6 findings of survivors."
 7 MR BIZOS SC: Yes, it's really a
 8 summarised figure that I have given based on those pages.
 9 CHAIRPERSON: Now that we've both
 10 directed the witness to the page, perhaps you would like to
 11 ask her the questions based on it.
 12 MR BIZOS SC: That 66 injuries were
 13 sustained to the upper body with only 25 injuries being
 14 sustained on the lower body, that is in relation to the
 15 people who were injured. Do you agree that the vast
 16 majority were the victims of excessive force and not, or
 17 maximum force and not with minimum force?
 18 MR SEMENYA SC: Chairperson, the witness
 19 must be directed to a very critical note which appears to
 20 those stats, and it reads "the above includes only the 61
 21 cases where documentation was available. 2. Categories
 22 will overlap because of occasional multiplicity of injuries
 23 on the same survivor, thus totalling of figures between
 24 columns and rows will bear no meaningful result."
 25 MR BIZOS SC: Well, I make that

Page 7433

1 reservation, but I don't understand the note to negate
 2 these figures of 26 and 25 in any material respect but I
 3 suppose from the witness, we can't expect any answer other
 4 than that you don't want to deal with it because it's a
 5 technical matter. Is that our answer?
 6 GENERAL PHIYEGA: Counsel, that's your
 7 answer.
 8 MR BIZOS SC: Is it your answer?
 9 GENERAL PHIYEGA: That's your answer.
 10 MR BIZOS SC: What is your answer?
 11 GENERAL PHIYEGA: My answer is, I have
 12 said, the shots at this point the circumstances would have
 13 to be taken – you can't read the numbers alone, you must
 14 read the numbers with the circumstances. We had spoken
 15 about pictures, we've spoken about other things, we have
 16 spoken about crouching, we have spoken about people who
 17 were upright, I don't have those facts and you also right
 18 now, are not able to give me those facts. So it's a
 19 difficult thing to answer even for yourself.
 20 CHAIRPERSON: Mr Bizos, I see it's five
 21 minutes to one. I don't know whether you are going to go
 22 onto another topic now.
 23 MR BIZOS SC: I want to round off this
 24 topic.
 25 CHAIRPERSON: Right, round off the topic,

Page 7434

1 and then I want to make an appeal to parties on an
 2 housekeeping aspect which – you round off the topic.
 3 MR BIZOS SC: I want to put to you that
 4 the post-mortem reports and the clinical records indicate a
 5 total deviation from what is expected of the police in any
 6 situation, and what they show that there was a deviation,
 7 or what is expected from the police by the standing orders,
 8 the legislation, and our constitution. And I want to put
 9 to you that the force employed was disproportional,
 10 excessive and extreme and manifestly unlawful.
 11 MR SEMENYA SC: Are we are the stage of
 12 argument, Chair?
 13 MR BIZOS SC: No, I am putting it to –
 14 CHAIRPERSON: I am not under oath, so I
 15 decline to answer any questions. It's a rhetorical
 16 question, but insofar it's a question, it's directed to Mr
 17 Bizos. The suggestion is that this is basically a point
 18 for argument.
 19 MR BIZOS SC: Yes, but I have to put it
 20 to her.
 21 CHAIRPERSON: Alright, you've put it to
 22 her.
 23 MR BIZOS SC: Yes, I know what the answer
 24 is going to be, but that will not prevent me –
 25 CHAIRPERSON: Well, you know, you know,

Page 7435

1 actually sometimes, full of surprises, let's see whether
 2 you are going to get, prior to this occasion.
 3 MR BIZOS SC: No, no.
 4 CHAIRPERSON: What do you say, National
 5 Commissioner, do you agree with counsel is putting to you,
 6 or do you disagree?
 7 GENERAL PHIYEGA: I disagree, it's
 8 absolutely premature that there's evidence that is going to
 9 be led here, the arguments that are going to be taken, I
 10 disagree.
 11 CHAIRPERSON: Was that the answer you
 12 expect, Mr Bizos? Was that the answer you expected?
 13 MR BIZOS SC: I think that I do not
 14 accept the correct –
 15 CHAIRPERSON: No, no, I didn't ask you if
 16 you accept it, did you expect it?
 17 MR BIZOS SC: I -
 18 CHAIRPERSON: I don't think you've got
 19 more questions to ask on –
 20 MR BIZOS SC: No, not on this issue.
 21 CHAIRPERSON: On other topics on Tuesday?
 22 Are you finished this point?
 23 MR BIZOS SC: I've finished this point, I
 24 am going to go onto another matter and I understand that
 25 this may be a convenient stage.

Page 7436

1 CHAIRPERSON: It is a convenient stage.
 2 Before we adjourn, I would just like to say that what has
 3 been happening recently, is articles, as I understand it,
 4 been sent to the parties by other parties beforehand, but
 5 they haven't been given to us. So we only see them for the
 6 first time when they are mentioned in examination or cross-
 7 examination, and we've done our best to speed read them
 8 here at the table, but it's not been very easy, and we
 9 would appreciate in future, if parties are going to
 10 exchange or give each other articles and other material,
 11 which will be used in cross-examination, that we could be
 12 given it a day or so beforehand, so we can study it
 13 overnight beforehand. It enables us to follow the evidence
 14 more easily and to in fact, sometimes even contribute to
 15 the discussion. So that's a favour we ask, and I don't
 16 think it's an unreasonable one. I expect the parties will
 17 comply with that. It remains for me to wish all concerned,
 18 a very happy and enjoyable Easter weekend, we will resume
 19 at 10 o'clock on Tuesday morning. The Commission adjourns.
 20 [COMMISSION ADJOURNED]
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 22 .
 23 .
 24 .
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A				B
ability 7386:23,24	7414:23	annexures 7367:12,13	arm 7360:14	averse 7412:4
able 7361:23 7362:5,7	affirm 7412:24	7367:14 7391:5	arms 7361:5 7363:12	avoid 7409:1 7410:24
7366:9 7382:8	affirmed 7412:23	announce 7397:17	7364:9,9,12,12,21	aware 7378:12 7427:24
7387:12,16 7400:21	7413:24	answer 7359:16	7365:1	
7406:8,15 7415:8	Africa 7395:22 7408:11	7360:20 7361:14,14	arose 7412:3	B 7431:20
7422:3 7430:12,13	African 7357:15,20	7361:18,23,23,24	arrests 7397:24 7398:6	back 7365:19 7366:6
7433:18	7358:6 7414:11	7362:1,1,2,5,7,18	arrive 7374:8	7366:13 7367:2
absolutely 7365:12	Africans 7396:18	7366:1 7372:22	arrived 7358:14	7368:12,13,15,16
7413:12 7435:8	age 7358:9 7359:2,4	7374:14 7381:24	arteries 7360:16	7369:2 7370:8 7375:7
abundantly 7393:14	aggression 7383:15	7382:1,9,12,25	article 7357:6,13	7383:16 7404:7
abuse 7379:15 7394:24	ago 7377:23 7395:24	7383:19,23 7385:22	articles 7371:18 7372:1	7406:12 7421:23
7396:1,10	7415:22	7385:24 7392:19	7436:3,10	7422:7
academics 7371:19	agree 7361:8 7363:7	7393:9,13 7395:10	artificial 7377:8	backed 7370:3,6
accept 7365:22 7366:5	7369:4 7375:24	7399:7,15 7400:16	ascertain 7383:25	7393:19
7366:7,9,13,15,20	7382:3,7 7386:8	7402:2 7410:4	ascertained 7425:18	backside 7426:9
7369:3,9,12 7385:16	7401:4,18,18 7403:20	7412:14 7415:8,12	asked 7358:24 7361:13	balls 7388:8,14,19
7389:18 7398:7	7405:15,15 7407:23	7422:8,9,9 7423:21	7363:7 7366:1 7373:8	7389:22
7404:1 7410:12	7415:25 7422:18,23	7424:1 7428:20	7382:11 7394:21	bandied 7404:3
7418:9 7435:14,16	7430:20 7432:15	7429:2 7430:2,6,7,11	7397:15 7399:23	bank 7427:17
acceptable 7362:6	7435:5	7430:23 7431:9	7402:14 7415:3,17	base 7387:13 7389:20
accepted 7405:19,19,25	Al 7415:17	7433:3,5,7,8,9,10,11	7416:17 7422:25	7398:2
7411:3	alarming 7405:11,12	7433:19 7434:15,23	7429:25	based 7419:23 7432:8
accepts 7359:6	alerting 7372:20	7435:11,12	asking 7361:8 7368:2,3	7432:11
access 7418:2	allegation 7426:7	answered 7361:3	7370:3,5 7382:4	basically 7434:17
accord 7370:12	7428:4	7362:3 7390:16,17,19	7386:11 7388:1,22	basis 7363:5 7368:3,8
account 7423:11,25	allegations 7398:7	7425:13 7430:8	7397:20 7403:7	7388:22,23 7403:6
7428:22,25	7399:5,8,15,24	answers 7377:6,9	7413:4 7415:13	7428:2
accurate 7375:20	7401:8,8,12,19	7400:21 7426:21	aspect 7378:18 7405:21	bear 7380:19 7406:19
7403:16 7419:9	7414:22,25 7415:1	7431:6	7434:2	7432:24
acknowledges 7409:10	allow 7392:16 7428:7	anybody 7423:7 7424:2	aspects 7367:24 7432:1	beautiful 7415:6
acknowledging 7406:1	allowance 7387:18	anyway 7364:6 7373:8	7432:5	bedrock 7408:13
acted 7382:17 7384:7	7389:24	7409:8 7419:17	assault 7396:12,13	beg 7373:1 7376:3
7426:8	Alright 7393:10	apologies 7409:7	assertions 7397:10	7381:1 7407:24
action 7372:7 7375:6	7400:14 7411:9	apparently 7388:5	assessment 7422:1	7419:20
7413:16	7434:21	appeal 7371:6 7392:5	assist 7386:3 7406:23	beginning 7391:3
actions 7370:25	ambush 7380:15	7434:1	assume 7365:17,20	begins 7417:15
actively 7371:14	7392:17	appear 7388:13	7390:2,4,15 7429:14	behave 7415:17
acts 7401:21	ambushed 7379:2	7389:16 7409:14	assumed 7368:14	belabour 7413:9
actual 7388:4 7418:2	amend 7368:12	7410:7,8 7412:20	7373:24	believe 7358:23
add 7410:23	amendments 7411:25	7417:24 7419:13	assuming 7382:7	7365:24 7423:14
added 7368:11	ammunition 7366:6,14	appeared 7419:14	assumption 7366:2,13	believes 7418:2
addition 7396:15	7385:8,9,19 7386:2,9	appearing 7418:14	7370:3,5 7384:20	benefit 7407:9
7418:17	7386:17,25 7387:9,11	7425:21	attaching 7405:8	best 7376:25 7436:7
addresses 7358:7	7387:14,22 7388:9,15	appears 7404:16,21	attack 7369:4 7384:14	better 7362:3 7400:20
addressing 7423:20,21	7389:14,15,16,18	7408:20 7432:19	7420:20 7427:22	7431:2
adjourn 7394:10	7390:4,11 7393:14	applicable 7428:11	7430:18	bill 7407:20 7409:15
7395:6 7436:2	7416:16	applied 7427:5	attacked 7421:10,21	7410:19,21 7411:19
ADJOURNED 7436:20	amount 7402:21	applies 7380:13	attacking 7424:3	7413:10
adjournment 7379:8	7403:15,21	apply 7393:11 7426:24	attacks 7418:19	billion 7396:13,15
7392:9,10,15 7393:2	amounts 7360:22	7427:7	attendance 7398:25	7402:4,6
7393:23 7394:5	7363:9 7403:5,15	appoint 7413:22	7399:2	billions 7401:20
adjourns 7394:11	amplification 7377:8	appreciate 7436:9	attention 7374:12	bit 7365:14 7372:10
7436:19	amplify 7377:6,8	approach 7392:3	7375:2 7389:10	7393:3 7394:1,4,6
administration	analysed 7418:7	approaching 7424:7	7398:23	7399:24 7415:10,11
7372:16	analysis 7389:21	appropriate 7365:10	attitude 7415:3	7415:14 7419:19
admitted 7396:19	7432:1,5	7373:7 7393:6	ought 7374:3	7427:17 7431:18
adult 7360:14,22	analyst 7418:2	7406:20	August 7360:23	blame 7405:8
7396:15	and/or 7407:22	approximately 7368:5	7364:20,25 7414:17	blood 7360:15
adverse 7430:10	7409:17 7411:21	April 7401:1	7426:16	board 7370:9
advice 7375:11 7406:11	7413:12 7421:23	area 7427:8	author's 7419:3	body 7368:1,19
advise 7373:14	anecdotal 7392:3	areas 7357:23	autopsies 7367:16,20	7369:12 7371:17,19
advised 7374:2,4	7398:3 7404:10	argue 7427:16 7430:9	Autopsy 7367:15,24	7371:22,24 7381:5
advocate 7374:5	angles 7418:18	argument 7430:23	available 7391:20	7383:12,12 7399:11
affidavit 7374:7	annexure 7367:6,12,13	7431:2 7434:12,18	7400:19 7417:19,21	7418:19 7422:17
	7367:14,14,23,25	arguments 7435:9	7419:8,11 7432:21	7423:7 7424:21
	7368:17 7431:20,25	arising 7392:11	average 7396:4	

