

# 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 285

4 SEPTEMBER 2014

PAGES 36869 TO 37026



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1 [PROCEEDINGS ON 4SEPTEMBER 2014]  
 2 [09:10] CHAIRPERSON: The Commission resumes.  
 3 Before I remind Mr Hendrickx that he's still bound by his  
 4 affirmation I want to know from you, Mr Semenya, whether  
 5 it's necessary to do so. Do you have further questions for  
 6 him?  
 7 MR SEMENYA SC: Two or three questions,  
 8 Chair.  
 9 CHAIRPERSON: Mr Budlender, I know there  
 10 are time constraints that are pressing. Shall I allow him  
 11 to ask the two or three questions now, or shall we stand it  
 12 over until you're finished –  
 13 MR BUDLENDER SC: Chair, if you're asking  
 14 me my personal –  
 15 CHAIRPERSON: I'm asking you your  
 16 personal –  
 17 MR BUDLENDER SC: My personal preference  
 18 would be that I could start now with Mr De Rover.  
 19 CHAIRPERSON: Okay, you're happy –  
 20 MR BUDLENDER SC: It's quarter past 9  
 21 already.  
 22 CHAIRPERSON: You're happy with that, Mr  
 23 Semenya?  
 24 MR SEMENYA SC: Perhaps I could also  
 25 announce that leading of Mr De Rover won't be 15 minutes,

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1 it would be like five minutes as well.  
 2 CHAIRPERSON: That's something to bear in  
 3 mind when it happens. Thank you. Yes, so you may stand  
 4 down for the moment, Mr Hendrickx.  
 5 MR BUDLENDER SC: Chair, if it's really  
 6 only two or three questions, let's get it over with and –  
 7 CHAIRPERSON: Alright. Mr Hendrickx,  
 8 you're still bound by your affirmation.  
 9 EDDIE MARTINUS ROSALIA HENDRICKX:  
 10 [affirms further]  
 11 CHAIRPERSON: Thank you. Yes, Mr  
 12 Semenya.  
 13 CROSS-EXAMINATION BY MR SEMENYA SC (CONTD.):  
 14 Mr Hendrickx, good morning.  
 15 MR HENDRICKX: Good morning, Sir.  
 16 MR SEMENYA SC: I tried to obtain  
 17 information in relation to the use of the water cannon.  
 18 I'm told the functions it has, it's a short pulse with 10  
 19 litre per shot, a long pulse with 20 litre per shot, and a  
 20 continuous spray. There is no recognition of what you call  
 21 jet spray.  
 22 MR HENDRICKX: I'm not referring to the  
 23 third, to the spray. I'm referring to the two ways of, the  
 24 two manners of providing the water to the, to protesters or  
 25 whatever, or to the people. That's what I'm referring to.

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1 I call that a jet, a jet stream.  
 2 MR SEMENYA SC: The 10 litre per shot or  
 3 the 20 litre per shot, is that what you call jet spray?  
 4 MR HENDRICKX: Ja. That's what I call a  
 5 jet stream, what you said providing for a few seconds, a  
 6 few litres of water intended to reach or hit a person.  
 7 MR SEMENYA SC: Can I ask that we, Chair,  
 8 have a statement of Tshepiso Isaac Segaole, it's a new  
 9 exhibit.  
 10 CHAIRPERSON: Has the witness seen it?  
 11 MR SEMENYA SC: The witness has not seen  
 12 it, but it's a very short statement. It's one paragraph  
 13 I'm interested in really, Chair.  
 14 CHAIRPERSON: I take it there's no  
 15 objection, Mr Bizos.  
 16 MR BIZOS SC: No.  
 17 CHAIRPERSON: TTTT4, statement, how do  
 18 you spell the deponent's name?  
 19 MR SEMENYA SC: Segaole would be S-E-G-A-  
 20 O-L-E.  
 21 CHAIRPERSON: Surname?  
 22 MR SEMENYA SC: That's Segaole. The name  
 23 is Tshepiso, T-S-H-E-P-I-S-O, Isaac.  
 24 CHAIRPERSON: Alright, his statement will  
 25 be TTTT4.

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1 MR SEMENYA SC: Yes. Thank you, Chair.  
 2 The operator has it; maybe they will just flight it on the  
 3 screen, but this is an individual who was an operator of  
 4 the North West cannon, Mr Hendrickx. What he does say, and  
 5 maybe this is what you are referring to, in paragraph 3, "I  
 6 operated from my operator's control panel and Warrant  
 7 Officer Maloetse operated from the driver's control panel.  
 8 Warrant Officer Maloetse and I, that is Constable Segaole,  
 9 attended a water cannon course at Benoni SAPS College. We  
 10 never received any training on how to use the recorder that  
 11 is installed in the water cannon. It is the recorder that  
 12 was a problem, not the operation of the water cannon." Do  
 13 you have any information different?  
 14 MR HENDRICKX: Well, not for the moment.  
 15 But you can see from this statement as well that people in  
 16 the water cannon were not trained to use the video camera,  
 17 the recorder. Is that what you say?  
 18 MR SEMENYA SC: That's right.  
 19 MR HENDRICKX: Well, I think that's a  
 20 lack of training then.  
 21 MR SEMENYA SC: Those are the questions –  
 22 CHAIRPERSON: That's obvious, but the  
 23 question is whether it has a bearing on the use of the  
 24 cannon for firing water at people is concerned, whether he  
 25 was adequately trained for that and we don't know that.

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1 But anyway –

2 MR SEMENYA SC: Those are all the

3 questions I have.

4 CHAIRPERSON: All your questions, thank

5 you.

6 MR HENDRICKX: Can I comment on that,

7 Sir, or not?

8 CHAIRPERSON: Yes, you can comment, of

9 course.

10 MR HENDRICKX: The best way to go then

11 ahead if I make, if I may make a recommendation to the

12 Commission, is to see what a water cannon can do when it's

13 used properly.

14 CHAIRPERSON: Yes, perhaps arrangements

15 can be made for a water cannon to be taken to Marikana on

16 Monday and while we're at the inspection we can see – I

17 don't know whether that's practical, but if it's practical

18 it will take a few minutes and we can fire water at a

19 koppie and see what happens. We can get somebody to stand

20 in the way of a cannon and see, like Mr Mpofu, see whether

21 it pushes him back 20 metres.

22 MR BUDLENDER SC: Can we nominate?

23 MR SEMENYA SC: We nominate Mr Mpofu.

24 CHAIRPERSON: I think what can happen is

25 the legal representatives can draw lots, as was done in the

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1 Bible when the 12th apostle was chosen and we see on whom

2 the lot falls.

3 MR HENDRICKX: And perhaps with a trained

4 team in the water cannon then?

5 CHAIRPERSON: Yes, of course. Alright,

6 that's your recommendation. That's your evidence. Thank

7 you very much. You're excused from further attendance on

8 the usual basis that if you have to come back we don't have

9 to serve a subpoena. I don't think that will be likely,

10 but if you're prepared to give that undertaking you'll be

11 excused.

12 MR HENDRICKX: Yes, Sir.

13 CHAIRPERSON: Thank you very much.

14 MR HENDRICKX: Thank you.

15 CHAIRPERSON: Thank you for coming and

16 thank you for –

17 MR HENDRICKX: Thank you.

18 [NO FURTHER QUESTIONS – WITNESS EXCUSED]

19 MR CHASKALSON SC: Chairperson, if I can

20 just add, there is in fact a statement from Warrant Officer

21 Fourie who identifies what training was given, not to Mr

22 Segaole who was in the North West water cannon, but to the

23 operators of the Johannesburg water cannon that specifies

24 exactly what training was given.

25 CHAIRPERSON: Well, we can look at that

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1 after Mr Budlender has had a chance to cross-examine Mr De

2 Rover. Mr Semenya?

3 MR SEMENYA SC: I beg leave to call Mr De

4 Rover.

5 CHAIRPERSON: Yes, Mr Semenya, when the

6 witness seat is vacated, your witness will sit in it. You

7 call Mr De Rover.

8 MR SEMENYA SC: I do, Chair.

9 CHAIRPERSON: Mr De Rover, would you

10 please stand? Are you prepared to take the oath or do you

11 wish to affirm?

12 MR DE ROVER: The oath.

13 CHAIRPERSON: The oath. Do you swear

14 that the evidence you will give before this Commission will

15 be the truth, the whole truth, and nothing but the truth?

16 Would you please raise your right hand and say, "I swear,

17 so help me God."

18 CEES DE ROVER: I swear, so help me God.

19 CHAIRPERSON: Please be seated.

20 MR DE ROVER: Thank you.

21 CHAIRPERSON: Yes, Mr Semenya.

22 EXAMINATION BY MR SEMENYA SC: Thank you,

23 Chair. Mr De Rover, you have been engaged in the

24 proceedings around the Marikana Inquiry by the South

25 African Police Service. Is that right?

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1 MR DE ROVER: That is correct, Mr

2 Semenya.

3 MR SEMENYA SC: And might I just show you

4 two documents, the first is already an exhibit before the

5 Commission and it is exhibit FFF11 and on page 22 of that

6 document you will see a signature there. Please tell us if

7 you recognise it.

8 MR DE ROVER: Yes, that is my signature.

9 MR SEMENYA SC: And it is a statement

10 dated 8th day of March of 2013.

11 MR DE ROVER: That is correct.

12 MR SEMENYA SC: So too you will find a

13 document, exhibit FFF11A, mine isn't signed but I would

14 invite you to look at the document and if it is your

15 statement to confirm that it is so, exhibit FFF11A, written

16 supplementary statement of Mr Cees de Rover on page 1.

17 That's the one. Let's do page 1 first so that Mr De Rover

18 can see what is in the tramlines there.

19 MR DE ROVER: That is my statement.

20 MR SEMENYA SC: That is your statement.

21 MR DE ROVER: Yes, Sir.

22 MR SEMENYA SC: You confirm its contents?

23 MR DE ROVER: I do confirm it.

24 MR SEMENYA SC: So too the contents of

25 exhibit FFF11?

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1 MR DE ROVER: Yes, I do.  
 2 MR SEMENYA SC: Might I invite you, Mr De  
 3 Rover, to tell us your background, professional background  
 4 that is?  
 5 MR DE ROVER: Chairperson, I will not  
 6 repeat that what is already included in my first statement,  
 7 to save time, maybe just to add a few elements to it. My  
 8 career now spans 35 years, 14 of which in the Dutch police  
 9 and a slight overlap of two years where there's an  
 10 international career that now runs in excess of 20 years.  
 11 I have a Masters Degree of Business Administration in  
 12 addition to my formal policing qualifications, with a  
 13 specialisation in Organisational Change. I have a Masters  
 14 Degree of Public International Law with focus on human  
 15 rights and humanitarian law.  
 16 The last 22 years have seen me in close to 70  
 17 different countries around the world on all continents,  
 18 including South Africa, where I have worked closely with  
 19 police security forces and armed forces, surely at  
 20 instances in matters relating to use of force and firearms  
 21 in public order management which seem to be of particular  
 22 interest to this Commission, but more generally on issues  
 23 of task organisation and task implementation.  
 24 I've worked extensively with the United Nations.  
 25 I've been a staff member of the United Nations in 1995 when

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1 the Department of Peacekeeping Operations placed me in  
 2 Burundi as a special advisor to the special representative  
 3 of the secretary-general. I've worked extensively with the  
 4 Office of the High Commissioner for Human Rights, and in  
 5 fact where professional training series number 5 is  
 6 concerned the manual that covers human rights and policing,  
 7 I'm one of the two authors responsible for that  
 8 publication.  
 9 I've been part of many expert working groups of  
 10 the Office of the High Commissioner for Human Rights and I  
 11 routinely assist mandate holders, special rapporteurs on  
 12 thematic issues. I particularly like to mention Professor  
 13 Philip Alston who held the mandate that is currently being  
 14 held by Professor Heyns. In that capacity of working for  
 15 the UN I've worked for several of the UN specialised  
 16 agencies, including the United Nations Development  
 17 Programme for whom I did the needs assessment, validation  
 18 and programming of the needs of Rwanda to re-establish a  
 19 national policing capability following the genocide in  
 20 1994.  
 21 I've worked extensively with the High  
 22 Commissioner for Refugees, most notably on a project in  
 23 Indonesia that ran from 2001 till the middle of 2003 and  
 24 that was aimed at bringing human rights training to the  
 25 Indonesian national police and introduce community

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1 policing, as well as restructure and retrain Indonesia's  
 2 mobile brigades, which are their riot policing variant.  
 3 The Indonesian police is in personnel strength close to  
 4 600 000, so it's about three times as large as SAPS, and  
 5 its riot policing component counts 42 000 personnel.  
 6 CHAIRPERSON: What is the population of  
 7 Indonesia? How does it compare with ours?  
 8 MR DE ROVER: I think it's about four  
 9 times as large.  
 10 CHAIRPERSON: I see.  
 11 MR DE ROVER: In excess of 200 million  
 12 people. I have worked extensively for the International  
 13 Committee of the Red Cross. I was brought in there  
 14 initially to produce the book "To Serve and to Protect  
 15 Human Rights and Humanitarian Law for Police and Security  
 16 Forces." This book, first published in 1998, now knows a  
 17 second edition that was published in March this year. The  
 18 original book has been translated into 36 languages and  
 19 forms for many police forces an important reference work.  
 20 It's actually to date still one of the best-selling books  
 21 the organisation has at its disposal.  
 22 Once that book was complete I was placed in the  
 23 position of being ICRC's first coordinator for police and  
 24 security forces because the organisation realised the need  
 25 to not just engage the armed bearers that are part of the

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1 armed forces, but that it would also be in interest to  
 2 engage with the armed bearers that are part of police and  
 3 security forces. So I established the strategy, the  
 4 methodology. I recruited the people and I established the  
 5 practices. Today in that branch of ICRC's activities 36  
 6 people have a full-time job and it forms a core part of  
 7 that organisation's activities.  
 8 In 1999 I was recruited by the Australian Defence  
 9 Force and at a request of the Chief of the Army in  
 10 Australia I deployed with Australian troops to Delhi in  
 11 East Timor where the Australian-led intervention forces  
 12 established the first steps on the path to self rule for  
 13 the East Timorese. I worked as an advisor for General  
 14 Cosgrove and was particularly tasked to look at issues of  
 15 public order and to look at issues of treatment of  
 16 prisoners and condition of detention and conducted the  
 17 necessary negotiations with the International Committee of  
 18 the Red Cross who routinely visit prisoners in such  
 19 circumstances.  
 20 As a consequence of the public order  
 21 recommendations I conducted extensive training both in  
 22 Delhi and in Australia at various barracks locations for  
 23 troops that were scheduled to rotate into East Timor and  
 24 gave them what essentially are basic law enforcement skills  
 25 and abilities to counter possible situations on the ground,

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1 and I was drawn into the security arrangements for the  
 2 Sydney Olympics, so everything that had to do with the  
 3 military's role in securing the Sydney Olympics, I was one  
 4 of the architects of what actually then happened on the  
 5 ground, including creating and establishing and giving the  
 6 army the capability of having two extraction and recovery  
 7 teams, which essentially are surveillance teams of eight  
 8 that work generally in plainclothes and can mix with the  
 9 crowd and can signal and identify early signs of  
 10 troublemakers and actually physically take troublemakers  
 11 out.