7425:19 7426:15,17 7426:18 7428:23 7431:22,23 7432:13 7432:14 bone 7360:16 breach 7428:8,14 briefed 7366:10,18 briefing 7362:23 7384:22 bring 7420:18 bringing 7404:11 broadcast 7384:23 brought 7374:12 7375:1 7398:23 7427:2 bruise 7389:8 brutality 7396:2 7397:23 bullet 7360:11,18 7404:15 7426:14 bullets 7365:24 7385:16,19 7386:1,5 7386:9,11,21,24 7387:10,11,15,19,19 7388:8,14 7389:3,15 7390:15 7393:15 7404:13 7422:21 Bunge 7360:21 burning 7394:9 busy 7390:20 7400:18 bypass 7421:3	certainly 7363:2 7405:9 certificate 7391:6 certificates 7404:22 CFO 7372:15 7373:20 Chair 7357:10 7361:16 7363:21 7369:8,14,21 7375:3 7377:17 7381:15 7382:20 7386:16 7395:15 7408:25 7410:23 7412:6,8 7418:13 7420:22 7425:4,19 7428:21 7434:12 Chairman 7357:6,6 7368:11 7375:23 7376:19 7377:4,11,12 7378:17 7380:20 7385:2,10 7386:19 7388:25 7390:12 7395:18 7411:11 7412:18 7413:9 7419:7 7420:2 7427:12 7430:6 7431:11 challenges 7401:12 chance 7361:19 7379:8 7391:17,25 7394:8 7395:9 change 7381:20 7389:11 changes 7418:21 charged 7396:8 checked 7401:22 chests 7369:11 choose 7361:4 chronological 7411:6 church 7423:10 circumstances 7357:22 7359:9,22 7362:15 7365:4,13 7384:11,12 7405:8 7423:3,10,11 7423:14,15,17,19,25 7424:9 7425:7,10 7426:10 7427:2 7433:12,14 civil 7396:11,12,12 7402:13 claim 7402:19 7405:20 claimed 7401:21 7402:21,25 7403:15 claims 7396:13,14 7402:13 7403:11,12 clarify 7415:16 7418:4 clashed 7397:2,8 clashes 7397:16 clear 7371:16 7393:14 7411:18 7419:11,11 clearly 7372:10 7403:3 clients 7406:23 clinical 7379:19,23 7380:4 7385:10 7417:3 7434:4 close 7384:17,19 7427:20 closer 7403:24	closest 7428:23 clustered 7397:9 colleague 7369:22 7421:18 collected 7397:19 collection 7420:17 column 7367:17 columns 7432:24 combat 7358:3 combine 7389:10 come 7361:7 7367:8 7383:21 7406:11 7419:20,21 7431:1 comes 7362:16 7372:15 7372:17 coming 7374:20 7401:8 command 7408:6 commander 7361:3 commanders 7361:7,11 comment 7358:5 7368:7 7371:9,10,14 7371:15 7419:17 7428:5,6 commission 7357:2 7358:13,18 7365:22 7369:1 7370:22 7374:15,16,18 7375:4 7375:6,8 7391:24 7394:11,11,12 7401:4 7402:3,11 7404:12 7413:22 7416:4,9 7421:5 7427:1 7436:19,20 commissioned 7362:4 7402:16 commissioner 7357:3 7357:13 7358:21 7362:8 7366:21 7373:6 7383:14 7390:22 7393:24 7394:7,13,19 7395:14 7402:1,13,17 7405:16 7407:3 7409:18,22,25 7410:25 7411:18 7414:9 7419:3 7424:15 7431:24 7435:5 commitment 7408:9 committed 7408:7 committee 7377:22 7395:23 7398:18 7399:7,10,12,20,21 7400:3,8 7416:7 common 7386:19 commonality 7397:17 Commonsense 7386:18 community 7407:13,18 compare 7388:2 compared 7386:24 7388:14,20 comparing 7427:17 comparison 7387:18 compassion 7408:8 competence 7396:24 complacent 7405:13 complaint 7370:4,11	complaints 7372:2,5 7373:2 7398:6 complete 7359:16 completely 7414:19 complexities 7429:2 complexity 7427:11 7428:7,17 comply 7436:17 comprehensively 7402:3 compromising 7392:5 compute 7386:17 conceal 7413:1 concern 7405:5,15 7412:16 7414:21 concerned 7388:9,12 7436:17 concluded 7360:18 conclusion 7374:8 7375:18 7431:1 conclusions 7419:16 conduct 7371:7 7373:25,25 7381:16 conducted 7380:21 confess 7364:3 confined 7424:20 confirmation 7357:8 confuses 7404:6 confusion 7409:1 7410:24 congruent 7407:20 7409:14 7411:19 7413:10 consider 7365:10 7376:8,14 7393:6 7401:3 7425:6 consideration 7423:18 considered 7423:12 constitution 7371:20 7407:21 7409:15 7411:20 7413:11 7434:8 constitutional 7371:6 7407:14,19 construed 7377:2 consultant 7360:17 contained 7415:19 CONTD 7357:5 context 7386:5 7398:3 7399:17 contextualise 7385:23 7401:14 continue 7408:2 contradicted 7384:8 contradicting 7414:23 contradiction 7427:21 contribute 7436:14 control 7357:24 7360:9 7360:19 7375:25 controversial 7426:25 7427:7 convenience 7380:9 convenient 7435:25 7436:1 convictions 7406:10,13 7406:14	copied 7403:22 copy 7357:16 7377:24 7378:4 correct 7357:10 7363:20 7368:17 7370:13 7377:17 7382:3 7383:7 7386:8 7388:8,13 7399:18,19 7400:3,23 7404:22 7405:19 7409:2,2 7410:20 7411:11 7421:7 7426:5 7428:6 7432:2 7435:14 corrected 7364:5 7368:25 7379:13 correction 7363:25 7368:11 7375:2 7409:13 correctly 7365:20 7375:21 7431:1 correctness 7385:17 correspond 7386:20 corruption 7396:8,16 couldn't 7400:9 counsel 7383:7 7391:13 7414:1 7433:6 7435:5 counsel's 7365:22 count 7402:8 7404:8 counted 7367:5 country 7371:21 counts 7367:21 couple 7395:8 7402:24 7425:2 course 7365:15 7378:22 7380:14 7384:21 7400:2 7403:4 7405:4 7406:14 7424:22 7426:25 7427:5,6 court 7371:6,6 7373:16 7402:9 7405:19 7406:2 courts 7371:18,25 cover 7425:21 criminal 7396:2 criminality 7396:6 7404:5 7405:1,18,23 7406:6 criminals 7415:17 critical 7400:17 7418:15 7423:14 7424:10 7432:19 criticism 7371:2 7372:2 7372:5 criticisms 7370:24 7371:25 7373:2,24 cross 7370:9 7436:6 cross-examination 7357:4,5 7370:16 7380:18 7392:17 7436:11 crouching 7422:20 7423:24 7433:16 crowd 7357:24 7360:9 7360:19,25 7364:22 7365:11 7374:10
C				
C 7367:6,14 calculate 7402:6 calibre 7374:9 7375:13 7375:19,19 call 7388:6 called 7357:14 7388:19 7402:13 calling 7415:6 calls 7392:10 can't 7400:16 7410:10 7421:24,25 7422:8 7427:12 7433:3,13 capable 7380:11 Captain 7428:22 care 7419:14 carry 7395:11 7412:16 7413:7 cartridge 7428:23 case 7402:20 cases 7375:18 7385:6,6 7385:8 7390:14 7396:2,4,4,7,7,11,12 7397:23 7398:5 7405:10 7406:14 7417:22,23,25,25 7418:1,1,5 7425:17 7432:21 Categories 7432:21 cater 7427:11 7428:17 Cause 7367:18 caused 7385:16 7404:3 certain 7362:15,24 7406:14 7415:3				

<p>7375:25 7387:11 7420:20 7421:21 crowds 7357:23 currently 7409:3 7425:10 custody 7404:19,23,25</p> <hr/> <p style="text-align: center;">D</p> <p>D 7360:17 7367:23 7368:17 damage 7360:15 danger 7421:15 7422:5 7427:23 7429:20,23 7430:4,18 data 7389:20 7397:2,9 7397:16,16 7398:14 database 7389:23 date 7360:23 7408:1 dated 7395:23 day 7379:13 7396:5 7436:12 days 7377:23 7395:24 De 7374:7,12 7375:11 7375:14,15,24,24 dead 7369:5 deadly 7357:15,21 7361:9 7364:9 7365:20 deal 7359:4 7370:9 7371:10,15 7372:19 7372:22 7373:21 7378:14 7392:11 7394:3,8 7401:5 7403:14,19,23 7426:22 7429:1 7433:4 dealing 7359:12 7399:24 7414:16 7423:4 dealt 7371:3 7373:7 7392:23 7398:17 7430:23 death 7360:14 7363:18 7367:18 7381:16 deaths 7367:11 7377:21 7379:25 7385:25 7390:25 7396:5 7404:3,16,18 7404:23 7405:3,6,7 7405:13,14,14,22,22 7427:1 debatable 7403:25 debate 7406:20 7419:19 7428:15 deceased 7367:16 7390:10 7420:2,7,19 7422:11,11 7426:2,2 7426:13 decide 7381:8,11,22 7382:14,16 decided 7412:12 deciding 7383:13 decision 7384:11 7413:13 decline 7434:15 dedicated 7372:3</p>	<p>7407:12,17 defence 7365:6 7381:9 7381:12,23 7382:15 7382:17 7383:14 7384:7 7420:19 7421:13,14 7426:8,18 7426:19,23,25 7427:2 7427:3,6,9,10,20 7428:3,10,11 defend 7425:13 define 7371:23 7418:17 defined 7382:24 defines 7425:11 definite 7422:8 degree 7418:9 delay 7374:11 7375:17 deliberate 7408:12 7413:15 deliberately 7392:20 7423:7 deliberateness 7423:13 delicate 7422:17 democracy 7358:14 7408:11,14 demonstrate 7430:24 demonstrated 7424:21 demonstration 7409:16 7411:21 demonstrations 7407:22 7413:12 department 7373:13,13 7402:14 depend 7386:22 7423:3 depended 7365:4 dependent 7408:12 Depending 7389:4 depends 7365:12 7371:2 7422:19 7423:15 described 7367:18 7383:2 describes 7358:14 deserve 7425:1 desirable 7377:3 desk 7378:4 despite 7385:3 detail 7369:24 7418:19 detailed 7400:2 7406:22 details 7365:16 7367:8 determination 7418:17 determine 7425:11 determining 7417:22 deviation 7434:5,6 didn't 7410:5 7413:1 7417:6 7431:8 7435:15 die 7390:3 died 7369:2,11 7422:12 7426:15 different 7359:10,22 7381:17 7399:20 7411:1 7414:20 7425:23 7431:1,9 differently 7359:14,18 7359:22 7397:18</p>	<p>difficult 7400:16 7422:9 7433:19 direct 7361:18 7372:21 directed 7408:12 7430:6 7432:10,19 7434:16 direction 7417:22,23 7418:2 7419:12 7420:13 7425:17 Directions 7417:12,16 directly 7361:14 7430:9 disadvantage 7399:24 disagree 7382:23 7435:6,7,10 disbelieve 7398:11 discharge 7360:11 7407:14 7408:5 disciplinarily 7412:15 disclaimer 7418:25 disclose 7385:1 discuss 7414:4 discussed 7393:23 discussing 7423:15,22 discussion 7436:15 discussions 7374:7 disparity 7403:4 disposed 7402:20 disproportional 7434:9 dispute 7421:20 Disregard 7408:3 distance 7389:5,6 7430:1 disturbing 7357:24 7360:10 diverse 7372:13 7373:15,21 divisions 7371:7 DNA 7373:16 docket 7405:23 Doctor 7360:17 7379:20 doctors 7379:19 7391:4 7418:3 document 7358:9 7367:19 7368:2,5,9 7377:12,13,21 7378:12,16,17,20,21 7379:11,22,25 7380:18 7390:23 7391:20 7392:8,13,17 7393:13 7394:23 7399:25 7400:10,20 7400:22 7401:10 7404:15 7416:15,17 7420:10,23,25 documentation 7432:21 documents 7391:23 7413:1 7416:16 doesn't 7391:20 7402:19 7405:18 7409:8 7412:16 7413:3 7425:1 7426:24 7427:11 doing 7376:25 7392:20</p>	<p>7403:12 don't 7404:8 7409:13 7410:7 7413:5,8,21 7413:22 7415:15,25 7417:9,10 7418:21 7430:13 7431:5,15 7433:1,4,17,21 7435:18 7436:15 doubled 7396:14 doubt 7396:24 7419:7 Dr 7419:21 draft 7408:19 7413:25 draw 7383:17,18 7419:15 7430:10 drawing 7370:8 7389:10 drawn 7367:1 drinking 7392:12 duck 7422:21 due 7400:2 7418:19 duties 7357:20 7360:10 7378:22 D1 7385:14 D3 7416:18,19 7417:4 7417:12</p> <hr/> <p style="text-align: center;">E</p> <p>E 7418:24 7419:2 earlier 7407:25 7408:23 7423:23 7426:10 early 7393:3 easier 7370:23 easily 7401:22 7436:14 Easter 7436:18 easy 7362:9 7421:24,25 7422:8 7436:8 effect 7360:18,21 7361:9 7377:2 7392:19 effected 7374:11 7375:17 7389:2 effective 7358:4 efficient 7424:13 efforts 7385:4 eight 7367:25 either 7368:16 7369:2 7403:12 7405:25 7414:10 7420:7 7430:16 elicit 7428:19 embarrassed 7395:7 employed 7434:9 employment 7374:9 enable 7428:16 enables 7436:13 endeavour 7429:1 enforcement 7360:10 7408:13 engage 7415:1 enjoyable 7436:18 enshrined 7407:21 7409:15 7411:19 7413:10 enters 7372:1 entirely 7375:20</p>	<p>entitled 7361:4 7370:1 7421:15 7427:23 7428:1 entity 7381:17 entrusted 7371:20 entry 7369:10 enunciated 7359:5 environment 7371:3 7404:6 7406:6 environments 7371:9 7371:14 7372:22 7373:15,22 equally 7360:10 equip 7362:14 equipment 7361:2,2 7377:6 erect 7424:23 establish 7423:12 ethics 7398:1 evaluation 7379:18,23 7380:4 event 7413:23 everybody 7419:16 evidence 7360:21 7366:16 7369:1,10,13 7369:20 7370:6,7 7381:22 7384:8,17,18 7390:1 7396:6 7404:5 7405:1,18,18,22,24 7406:5 7420:25,25 7421:1,3,4,8 7428:2 7430:16 7431:10 7435:8 7436:13 evidenced 7393:15 exaggerated 7399:17 7402:10 examination 7370:10 7436:6,7 examining 7384:8 example 7406:16 7421:17 excellence 7408:9 exception 7411:3 excessive 7432:16 7434:10 exchange 7436:10 execution 7357:19 executives 7372:18 exercise 7402:24 7406:24 exhibit 7362:22 7367:9 7370:13 7379:24 7380:4 7385:20 7388:2 7393:20 7394:17 7395:21 7407:1 7414:17 7416:18 7424:16 7429:5,7,9,11,13 7432:1,3,5 exist 7359:12,20,23 7360:2 expect 7431:8 7433:3 7435:12,16 7436:16 expected 7367:20 7381:3,18 7385:17 7414:11,14 7421:22</p>
--	--	--	--	---