12 Around the Olympics, and this has never seen the  
 13 light of day, but those teams actually arrested three  
 14 individuals, managed to identify, follow, isolate and  
 15 arrest people that carried on them items that would have  
 16 permitted an Atlanta-type bombing to occur in Sydney, but  
 17 because of those interventions that never eventuated.

18 At a later stage I have established in 1998 the  
 19 organisation Equity International. My, at that time I was  
 20 working more than six years in policing and human rights  
 21 and frankly, I experienced a disappointment because many  
 22 times I was asked to go to a country and stand up in front  
 23 of police officials and cite International Law as it  
 24 relates to law enforcement practice, and I would always  
 25 have to stop myself at pointing out what their

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1 responsibilities are, and at times people would raise their  
 2 hand and say okay, I understand that I can't torture to  
 3 solicit information, but, and you say I need to use ethical  
 4 interviewing techniques; can you teach me ethical  
 5 interviewing techniques, and I would have to say yes, I  
 6 could, but I'm not allowed to.

7 [09:30] So my personal experience was that training  
 8 courses of that nature only add to frustration because you  
 9 do not add into the mix the ability to, for people to  
 10 translate the standard into operational practice. There is  
 11 no point in pointing out what a police responsibility is if  
 12 you can't say how it should be operationalised and that –

13 MR SEMENYA SC: Alright, we'll have an  
 14 opportunity to amplify. I just want make sure that we  
 15 cover this aspect before the cross-examination starts.  
 16 Before compiling the statements you have, what did you do,  
 17 coming into the country after receiving your mandate?

18 MR DE ROVER: Chairperson, it's probably  
 19 good to point out that I was outside South Africa when  
 20 Marikana happened and of course I saw the news, or at least  
 21 I saw the news broadcasting that little bit that sells news  
 22 and that makes news interesting, and I was horrified. I'd  
 23 never –

24 CHAIRPERSON: The question was asked what  
 25 did you read and look at in order to prepare yourself for

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1 your testimony. You'll have an opportunity to expand on  
 2 these other points later –

3 MR DE ROVER: Okay.

4 CHAIRPERSON: - but we have a particular  
 5 concern that Adv Budlender should be able to cross-examine  
 6 you in the time available.

7 MR DE ROVER: Okay, fair enough.

8 MR SEMENYA SC: Did you have access to  
 9 the terrain?

10 MR DE ROVER: Let me set out how I  
 11 approached the work that I have done. I've used as a  
 12 normative framework International Law, applicable Treaty  
 13 Law, like treaties that South Africa is a state party to  
 14 and that could give guidance. I've used Soft Law. I've  
 15 used all those instruments that talk about what law  
 16 enforcement responsibility is. I've used Humanitarian Law.

17 CHAIRPERSON: Yes, I think it's clear  
 18 from the report, if I may say this, all the things that you  
 19 took into account and the authorities and so forth to which  
 20 you referred. I don't think that's what Mr Semanya wants.  
 21 He really wants to know I think as far as the evidence is  
 22 concerned have you read the transcripts, have you read  
 23 statements? Have you looked at video clips? If you can  
 24 just explain that in a sentence it will be helpful.

25 MR DE ROVER: I will get to that, Chair,

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1 with your permission, to explain that I can say I did that,  
 2 but if I don't add to that the context –

3 CHAIRPERSON: We'll take your word for it  
 4 for the time being and when you're being cross-examined  
 5 you'll get an opportunity.

6 MR DE ROVER: Okay.

7 CHAIRPERSON: We're rather concerned  
 8 about time for reasons I think have been explained to you.

9 MR DE ROVER: Okay.

10 CHAIRPERSON: Mr Semanya?

11 MR DE ROVER: I had access to all the  
 12 documents that pertain to the Commission. That includes  
 13 transcripts, that includes statements, that includes  
 14 physical evidence, and I had access to SAPS members that  
 15 were present on the day and I spoke I think to most of  
 16 those.

17 CHAIRPERSON: I take it you went to  
 18 Marikana –

19 MR DE ROVER: I went to Marikana –

20 CHAIRPERSON: - and saw the scene where –

21 MR DE ROVER: - on several occasions.

22 CHAIRPERSON: - these events happened,  
 23 yes.

24 MR DE ROVER: Ja, I went to Marikana on  
 25 several occasions.

<p style="text-align: right;">Page 36885</p> <p>1 MR SEMENYA SC: And were there any 2 attempts you're involved in, in some reconstruction of how 3 the events would have unfolded on various days with 4 members? 5 MR DE ROVER: Particularly with regards 6 to scene 2, yes. 7 MR SEMENYA SC: Those are the questions 8 we have for the witness. 9 CHAIRPERSON: Thank you, Mr Semenya. Mr 10 Budlender. 11 CROSS-EXAMINATION BY MR BUDLENDER SC: 12 Thank you, Chair. Good morning, Mr De Rover. 13 MR DE ROVER: Good morning, Mr Budlender. 14 MR BUDLENDER SC: You've just – well, let 15 me take step back. In exhibit FFF11, your first statement, 16 you say that you commenced your work on behalf of the SAPS 17 on the 28th of February last year. Is that correct? 18 MR DE ROVER: That is correct. 19 MR BUDLENDER SC: Before the 28th of 20 February, other than seeing television news, did you have 21 any opportunity to review any of the evidence relevant to 22 Marikana? 23 MR DE ROVER: No. 24 MR BUDLENDER SC: Then your statement is 25 dated the 8th of March, your first statement, the 8th of</p>	<p style="text-align: right;">Page 36887</p> <p>1 read all of that in those eight days? 2 MR DE ROVER: I read all of that in that 3 eight days. 4 MR BUDLENDER SC: And the transcript of 5 the evidence given up to that time, did you read all of 6 that also in those eight days? 7 MR DE ROVER: No. 8 MR BUDLENDER SC: You didn't have a 9 chance to look at the exhibits, I take it, during those 10 eight days? 11 MR DE ROVER: Not in the detail that you 12 are looking at here. 13 MR BUDLENDER SC: No, I appreciate that. 14 So would it be fair to say that the main source for the 15 first statement was statements of SAPS members and meetings 16 with SAPS members, and I don't know whether you also went 17 out and had a look at the scene over that period? 18 MR DE ROVER: Ja. 19 MR BUDLENDER SC: So there was a site 20 inspection, the statements of SAPS members and interviews 21 with SAPS members. Would those be your sources at that 22 time? 23 MR DE ROVER: Well, with of course in 24 the, and I can't pinpoint exactly which parts now of 25 Commission proceedings, but of course more than that to</p>
<p style="text-align: right;">Page 36886</p> <p>1 March 2013. So you had eight days between the time when 2 you commenced work and you delivered your first statement. 3 MR DE ROVER: That's correct. 4 MR BUDLENDER SC: And you've explained 5 that in your statement that there was a limitation at that 6 time, you had a time limitation. At that time the 7 information you had available to you, as I understand it, 8 is – well, perhaps you can tell us. Let me not put words 9 in your mouth. At the time that you made your first 10 statement what information did you have available to you? 11 MR DE ROVER: At that time I had 12 obviously what was available to the Commission at that time 13 and I had the statements of the SAPS members involved, plus 14 the meetings that I had with individuals SAPS members, but 15 in addition I had my own faculties to look at the Marikana 16 incident and to basically conduct my own research and try 17 and give an investigation structure to what happened at 18 Marikana prior to, during and after. 19 MR BUDLENDER SC: I don't want to 20 interrupt you, Mr De Rover, so if I do please stop me, but 21 I just want to understand what, I understand you applied 22 your knowledge and your experience to the information you 23 received. What I'm interested in is what information had 24 you received at that stage. You say you had meetings with 25 SAPS members. You had statements of SAPS members. Did you</p>	<p style="text-align: right;">Page 36888</p> <p>1 contextualise what happened at Marikana. 2 MR BUDLENDER SC: Well, could you give 3 the Commission some indication of what material from the 4 Commission's proceedings you had access to before you made 5 your first statement? 6 MR DE ROVER: Transcripts that, I think I 7 had a selection of transcripts of people that had appeared 8 at that time from, if I recall correctly from NUM and from 9 AMCU and I of course had access to any media report that 10 was published in that period. 11 MR BUDLENDER SC: And then you went on 12 and you prepared your subsequent statement in May 2013, or 13 you finalised it on the 1st of May 2013. You had again 14 access to SAPS members. You had their statements. You had 15 access to the transcripts. You had the benefit of visits 16 to the site. Are there any other sources of information 17 which you relied on at that stage? 18 MR DE ROVER: Again I used, in addition 19 to what you have said I used, and that's what I was trying 20 to explain before that I used sources of International Law 21 and Domestic Law. I looked at national legislation as it 22 relates to public protest in South Africa. So – 23 MR BUDLENDER SC: Sorry to interrupt you. 24 I'm not talking – I understand you made normative judgments 25 based on that expertise.</p>

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1 MR DE ROVER: Ja.

2 MR BUDLENDER SC: At this stage I'm

3 interested only in the factual information which you

4 obtained.

5 MR DE ROVER: Ja.

6 MR BUDLENDER SC: Factual information of

7 the sources which – the sources of factual information as I

8 understand it –

9 MR DE ROVER: Ja.

10 MR BUDLENDER SC: - are those I've

11 listed; SAPS statements, interviews of members of SAPS,

12 transcript of the evidence, or parts of the transcript of

13 the evidence, and visits to see for yourself.

14 MR DE ROVER: Plus of course the exhibits

15 of the Commission that existed then to date –

16 MR BUDLENDER SC: Yes, indeed.

17 MR DE ROVER: - plus the statements of

18 the other experts, plus the questioning that had happened

19 at that stage of people from SAPS that had appeared before

20 the Commission.

21 MR BUDLENDER SC: No, I appreciate that.

22 Now I'm sure you'll agree that an expert's opinion is only

23 as good as the information on which he bases it. If the

24 information is unreliable or incorrect then the opinion may

25 be unreliable.

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1 MR DE ROVER: I think if you want a

2 precise opinion on a precise incident or occurrence

3 particular to you then of course you are right. But if you

4 look, and I've, you know like frankly if I see yesterday

5 that Marikana can be made to hinge on the movement of one

6 Nyala, then I worry because I don't think that that will

7 ever provide you the answers that you are looking for. So

8 I know that there is concern possibly, or disagreement -

9 and I accept that – with findings that I made, but I've

10 tried to actually offer to the Commission, and of course

11 not being able to be led in chief undermines that a little

12 bit, but what I was seeking to also do is to perhaps offer

13 what is referred to as contradiction, or to challenge you

14 to look in other ways than just in that micro detail.

15 MR BUDLENDER SC: I understand that. My

16 question is that if an expert's opinion is based on

17 unreliable or incorrect information then the opinion itself

18 may be unreliable. Do you accept that?

19 MR DE ROVER: Of course.

20 MR BUDLENDER SC: Yes, have you

21 previously given evidence as an expert witness in a trial

22 or in a commission like this?

23 MR DE ROVER: No.

24 MR BUDLENDER SC: I take it you agree,

25 I'm sure you agree that an expert should be objective and

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1 unbiased.

2 MR DE ROVER: Yes.

3 MR BUDLENDER SC: Yes. Now I want to

4 look at - you told us the sources from which you obtained

5 the information on which you rely. Did it occur to you

6 that there might be some other useful sources from which

7 you could have obtained, as you put it, contradictory

8 information?

9 MR DE ROVER: Please clarify.

10 MR BUDLENDER SC: Well, for example let's

11 go to FFF11A, paragraph 24. That's your supplementary

12 statement. Paragraph 24. You have it? It's on page 13.