<p>7423:18 7434:5,7 7435:12 expended 7388:5,7 experience 7403:22 experienced 7396:10 expert 7374:11,15,15 7374:18 7382:21 7383:16 expertise 7362:5 7373:22 experts 7369:1 7419:19 explain 7422:4 expressed 7382:8 7413:5 expression 7388:8 extent 7362:13 7393:19 extra 7392:15 extracted 7417:23 7419:12 extrapolation 7418:5 extreme 7434:10 eye 7372:5 eyes 7384:17,20 7427:21</p>	<p>favour 7430:12 7436:15 favoured 7387:21 feature 7357:24 feedback 7402:3 7404:7 feel 7395:10 7416:9 FFF 7357:7 7422:10 7431:14 FFF19 7357:8,11 FFF2 7408:20 7409:4 7409:22,23 7411:2,22 FFF20 7367:10 7370:13 7377:21 7379:25 7390:12 7391:1 7394:20 7395:2 7417:5,8 7420:2 7425:16 7426:13 FFF21 7377:15,22 7394:18 7395:21 7415:19 FFF22 7380:5 7416:18 7417:2,3,9,12,14 7431:13,19 FFF3 7407:1,2 7409:3 7409:19 7411:3,22</p>	<p>7412:23 7413:25 7424:23 7427:18 7431:17 7436:6 five 7368:22 7396:7 7404:23,25 7405:17 7433:20 flashing 7395:21 floor 7423:24 flow 7370:15 flows 7404:15 focused 7408:12 follow 7366:8 7369:8 7415:8 7436:13 followed 7391:4 following 7374:8 footage 7384:23 force 7357:15,21 7370:24 7372:25 7375:4 7425:7,8,13 7432:16,17,17 7434:9 forensic 7360:17 7373:17 7380:21 7418:20 forever 7416:13 forgive 7362:9 7363:2 7400:7 form 7365:7 7375:23 7383:22 7389:23 7403:6 7414:10,12 forms 7386:1 formula 7402:5 forth 7404:19 forward 7365:14 7424:25 found 7385:3,11,25 7390:12 7406:2 7418:7 four 7360:5 7367:17 Frame 7428:25 Frankly 7414:4 friend 7357:9 7389:12 7412:11 7424:18 7426:4 friends 7431:10 friend's 7415:16 front 7357:16 7369:12 7377:25 7383:18 7391:5 7407:2 7417:25 7424:14 7425:19 7426:3,6,9 fruitfully 7430:22 full 7412:5 7430:11 7435:1 fuller 7410:13,13 fully 7418:6 function 7414:14 further 7364:6 7389:8 7405:23 7418:5 7420:6 7430:14 future 7396:19 7408:10 7436:9 F3 7425:19</p>	<p>getting 7376:12 gist 7410:22 give 7358:10,11 7361:13,18,19,19 7362:1 7365:15 7367:9 7378:2,11 7379:2,8 7380:16 7386:5 7391:17,25 7392:13,15 7395:9 7398:1 7400:2,9,21 7401:15 7402:3,11 7403:16 7404:7 7416:6 7419:18,24 7421:17 7422:8 7433:18 7436:10 given 7361:22 7372:14 7377:7 7385:24 7392:6 7397:24 7406:11 7415:4 7416:10,18 7421:1,1 7430:11,24 7432:8 7436:5,12 gives 7394:7 7403:13 7405:4 giving 7361:25 7372:23 7392:25 7400:12 7411:25 go 7365:14 7370:8 7372:18 7389:22 7406:4 7416:1,15,19 7422:6 7424:22 7433:21 7435:24 goes 7402:9 going 7357:7 7370:3,5 7370:6 7374:16 7375:2 7376:12 7378:17 7379:16 7380:18 7382:10 7402:5,11 7409:4 7412:13 7413:6 7415:12 7416:4 7419:19,20,21 7422:22 7427:16 7430:15 7431:7 7433:21 7434:24 7435:2,8,9,24 7436:9 great 7431:6 greatest 7412:19 greatly 7418:4 ground 7422:22 group 7421:8 7424:16 growth 7397:23 guarantees 7407:21 7409:16 7411:20 7413:11 gun 7422:2 7427:18 gunshot 7385:6 7422:12 gunshots 7385:7,9 7418:7</p>	<p>handled 7372:14 handling 7380:11 hands 7393:5 7404:18 hang 7414:5 happened 7384:17 7414:16 7423:13 happening 7375:5 7436:3 happens 7392:21 7401:3 7423:11 happy 7400:4 7436:18 hard 7366:6,14 hasn't 7430:8 haunches 7424:3,12 haven't 7390:17,19,20 7392:18 7394:23 7395:1 7431:11 7436:5 Haysom 7357:7,14 7358:7 7359:5 head 7359:6 7360:18 7361:6 7362:10 7372:16 7394:3 7404:11 7414:5 7422:13,16,17,20,25 7423:3,8,19,23 7424:5,12 7425:7 headed 7357:19 7367:17 7395:21,25 7417:15 7432:5 heading 7379:15 7418:15 hear 7359:15 7371:11 7376:18 7381:25 7383:1 7397:4 7417:7 heard 7382:1 7385:24 7409:11 hearsay 7363:3 heed 7375:5 held 7424:23 help 7369:15 7377:9 7412:7,14 7413:6 7415:12 7431:7 helpful 7365:8 7400:19 7402:23 7417:22 7418:24 7429:2 helps 7410:15 7414:24 Hemraj 7366:21,25 7367:4 7389:19 7405:17 7419:3 high 7360:11 7390:11 7418:9 highly 7402:9 7408:11 history 7406:5,8 hit 7386:24,25 homework 7395:2,5 homicides 7404:20 honesty 7408:8 hope 7394:8 7402:18 hoping 7376:17 hospital 7389:23 hospitals 7383:6 hour 7393:25 housekeeping 7434:2 HSRC 7396:17,18 human 7358:1 7374:1</p>
<p style="text-align: center;">F</p>				
<p>F 7431:18 face 7369:5,6 7386:7,7 7386:16 7422:4,13 faced 7400:22 7421:11 7421:11 faces 7369:11 facie 7387:7 facing 7396:11 fact 7362:9,25 7365:23 7368:21 7378:13 7390:2 7391:14 7396:19 7397:11 7398:7 7401:19 7404:20 7405:7 7409:1 7410:11 7412:22 7413:23 7427:13,15,16 7436:14 factor 7384:21 7405:7 factors 7386:23 facts 7362:22 7387:13 7388:5 7397:12 7398:5,10 7401:15 7404:20 7414:19 7433:17,18 factual 7362:17 Fahrumu 7391:4 failing 7421:7 fair 7378:11 7393:7 7426:21 fairly 7378:21 7380:16 7392:23 7400:1 fairness 7418:13 false 7428:3 fantastic 7403:22 far 7370:7 7388:9,12 7388:12 fast 7400:24 fatal 7426:14 fault 7368:11 7408:1</p>	<p>FFF19 7357:8,11 FFF2 7408:20 7409:4 7409:22,23 7411:2,22 FFF20 7367:10 7370:13 7377:21 7379:25 7390:12 7391:1 7394:20 7395:2 7417:5,8 7420:2 7425:16 7426:13 FFF21 7377:15,22 7394:18 7395:21 7415:19 FFF22 7380:5 7416:18 7417:2,3,9,12,14 7431:13,19 FFF3 7407:1,2 7409:3 7409:19 7411:3,22 FF2 7425:19 FF22 7425:16,19 field 7382:21 figure 7401:24 7405:4 7405:11,12,24 7432:8 figures 7386:8 7387:20 7388:17 7389:12,15 7404:1 7406:21 7432:23 7433:2 final 7379:17 7409:17 7411:2 7412:21 finally 7402:20 7415:2 find 7385:10 7403:3 7413:20,22 7415:22 7431:25 finding 7406:16 7419:5 7419:23 findings 7367:15,24 7406:22 7432:1,6 finds 7406:17 finish 7369:5 finished 7375:8 7435:22,23 fire 7385:18 7386:23 firearm 7390:11 7424:13 firearms 7357:20,22,25 7362:4 fired 7362:25,25 7383:14 7387:14 7388:10,11,14,15,19 7388:20 7389:5 fires 7394:9 firing 7385:7,9 first 7357:18 7358:9 7360:5 7391:18 7397:19 7399:25 7400:23 7401:25 7410:1,17 7411:22</p>	<p>gatherings 7357:23 generalised 7365:7</p>	<p style="text-align: center;">H</p> <p>hamper 7392:23 hand 7427:22,22 handed 7357:6 7358:13 7394:18</p>	

<p>hurt 7422:7 hypothesis 7366:15</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>idea 7427:17 7428:3 identified 7396:9 identify 7406:15 7414:6 IFF 7431:15,16 IFF22 7431:12 IFS 7396:9 ignore 7427:13 illustrates 7428:6 illustration 7358:4 immediately 7375:12 7424:17 imminent 7421:15 7430:17 implication 7382:7 7405:25 7430:8 implied 7382:2,8 importance 7381:11 7382:14 7383:13 important 7359:1 7387:13 7399:11 impression 7364:3 7403:13,17 improperly 7413:5 inaccuracies 7399:16 inadvertence 7414:2 inaudible 7379:12 incident 7358:19 incidents 7396:14 includes 7388:9 7432:20 including 7357:22 7374:5 7376:12 7381:11 7383:13 7386:23 incontrovertible 7427:16 incorrect 7401:20 7416:9 7430:24 increased 7396:4 incurring 7387:6 independent 7360:17 indicate 7360:22 7363:9 7388:3,13 7404:21 7426:17 7434:4 indicated 7361:1 7424:12 indicates 7405:10 indicator 7397:22 infer 7387:10 inference 7383:17,18 7383:19 7387:15 7388:4 7430:10 inflict 7357:21 information 7362:23 7388:12 7397:9 7404:10 7418:17 7419:8,10 informed 7364:4 7384:11 7391:19 informs 7425:10</p>	<p>initial 7411:4 initially 7409:3 injured 7381:9 7382:14 7383:4 7385:5 7389:13,17,17 7390:3 7390:3 7422:1 7426:3 7432:15 injuries 7360:13 7380:22 7381:10,21 7382:16 7383:9,11 7384:1 7385:7,8,15 7386:7,16,20 7387:9 7388:4 7393:16 7421:23 7426:14 7431:21,22 7432:12 7432:13,22 injury 7367:19,22 7385:14 7387:20 innocent 7406:7 input 7374:15 inquest 7406:16 insofar 7399:16 7404:20 7428:11 7434:16 instance 7372:14 7375:10 7397:21 7398:5 7401:20 7426:1 instances 7423:9 7424:7 Institute 7395:24 7396:20 7398:22 7414:18,22 7415:5 instructed 7375:12 instructions 7400:10 7400:12 insufficient 7361:24 integrity 7397:16 7408:8 intend 7377:3 intended 7412:21 intentional 7360:23 7363:9,11 interested 7361:11 7414:4,6 interesting 7404:14 interfere 7370:15 internal 7412:15 internally 7401:13 interpret 7371:20 interrupt 7379:21 7398:15 interruption 7408:3 interviewed 7396:18 intimidatory 7377:2 intricate 7392:2 investigation 7380:22 involved 7398:6 IPID 7380:24 7381:3 7396:3,5 7404:3,8,9 irrelevant 7408:4 isn't 7400:9 7406:19 7427:13 ISS 7415:1,23 7416:7 issue 7372:17 7403:24 7423:3 7435:20</p>	<p>issues 7372:21 7373:16 7392:4 7397:21 7412:4 7415:24 item 7368:18 it's 7392:20 7393:3 7395:6,6 7399:5 7400:7 7402:4 7403:10 7404:5,17,17 7405:5,19 7406:13,14 7408:11 7410:14,17 7413:6,20 7416:19 7417:2,11,14 7418:15 7419:18 7420:17 7422:8,9 7426:25 7427:21 7429:12 7430:7,9 7431:2,20 7432:5,7 7433:4,18 7433:20 7434:15,16 7434:16 7435:7 7436:8,16 iv 7367:17 I'd 7387:25 7398:12 7400:4 7404:12 7407:23 7421:16 I'll 7402:10 7415:16 7423:21 I'm 7387:1,12,16 7390:20 7391:22 7392:19,20 7393:5 7397:4 7402:11 7414:4,6 7415:11,12 7416:23 7417:6 7418:23 7419:17 7420:24 7421:15 7422:2 7423:10,20 7426:21 7427:23,24 7427:24 7428:1,9 I've 7395:12 7410:18 7416:7 7429:16 7435:23</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>Ja 7372:12 7391:11 7395:15 Jazeera 7415:17 job 7372:4 7373:1 joined 7364:13,16,18 joint 7429:21 judge 7362:6,20 7363:6 7363:10 7372:12 7382:10 7399:19 7400:5,13,24 7401:14 7406:3 judgements 7374:2 judges 7371:5 judging 7383:25 judgment 7372:13 7429:24 judgments 7371:18 7372:13 jumps 7422:5 jurisdictions 7403:23 justifiable 7404:20 justified 7360:19 7421:17</p>	<p style="text-align: center;">K</p> <hr/> <p>Kannemeyer 7358:13 7358:18 keep 7372:4 keeps 7404:10 kept 7383:8 7412:1 kill 7357:14 7422:7 killed 7358:20 7365:1,1 7365:19 7366:6 7403:24 7406:17 killling 7360:23 7422:16 7423:1 killings 7363:9 7426:23 kind 7365:8 7386:25 7388:22 7400:1,21 7403:6 7412:15 7419:24 kinds 7372:5 Klatzow 7360:17 knees 7424:4,19,21 knew 7362:4 7365:2,9 7400:10 know 7361:7 7362:20 7362:21 7363:1,2,4 7363:18 7364:19,24 7365:25 7366:19 7379:11 7380:17,21 7381:4,6 7382:18,19 7383:3 7384:3 7386:10 7394:1,1,5 7396:20 7397:22 7399:22 7400:11,15 7400:17 7402:19 7403:21 7411:5,6,7 7411:24 7412:11 7413:16 7415:15 7416:9 7418:21 7422:2,22 7423:23 7427:8 7430:13 7431:5,15 7433:21 7434:23,25,25 knows 7378:15 7427:18 kraal 7421:3</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>L 7362:22 7388:2 7393:20 7424:16 7429:5,7,9,11,14 lack 7418:20 large 7414:7 latest 7401:1 7411:8 law 7360:9 7381:16 7407:12,17 7408:10 7408:12 7421:15 laws 7371:21 lawyer 7357:14 7423:10 lawyers 7371:19 lead 7363:18 7370:7 7375:18 7407:11,17 7414:21 leadership 7407:15 7408:6 leading 7416:12 leant 7424:25</p>	<p>learn 7364:8,10 learned 7357:8 7369:21 7389:12 7412:11 7415:16 7421:18 7424:18 7426:4 7431:10 leave 7387:19 7389:3 7401:6,7 7412:12 7420:1 lecture 7361:13,20 led 7357:25 7435:9 left 7407:16 7410:10 7411:14,17,23 7413:2 leg 7360:14 legal 7366:22 7367:11 7370:12 7372:20 7373:13,13,14 7377:21 7379:18,25 7381:17 7390:23 7402:14 7412:9,10,12 7412:16 7413:14 7416:22 legislation 7434:8 legs 7369:11 lengthy 7380:16 lesser 7390:1 lethal 7388:6,9 7393:14 letter 7402:7,8 7423:6 let's 7412:16 7435:1 let's 7361:13 7364:6 7370:17 liability 7406:1,2 Licence 7357:14 life 7358:2 7374:1 light 7380:8,10 7381:13 lights 7392:8 7395:21 line 7387:13 7431:18 lines 7370:2,2 7398:2 lion 7422:4,5,5,6,8 list 7425:24 lists 7367:15 litigation 7401:25,25 7402:13 little 7376:18 7394:1,6 7415:11 lived 7381:22 7393:16 long 7395:6 7401:9 longer 7394:6 look 7359:13,17,21 7366:25 7367:6,10,24 7370:14 7372:16,17 7373:2,17 7374:16,19 7386:6 7388:1 7391:23 7392:13,18 7393:13 7397:14,20 7397:22 7403:10,12 7404:9,17 7405:3,6 7405:23 7406:4,8,8,9 7413:3 7425:15 7426:13 7430:25 looked 7373:23 7405:21 7410:18 looking 7373:21 7390:18 7392:8 7420:15 looks 7371:17</p>
--	--	--	---	--

<p>lordship 7414:12 loss 7360:15 lost 7420:16 lot 7370:21 7391:23 7401:11 low 7424:4 lower 7423:6 7426:18 7431:23 7432:14</p> <hr/> <p style="text-align: center;">M</p> <p>machine 7369:16 magistrate 7406:16 MAHLANGU 7364:11 7420:9,14 main 7367:18,18,22 majority 7365:18 7366:5 7367:23 7368:4,8,13,13,16,23 7368:24 7432:16 making 7371:24 7384:20 7387:15 7405:5 7426:3 management 7374:10 mandate 7407:14,14,19 7408:6 manifestly 7434:10 March 7357:1 7377:23 7395:23 7398:23 7408:24 7409:5 7411:1,4 Marikana 7362:21,22 7367:11 7374:8 7390:25 mark 7389:3 marked 7380:8,10 massacre 7380:23 material 7412:17 7429:5 7433:2 7436:10 matter 7362:13 7370:7 7372:15 7373:14,15 7373:18,19 7375:3 7376:9,14 7379:13 7381:15 7382:21 7383:15 7391:20 7394:3 7405:14 7406:18 7409:8 7410:11 7413:14,15 7414:3,12,21 7416:13 7416:14 7421:25 7430:9,22 7433:5 7435:24 matters 7369:24 7391:24 7393:22 7396:24 7412:17 maximum 7425:8,11 7432:17 meagreness 7418:19 mean 7375:4 7387:1 7402:20 7405:18 7411:12 7422:19 7431:13 meaningful 7428:19 7429:3 7432:24 media 7404:11 medical 7365:21</p>	<p>7366:22 7367:11 7369:23,24 7370:12 7379:17,25 7390:23 medico 7416:21 medico-legal 7416:25 meet 7392:22 member 7412:11 7414:3 7421:15 members 7362:14,24 7368:25 7396:8 7420:20 7421:21 memory 7421:6 men 7408:7 mentioned 7415:18,21 7415:24 7426:10 7436:6 mentioning 7415:25 merely 7431:9 messages 7404:6 met 7422:21 metres 7428:23 microphone 7369:16 7381:13 7386:14 mid 7401:1 middle 7360:20 mightn't 7406:15 million 7402:8 millions 7403:23 mind 7360:23 7361:25 7380:19 7393:12 7395:5 7398:9 7406:19 7425:2 mine 7367:11 7390:25 miners 7385:5 7390:11 7420:3,7 7422:11,11 7426:13 minimum 7425:7,12 7432:17 minor 7393:15 7413:15 minutes 7395:8 7415:22 7433:21 misconception 7364:5 misinterpreted 7402:16 misleading 7386:16 7403:13 7404:17 7405:6,17 7421:19 missiles 7418:18 mistake 7408:23 7412:9 7413:14 modification 7383:2 modify 7389:1 Mohlaki 7428:22 moment 7370:11 7394:10 7398:16 7427:8 money 7401:20 7402:5 morning 7365:15 7394:18 7398:24 7436:19 move 7364:6 7414:8 7425:2 moves 7388:17 moving 7390:20 Mpofu 7410:16,17 multiple 7373:21</p>	<p>multiplicity 7432:22 munitions 7388:5,7,19 muscle 7360:16 mustn't 7405:13</p> <hr/> <p style="text-align: center;">N</p> <p>Naidoo 7379:19 7391:4 7419:20,21 national 7357:3 7373:6 7390:22 7393:24 7394:7,13 7395:13 7402:1,12,17 7416:3 7431:24 7435:4 nature 7361:2 7365:16 7380:14,22 7381:10 7381:21 7382:13 7383:2,9 7384:1 7399:5 7403:17 near 7358:19 7391:5 7402:21 7405:12 7429:19,22 necessarily 7373:4 7375:18 7402:20 7406:14 7416:13 7422:6 necessary 7361:20 7372:7 7373:5 7376:16 7392:12 7400:10 7413:23 7425:13 need 7392:3 7394:1,4 7397:20 7398:1 needs 7379:3 negate 7426:7 7433:1 negative 7426:18 never 7360:19,23 7395:5 7398:9 nevertheless 7387:20 7410:8 new 7401:9 news 7384:25 newspaper 7372:1 Nicolas 7357:7,14 noble 7414:14 non 7393:14 non-direction 7418:6 note 7398:12 7425:22 7432:19 7433:1 notes 7418:3 7419:14 notice 7375:12 7420:19 nub 7387:4 number 7358:19 7364:25 7367:12,25 7367:25 7368:6,18 7372:13 7374:25 7379:24 7385:25 7386:20,22 7387:8,18 7390:1 7397:13 7398:5,6 7402:10,15 7402:15 7403:24 7404:2,18 7405:2,12 7405:21,22 7408:20 7426:6 7429:17 numbering 7410:25 7411:6 numbers 7367:10</p>	<p>7389:2 7394:22 7425:24 7433:13,14 nursing 7419:14</p> <hr/> <p style="text-align: center;">O</p> <p>oath 7357:3 7394:13 7412:25 7413:24,24 7434:14 object 7420:22 objection 7369:7 7387:7,23 obliged 7382:25 obliges 7383:23 observation 7418:20 obviously 7379:24 7400:9 7401:2 7405:11,14 7406:23 7427:19 occasion 7435:2 occasional 7432:22 occur 7415:4 7421:23 occurred 7405:8 occurs 7387:1 offences 7396:9 offender 7406:15 office 7372:15 7373:24 7391:25 7392:11 7394:3,9 officer 7430:17 officials 7396:3 Oh 7407:24 7409:6 7420:14 Okay 7358:16 7378:5,7 7386:3,11 7390:24 7408:2 ombudsman 7373:3,5 omission 7414:1 oneself 7425:14 ongoing 7391:24 open 7372:5 opened 7396:2 operation 7393:15 7418:3 7424:3 operational 7407:15 7408:6 Operator 7377:5 operator 7359:25 7374:11,17 7383:16 7418:9 7425:9 opinions 7397:11 7398:9 7414:19 opportunity 7378:11 7379:3 7380:17 7392:13 7394:17,19 7401:5 7404:12 7416:10,17,19 opposed 7388:16 order 7381:8,21 7382:15 7408:11,13 7409:13 7411:6 7413:13 7421:2 7423:8 7426:24 7427:5,6 7428:15 orders 7385:18,20 7423:5,17 7426:17,22 7428:9,10 7434:7</p>	<p>ordinary 7393:25 organisation 7407:11 7407:17 original 7414:12 ORS 7372:18 7373:18 ought 7374:3 outcomes 7374:16 overcome 7390:1 overlap 7425:24,25 7426:4 7432:22 overnight 7436:13 overwhelming 7419:16 owe 7399:11,12 7400:8 o'clock 7436:19</p> <hr/> <p style="text-align: center;">P</p> <p>page 7360:5,5 7379:14 7385:11,13 7390:12 7391:9,9,14 7395:6 7395:25 7407:2 7411:3 7417:14,15,15 7418:24 7419:1,2,4 7420:3,9,10,11,14 7422:10,10 7425:19 7425:20 7426:13 7431:19,25 7432:4,10 pages 7390:20 7417:16 7432:8 paid 7402:5 7403:3,5 7403:16 paragraph 7357:19 7360:5,6 7374:6,22 7391:14 7395:25 7407:5,6,9 7408:16 7409:17 7414:9,13 7415:19 7417:11,13 7417:15 7418:14,24 7419:4 7422:11 7425:22 paragraphs 7407:1 pardon 7373:1 7376:3 7381:1 7407:24 7419:20 Parliament 7379:12 part 7357:14 7369:12 7381:7 7383:12 7389:20,23,25 7391:5 7396:6 7405:1 7421:8 7422:17 7423:7 7424:3 7426:18 particular 7362:12 7371:1,17 7379:4,5 particularise 7415:10 7415:14 particularly 7358:17 7390:7 7393:17 7399:25 7414:16 7416:18 parties 7434:1 7436:4,4 7436:9,16 parts 7426:16 passage 7379:3,4,5 7380:15 7391:12 7392:18 7393:20 7408:21 7409:2 pathologies 7381:18</p>
--	---	---	---	---