13 You say, "It is on this basis that I'm uneasy about claims

14 of the involved unions that the actions of their members

15 were completely beyond their control. The unions support

16 their members and facilitate the protest for wage increases

17 of their members. They take their payments in the form of

18 union dues. They take part in negotiations on behalf of

19 their members. They regularly address their members. They

20 cannot simply walk away from any responsibility for what

21 took place on the 16th of August 2012 when negotiations

22 broke down, stating that there is nothing more that they

23 can do." Now did you seek to interview anybody from AMCU

24 or NUM to put this proposition to them?

25 MR DE ROVER: No.

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1 MR BUDLENDER SC: Are you aware that Mr

2 Mathunjwa on two occasions on the 16th of August went to the

3 koppie and pleaded with the strikers to lay down their arms

4 and leave the koppie?

5 MR DE ROVER: Yes.

6 MR BUDLENDER SC: What more do you think

7 AMCU should have done?

8 MR DE ROVER: I think still you know

9 that, and it's, if you pinpoint it on that day maybe, maybe

10 there is nothing more to do, but I am quite aware that what

11 produced at Marikana is in part a consequence of a rivalry

12 between unions and unions vying for majority membership.

13 Now I think that responsibility for action should be

14 exercised when it can make a difference and that you can

15 point and say well on that day there was nothing more he

16 could do, I may well agree with it, but I would actually

17 say that that responsibility should be acted upon before

18 the issue becomes one of no options left.

19 MR BUDLENDER SC: Mr De Rover, you're

20 criticising the conduct of AMCU and you're holding them in

21 part responsible for the deaths. Now I'm asking you what

22 you say they should have done that they didn't do.

23 MR DE ROVER: I've heard various –

24 MR SEMENYA SC: Chair, I object. I don't

25 see anywhere where Mr De Rover is saying AMCU is

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1 responsible for the deaths.  
 2 MR BUDLENDER SC: No Chair, I think the  
 3 context is clear, but the witness can answer for himself.  
 4 He's a very experienced man.  
 5 CHAIRPERSON: [Microphone off, inaudible]  
 6 ask him the question. Mr De Rover, do you say that partly  
 7 responsibility for the deaths rests with AMCU? Is that  
 8 your evidence? Is that what you are saying in the  
 9 paragraph to which Mr Budlender has referred you, paragraph  
 10 24 of your supplementary statement?  
 11 MR DE ROVER: I think what I need to say  
 12 at this stage is that Marikana represents an unravelling  
 13 system and I've seen in this Commission evidence being  
 14 presented and arguments being built, for example that a  
 15 refusal of Lonmin to talk to strikers makes them  
 16 responsible for the deaths, or as you put it now in this  
 17 question, and what I see is this drive to look for operator  
 18 failure.  
 19 CHAIRPERSON: Yes, I understand that, but  
 20 you haven't answered the question. The question is a  
 21 simple one. Do you say that part of the responsibility for  
 22 the deaths rests with AMCU?  
 23 MR DE ROVER: Yes.  
 24 CHAIRPERSON: Thank you.  
 25 MR DE ROVER: If you want to link the two

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1 together and you want to look at the process in that way  
 2 that a failure to engage at an earlier stage, or make  
 3 yourself available at a stage that it could be making a  
 4 difference, or a failure to conduct the business of the  
 5 union in such a way that it doesn't propagate violence, or  
 6 tolerate that, and that it doesn't breed animosity, I think  
 7 that there were ample opportunities before because the  
 8 strikes in the Platinum Belt did not start in August of  
 9 that year.  
 10 MR BUDLENDER SC: Mr De Rover, you say  
 11 that AMCU are partly responsible for the deaths. I'm  
 12 asking you specifically what do you say they should have  
 13 done that they didn't do, or what did they do that they  
 14 shouldn't have done which contributed, which was a causal  
 15 factor in the deaths?  
 16 MR DE ROVER: I've just –  
 17 MR BUDLENDER SC: In the shootings by  
 18 members of the South African Police Service.  
 19 MR DE ROVER: I don't know if that  
 20 additional qualification is required, but –  
 21 MR BUDLENDER SC: Well, that's my  
 22 question. What do you say that AMCU did which they  
 23 shouldn't have done, or didn't do that they should have  
 24 done, which was a causal factor in the killings of 34  
 25 people by the police on the 16th of August?

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1 MR DE ROVER: I think that AMCU as an  
 2 organisation should have exercised better control over its  
 3 members. There were deaths at Marikana before the police  
 4 was involved. There was wanton destruction of property. I  
 5 have a list of case dockets that between February and the  
 6 1st of August of 2012 runs in excess of 100 cases opened of  
 7 destruction of property, grievous bodily harm, murder and  
 8 attempted murder, and all of those are linked to mine  
 9 strikes and union rivalry. I just think that if you run an  
 10 organisation that has a public character, you have a  
 11 responsibility towards your members, but also towards the  
 12 general public.  
 13 MR BUDLENDER SC: Right, that's your  
 14 answer. Do you also blame the NUM in part for the deaths  
 15 on the 16th of August?  
 16 MR DE ROVER: Yes.  
 17 MR BUDLENDER SC: And what should they  
 18 have done that they didn't do, or what didn't they do that  
 19 they should have done that led to the deaths of 34 people  
 20 on the 16th of August?  
 21 MR DE ROVER: As a majority union they  
 22 obviously did not represent or share or wish to represent  
 23 or share the concerns of those that were demonstrating at  
 24 the koppie. Now if your system of collective bargaining is  
 25 such that you only do business with the one that holds the

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1 majority you force people into militancy because numbers  
 2 become important, and if on top of that NUM, who had at  
 3 that time the majority, do not represent that group, you  
 4 breed militancy because people will not feel themselves  
 5 represented, not heard and not listened to, and what  
 6 alternative but to take a stance and to stand up do you  
 7 leave open to them?  
 8 MR BUDLENDER SC: No, I understand that.  
 9 That's with respect not an answer to my question. We know  
 10 that the strikers had lost confidence in the NUM, that the  
 11 NUM president tried to speak to them and they weren't  
 12 interested in listening to him. Now what do you say they  
 13 did that they shouldn't have done, or should have done that  
 14 they didn't do, that led to the deaths of 34 people on the  
 15 16th of August?  
 16 MR DE ROVER: If I, and you will correct  
 17 me I'm sure if I'm wrong, but my understanding of what has  
 18 been presented before the Commission is that on the 10th of  
 19 August the strikers marched to the NUM offices and I take  
 20 that march, and I've seen the footage of it, as an attempt  
 21 to draw attention to their plight and to engage NUM. There  
 22 wasn't anything hostile in that. There wasn't anything  
 23 aggressive. I think it was a genuine question for  
 24 attention and that attention wasn't given. On the 11th when  
 25 they went back there is that allegation that shots were



<p style="text-align: right;">Page 36897</p> <p>1 fired from the NUM offices into the group that approached 2 and that has triggered subsequent responses, and that is 3 when matters went violent. 4 [09:50] MR BUDLENDER SC: And that led to the 5 police shooting 34 people on the 16th of August? 6 MR DE ROVER: Look, I'm sure we will get 7 to that, but you know the problem that I have with those 8 reasonings is that you're hinting at what I call that 9 unravelling system and I will get an opportunity to clarify 10 that. There are relationships at work that when put in 11 sequence under the conditions as they happened at Marikana 12 produced that unimaginable result. Now it's far more 13 interesting to look at the system that permitted to produce 14 that in first instance before you come to the point where 15 you judge the responses as they happened at scene 1 and 16 scene 2, and I'm happy to engage with you on those as well, 17 but before doing that I would like to also be able to point 18 out that there are bigger forces at work here because my 19 concern is even if you would accept that Marikana was 20 without precedent - and I know that already some people 21 struggle to accept that - if, the least you need to 22 recognise that it is a precedent and that if you do not 23 alter reality that led to Marikana, it will happen again. 24 That's just a matter of time. 25 MR BUDLENDER SC: Mr De Rover, do you</p>	<p style="text-align: right;">Page 36899</p> <p>1 MR BUDLENDER SC: What criticism did the 2 National Commissioner make of the conduct of the South 3 African Police Service at Marikana? 4 MR DE ROVER: I think - 5 MR BUDLENDER SC: Not what you think, 6 what she told you. 7 MR DE ROVER: She asked me to assist SAPS 8 with establishing what went wrong and why and to seek the 9 remedies to avoid this from happening again. 10 MR BUDLENDER SC: I'm sure she did, but 11 I'm asking you what criticism did the National Commissioner 12 make to you of the conduct of the SAPS at Marikana? 13 MR DE ROVER: I don't think that she 14 voiced any particular one that I can give you as a quote 15 and that you can cross-reference with her, but - 16 MR BUDLENDER SC: Well, you told the 17 Commission that she was critical of the - 18 MR DE ROVER: Ja. 19 MR BUDLENDER SC: - from the National 20 Commissioner down she was critical of the conduct of the 21 SAPS. I'm asking you to say how, in what manner was she 22 critical. 23 MR DE ROVER: In the conversations I have 24 had with her I think she has a great concern for the 25 outcome and wants to understand how it can be prevented, or</p>
<p style="text-align: right;">Page 36898</p> <p>1 consider that the conduct of the South African Police 2 Service is partly to blame for the shootings, for the 3 killings at scene 1? 4 MR DE ROVER: Yes. 5 MR BUDLENDER SC: Alright. Now did you 6 interview South African Police Service members who were 7 critical of the conduct of the SAPS? 8 MR DE ROVER: Yes. 9 MR BUDLENDER SC: Who were they and in 10 what respects were they critical? 11 MR DE ROVER: Do you really want me to 12 give you the names of the people that were critical? 13 MR BUDLENDER SC: Yes. 14 MR DE ROVER: Okay. They go from the 15 National Commissioner right down to the operational 16 commander. 17 MR BUDLENDER SC: Well, let's start with 18 the National Commissioner. In what respects was the 19 National Commissioner critical of the conduct of the SAPS? 20 MR DE ROVER: I think that on the outcome 21 of the operation, the way the operation evolved on the 22 ground and could not be controlled, she had serious 23 concerns and those concerns have led to her presentation 24 yesterday before the Portfolio Committee to seek and 25 redress.</p>	<p style="text-align: right;">Page 36900</p> <p>1 how it can be explained. 2 MR BUDLENDER SC: I'm sure that's so. I 3 don't doubt that for a moment. 4 MR DE ROVER: Ja. 5 MR BUDLENDER SC: But that's not an 6 answer to the question. The question is in what manner was 7 the National Commissioner critical of the conduct of the 8 SAPS at Marikana? 9 MR DE ROVER: I cannot be more specific 10 than I have been. 11 MR BUDLENDER SC: Well, it's not a 12 matter, Mr De Rover, of not being specific. You actually 13 haven't answered the question. 14 MR DE ROVER: Ja. 15 MR BUDLENDER SC: Can you tell us, was 16 the Provincial Commissioner critical of the conduct of the 17 SAPS at Marikana? 18 MR DE ROVER: Yes. 19 MR BUDLENDER SC: In what manner, what 20 respects was she critical of the conduct of the SAPS at 21 Marikana? 22 MR DE ROVER: In terms of organisation 23 and communication. 24 MR BUDLENDER SC: Can you explain that 25 further? What did she say the SAPS did wrong? Because</p>

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1 that's what you were trying to find out –  
 2 MR DE ROVER: Ja.  
 3 MR BUDLENDER SC: - did the SAPS do  
 4 something wrong. The Provincial Commissioner gave you an  
 5 answer. What was her answer?  
 6 MR DE ROVER: The answers of the  
 7 Provincial Commissioner went to the running of the JOC and  
 8 the communication between the different stakeholders. The  
 9 concern that with the interactions that happened in the  
 10 JOC, the different parties that were represented and  
 11 present there, plus the lateral connections of people  
 12 ringing on mobile phones created a reality that was very  
 13 difficult to manage.  
 14 MR BUDLENDER SC: That's what she told  
 15 you?  
 16 MR DE ROVER: Yes.  
 17 MR BUDLENDER SC: She didn't tell the  
 18 Commission that.  
 19 MR DE ROVER: I can't help that.  
 20 MR BUDLENDER SC: In what respect was  
 21 Brigadier Calitz critical of the conduct of the SAPS at  
 22 Marikana? Or was he not critical?  
 23 MR DE ROVER: I think his frustration was  
 24 with communication on the ground, the possibility to relay  
 25 information and to get updated as to what was actually

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1 happening on the ground.  
 2 MR BUDLENDER SC: In what respects was  
 3 General, if any, was General Annandale critical of the  
 4 conduct of the SAPS at Marikana?  
 5 MR DE ROVER: It's the same thing, the,  
 6 their inability to at all times be informed of what was  
 7 transpiring on the ground.  
 8 MR BUDLENDER SC: Well, let's come to  
 9 that. Incidentally, just before I come to that, have you  
 10 consulted at all with Lieutenant-Colonel Vermaak or  
 11 Lieutenant-Colonel Merafe?  
 12 MR DE ROVER: I have consulted with  
 13 Lieutenant-Colonel Merafe. I have not consulted with  
 14 Vermaak.  
 15 MR BUDLENDER SC: Why not with Vermaak?  
 16 MR DE ROVER: I have his statements and I  
 17 have the transcripts of his evidence. I have never had the  
 18 chance or made the decision to sit down with him.  
 19 MR BUDLENDER SC: I'm sorry, you'd never  
 20 had the?  
 21 MR DE ROVER: I have never had the  
 22 opportunity to sit down with him.  
 23 MR BUDLENDER SC: Did you ask for an  
 24 opportunity to sit down with him?  
 25 MR DE ROVER: No, I did not.