<p>patients 7419:10 patrols 7358:3 paying 7405:25 peaceful 7407:22 7409:16 7411:20 7413:11 pedestrian 7421:25 people 7358:19 7361:9 7363:4 7365:1,18 7366:5,13 7369:4 7381:9 7382:16,22 7383:3,15 7385:4,25 7388:4,11,15,20 7389:13,13,17,20,22 7390:3 7393:16 7396:9 7398:2 7402:19 7403:24 7404:8 7418:10 7421:1,10 7422:16,20 7422:25 7424:7,17,25 7425:17 7426:6,15 7432:15 7433:16 pepper 7391:18 percentage 7386:21 perfectly 7370:1 perform 7414:15 performed 7367:16 period 7358:14 7374:19 7403:15 7405:10 persist 7426:11 person 7423:3,8,19 7424:11 personal 7403:21 7427:23 persons 7367:16 person's 7414:6 persuade 7413:7 Perumo 7379:20 photograph 7429:19,25 photographic 7430:16 photographs 7429:9,13 7429:15 physically 7363:3 picture 7403:5,17 pictures 7424:6 7429:15 7433:15 pieces 7395:4 pig's 7360:18 Pillay 7357:10 7377:16 7377:17 7408:25 7409:11 7410:23 placed 7377:12 placing 7408:9 played 7393:15 please 7359:16 7364:6 7365:20,22 7366:2 7369:12,19 7371:12 7376:15 7379:16 7383:19 7389:18 7392:19 7394:4 7395:25 7397:5 7407:9 7413:7 7423:16 7426:13 7430:1 pleased 7364:5</p>	<p>point 7364:2 7371:24 7374:17,20 7380:13 7380:19 7387:1,4,16 7387:25 7388:15 7390:8 7403:9,10 7405:5,16 7408:25 7410:15 7413:9 7415:2 7420:11 7425:1,12 7433:12 7434:17 7435:22,23 points 7392:24 7401:3 7404:15 policeman 7369:6 7406:18 7424:13 7427:15,18,19 7429:19,20 7430:1 policemen 7358:3 7369:4 policewoman 7406:18 police's 7427:3 policing 7357:25 7395:21 policy 7362:13,13 population 7396:16,17 portfolio 7377:22 7395:22 7398:18 7399:7,10,12 7416:7 portion 7360:20 poses 7359:20 position 7369:25 7374:18 7398:13 7420:23 possession 7365:22 possibilities 7389:25 possible 7372:2 7377:5 7383:19 possibly 7365:24 7378:21 7406:1 7419:21 post 7374:18 7398:25 7399:2 post-mortem 7434:4 power 7379:15 7394:24 7396:1 practice 7358:2 7371:21 praised 7364:21 7365:2 praising 7364:20 7414:14 precious 7358:1 precisely 7371:24 premature 7435:8 prepare 7369:9 7393:13 prepared 7366:4,7,12 7366:15 7375:5 7390:4,15 7400:2,12 7410:12 7412:24 7419:24 presence 7429:21 present 7358:5 7359:6 7403:5 presentation 7377:22 7378:13 7395:22 7398:21 President 7413:21</p>	<p>press 7401:12 7403:18 presumably 7372:1 7373:5 7399:11 7404:24 presume 7389:7 7399:4 7400:1 prevail 7359:9 prevent 7434:24 previous 7377:20 previously 7413:1 prima 7387:7 principle 7359:4,5 prior 7435:2 private 7365:6 7421:14 7427:3 probability 7386:20 7418:10 7419:16 probably 7392:9 7400:20 problem 7357:19 7358:6,23,23,24 7359:7,11,19,23 7370:16 7376:25 7379:15 7393:2 7394:23 7396:1,16 7401:9 7403:17,18 7415:16 problems 7376:21 7392:11 7394:2 7412:3 7415:22 procedure 7418:3 proceed 7357:4 7369:19 7382:25 7395:19 7431:11 proceeded 7431:2 proceeding 7388:23 proceedings 7357:1 7398:17 7412:15 process 7400:25 7412:3 processes 7384:4 procurement 7372:14 produced 7429:9 produces 7360:13 professional 7378:22 professionalism 7408:8 Professor 7360:20 promised 7401:13 property 7407:13,18 proposition 7369:21 7421:17 protecting 7407:12,18 protester 7429:19,21 7430:1,18 protestor 7427:15 protestors 7363:19 protests 7407:22 7409:17 7411:21 7413:12 proved 7406:7 provide 7428:10 provided 7392:7 provincial 7371:7 provisional 7418:8,21 7419:7,23,24 proximity 7430:3 public 7395:8 7408:13</p>	<p>published 7401:10 punish 7382:16 punishment 7381:10 pure 7418:20 purport 7414:19 purpose 7365:6 purposes 7365:5,17,23 7366:4,7,15 7369:3 pursuant 7407:13,19 push 7430:14 put 7366:3 7368:7,15 7369:21 7370:1,6,21 7372:9 7375:21,23 7378:3,24 7379:1 7385:5 7392:24 7393:23 7398:10 7411:23 7414:17,19 7421:9 7428:2,6 7430:15 7431:9 7434:3,8,19,21 puts 7387:4 putting 7366:22 7369:22 7370:2,11 7392:17,23 7393:8 7421:18 7424:12 7434:13 7435:5</p> <hr/> <p style="text-align: center;">Q</p> <p>qualification 7365:8 qualified 7419:5 qualify 7402:10 quality 7392:5 quarrel 7410:14 quarter 7393:25 7394:6 questions 7366:4 7370:1 7379:17 7388:22 7391:18 7395:10 7403:6 7425:2 7428:2 7432:11 7434:15 7435:19 quietly 7395:7 quite 7359:3 7387:2 7390:5 7399:7 7401:22 7403:5,18 7405:4,11 7410:10,15 quoting 7407:25,25</p> <hr/> <p style="text-align: center;">R</p> <p>raise 7376:16 7377:1 raised 7371:15 7390:8 7392:4 7397:21 7412:4 raising 7372:17 7377:7 rands 7396:12 range 7364:1 7389:8 read 7357:18 7360:8 7363:8 7374:2 7378:11,16,20,21 7379:9,16 7380:17 7391:18 7392:3,6,18 7394:8,8,21,23 7395:1,7,9,12 7397:11 7401:11 7404:4,16 7407:9</p>	<p>7408:22 7409:20 7415:19 7416:17,20 7417:12,19 7418:14 7418:20,24 7430:25 7433:13,14 7436:7 readily 7357:21 reading 7394:17,19 7408:22 7409:1,7 7420:10 reads 7432:20 ready 7392:14 7395:10 7395:13,17 7400:15 7400:18 really 7365:5 7366:19 7387:13 7398:13 7406:4 7414:10 7416:15,16 7427:21 7431:7,8 7432:7 rear 7367:21,22 7368:1 7368:6 7417:24 7418:8,12 7419:8,13 7420:6,8,18 rearing 7404:10 reason 7361:17 7396:23 7398:10 7399:23 reasonably 7401:19 reasons 7415:5 reassess 7376:2,4,11,11 reassessment 7374:9 7375:15,16,17 rebutted 7401:19 receive 7402:7 recommendations 7374:19 7376:11 Reconciled 7367:18 record 7369:17 7412:8 7417:3 7424:22 recorded 7385:6 records 7363:11 7379:19,23 7380:4 7383:8 7385:2 7417:21 7418:4,6 7434:4 record's 7417:18 recruiting 7358:2 refer 7357:13 7367:7 7373:5 7379:22 7380:15 7395:20 7406:25 reference 7410:19,21 7412:14 7413:20 referred 7372:6 7391:13 7393:20 7409:19 referring 7391:14 7424:19 refine 7428:16 reflected 7402:2 reformulate 7375:21 7387:3 regard 7371:5 7385:5 7387:8 7398:4 7399:4 regarding 7404:23 7420:2 Reggie 7379:20</p>
--	---	---	---	--