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1 MR BUDLENDER SC: You mentioned the  
 2 communication problems – let me come back to that in due  
 3 course.  
 4 CHAIRPERSON: Before you move on, did you  
 5 speak to General Mpembe?  
 6 MR DE ROVER: Yes, I did.  
 7 CHAIRPERSON: Did he have critical  
 8 comments?  
 9 MR DE ROVER: I think General Mpembe's  
 10 frustration is with particularly the events on the 13th of  
 11 August.  
 12 CHAIRPERSON: Yes, I understand that.  
 13 MR DE ROVER: Ja.  
 14 CHAIRPERSON: That's a valid reply.  
 15 MR DE ROVER: Yes, Sir.  
 16 CHAIRPERSON: But as far as the events of  
 17 the 16th are concerned did he have any critical comments  
 18 that he communicated to you –  
 19 MR DE ROVER: No.  
 20 CHAIRPERSON: - about what happened on  
 21 the 16th?  
 22 MR DE ROVER: No.  
 23 CHAIRPERSON: I see. What were his  
 24 concerns about the 13th?  
 25 MR DE ROVER: I think, I've had several

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1 meetings with General Mpembe and it, I'm not an expert on  
 2 trauma but I think he still carries a legacy of what  
 3 happened on that day and I think he has a narrative for  
 4 what happened, what occurred, and he's questioning whether  
 5 if he had been somewhere else or positioned himself  
 6 somewhere else rather than to be walked behind the group  
 7 when they diverted from the railway line, if him being in  
 8 another position than the one he opted for it would have  
 9 been possible to avert what actually happened there.  
 10 CHAIRPERSON: Yes, the point is to me  
 11 whether he had critical comments. Are you suggesting he  
 12 was only criticising himself because he was in the wrong  
 13 position, or did he have more critical comments to make  
 14 than that?  
 15 MR DE ROVER: He cites the discussions  
 16 that he had with Colonel Merafe and it's why I went to see  
 17 Colonel Merafe to get his side of that story, because it  
 18 appears from what both say that they did have an argument  
 19 about what action was to be preferred at that stage and at  
 20 that moment in time.  
 21 MR BUDLENDER SC: Now you referred to the  
 22 problem of communication and I want to take you to the  
 23 evidence leaders' interrogatories which, Commissioners, is  
 24 document 8 in your bundle, I think. No –  
 25 CHAIRPERSON: [Inaudible] we have an

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1 index that says it's 1, but 1 –

2 MR BUDLENDER SC: It's flag 1 in your

3 bundle.

4 CHAIRPERSON: What is flag 1 in my bundle

5 is actually Colonel Scott's statement. I see, yes I've got

6 it. Behind Colonel Scott's statement in my bundle is the

7 interrogatories. Is it an exhibit yet?

8 MR BUDLENDER SC: No, it's not an exhibit

9 yet, Chair. The Human Rights Commission has prepared a

10 list of exhibits, so could we use their number? Their

11 numbers, it's UUUU2.4.

12 CHAIRPERSON: UUUU –

13 MR BUDLENDER SC: That will fall into a

14 sequence which they're going to use.

15 CHAIRPERSON: - 2.4, that's evidence

16 leaders' interrogatories.

17 MR BUDLENDER SC: Yes. Now Mr De Rover,

18 could you go to page 6 of that document, paragraphs 10 and

19 11. Paragraph 10 you were asked the following question,

20 "When you prepared FFF11 and FFF11A were you informed that

21 at 16:03 before scene 2 commenced Brigadier Pretorius in

22 charge of the JOC sent an SMS message to Mr Molatedi at

23 IPID stating 'Having operation at Wonderkop, bad, bodies.

24 Please prepare your members as going to be bad,' or that

25 there was any communication between Brigadier Pretorius and

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1 IPID at the time?" and you said no. You said this was the

2 first you'd heard of this, and then the next question,

3 paragraph 11 was, "When you prepared FFF11 and 11A were you

4 informed that from 16:05 before scene 2 commenced Brigadier

5 Pretorius had a series of telephone calls with Captain

6 Loest who was at scene 1 and informed her what had happened

7 there?" and you said no, this was the first time you were

8 told about this.

9 MR DE ROVER: Yes.

10 MR BUDLENDER SC: Now we know that

11 Brigadier Pretorius was in charge of the JOC. She was the

12 manager of the JOC.

13 MR DE ROVER: Yes.

14 MR BUDLENDER SC: Could you just speak a

15 bit louder?

16 MR DE ROVER: Yes.

17 MR BUDLENDER SC: So we know that the

18 person in charge of the JOC knew shortly after 4 o'clock

19 and well before scene 2 happened that there had been

20 shootings and there was a bad situation at scene 1, but you

21 weren't told that when you prepared your reports. I

22 understand that. Is that correct?

23 MR DE ROVER: That's correct.

24 MR BUDLENDER SC: What it means is that

25 however bad the communication system was, the person in

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1 charge of the JOC knew well before scene 2 happened of the

2 bad incident and the shootings that had happened at scene

3 1. Is that correct?

4 MR DE ROVER: If I take that –

5 MR BUDLENDER SC: If you take that at

6 face value.

7 MR DE ROVER: Ja, at face value that that

8 would appear, you know there would have been at least what,

9 is it five minutes or six minutes –

10 MR BUDLENDER SC: Yes, from 16:03.

11 MR DE ROVER: Ja.

12 MR BUDLENDER SC: At least, yes.

13 MR DE ROVER: Before scene 2 started.

14 MR BUDLENDER SC: Yes. Now if you had

15 known that when you prepared your report, would that have

16 influenced your opinion on the failure to call a halt to

17 the operation before scene 2 happened?

18 MR DE ROVER: No, because I think I said

19 already in my first statement that I believe a halt should

20 have been called and the fact that it didn't happen can be

21 led back to part of unravelling systems and issues that in

22 and of themselves might not be fatal, but when you sequence

23 them produce a result.

24 MR BUDLENDER SC: I understand that.

25 MR DE ROVER: Yes.

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1 MR BUDLENDER SC: You criticise, you say

2 that there should have been a halt before scene 2.

3 MR DE ROVER: Yes.

4 MR BUDLENDER SC: But your understanding

5 at that time was that the JOC didn't know about scene 1.

6 MR DE ROVER: No, my understanding at

7 that time was that the JOC could not access the commanders

8 via the radio and I don't know if the fact that Brigadier

9 Pretorius may have known at 16:03 – I don't even know what

10 it exactly then is that she knew, but if at that stage

11 there is a problem with the radios, the fact that the JOC

12 would know but they are unable to reach people on the

13 ground at that time, that still leaves that part of the

14 problem –

15 MR BUDLENDER SC: Are you aware – sorry,

16 Mr De Rover. Are you aware of any evidence that the JOC

17 attempted to call a halt to the operation after scene 1?

18 MR DE ROVER: No, I'm not.

19 MR BUDLENDER SC: Right, can we then in a

20 related matter – did you ask them why they didn't try to

21 call a halt to the operation?

22 MR DE ROVER: Yes.

23 MR BUDLENDER SC: And what did they say?

24 MR DE ROVER: They said they were unable

25 to contact people on the ground and –

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1 MR BUDLENDER SC: No, Mr De Rover, you  
 2 just said you're not aware that they made any attempt to  
 3 halt the operation, so they can't have – if you aren't  
 4 aware that they made any attempt then how can you –  
 5 MR DE ROVER: I think there's two  
 6 different things. You asked me if they made an attempt.  
 7 I –  
 8 MR BUDLENDER SC: Sorry, my first  
 9 question was, are you aware of any evidence that they made  
 10 an attempt.  
 11 MR DE ROVER: No.  
 12 MR BUDLENDER SC: Then how can the  
 13 communication problems be a cause of the failure to call a  
 14 halt if they didn't try?  
 15 MR DE ROVER: Well, let's - I would take  
 16 the inference of the reference to the radio problem that  
 17 they would have tried but found that the radios weren't  
 18 working.  
 19 MR BUDLENDER SC: Did anyone tell you  
 20 that?  
 21 MR DE ROVER: Yes.  
 22 MR BUDLENDER SC: They told you that they  
 23 wanted to try but the radios weren't working?  
 24 MR DE ROVER: Yes.  
 25 MR BUDLENDER SC: Who told you that?

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1 MR DE ROVER: Annandale and Scott.  
 2 MR BUDLENDER SC: So Annandale and Scott  
 3 told you they were aware that scene 1 had happened and they  
 4 tried to stop scene 2 –  
 5 MR DE ROVER: No, no, no –  
 6 MR BUDLENDER SC: - but the  
 7 communications wouldn't happen, wouldn't work?  
 8 MR DE ROVER: No, they did not did not  
 9 say that they were aware of scene 1. They did –  
 10 MR BUDLENDER SC: Did they say that –  
 11 MR DE ROVER: They did say that they lost  
 12 for a period of time contact with people on the ground –  
 13 MR BUDLENDER SC: Did they say that –  
 14 MR DE ROVER: - with the operational  
 15 commander.  
 16 MR BUDLENDER SC: Did they –  
 17 CHAIRPERSON: Mr Budlender, sorry. You  
 18 mustn't interrupt the witness.  
 19 MR BUDLENDER SC: I apologise.  
 20 CHAIRPERSON: When he's giving an answer  
 21 you must let him finish.  
 22 MR BUDLENDER SC: I apologise. Did they  
 23 tell you that they wanted to call a halt but they were  
 24 unable to do so?  
 25 MR DE ROVER: No, that was never said.

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1 MR BUDLENDER SC: Alright, okay. Also  
 2 around that issue can you go to paragraph 8 of that  
 3 interrogatory? That's on page 6. The question is asked,  
 4 "When you prepared FFF11 and FFF11A were you informed that  
 5 the firing of R5 rifles at scene 1 was audible through the  
 6 police radio to members of the JOC and to other commanders  
 7 on the ground?" and your answer is, "I'm not sure that this  
 8 assertion represents a statement of fact. I understand  
 9 that Mr Dirk Botes made a statement to this effect. What I  
 10 understand is that as scene 1 happened radio traffic was  
 11 between Brigadier Calitz, who was inside a Nyala at the  
 12 time, and Lieutenant-Colonel Vermaak, who was in a chopper  
 13 in the air. I'm therefore not sure as to the mechanics of  
 14 how this is supposed to have happened as no other person  
 15 made a similar statement to that effect." Now can I take  
 16 you to – is this what you were informed by the SAPS that no  
 17 other person made a similar statement to this effect?  
 18 MR DE ROVER: Yes.  
 19 MR BUDLENDER SC: Right, now can we go to  
 20 exhibit HHH8, the statement Warrant Officer Masinya.  
 21 CHAIRPERSON: Behind flag 3 in your  
 22 bundle.  
 23 MR BUDLENDER SC: Paragraph 12 –  
 24 CHAIRPERSON: There are a couple of  
 25 statements [microphone off, inaudible].

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1 MR BUDLENDER SC: Yes, there's several,  
 2 I'm afraid. It's the last one in the bundle of HHH8.  
 3 Perhaps we should go to the previous page just so we can  
 4 identify what was happening. On the previous page,  
 5 paragraph 11, Warrant Officer Masinya was one of the video  
 6 operators who left the scene. He says, "Captain Adriaio of  
 7 Communication Services, are you guys from SAPS?" "Yes."  
 8 Warrant Officer Masinya replied, "You've been identified to  
 9 as police spies. You should withdraw from this place as  
 10 the miners said they wanted to kill you." Then he goes on  
 11 in paragraph 12, "We then went back to the JOC. The  
 12 shooting started. We heard this because we were listening  
 13 through the radio at the JOC." So he heard the shooting  
 14 over the radio, correct?  
 15 MR DE ROVER: That's what he says.  
 16 MR BUDLENDER SC: That's what he says.  
 17 MR DE ROVER: Yes, that's what he says.  
 18 MR BUDLENDER SC: You were not informed  
 19 of that?  
 20 MR DE ROVER: No, I read this statement  
 21 yesterday because it was part of the documents that you  
 22 sent across.  
 23 MR BUDLENDER SC: Yes, but you didn't see  
 24 that previously?  
 25 MR DE ROVER: No.

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1 MR BUDLENDER SC: And you've also seen,  
 2 because that's one of the documents I've sent across, was  
 3 LLL9, the statement of Colonel Moolman at paragraph 35 –  
 4 CHAIRPERSON: Paragraph 35 on page –  
 5 these documents, we haven't got page numbers, we have to go  
 6 by paragraph numbers.  
 7 MR BUDLENDER SC: Ja, paragraph - do you  
 8 have that?  
 9 MR DE ROVER: Sorry, which paragraph?  
 10 [10:10] MR BUDLENDER SC: Paragraph 35. It's  
 11 about three pages from the end, and this is what  
 12 Lieutenant-Colonel Moolman says. She says, "I remained at  
 13 the JOC during the afternoon. I heard over the radio that  
 14 there was a shooting. To me it sounded like chaos on the  
 15 radio, but I think I heard Brigadier Calitz's voice. I  
 16 heard shots being fired and I think I heard Brigadier  
 17 Calitz's voice saying 'Cease fire.' I recalled Brigadier  
 18 Pretorius starting to despatch emergency services." You  
 19 didn't see that before you prepared your report either, did  
 20 you?  
 21 MR DE ROVER: No.  
 22 MR BUDLENDER SC: Or before you prepared  
 23 your interrogatory answers?  
 24 MR DE ROVER: No.  
 25 MR BUDLENDER SC: But if what she says is

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1 correct then she too says that it was audible over the  
 2 radio.  
 3 MR DE ROVER: Yes.  
 4 MR BUDLENDER SC: And then can I take you  
 5 to the evidence of Captain Kidd. Could we have the  
 6 transcript of day 232, page 29003, line 14. This is line  
 7 14, Ms Baloyi is questioning Captain Kidd. She says, "You  
 8 say you'd reached, before you'd reached your intended  
 9 position you heard about the attack on the radio that the  
 10 police were under attack. You hear that. What then  
 11 happens? What do you do, if anything, after you hear this  
 12 message?" He answers, "Okay, when that happens I start  
 13 calling on the radio. I start calling on the radio,  
 14 Brigadier Calitz, the JOC, Lieutenant-Colonel Vermaak. I  
 15 was calling, calling just to get some response but I  
 16 received nothing." Ms Baloyi says, "And what" and then  
 17 Commissioner Hemraj says, "Sorry, what did you hear on the  
 18 radio? Exactly what did you hear as regards the attack?"  
 19 Captain Kidd says, "Mr Chairman, I heard commotion, the  
 20 firing of ammunition, people screaming." Commissioner  
 21 Hemraj asks, "And could you identify any person's voice  
 22 making the report that the police were under attack?"  
 23 Captain Kidd, "No, I couldn't identify any members."  
 24 Chairperson, "You hear on the radio that a volley was being  
 25 fired, ammunition was being fired, and presumably you can

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1 tell the difference between rubber balls being fired from a  
 2 shotgun and sharp ammunition being fired from an R5 rifle,  
 3 can you? It's a different sound, isn't it?" Answer,  
 4 "That's correct, Mr Chairman." Chairperson, "That's what  
 5 you heard?" Captain Kidd, "That's correct." Chairperson,  
 6 "R5 rifles? So anyone listening to the radio would have  
 7 heard that?" Captain Kidd, "That's correct, Mr Chairman."  
 8 Now if Captain Kidd's evidence is the truth then everyone  
 9 who was listening to the radio would have heard the  
 10 shooting at scene 1. You accept that? That's what he  
 11 says.  
 12 MR DE ROVER: If radios work and people  
 13 are listening to them, yes.  
 14 MR BUDLENDER SC: Yes, okay. Anyone who  
 15 was listening, he says – yes, alright. Now did you know  
 16 that when you answered the interrogatories?  
 17 MR DE ROVER: When I spoke to Captain  
 18 Kidd, and that's different from what he said here, when I  
 19 spoke to him he said he could hear the shooting just  
 20 because of the physical distance. He never, when he, when  
 21 I talked to him he never said that he heard it on his  
 22 radio. That qualification is new to me. What I understood  
 23 was that he could hear the gunfire from where he was  
 24 approaching from the settlement that is on the south-  
 25 western side where he was originally.

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1 MR BUDLENDER SC: But you now know that  
 2 his evidence is that you could hear it over the radio?  
 3 MR DE ROVER: That's what I see, yes.  
 4 MR BUDLENDER SC: So the information  
 5 which you had that no person other than Mr Botes said it  
 6 was audible over the radio seems not to be correct?  
 7 MR DE ROVER: That's correct.  
 8 MR BUDLENDER SC: Right. Does that  
 9 affect your opinions in any way?  
 10 MR DE ROVER: Well of course it does. Of  
 11 course it does.  
 12 MR BUDLENDER SC: Yes, alright. Let's  
 13 move on. Can we go to page 3 of the interrogatory?  
 14 CHAIRPERSON: We haven't got page numbers  
 15 on ours. Just give us the paragraph number.  
 16 MR BUDLENDER SC: It's paragraph 1.12.  
 17 CHAIRPERSON: Thank you.  
 18 MR BUDLENDER SC: Before I go there, Mr  
 19 De Rover, let me just make clear what I'm asking because I  
 20 don't want to be unfair to you. I appreciate you were  
 21 dependent on the information which was given to you. You  
 22 weren't an eyewitness and so you have no personal knowledge  
 23 of what happened. You can only rely on what you were told,  
 24 and so it's not fair to ask you – and I'm not going to ask  
 25 you – do you agree that X happened or do you agree that Y

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1 happened, because you don't know. You rely on other  
 2 people's accounts. So what I'm really asking you is if  
 3 what so-and-so says is correct that would affect your  
 4 conclusions, I'm not asking you to say that what he says is  
 5 correct.  
 6 MR DE ROVER: Okay.  
 7 MR BUDLENDER SC: Or not correct. You're  
 8 with me, right. Now paragraph 1.12 on page 3 you were  
 9 asked, "When you prepared FFF11 and FFF11A were you  
 10 informed that there was no POP input into the formulation  
 11 of the stage 3 disperse, disarm and arrest plan?" and your  
 12 answer was, "To my knowledge this assertion is not  
 13 supported by the evidence led before the Commission,  
 14 notably Brigadier Calitz, Brigadier Tsiloane, Colonel  
 15 Makhubela, Lieutenant-Colonel Merafe, Lieutenant-Colonel  
 16 Pitsi and Lieutenant-Colonel Mere all had inputs into the  
 17 plan and all have extensive POP experience." Now when do  
 18 you, from what you've been told, when do you understand  
 19 that the stage 3 disperse, disarm and arrest plan was  
 20 formulated?  
 21 MR DE ROVER: My understanding was that  
 22 on the 14th and the 15th the plan for Marikana in its  
 23 possible outlines that, or in situations that could  
 24 eventuate was prepared.  
 25 MR BUDLENDER SC: When do you understand

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1 that the plan for what would actually be done on the 16th  
 2 was prepared?  
 3 MR DE ROVER: Before the 16th.  
 4 MR BUDLENDER SC: Before the 16th. Now if  
 5 you assume for the moment that the Commission finds that  
 6 there was no stage 3 plan before the 13:30 JOCCOM on the  
 7 16th, assume the Commission finds that, then that would mean  
 8 that there had been no POP input into the plan. Do you  
 9 accept that?  
 10 MR DE ROVER: Well look, ja, if you put  
 11 that time constraint you're presenting a physical  
 12 impossibility to consult, so –  
 13 MR BUDLENDER SC: Yes, and that would  
 14 affect your opinion as to the planning of the operation?  
 15 MR DE ROVER: Ja, but logically, yes.  
 16 MR BUDLENDER SC: Yes, I accept that.  
 17 That's fair enough. It's for the Commission to decide  
 18 whether that is or isn't in fact the case.  
 19 MR DE ROVER: No, but what I want to,  
 20 maybe to give a little bit more context, and if that's not  
 21 pleasing please stop me doing so, but on an operation of  
 22 this kind I would expect a police force to do the Alpha and  
 23 the Omega, like you don't plan half of it and hope that  
 24 half of it will suffice and if you need more that you are  
 25 going to go back and envisage what other eventualities

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1 could occur. So I would be surprised if a plan indeed into  
 2 completed to phases 3, 4, 5 and 6 was only thought of at  
 3 half past 1 on the 16th. That would be a serious worry.  
 4 MR BUDLENDER SC: Well, the Commission  
 5 will make its own findings as to what was planned when, and  
 6 I don't want to debate that with you.  
 7 MR DE ROVER: Sure.  
 8 MR BUDLENDER SC: That's not fair to you  
 9 or appropriate.  
 10 MR DE ROVER: Okay.  
 11 MR BUDLENDER SC: Then when you –  
 12 CHAIRPERSON: Have you read all of  
 13 Colonel Scott's evidence?  
 14 MR DE ROVER: Yes.  
 15 CHAIRPERSON: I see. So you know what he  
 16 said about what happened on the Thursday morning and what  
 17 happened at the 1:30 meeting.  
 18 MR BUDLENDER SC: Now related to that, at  
 19 paragraph 1.11 of the evidence leaders' interrogatories you  
 20 were asked, "When you prepared FFF11 and FFF11A were you  
 21 informed that when just before 1:30 on 16 August the  
 22 Provincial Commissioner made the decision referred to in  
 23 1.9," that's to put it into operation, "there was no  
 24 written plan for the stage 3 disperse, disarm and arrest  
 25 operation?" and your answer is, "Yes. I also understand

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1 the disperse, disarm and arrest was standard operational  
 2 procedures that do not require a written plan. My  
 3 appreciation is that the plan that existed at Marikana does  
 4 provide the breakdown of the different stages. Disperse,  
 5 disarm and arrest are common POP terms referring to common  
 6 tactical options available to POP, known and understood and  
 7 regularly practised and applied by POP members. There is  
 8 no need for those terms to be further clarified or detailed  
 9 in writing beyond their indication as forming part of stage  
 10 3 of the plan." Now let me, so as I understand your  
 11 response the disperse, disarm and arrest plan was so  
 12 familiar to POP members as part of their routine that as a  
 13 practical matter there was no need for a written plan?  
 14 MR DE ROVER: If – ja, I take that, if I  
 15 think I just take the number of public order incidents that  
 16 happen in this country on an annual basis then I would  
 17 expect them on, just on the basis and force of that number  
 18 to be very familiar, given that in their approach there is  
 19 a limited number of tactical options available to them.  
 20 MR BUDLENDER SC: Can we go to the  
 21 statement of Lieutenant-Colonel Scott? It's GGG39,  
 22 paragraph 6. It's a long paragraph, but I do need to read  
 23 it. He says, "Finally I want to add that in my 20 years at  
 24 the South African Police Services, 19 of which in the  
 25 Special Task Force, I'm not aware that the SAPS has never"

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1 – I think he means has ever – “been confronted with a  
 2 situation of the kind with which members were confronted on  
 3 the ground on 16 August 2012. The plan or strategy that I  
 4 prepared and proposed for adoption by the JOCCOM was the  
 5 first of its kind. Neither the crowd management strategies  
 6 for which Standing Order 262 provides, nor the hostage  
 7 management strategies were appropriate in isolation. I  
 8 thus had to devise what I considered at the time to be an  
 9 appropriate plan for an unprecedented situation, being one  
 10 which had to encompass the principles of Standing Order  
 11 262, but moving beyond the restrictions of the standing  
 12 order to effectively plan for the disarming of the  
 13 protesters while considering protection of the police  
 14 officials and the community in the area when dealing with  
 15 the belligerent armed group numbering up to 3 000 persons  
 16 who were choosing to contest the request to disperse and/or  
 17 disarm, demonstrating a clear defiance towards the law and  
 18 the enforcers of the law with aggressive action should they  
 19 be approached, as determined on Monday 13th August 2012.”  
 20 Now Colonel Scott doesn't seem to have regarded  
 21 this as a normal operation which required no special  
 22 planning. You note that?  
 23 MR DE ROVER: I think that his statement  
 24 is probably a reflection of his particular brand of  
 25 knowledge. It doesn't take away of the reality that

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1 disperse, disarm and arrest are known concepts to POP that  
 2 when you consider POP do not require that detailed  
 3 explanation. They might have needed it for Colonel Scott,  
 4 but definitely not for POP.  
 5 MR BUDLENDER SC: This was an operation  
 6 involving multiple forces that was according to Colonel  
 7 Scott an unprecedented operation as far as his experience  
 8 went.  
 9 MR DE ROVER: Yes.  
 10 MR BUDLENDER SC: Surely that required a  
 11 plan, a proper plan in advance. You couldn't just say just  
 12 go and disperse, disarm and arrest, because it was a  
 13 multiple plan involving multiple parties in an  
 14 unprecedented situation. Surely that required a proper  
 15 written plan.  
 16 MR DE ROVER: The responsibilities of the  
 17 different units are contained in the plan and I'm only  
 18 saying that where you ask me the question on where, on  
 19 stage 3, disperse, disarm and arrest, whether you need to  
 20 spell that out for the units that are supposed to initially  
 21 do that, my answer is no, you don't have to do that.  
 22 MR BUDLENDER SC: Do you think for an  
 23 operation of this kind there was a need for a written plan  
 24 communicated to all of the different units?  
 25 MR DE ROVER: Of course there is a need

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1 for a written plan. The thing is I think that you can't  
 2 plan for the unimaginable. You are trying to find  
 3 somewhere now in the process a development, a situation or  
 4 a decision that can be held as the key point on if you  
 5 hadn't done that this wouldn't have happened, and I think  
 6 that the plan as it stood, the base idea is obviously born  
 7 from experience, from doctrine and from the availability of  
 8 resources on a point, and I see in the sequencing of what  
 9 happened it's not hard to identify the moments where you  
 10 can say if you hadn't done this, that wouldn't have  
 11 happened. But my problem is much more with whether you  
 12 could actually foresee that development.  
 13 MR BUDLENDER SC: Mr De Rover, my  
 14 question was this; for an operation of this kind involving  
 15 multiple forces and according to Colonel Scott an  
 16 unprecedented operation, was there a need for a written  
 17 plan?  
 18 MR DE ROVER: Of course.  
 19 MR BUDLENDER SC: Right, and the plan  
 20 must cater for a variety of contingencies. You plan for  
 21 the best case and the worst case scenarios.  
 22 MR DE ROVER: Yes.  
 23 MR BUDLENDER SC: Yes, and that's what  
 24 the plan needed to provide for, correct?  
 25 MR DE ROVER: I needs to provide for

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1 these contingencies of best and worst case and that needs  
 2 to be accompanied with a probability estimate.  
 3 MR BUDLENDER SC: Yes, indeed. Alright,  
 4 have you seen such a plan?  
 5 MR DE ROVER: I have seen the plan that  
 6 SAPS had available and the contingencies that they planned  
 7 for.  
 8 MR BUDLENDER SC: And in your opinion did  
 9 it meet the requirements of a plan which informs the  
 10 different units of what they're going to do and which deals  
 11 with the best case scenarios and the worst case scenarios  
 12 and for contingencies?  
 13 MR DE ROVER: I've seen better plans and  
 14 I've seen worse plans.  
 15 MR BUDLENDER SC: No, that's not the  
 16 question, Mr De Rover.  
 17 MR DE ROVER: Ja.  
 18 MR BUDLENDER SC: The question is was it  
 19 a plan, was it an adequate plan?  
 20 MR DE ROVER: For me it was an adequate  
 21 plan.  
 22 MR BUDLENDER SC: Alright, well I'm going  
 23 to have to leave shortly, but can you make available to the  
 24 Commission the plan which you say met those requirements  
 25 adequately?