<p>regular 7385:7,9 related 7358:18 7373:14 7396:2,8 relates 7373:19 relating 7391:23,24 relation 7358:5,18 7370:22 7373:25 7396:12,13,13 7397:14 7401:17 7403:21 7413:13 7432:14 relevant 7372:6 7382:16 7401:4 7406:19 7410:6 rely 7379:5 relying 7366:22 remains 7436:17 remarks 7419:4 Remember 7416:3 removed 7410:22 repeat 7368:25 7372:11 7374:13 7382:24 repeatedly 7375:3 report 7358:13,18 7366:19,22 7367:11 7370:4,12 7377:21 7379:18,18,23,25 7380:3 7390:21,23 7391:4,5 7392:3,6 7396:11,25 7401:25 7401:25 7402:6,11,14 7402:15 7404:8 7416:21,24 7425:16 7426:5 reported 7396:5 7404:3 reports 7365:21 7385:10 7403:18 7434:4 representative 7403:15 7419:15 reproduced 7429:9 request 7392:22 requested 7402:1 Research 7396:9 reservation 7397:6 7433:1 reservations 7397:1,7 resort 7385:18 respect 7374:1 7376:21 7378:17 7382:23 7384:19 7385:4 7386:19 7389:11 7403:20 7412:18,19 7413:9 7418:1 7419:10 7428:1 7431:6 7433:2 respective 7371:3 7372:21 respond 7397:18 7401:14,24 7403:14 7404:13 7414:24 responded 7397:19 response 7400:2,12,20 7400:25 7416:4,8 7419:24 7430:19 responses 7392:5</p>	<p>responsibility 7409:10 7410:12 rest 7377:10 7392:19 result 7360:14 7385:3 7401:25 7426:14 7432:24 results 7381:16 resume 7436:18 resumes 7357:2 7394:11,12 revealing 7360:21 revert 7399:6 reviewed 7376:1 reword 7375:22 rhetorical 7434:15 rifle 7360:6 rifles 7358:4 7360:9,10 7360:21 right 7358:2,22 7359:3 7380:11 7391:15 7400:9 7413:7 7430:11 7433:17,25 rights 7358:2 7407:20 7407:21 7409:15,16 7410:19,22 7411:19 7411:20 7413:10,11 rise 7403:13 7405:5 robber 7427:17 role 7393:15 rolling 7384:5 Roman 7367:17 round 7433:23,25 7434:2 Rover 7374:7,12 7375:11,14,15,24,24 rows 7432:24 rubber 7385:16,19 7386:1,4,8,11,23 7387:10,11,15,19,19 7388:7,14,19 7389:2 7389:15,22 7390:15 7393:14 ruled 7373:16 7414:13 run 7421:3 rush 7420:20 R1 7360:6,9 7363:22 R1's 7360:24 7361:8 7362:25 7363:4 R4 7360:6,9,18,21 R4's 7360:24 7361:8 7362:25 7363:4,5,22 7364:4 R5's 7362:25 7363:4,22</p> <hr/> <p style="text-align: center;">S</p> <p>S 7385:20 safer 7388:21 sample 7419:15 SAPS 7374:8,19 7375:12 7379:15 7394:23 7396:1,7,11 7397:8 7407:13,19 satisfy 7389:12 saw 7401:9 7422:2,20 7424:6 7429:23,25 7430:3</p>	<p>saying 7362:6 7363:10 7366:17 7372:12 7375:7 7382:7 7392:18 7400:7 7406:21 7412:1 7414:25 7422:1 7426:24 7428:9 says 7368:18 7371:19 7374:7 7391:4 7402:7 7409:11 7429:13 say-so 7384:7 scared 7396:19 scene 7362:25 7388:7 7388:17 7393:16,17 scenes 7388:5 scheduled 7392:14 scientifically 7382:21 seated 7400:21 second 7379:22 7395:25 7404:15 7413:2,3 section 7372:4,6,25 7373:7 7391:9 7392:8 7408:20 Security 7395:24 7396:20 7398:22 7414:18 see 7360:6,7 7367:19 7367:25 7379:14 7401:24 7404:4 7405:24 7409:6 7410:10 7412:2 7422:5,14,15 7425:16 7433:20 7435:1 7436:5 seen 7363:3,12,12 7366:10,18 7384:22 7384:24 7390:20 7399:25 7427:14,22 7427:22 7429:4,6,8 7429:13,14,15,16,18 7429:21 7431:11 selected 7367:23 7432:1,5 self 7365:6 7381:9,12 7381:23 7382:15,17 7383:14 7384:7 7426:8,19,23,24 7427:2,6,9,9,20 7428:3,10,11 self-defence 7421:11,22 Semenya 7363:21 7364:1 7369:7,13,16 7369:18,20 7378:7,9 7381:15 7382:20 7386:13,15 7387:23 7387:24 7389:12 7412:6,8 7413:18 7415:7 7418:13 7420:22 7421:4,13 7424:15 7425:21 7428:21 7430:12,25 7432:18 7434:11 Semenya's 7370:4 senior 7414:1 sense 7370:8 7386:19</p>	<p>7387:15 sensible 7370:10 sent 7436:4 sentence 7363:8 separate 7379:24 sequence 7380:10 serious 7395:4 7399:8 7403:18 7415:22 serve 7408:7 serves 7358:4 service 7362:10,14,24 7373:1 7399:6,13 7400:8,9 7408:9 services 7373:17 serving 7407:12,18 set 7415:5 settle 7405:20 seven 7367:1,4 7368:1 7368:5,18 severe 7360:13,16 shame 7414:5 sharp 7385:8,9,19 7386:2,9,25 7387:9 7387:11,14,21 7388:14 7389:13,14 7389:18 7390:3 she's 7392:14 shoot 7421:16 7423:6,6 shooting 7382:15 7396:14 7422:15,25 7423:2,18 7424:17 7425:6 7426:18 7428:3,10 shoots 7427:19,19 short 7364:11 7389:7 7417:11 7427:14 7429:25 7431:18 shorten 7398:17 shot 7358:3 7360:13 7361:10 7365:19 7366:6,13,14 7367:2 7367:25 7368:6,13,16 7368:18 7369:2,5 7381:23 7382:15 7383:16,17,18 7386:5 7386:12 7389:22 7390:11 7404:25 7417:12,16,23,24 7418:1,8,10,11 7419:12,13 7420:5,6 7420:7,21 7421:10,22 7422:20 7423:7 7424:5 7425:17,18 7426:3,6,16 7429:20 shotguns 7357:22 shots 7365:20 7367:21 7383:14 7387:14 7388:10,10,11 7389:14 7390:1 7420:13 7433:12 shouldn't 7419:17 show 7364:25 7386:18 7386:19 7387:20 7402:25 7425:18,23 7430:17 7434:6 shows 7424:16 7426:1</p>	<p>7430:4 7431:21 side 7365:19 7368:12 7368:14,16 7369:3 7383:12,19 7415:11 7417:25 7419:21,22 7420:6,7,18,21 7421:2,14,16,23 7422:1 sides 7368:18 signature 7413:25 signed 7409:9 7410:7,8 7411:7 7412:1 significance 7410:9 7411:13 significant 7368:6 7405:4 similar 7389:15 simple 7397:22 simply 7362:16 sincerity 7396:24 single 7427:13 sitting 7372:19,20 7375:7 7400:21 situation 7358:5,15 7359:9 7374:10 7423:21,22 7428:8,17 7434:6 situations 7357:25 six 7367:1,4 7386:4 7390:14 7418:1 7425:16 7431:21 skip 7360:19 slide 7388:1,3 7424:16 7424:16,25 7429:7,11 7429:11 slides 7388:3 slightly 7381:21 7382:24 small 7414:7,12 7426:6 society 7408:10 solve 7393:2 somebody 7425:7,22 soon 7375:11 7378:21 sorry 7358:21 7359:15 7368:14 7371:11 7372:25 7374:21 7379:21 7388:13 7397:4 7399:1 7407:2 7408:1,1 7410:17 7416:23 7417:6 7418:23 7431:17 7432:3 sort 7364:9,11,12 7370:14 7388:2 7416:16 7424:24 sorts 7372:2 sounds 7414:7 7419:18 sources 7372:2 South 7357:15,20 7358:6 7395:22 7396:18 7408:11 7414:11 so-called 7381:12 space 7427:14 speak 7359:16 7371:12 7376:18,25 7397:5</p>
--	---	--	---	--

<p>speaks 7426:5 special 7372:25 specifically 7409:19 speed 7436:7 spoken 7433:14,15,16 7433:16 SSG 7358:3 stab 7422:5 stabbed 7429:20 stage 7361:11 7406:20 7427:8 7431:3 7434:11 7435:25 7436:1 stand 7414:21 standing 7385:20 7422:20 7423:17,23 7424:23 7426:17,22 7426:24 7427:4,6 7428:9,10,15 7434:7 stands 7430:11 start 7387:15 started 7411:25 startling 7403:5 7405:2 stated 7398:5 7399:16 statement 7364:20 7382:1,6 7407:1,3,4 7408:18,23 7409:2,4 7409:8,9 7410:8,21 7411:1,2,4 7412:1,2 7412:21,24 statements 7410:6,18 7414:18 7415:23 statistic 7405:9 7406:19 statistical 7398:1 statistics 7397:2,18 stats 7397:17 7432:20 steps 7383:25 Steve 7379:19 stop 7368:2,3 7375:12 7395:8 7413:4 7425:3 stopping 7415:12 storm 7414:7 story 7381:12 straight 7422:21 7424:8 straightforward 7387:2 striking 7360:12 structure 7370:15,24 7371:2,4 7372:19,20 structures 7408:7 studies 7370:24 7395:24 7396:20 7398:22 7414:19 study 7374:1 7379:3 7436:12 stuff 7369:24 subject 7357:8 7388:24 7416:2 submitted 7418:5 subscribe 7412:5 subsequent 7410:21 substantially 7414:20 succeed 7408:14 sufficiently 7406:21</p>	<p>7419:15 suggest 7370:14 7387:2 7388:21 7402:24 7403:14 7414:8 7418:6 suggesting 7392:20 7403:11 suggestion 7402:18 7434:17 summarised 7365:21 7367:15 7421:9 7432:8 summary 7367:23 summons 7402:9 sums 7403:22 support 7388:17 7420:23 suppose 7419:17 7428:24 7433:3 sure 7367:13 7376:20 7376:25 7377:3 7387:1 7391:22 7392:19 7403:8 7405:15 7407:8 7410:15 7413:20 7415:11 7419:17 7421:7 7422:16,25 7426:21 surprises 7435:1 survived 7381:11 7418:11 survivor 7432:23 survivors 7379:19,23 7380:4,23 7432:2,6 suspects 7418:18 suspicion 7411:10 sustained 7380:22 7385:7,9 7425:22 7431:21,22 7432:13 7432:14 swear 7408:24 swore 7410:7,9 7412:23 sympathy 7376:24</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>table 7367:1,15 7431:21 7436:8 take 7361:15 7362:18 7372:10 7373:17,18 7373:20 7375:5 7383:24 7384:6,21 7389:9 7393:1 7394:5 7394:6 7397:20 7400:6,11 7402:18,24 7405:2,3 7406:11 7414:2 7428:22,25 7429:11 taken 7409:3 7411:22 7411:22 7423:10,18 7423:25 7433:13 7435:9 takes 7371:5 7381:17 talk 7397:23 7402:6,11 7406:5,7 talking 7384:4 7420:24</p>	<p>7420:25 tall 7424:8 target 7360:12 7386:24 7386:25 7389:3 task 7400:18 tea 7379:8 7392:9,10 7392:12,15 7393:1,23 7393:25 7394:5,10 teacup 7414:7 team 7412:9,10,16 7413:15,19 7414:3 teams 7412:12 technical 7392:2 7433:5 tell 7361:6 7363:1 7379:7,10 7393:6 7400:15 7401:23 7402:15 7423:16 telling 7366:3 tells 7378:3 7425:22 ten 7391:9 tend 7388:17 tendered 7421:5 tenders 7373:19 tends 7360:12 terms 7385:18,19 7397:2,16 7412:14 7413:20 7414:15 7423:17 7428:22 test 7398:13 tested 7360:17 testimony 7411:25 thank 7357:6,12 7361:16 7363:24,24 7367:10 7368:10 7375:22 7377:4,11,18 7380:6 7388:25 7389:9 7390:13 7395:15,18 7409:12 that's 7387:1 7391:5 7393:18 7394:6,7,18 7394:20 7400:15,15 7401:22 7402:2 7405:14 7408:21 7409:20 7410:22 7411:2 7414:12 7417:13,16 7418:16 7426:21 7429:24 7433:6,9 7436:15 theatre 7418:3 there'd 7389:8 there's 7399:7 7405:1,8 7405:22 7408:10 7410:13 7416:8 7419:19 7425:22 7426:23 7428:12 7435:8 they're 7389:5 they've 7397:12 7402:21 thing 7395:6 7426:23 7433:19 things 7363:8 7373:19 7374:5 7391:23 7397:14 7399:16 7412:2 7415:18</p>	<p>7427:21 7433:15 think 7357:7 7358:8 7359:2 7361:18 7362:8 7363:2,10 7365:7 7367:22 7369:15 7371:23 7372:9 7374:21,24 7375:20 7378:10,20 7379:11,12 7380:1,16 7380:24 7388:1,24 7389:4,11 7391:13 7392:16 7396:16 7397:13 7400:7,19 7403:10 7406:3,6 7407:19 7408:24 7409:9 7410:20,22 7412:3 7413:6,21,22 7415:9,13 7421:14 7424:20 7425:1 7426:4 7428:16 7429:14 7430:11,21 7431:2,13,25 7435:13 7435:18 7436:16 thinking 7408:22 thought 7373:7 7409:7 7410:11 thoughts 7413:2,3 threaten 7424:13 three 7368:22 7379:14 7417:25 till 7394:6 time 7364:6 7374:17,20 7383:21 7384:2 7387:16 7392:3,6,10 7392:14,15 7393:24 7394:1,4 7400:1,23 7410:2,17 7425:12 7436:6 today 7400:1,23 7414:18 TOKOTA 7409:18,22 7409:25 Tokota's 7410:25 told 7392:16 7413:14 7413:18 7414:1 tomorrow 7372:16 top 7391:14 topic 7433:22,24,25 7434:2 topics 7370:18,19 7435:21 total 7388:11,18 7396:2 7396:14 7426:3 7434:5 totalling 7432:23 totally 7412:4 touch 7402:4 township 7357:24 7358:3 track 7400:25 tracks 7425:23 trained 7382:21 trajectory 7417:13,16 7418:18 tried 7396:11 troubled 7394:2</p>	<p>true 7381:12 trust 7396:17 trusted 7397:15 truth 7426:7 try 7376:22 7400:25 7415:16 7421:20 trying 7364:2 7422:21 Tuesday 7435:21 7436:19 tumble 7360:12 turn 7360:5 7365:24 7379:17 7395:25 7397:25 7420:2 7422:6 7426:12 turned 7369:16 7386:13 7420:21 7421:2 7422:2 turns 7388:16 two 7377:23 7385:12 7385:13 7388:3,5 7389:11 7395:3 7396:15 7403:4 7406:9 7421:7 7425:5 type 7362:2 7385:14 7386:17 7404:5 7415:24 types 7363:12 t'other 7431:7</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>Uitenhage 7358:19 umbrage 7402:18 unacceptable 7357:21 unarmed 7407:22 7409:16 7411:21 7413:12 uncharacterised 7402:10 unclear 7415:7 understand 7359:2 7362:17 7371:24 7372:3 7382:12 7386:4 7398:2 7399:23 7402:12 7410:25 7426:22 7427:4 7433:1 7435:24 7436:3 understands 7372:10 understood 7416:20 unfair 7366:11,19 7399:17 7421:18 unidentifiable 7406:17 unit 7373:20 unlawful 7434:10 unnecessary 7410:11 unreasonable 7436:16 unrest 7357:23 unspecified 7418:1,4 unstable 7360:11 upholding 7407:12,17 upper 7426:15,16 7431:22 7432:13 upright 7424:24 7433:17 urgency 7394:4 urgent 7374:10 7375:6</p>
--	--	---	---	--

<p>7375:16 7376:9,14 7392:11 urgently 7375:25 use 7357:15,20,22,25 7360:6,8,22 7362:12 7362:15 7363:9,18 7375:24 7380:18 7385:18,19 7406:22 7418:11 7430:12,13 useful 7381:22 usual 7394:7 usually 7360:15 7389:3</p> <hr/> <p style="text-align: center;">V</p> <p>vague 7415:11 various 7371:9,13,25 7372:5 7382:21 vast 7432:15 velocity 7360:11 7390:11 veracity 7398:13 version 7384:16 7410:13,14 7420:19 7427:3 victim 7360:14,16 victims 7360:22 7369:2 7417:24 7418:8,12 7421:11 7422:12 7432:16 video 7384:22 7427:13 7429:5 7430:17 videos 7429:4 7430:24 7431:1 view 7378:12 7413:5 7421:25 views 7419:18 violation 7358:1 7423:8 visible 7384:19 vital 7412:19,20 7413:13 voice 7376:16 7377:1,7</p> <hr/> <p style="text-align: center;">W</p> <p>walking 7424:8,8 want 7357:13,18 7359:4 7360:4,19 7365:17 7366:1 7368:2,3 7370:20,23 7372:11 7378:15 7379:2,5 7380:9,12 7380:14,15 7381:14 7385:4 7388:22 7390:2 7392:1 7393:7 7393:8 7394:16 7395:20,24 7401:7 7402:7 7406:25 7412:11 7413:8,16 7414:13 7420:18 7422:4 7425:3 7433:4 7433:23 7434:1,3,8 wanted 7379:2 7402:12 7422:7 wanton 7381:9 7382:15 war 7360:11 warning 7380:8,10 7388:10,10,21 7392:8</p>	<p>7395:21 warnings 7388:16 wasn't 7413:19 wasn't 7399:20 waste 7364:6 way 7370:10 7377:1,6 7379:4 7387:4 7388:10,20 7389:7 7392:22 7415:18 7421:9 7422:6,16,25 7424:12 7428:15,17 7429:1 7431:6 weapon 7387:21 weapons 7360:11 7362:13,15,17 7363:18 7365:4,10,10 7365:13 7374:9 7375:13,19,19,25 weekend 7436:18 welcomed 7414:15 went 7379:12 7383:6 7420:16 weren't 7398:18 7427:6,10 we'll 7392:25 7394:5,5 7394:6 7395:8 7402:6 7403:19 7420:1 7431:11 we're 7400:18 7416:4 7427:7 we've 7397:2 7404:7 7413:25 7432:9 7433:15 7436:7 we'll 7374:20 7376:11 7383:1 we've 7378:9 7380:8,10 what's 7410:3 7411:12 7419:9 whichever 7367:14 who's 7404:25 widespread 7396:16 wish 7386:14 7392:24 7399:6 7429:1 7436:17 withdraw 7409:7 witness 7361:13 7368:4 7370:2,22 7372:10 7377:9 7378:11 7380:16 7382:25 7383:23 7387:3,4 7390:2 7391:17 7392:22 7394:16 7395:16 7409:3,9 7411:2,7 7412:21 7413:17,19,24 7419:18 7421:18 7428:20 7430:5 7431:3 7432:10,18 7433:3 witnessed 7396:10 witnesses 7421:8 witness's 7407:2 women 7408:7 won't 7413:4 7415:8 word 7368:14 words 7407:16 7409:13</p>	<p>7409:14 7410:7,10,14 7411:11,19,23 7412:12,19,20,25 7413:2 7418:11 work 7373:15 7395:4 works 7367:19 worry 7404:10 worth 7363:22,23 worthwhile 7406:22 wouldn't 7427:5 wouldn't 7365:3 7373:4 7375:17 wound 7369:10 wounded 7381:22 7385:4 wounds 7365:16,17 7382:13 7385:6 7422:13 7425:23 7426:14 write 7408:15 writers 7372:1 written 7358:12 7371:18 wrong 7371:21 7373:8 7374:24 7397:12 7409:8,13 7410:13 7413:6 wrongful 7401:21 wrote 7385:20 7407:8</p> <hr/> <p style="text-align: center;">Y</p> <p>year 7359:12,14,18 7360:24 7361:5,9 years 7358:15 7396:15 7402:24 7406:10 yesterday 7357:7 7361:2 7374:14 7391:21 7404:2 7425:12 young 7408:11 you'll 7400:7,11,21 7401:4 7416:10 7431:25 you're 7388:23 7391:13 7392:20 7395:9 7399:23 7414:25 7416:12 you've 7392:9 7403:10 7405:6 7406:11 7407:16 7409:11 7429:14,14,15 7430:23 7434:21 7435:18</p> <hr/> <p style="text-align: center;">0</p> <p>0.0009 7397:25 000 7396:12 050 7396:8 09:36 7357:2 09:57 7366:9</p> <hr/> <p style="text-align: center;">1</p> <p>1 7388:7 7396:4,8 7419:4 1.1 7396:13 10 7407:1,6,7 7408:20</p>	<p>7436:19 10% 7397:25 10:17 7376:20 10:37 7386:22 100% 7426:15 109 7388:16 11 7426:1 11% 7425:18 7426:3 11:26 7394:12 11:46 7403:9 12 7426:3 12th 7409:5 7410:18 7411:1 12:06 7413:18 12:26 7421:24 12:46 7429:8 120 7388:20 14 7402:4,6 14.8 7396:15 148 7388:20 16th 7414:17 7426:16 162 7396:7 7404:5 7405:10,13,14 17th 7364:19 7384:3 175 7388:15 19 7357:9 1987 7358:13 1994 7402:2</p> <hr/> <p style="text-align: center;">2</p> <p>2 7388:17 7391:14 7393:16,17 7409:24 7432:21 20 7377:19,20,21 7380:9,11,11 7416:19 7419:12 7422:10 20th 7364:20 7384:4 20% 7368:5 7405:3 2001/02 7396:1 2011 7396:9 2011/12 7396:3,5,7 2011/2012 7405:10 2012 7359:20 7362:18 7396:19 2012/2011 7406:9 2013 7357:1 7395:23 2013/14 7395:22 206 7424:16,19,25 21 7368:19,19,21 7377:20 7380:6,7,9 7420:5 21% 7420:6 211 7388:2,6 22 7380:1,6,11 7416:19 22% 7396:7 24% 7422:12 25 7431:22 7432:13 7433:2 257 7388:3,16 26 7433:2 26th 7377:23 7395:23 7398:23 28 7357:1 7418:1 284 7388:11,14 29 7390:10 7417:23 7419:11 7425:17</p>	<p>7426:1</p> <hr/> <p style="text-align: center;">3</p> <p>3 7395:6,25 7407:2 7417:14,16 7420:11 7425:19,22 30 7388:18,19 7402:7 300 7388:18 313% 7396:4 33 7385:6,8 34 7367:1,5,20 7368:5 7368:19,21 7390:10 7426:14 35% 7396:18</p> <hr/> <p style="text-align: center;">4</p> <p>4 7418:24 7419:2 41% 7396:17 416 7396:2</p> <hr/> <p style="text-align: center;">5</p> <p>5 7396:4 5.4 7428:23 5.56 7374:9 7375:13,19 50 7396:9 512 7396:11,12 522 7388:7,13 533 7388:6,13</p> <hr/> <p style="text-align: center;">6</p> <p>6 7426:2,2,2 60% 7368:22 7369:1 61 7385:2,5 7419:10 7432:20 62% 7420:5 64 7385:8 64% 7385:6 7387:9 66 7432:12 66% 7396:15</p> <hr/> <p style="text-align: center;">7</p> <p>7 7411:3 7420:6 7th 7408:24 7410:20 7411:4 7412:24 7% 7385:15 7387:9 70% 7368:20 720 7396:5 7404:3 7405:12 722 7396:4 75 7374:6 75% 7420:6,15,16</p> <hr/> <p style="text-align: center;">8</p> <p>8 7390:12 7391:10,15 7420:3,11,14 7422:10 7422:11,12 7425:20 7426:13 84 7383:3 7385:2 841 7396:11 89 7374:22,23</p> <hr/> <p style="text-align: center;">9</p> <p>94 7358:14</p>
---	---	---	--	--