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1 MR DE ROVER: Sorry?

2 MR BUDLENDER SC: Can you during the

3 course of the day identify which is the plan which you saw

4 which you say met the requirements adequately?

5 MR DE ROVER: Okay.

6 MR BUDLENDER SC: And make it available,

7 identify it for the benefit of the Commission. Right, now

8 let me move on to a different subject –

9 CHAIRPERSON: He can do that overnight if

10 he likes. He may be busy or-

11 MR BUDLENDER SC: Yes, he can do that

12 overnight because I think we are going to be here –

13 CHAIRPERSON: He'll be here until

14 lunchtime tomorrow, so he can do it overnight and give it

15 to us tomorrow morning.

16 MR BUDLENDER SC: Thank you, Chair.

17 CHAIRPERSON: Together, I don't know

18 whether the lessons that we were going to get –

19 MR BUDLENDER SC: I'm coming to that,

20 Chair. Two other matters I'd like to address with you, Mr

21 De Rover. Firstly can you go to paragraph 1.3 of the

22 evidence leaders' interrogatories. The question was asked,

23 "When you prepared FFF11 and FFF11A were you informed that

24 the decision was endorsed by an extraordinary session on

25 the evening of 15 August 2012 of most of the members of the

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1 National Management Forum?" and your answer is, "Yes, I was

2 aware of the recording and the minutes of the extraordinary

3 session held on 15 August 2012, that the session endorsed

4 the decision that the strikers be disarmed if they do not

5 do so voluntarily." Now did you know of that when you

6 produced FFF11? That was on the 8th of March 2013.

7 MR DE ROVER: Yes.

8 MR BUDLENDER SC: Had you seen the

9 minutes by that time?

10 MR DE ROVER: No.

11 MR BUDLENDER SC: When did you see the

12 minutes?

13 MR DE ROVER: I have not seen the

14 minutes.

15 MR BUDLENDER SC: Who told you about the

16 extraordinary session of the NMF before the 8th of March

17 2013?

18 MR DE ROVER: You'll have to accept that

19 I honestly cannot remember. I know that somebody from SAPS

20 told me, but I cannot recall who.

21 MR BUDLENDER SC: No, of course I accept

22 that. But somebody in SAPS who was briefing you thought

23 that the matter was sufficiently important to tell you of

24 the meeting.

25 MR DE ROVER: It wasn't even like that.

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1 I remember being at a place for a meeting and meeting a

2 third person just for the first time there and who in

3 conversation over a coffee divulged that information and it

4 was new to me.

5 CHAIRPERSON: Who was the third person?

6 MR DE ROVER: I, that's what I said I

7 can't remember, but I remember that somebody told me that

8 story and I took that back to General Annandale and General

9 Mbombo and just to ascertain what had actually happened.

10 MR BUDLENDER SC: And they told you what

11 had happened?

12 MR DE ROVER: Ja.

13 MR BUDLENDER SC: Would it surprise you

14 if I told you that the Commission, you were told that

15 before the Commission was told that?

16 MR DE ROVER: Sorry?

17 MR BUDLENDER SC: Would it surprise you

18 if I told you that you were told, or given this information

19 before the Commission was given the information?

20 MR DE ROVER: I'm not aware of that. If

21 that's true then I agree, I share your surprise, but I

22 don't know.

23 MR BUDLENDER SC: Thank you. Finally, Mr

24 De Rover, when General Annandale was giving evidence he was

25 asked about what was wrong, what had gone wrong at Marikana

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1 from an SAPS perspective. I think you'll remember that. I

2 think quite a few of us asked him about that, including Mr

3 Burger, and he said that the SAPS would produce a statement

4 setting out the lessons learned from Marikana, and then on

5 the 23rd of January – or let's go there. Could we have day

6 173? So that first reference was on 15 May 2013. Then if

7 we go to day 173, page 20442, could we go to line 11?

8 There the Chairperson says the following, "Before he

9 answers I must say Mr Semenya undertook some time ago in

10 response to a question we asked him to provide us with a

11 document setting out what lessons the police considered

12 they had learned and what steps they are taking, because I

13 said it wasn't any good to wait till our report comes out

14 because incidents may happen before the report comes out."

15 Mr Mpofo says, "That's the issue." Chairperson says, "He

16 said they were aware of that and they were preparing a

17 document, so perhaps before the Brigadier answers we can

18 ask Mr Semenya what progress he can report in that regard

19 to that document."

20 [10:29] Mr Semenya says, "Chair, I've also made enquiries

21 yesterday with client and I'm told Mr De Rover is working

22 on it." And then at the next page, Chairperson, "Thank

23 you. So do you know when we're likely to get it?" and Mr

24 Semenya says, "My instructions yesterday," so that would

25 have been on the 22nd of January 2014, "were that they made



<p style="text-align: right;">Page 36929</p> <p>1 contact with Mr De Rover to establish the timelines for 2 that report to be here." Now is it correct that you were 3 requested to prepare such a report? 4 MR DE ROVER: I was never requested to 5 prepare a report. I, from when I came I think one of the 6 first things that I did was talk to the National 7 Commissioner and point out to her that if we just take it 8 as a sequential occurrence of circumstances that produced 9 this result, the least SAPS should try to do is alter 10 enough in its methods of operations to stop a similar 11 occurrence from simply happening again, because while we 12 are trying to establish what went wrong, how it went wrong 13 and why, it's important to recognise that if outside world 14 stays exactly as it is, such things can simply produce 15 again, and that is a big concern. So I've pushed them on 16 that. My personal – 17 MR BUDLENDER SC: No – 18 MR DE ROVER: Let me maybe complete the 19 answer. 20 MR BUDLENDER SC: Please. 21 MR DE ROVER: I was never asked to 22 prepare the report on lessons learned. I approached 23 lessons learned. I get, and that is my reading of the 24 responses I got in meetings where I tried to push this 25 point. They equate lessons learned with mistakes made,</p>	<p style="text-align: right;">Page 36931</p> <p>1 ones that can produce such a document are the people that 2 were involved in that operation, and they are the ones that 3 should be doing it. 4 MR BUDLENDER SC: Well, indeed. I'd 5 respectfully agree. It doesn't help for you to tell them 6 the lessons they learned – 7 MR DE ROVER: No. 8 MR BUDLENDER SC: They must decide what 9 lessons they learned. 10 MR DE ROVER: Ja. 11 MR BUDLENDER SC: That would have been my 12 question. 13 MR DE ROVER: Yes. 14 MR BUDLENDER SC: But my point is that Mr 15 Semenya was told, I'm sure he was told that you were 16 preparing a report in that regard and that they'd been in 17 contact with you; what he was told was not correct. 18 MR DE ROVER: I think what he was told 19 was incomplete. 20 MR BUDLENDER SC: Not just incomplete, 21 it's not correct. You weren't preparing a report on 22 lessons learned. 23 MR DE ROVER: No, okay, if you want to 24 read it in the strict sense that I was apparently the one 25 who was writing the report, that is wrong. That is not</p>
<p style="text-align: right;">Page 36930</p> <p>1 rather than saying I have an experience and I learn from 2 that experience, and whether that was a good experience or 3 a bad experience I seek to further the learning 4 organisation model and I seek to improve my professional 5 practices, and I think there has been a genuine reticence 6 on that perception of lesson learned equals mistake made, 7 for them to be as forthcoming as you would have wanted them 8 to be. 9 MR BUDLENDER SC: Could we just go back 10 to the previous page? 20442, down to line 21. Let's just 11 read again, or line 20. Let's just read again, line 19 the 12 Chairperson says, "He said they were aware of that and they 13 were preparing a document. Perhaps before the Brigadier 14 answers we can ask Mr Semenya what progress he can report 15 in regard to that document," and Mr Semenya says, "Chair, I 16 have also made enquiries yesterday with client and I am 17 told Mr De Rover is working on it." What your evidence 18 means is that what Mr Semenya was told was not correct 19 because you were not working on the report because you'd 20 never been asked to produce such a report. 21 MR DE ROVER: What I'm saying to you is I 22 was never asked to write the physical report. I engaged at 23 several moments in time, including before and following 24 this intervention, because I remember it, with the SAPS 25 members concerned, but you will appreciate that the only</p>	<p style="text-align: right;">Page 36932</p> <p>1 correct, yes. 2 COMMISSIONER HEMRAJ: Mr De Rover, did 3 you suggest that such a report be compiled? 4 MR DE ROVER: I, from the very early 5 days, and that's why I'm saying to you in many of the 6 meetings where I sat, and I've never voiced it back to them 7 to check whether what I sensed was true, but I felt there 8 was that equation of a lesson learned is a mistake made and 9 not a more positive approach that when you conduct any 10 operation of any kind, whether successful or not, you try 11 and draw from that operation the positive and negative 12 points that facilitate the learning organisation experience 13 so that you retain that what was good and that you seek to 14 remedy that what went wrong. 15 COMMISSIONER HEMRAJ: If you've already 16 suggested or pointed out some of the lessons you think that 17 might have been learned, it's still open for such a 18 document to be drawn up without too much trouble, isn't it? 19 MR DE ROVER: I'm aware that a draft 20 document exists and is in circulation for commentary. So I 21 don't know at what stage that will be put forward to you. 22 MR BUDLENDER SC: If I may say, if ever. 23 CHAIRPERSON: Were you contacted in 24 January of this year to establish the timelines for the 25 report in relation to the lessons learned? Were you</p>

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1 contacted – or let me ask the question with more precision.  
 2 Were you contacted in January this year by people from the  
 3 SAPS to establish the timelines for the report in relation  
 4 to the lessons learned?  
 5 MR DE ROVER: I was contacted - I would  
 6 have to check whether that was in January - and I've pushed  
 7 the organisation into this introspection exercise that they  
 8 needed to conduct, and I know that sessions have been held  
 9 in Potchefstroom, that different actors have been brought  
 10 together and that in, on the basis of these meetings a  
 11 document has been produced.  
 12 CHAIRPERSON: You see, my question was  
 13 whether you were contacted in order to establish the  
 14 timelines for such a report.  
 15 MR DE ROVER: No, because I think SAPS  
 16 has throughout also in its dealings with me very much  
 17 stayed master of its own time and calendar.  
 18 COMMISSIONER HEMRAJ: Is it envisaged  
 19 that when that draft document is, that that draft document  
 20 will at some stage be discussed with you?  
 21 MR DE ROVER: I've seen the draft  
 22 document and I would hope that they would want to discuss  
 23 it because I've got questions, plenty. So, and I'd hope  
 24 that this document would be also made available to the  
 25 Commission because I think it would help and at, it would

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1 help the recommendations of this Commission.  
 2 COMMISSIONER HEMRAJ: And do you think  
 3 the draft document is almost complete and in a form that  
 4 can be received by us?  
 5 MR DE ROVER: Yes, but like I said, I  
 6 would still have questions that the range of topics, my  
 7 main question at this stage that I haven't had a chance to  
 8 give back is to terms of reference and methodology.  
 9 MR BUDLENDER SC: I said I'm moving off  
 10 this point, Chair, unless there's something –  
 11 CHAIRPERSON: I must confess my amazement  
 12 at this stage – perhaps that's the wrong word. We've been  
 13 asking for these lessons for a long time. It was reported  
 14 to us, I can't remember whether it was reported to us in  
 15 the chamber or outside the chamber, that an undertaking had  
 16 been given by the police, the legal representatives, that  
 17 we were going to get, the lessons document was on the point  
 18 of production. I seem to remember being told it was going  
 19 to be finalised last night because I expected to see it  
 20 this morning. Is my impression incorrect? Was such an  
 21 undertaking given to us?  
 22 MR BUDLENDER SC: Chair, my colleagues  
 23 and I have had various discussions. It's been promised  
 24 imminently on a number of occasions, but we haven't seen it  
 25 yet.

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1 CHAIRPERSON: [Microphone off, inaudible]  
 2 talk of last night it's being finalised, is that – that was  
 3 something I remember having been told. I don't know who  
 4 told me.  
 5 MR BUDLENDER SC: Not I, Chair.  
 6 CHAIRPERSON: Mr Semenya, can you throw  
 7 any light on this point?  
 8 MR SEMENYA SC: As the witness indicates,  
 9 Chair, we have seen a document that's a draft and in  
 10 looking at the document as a legal team our impression was  
 11 that it is not addressing the issues the Commission is  
 12 looking for and the National Commissioner in the meeting  
 13 that I was part of very recently instructed that that  
 14 document be produced by the Friday of last week. I have  
 15 seen what has come out of that and I still think there are  
 16 elements of it which require amplification, otherwise it  
 17 will be a document for document sake.  
 18 CHAIRPERSON: Thank you. Am I correct in  
 19 thinking there was mention, I think outside the chamber now  
 20 that you've put it the way you have, that mention was made  
 21 of last night, some finalisation of the document last  
 22 night? That's what I was told by somebody.  
 23 MR SEMENYA SC: I'm hearing it from you,  
 24 Chair, for the first time. No, I'm not aware.  
 25 CHAIRPERSON: Alright. Anyway, I don't

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1 propose making myself a witness in this matter, otherwise  
 2 Mr Mpofu may wish to cross-examine me and others may wish  
 3 to as well. Anyway, let's not go there now. What you're  
 4 telling us, you saw a draft, you weren't entirely happy  
 5 with it. It wasn't adequate. Is that right?  
 6 MR DE ROVER: The document isn't dated.  
 7 It doesn't identify authors. It doesn't set terms of  
 8 reference and it doesn't clarify the methodology. So I can  
 9 go on, but it covers some of the issues that interest this  
 10 Commission, and if I just take my interest as a  
 11 professional in this field, it doesn't cover many of the  
 12 issues that would interest me as a policing professional.  
 13 CHAIRPERSON: What I have said in the  
 14 past, this was a matter of concern when we asked previously  
 15 what have you learned, what changes have you made, we were  
 16 told we're waiting for the Commission. Well that was  
 17 perhaps, I'm not sure it was entirely so but it was perhaps  
 18 an acceptable stance when this Commission was supposed to  
 19 finish its work after four months, but the complexity of  
 20 the issues that arose were such that it is clear we had to  
 21 get a number of extensions and so again I raised the matter  
 22 and said you can't wait until our report comes out because  
 23 a lot of things may happen before then.  
 24 MR DE ROVER: Ja.  
 25 CHAIRPERSON: And yes, it was agreed

<p style="text-align: right;">Page 36937</p> <p>1 we're working on it, but do I now understand that they 2 still haven't produced the document of lessons, or agreed 3 on it, you know, working on it? So if there's a problem of 4 the Marikana kind somewhere else tomorrow they still won't 5 be ready to implement such lessons as they've learned from 6 what happened at Marikana. That seems to be implicit in 7 what's been said. Am I right?</p> <p>8 MR DE ROVER: Ja, I would agree that 9 however outlandish some of the facts that appear related in 10 what transpired and produced at Marikana, they managed to 11 get into a sequence and produce that result. Now if you as 12 an organisation don't recognise that you can't suffice with 13 setting out the responsibilities of others, you also have 14 to look at your own organisation, so SAPS as an 15 organisation needs to recognise where it fell short of 16 expectations that South African society can hold, and you 17 need to act on those, and whether that is because people 18 that are in charge are not subject matter specialist or 19 expert enough to recognise that, I don't know. It's, but 20 the reality remains that some of these discussions that I 21 have had on a personal level, they are difficult. They 22 frustrate because it's, I almost feel there is a 23 miscommunication, a misunderstanding of the purpose that 24 such a document would serve, and that produces a hurdle 25 that I haven't been able to get across.</p>	<p style="text-align: right;">Page 36939</p> <p>1 you want.</p> <p>2 MR BUDLENDER SC: No, I understand. I 3 don't want you – I'm not going to scene 2. I just want to 4 understand whether you've attempted to undertake a similar 5 analysis in respect of scene 1.</p> <p>6 MR DE ROVER: Yes, but I've not, like 7 with some of the other aspects, I'm fully aware that you 8 looking at me, you look at an expert for the SAPS. I want 9 to stress that although SAPS have engaged me, I don't work 10 for SAPS. I'm not a fall guy or somebody who can be plied 11 to organisational need or requirement and it commences with 12 reiterating, I wasn't at Marikana when Marikana happened. 13 I have a reputation and experience that are based on 14 professionalism and integrity. I can't lower my standards 15 to suit anybody's narrative, and that includes SAPS 16 narrative.</p> <p>17 MR BUDLENDER SC: Let me cut to the 18 chase, Mr De Rover. I just want to ask you a question 19 about scene 1. One of the people who were killed at scene 20 1 was a Mr Thembinkosi Gwelani. Have you ever heard of 21 him?</p> <p>22 MR DE ROVER: Is he the man who can be 23 seen moving and trying to get up in the –</p> <p>24 MR BUDLENDER SC: No. No, he's not seen 25 in any of the videos –</p>
<p style="text-align: right;">Page 36938</p> <p>1 CHAIRPERSON: Thank you. I'm sorry, Mr 2 Budlender, for taking up so much of your time.</p> <p>3 MR BUDLENDER SC: There is one brief last 4 matter which I omitted. Mr De Rover, you've done a fairly 5 detailed analysis of the shootings at scene 2 where the 6 different bodies were found and trying to explain how this 7 happened. That's in your report.</p> <p>8 MR DE ROVER: Yes.</p> <p>9 MR BUDLENDER SC: Have you done a similar 10 exercise in relation to scene 1?</p> <p>11 MR DE ROVER: I think scene 1 throws up, 12 I think you have plenty sources that allow you to analyse 13 what happened there and I can throw in my five cents worth 14 but I, on the facts of what transpired there I can give you 15 the opinions that I hold, but with scene 2 that is 16 different. You have very little auditable and independent 17 evidence. Now I'm not purporting that what I have set out 18 is then factually correct because the thing is that I 19 wasn't there, and people have rightfully pointed that out 20 and that's correct. SAHRC have pointed that out, LRC have 21 pointed that out. What I've tried to do is on the basis of 22 having spoken to the people that were there, and if you 23 will then looking through their eyes, give you a sequential 24 blow-by-blow account of what happened there, and I've tried 25 to do it dispassionately, not to give a value judgment, if</p>	<p style="text-align: right;">Page 36940</p> <p>1 MR DE ROVER: Then I don't know.</p> <p>2 MR BUDLENDER SC: Okay. Well, exhibit B 3 which you have shows where he was when he was shot and 4 killed. Could you just, you've got exhibit B. Could you 5 go to the last –</p> <p>6 MR DE ROVER: Sorry, it's –</p> <p>7 MR BUDLENDER SC: Exhibit B. You've got 8 pages 16 to 18, I hope, in your bundle, and could we go to 9 the last page, page 18, which is an aerial photograph. 10 Right, do you have that? Now you'll see that scene 1 is 11 marked and then there's a marking of P. Do you see that?</p> <p>12 MR DE ROVER: Yes.</p> <p>13 MR BUDLENDER SC: That's Mr Gwelani and 14 the evidence is that he was killed by a gunshot wound to 15 the head.</p> <p>16 MR DE ROVER: Ja.</p> <p>17 MR BUDLENDER SC: And you can take it 18 from me, P, that place where P is, is approximately 250 19 metres –</p> <p>20 MR DE ROVER: From scene 1?</p> <p>21 MR BUDLENDER SC: From scene 1. Now can 22 you think of any basis on which it might be found that the 23 shooting and killing of Mr Gwelani was justified?</p> <p>24 MR DE ROVER: No, I – you know, I would 25 hold to you - and I've expressed myself on the use of R5</p>

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1 rifles in crowd control – that that rifle has a horizontal  
 2 carriage that probably exceeds 600 metres easily. So you  
 3 fire that round, you aim it at someone who might be five  
 4 metres away from you, you miss and it's on a horizontal  
 5 plain. You have to in your judgment account for another at  
 6 least 595 metres of running distance.  
 7 MR BUDLENDER SC: So he's an innocent  
 8 victim?  
 9 MR DE ROVER: And you end up hitting an  
 10 innocent victim, yes.  
 11 MR BUDLENDER SC: Yes.  
 12 CHAIRPERSON: Mr Budlender, am I correct  
 13 in thinking if one looks at page 16 of your bundle, that's  
 14 the sketch plan, exhibit B, there is, on the more or less  
 15 extreme right of the plan there's a circle with, is that a  
 16 P –  
 17 MR BUDLENDER SC: That is, that should be  
 18 a P –  
 19 CHAIRPERSON: It doesn't look like a P,  
 20 but it is a P?  
 21 MR BUDLENDER SC: It looks more like a B,  
 22 but it's actually P.  
 23 CHAIRPERSON: Yes, and there's an arrow  
 24 going down and then there's a measurement 280 metres.  
 25 That's where Mr Gwelani was.

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1 MR BUDLENDER SC: That's where Mr Gwelani  
 2 was found dead with a gunshot wound to the head.  
 3 CHAIRPERSON: And does the PM report  
 4 indicate that he died instantaneously?  
 5 MR BUDLENDER SC: Yes, Chair.  
 6 CHAIRPERSON: I see.  
 7 MR SEMENYA SC: But Chair, I think also  
 8 the witness for fairness must also be told we have evidence  
 9 of injured people that were carried.  
 10 MR CHASKALSON SC: Chair, we have  
 11 photographic evidence of Mr Gwelani's body in that position  
 12 2 minutes and 33 seconds after the shooting at scene 1. I  
 13 don't think it can seriously be contended that someone shot  
 14 in the vicinity of scene 1 would have been carried to that  
 15 position within 2 minutes and 33 seconds of the first shots  
 16 at scene 1. That evidence I can refer to it. It is  
 17 Colonel Botha's KKK16.5108, you'll see Mr Gwelani's body in  
 18 the position where it was ultimately found.  
 19 CHAIRPERSON: The witness now I think has  
 20 all the facts that he needs and I think you've expressed  
 21 your views on the matter, he's an innocent victim.  
 22 MR DE ROVER: I think that –  
 23 CHAIRPERSON: I say you've expressed your  
 24 views.  
 25 MR DE ROVER: My view is I concur that

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1 it, to me it looks that a bullet travelled that distance  
 2 and hit an innocent victim. I can entertain other  
 3 possibilities, but generally the one that appears the most  
 4 logical is likely to be true. The problem remains that  
 5 you'd have to go back to the actual person who fired that  
 6 shot and establish whether or not they were justified in  
 7 firing that shot because you factor in that your shot may  
 8 miss. But at that point where the shooter is, can he  
 9 actually see that person and take sufficient note of the  
 10 risk –  
 11 [10:49] CHAIRPERSON: Yes, yes, I understand.  
 12 MR DE ROVER: - that it poses if you pull  
 13 the trigger.  
 14 CHAIRPERSON: I understood you to imply –  
 15 I don't know whether you said it directly. I understood  
 16 you to imply, and I'd be interested in your views on the  
 17 matter if I'm wrongly thinking this was the implication of  
 18 what you said, that you do not regard the use of TR rifles  
 19 with this problem that you've mentioned, or this quality  
 20 that you've mentioned, as suitable for use in Public Order  
 21 Policing. Would that be a fair inference of what you say?  
 22 MR DE ROVER: That was I think one of the  
 23 first, after being here, one of the first recommendations I  
 24 made to the National Commissioner to withdraw R5 rifles  
 25 from POP and to not permit them to be used in crowd

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1 control, and there is ample literature available on the use  
 2 of military weapons in law enforcement context, and  
 3 particularly there are rules of International Law that talk  
 4 about the use of assault rifles in a law enforcement  
 5 context and generally stating that it should be  
 6 discouraged, like you can't say prohibit it, but at least  
 7 in understanding the risks these weapons pose, and I'll be  
 8 more specific that a 556-round fired at close range is  
 9 virtually and per definition a kill shot. It doesn't even  
 10 matter where on the body you hit because if you strike, the  
 11 problem is with the fact that the bullet on impact  
 12 disintegrates because of the high kinetic energy it  
 13 carries. It's designed actually for the battlefield where  
 14 the confrontation per definition happens at a larger  
 15 distance and you want to be able to engage targets from 300  
 16 metres out to 600 metres, and then after 100 metres there  
 17 is a slight deformation and after 200 that bullet stays  
 18 with the shape it has and it produces a minimal wound  
 19 cavity. But at close range that bullet shatters on impact  
 20 and it produces horrific wounds. If you get hit on the arm  
 21 you're likely losing that arm. If you get hit centre body  
 22 mass you get a wound cavity from what I understand to be 20  
 23 centimetres across. So your chances of surviving that are  
 24 minimal.  
 25 CHAIRPERSON: And the ballistic evidence

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1 of course then doesn't help you to say who fired the shot  
 2 because the bullet is not capable of being analysed and –  
 3 MR DE ROVER: Well, it's very difficult –  
 4 CHAIRPERSON: Isn't that right?  
 5 MR DE ROVER: - because of the  
 6 disintegration of the round to do any ballistic comparison  
 7 to between bullet and rifle. So even if you have the  
 8 cartridge it would still be hard to establish a match  
 9 between that cartridge and a bullet that you have found in  
 10 a particular location.  
 11 CHAIRPERSON: Mr Budlender, do I sense  
 12 that you want to leave? Adv Hemraj wants to ask a question  
 13 and so do I, but if you can give us a couple of minutes  
 14 before you go.  
 15 COMMISSIONER HEMRAJ: Mr De Rover, I know  
 16 you said that you've recommended that POPS no longer use  
 17 the R5s, but at scene 1 the R5s were fired by the TRT.  
 18 MR DE ROVER: Yes.  
 19 COMMISSIONER HEMRAJ: Not the POPS.  
 20 MR DE ROVER: Well, it's my, my claim on  
 21 the use of the R5 goes to its use and employment in public  
 22 order management, and to me that's secondary to the unit  
 23 that you bring into public order management. I think that  
 24 if you take your legal requirements to apply potentially  
 25 lethal force, the least I would like to say is that on the

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1 array of firearms that you would have available to inflict  
 2 potential lethal force the R5 is guaranteed deadly. So if  
 3 you can differentiate again in applying potentially lethal  
 4 force, you should put the R5 at the end of the spectrum  
 5 that you would like to employ and maybe start with a 9mil,  
 6 and I'm not saying that a 9mil can't kill you, but I am  
 7 saying that a 9mil shot with a solid metal jacket fired at  
 8 centre body mass, I'd prefer my chances that I would  
 9 survive that as compared to being hit with an R5 because I  
 10 think that in 99 of 100 cases you are going to die before  
 11 medical assistance can be given, and even if medical  
 12 assistance is present the catastrophic damage to internal  
 13 organs are making your chances of survival very slim  
 14 indeed.  
 15 COMMISSIONER HEMRAJ: Does that mean, Mr  
 16 De Rover, that you criticise putting the TRT with R5s  
 17 immediately behind the POPS in the operation?  
 18 MR DE ROVER: Well, you see how – that's  
 19 why I call it unravelling systems and I hope to get a  
 20 moment to put that into context, not as an excuse but as an  
 21 explanation that needs to lead to recommendations on your  
 22 part. The TRT were never meant to engage in the way they  
 23 did. That much is clear from SAPS' spoken intentions and  
 24 whatever you think of their written intentions in the plan.  
 25 What you get is that where they were they end up

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1 confronting that group of people and all they have is that  
 2 R5.  
 3 CHAIRPERSON: Do I understand you can't  
 4 criticise them for using the R5 because that's all they  
 5 had?  
 6 MR DE ROVER: That's all they had, and –  
 7 CHAIRPERSON: There is evidence of course  
 8 that the POP people, out of every eight POP people one  
 9 apparently according to the evidence has also had an R5.  
 10 So there you even have according to the evidence POP  
 11 members, not all of them, one-eighth of them using R5s as  
 12 well. I take it you'll also feel that should be stopped  
 13 immediately?  
 14 MR DE ROVER: It, I could interpret that  
 15 at least as having it as a support weapon. I've worked  
 16 SWAT – we would have one member of our group with a heavier  
 17 calibre as a support weapon, not saying that that means  
 18 you're going to use it, but it's a redundancy, if you want,  
 19 that should things go really bad you can answer, but the  
 20 problem with bringing TRT into that equation is that, the  
 21 question for me that it turns on is was it reasonably  
 22 foreseeable that they would be forced in that position and  
 23 did they contemplate that that could occur, and if you have  
 24 it occurring, the thing is that it then almost follows; you  
 25 put them in that position, all they carry is that R5, so

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1 then it ends up being used.  
 2 CHAIRPERSON: Yes, I understand.  
 3 COMMISSIONER HEMRAJ: But they do have  
 4 side arms though. They do have 9millimetres as well.  
 5 MR DE ROVER: Ja, but the - I think if,  
 6 especially if they feel threatened, if I'm carrying my  
 7 rifle in both hands, I might have a side arm but it would  
 8 require me to either drop that on the sling and go for my  
 9 9mil, but if you feel an imminent threat to life you bring  
 10 that rifle to bear because that is what your two hands are  
 11 on.  
 12 CHAIRPERSON: Yes, thank you. Mr  
 13 Budlender, I gather you have to leave at 11 o'clock. Is  
 14 that correct?  
 15 MR BUDLENDER SC: [Microphone off,  
 16 inaudible]  
 17 CHAIRPERSON: Alright, I think we'll take  
 18 the tea adjournment at this stage.  
 19 [COMMISSION ADJOURNS COMMISSION RESUMES]  
 20 [11:20] CHAIRPERSON: The Commission resumes.  
 21 You're still under oath Mr De Rover. Before the next  
 22 cross-examination begins I'd like to ask you a question.  
 23 Did you tell the National Commissioner that you thought R5s  
 24 shouldn't be used in public order policing?  
 25 MR DE ROVER: After the 28th February and

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1 before the 8th of March 2013.

2 CHAIRPERSON: 2013 or '14?

3 MR DE ROVER: '13. So in the first week

4 of me being here.

5 CHAIRPERSON: Yes I see. Thank you. Mr

6 Semenya is not here, but Ms Baloyi would you, I don't

7 expect you to give me the answer now, but can you tell me,

8 at some stage, whether the police have withdrawn R5s for

9 public order policing not only, as the witness said, it's

10 not a question of which unit used it but the exercise that

11 it should not be used? Will you ascertain and inform the

12 Commission whether that advise that the witness gave the

13 National Commissioner has been accepted and implemented?

14 And if so the details of such implementation.

15 MS BALOYI: I will do so, Chairperson.

16 CHAIRPERSON: Thank you. Who's going to

17 cross-examine next, is it Ms Le Roux?

18 MS LE ROUX: The Human Rights Commission,

19 Chair, yes.

20 CHAIRPERSON: So you're going to cross-

21 examine on behalf of the Human Rights Commission.

22 MS LE ROUX: Correct, Chair. Chair, in

23 the interests of saving time, my attorney I believe has

24 handed to you an index of the new exhibits that we intend

25 to use in the cross-examination and we've taken the liberty

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1 of pre-marking those in the UUUU series that Mr Budlender

2 referred to in his cross-examination.

3 CHAIRPERSON: Correct.

4 MS LE ROUX: But, Chair, there is further

5 housekeeping point that we do need to address at the start

6 of the examination which is as you know there are a series

7 of videos that have been prepared by video experts, engaged

8 by the South African Human Rights Commission as well as

9 with CALS in collaboration with SERI for the families.

10 Those videos I intend to use during my cross-examination.

11 I understand that has been referred to as the commentary

12 meaning the annotations that appear in those videos are

13 subject to objection and some dispute by the SAPS –

14 CHAIRPERSON: I take it you saw the

15 affidavit that we were presented with this morning –

16 MS LE ROUX: Yes, Chair.

17 CHAIRPERSON: - made by Johan Lubbe –

18 MS LE ROUX: Yes, Chair, we have seen

19 that.

20 CHAIRPERSON: - which was prepared

21 obviously on behalf of the police.

22 MS LE ROUX: Yes. Chair, we've seen

23 that. In the interests of time obviously I'm happy to

24 address you on the details of all of those, but in the

25 interests of time we would like to propose that we be

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1 permitted to utilise the videos during the cross-

2 examination with the objection noted and obviously we will

3 then engage through the evidence leaders with the SAPS to

4 resolve any particular objections if they are to the

5 annotations on the videos. The five examples –

6 CHAIRPERSON: How do you do that? I was

7 originally under the impression that the narration was only

8 part of the sound track, so you could simply show the

9 videos without that part of the sound track, but I

10 understand that's not correct. There are actually sub-

11 titles or super titles, I don't know what the correct word

12 is, on the screen itself. Is that correct -

13 MS LE ROUX: Yes, Chair.

14 CHAIRPERSON: - to which objection has

15 been taken?

16 MS LE ROUX: We'll we're not sure exactly

17 which annotations are the subject of the objections, there

18 seem to be a handful of – there are five items identified

19 in the affidavit. The majority of those though are not

20 relevant because they address apparent inconsistencies with

21 the GW6 series as well as the Catherine Scott expert

22 evidence. Those are easily disposed of because, Chair,

23 those were prepared when we didn't have the Al Jazeera

24 footage, we didn't have all the SABC footage. So this

25 obviously supersedes that analysis, any revisions to those

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1 documents will be made. But the point here, Chair –

2 CHAIRPERSON: Let me not interrupt you,

3 but can I just put this to you? I understand the objection

4 has been taken by the police, so let's hear what Mr Semenya

5 has to say. Are you suggesting, however, that I should

6 allow you to show the video with the commentary and the

7 narration and so forth even though it contains things to

8 which the police take objection, if that's what you're

9 suggesting then I think we should hear Mr Semenya. Mr

10 Semenya. Then you can obviously reply to him when he's

11 finished. Mr Semenya.

12 MR SEMENYA SC: Chair, perhaps if I

13 describe the nature of the objection we have, principally

14 we say commentary like ballistic opinions offered by a non-

15 expert is obviously objectionable. If what he says is

16 something that we all can see he doesn't have to say it.

17 If some of his expertise is to make those visuals better

18 readable then of course we welcome that area of his

19 expertise. But there is commentary there which is – which

20 facts are in contestation and that's the nature of the

21 objection we have to the material.

22 MR CHASKALSON SC: Chair, I wonder if I

23 can give the evidence leaders' position on this because –

24 CHAIRPERSON: Can we finish hearing what

25 Mr Semenya says first before you give us your position?

<p style="text-align: right;">Page 36953</p> <p>1 Yes, Mr Semenya, are you finished.</p> <p>2 MR SEMENYA SC: Chair, I'm finished.</p> <p>3 CHAIRPERSON: Oh you have. I'm sorry, Mr</p> <p>4 Chaskalson, please proceed.</p> <p>5 MR CHASKALSON SC: I understand that</p> <p>6 there is a dispute from SAPS as to some aspects of the</p> <p>7 annotations on the videos, our concern is what is best for</p> <p>8 the Commission and will this video evidence assist the</p> <p>9 Commission to answer the questions that it has to answer.</p> <p>10 That's the question that's posed. Then the answer is a</p> <p>11 resounding yes, we regard this exhibit as one of the most</p> <p>12 important pieces of real evidence that this Commission is</p> <p>13 likely to see. What it does is it strings together the</p> <p>14 video streams from various different sources so that one</p> <p>15 gets a composite picture of scene 1. There are annotations</p> <p>16 which point you to particular things. I would imagine that</p> <p>17 90% of those annotations are utterly uncontroversial, there</p> <p>18 may be 10% which are. The SAPS are always at liberty to</p> <p>19 identify that which they dispute and they can table their</p> <p>20 objections and I would suggest that for today's purposes Ms</p> <p>21 Le Roux doesn't refer to annotations in cross-examination</p> <p>22 that are potentially in dispute. If she wants to point</p> <p>23 something out on the video to a witness she can use a</p> <p>24 pointer and point to it. If it happens to coincide with</p> <p>25 what an annotation says well then one can assess what Ms Le</p>	<p style="text-align: right;">Page 36955</p> <p>1 agreed and what is not agreed. That process started on the</p> <p>2 4th of December last year. On the 6th of January this year</p> <p>3 we received a document from SAPS which was expressed</p> <p>4 labelled Die Voorlopige Verslag which identified a handful,</p> <p>5 maybe five or six problems with GW6A, nothing else in GW6.</p> <p>6 We've been addressing letters to SAPS on a regular basis</p> <p>7 since January this year saying please tell us what your</p> <p>8 disputes are so we can try to resolve them. And we've</p> <p>9 received nothing back from SAPS. Now it raises a real</p> <p>10 difficulty because what you have is a position and I can</p> <p>11 see it from Mr Lubbe's affidavit in relation to this video.</p> <p>12 You identify a very narrow range of disputes, most of which</p> <p>13 will probably be conceded by CALS and the SAHRC. And then</p> <p>14 on the basis of that you say well let's eliminate the whole</p> <p>15 thing. And in the process the Commission is really</p> <p>16 prejudiced of getting to the truth because what is thrown</p> <p>17 out and what is a whole lot of material which is of</p> <p>18 extremely valuable or high probate of value addressing</p> <p>19 crucial facts for this Commission and not placed in dispute</p> <p>20 by SAPS. And with respect, Mr Chairperson, if SAPS has a</p> <p>21 problem with this video it should be asked to identify the</p> <p>22 particular passages in the annotation with which it takes</p> <p>23 issue. When it's done so we can have the fight over that.</p> <p>24 For present purposes the video should be shown, Ms Le Roux</p> <p>25 can – the SAPS's right can be reserved in relation to that.</p>
<p style="text-align: right;">Page 36954</p> <p>1 Roux says rather than the annotation. My concern is</p> <p>2 twofold, the first is that a very valuable piece of</p> <p>3 evidence the admissibility of which should really not be an</p> <p>4 issue, it should be a question of weight to be given to</p> <p>5 annotation.</p> <p>6 CHAIRPERSON: I don't understand Mr</p> <p>7 Semenya's objection to being against the video as such and</p> <p>8 I understand it's a useful compilation of various videos</p> <p>9 that we've seen putting things together on the same</p> <p>10 timeline and so on. I don't understand the objection being</p> <p>11 that, the objection is to commentary and in fact even parts</p> <p>12 of the commentary.</p> <p>13 MR CHASKALSON SC: But, Chair, can I</p> <p>14 finish because I do have a very serious concern to raise in</p> <p>15 relation to SAPS in this regard which is that the genesis</p> <p>16 of these videos as I understand it is they grow out of the</p> <p>17 annexures to Mr White's statement, the GW6 annexures. And</p> <p>18 they are a video graphic representation of what one sees in</p> <p>19 GW6. Now when GW6 was first exhibited SAPS complained that</p> <p>20 they did not accept it and that it was inappropriate for it</p> <p>21 to be exhibited through that means. We then started a</p> <p>22 process, we said right let's resolve this. Let's get you</p> <p>23 to identify the disputes that you have with GW6 and come</p> <p>24 back to us, we'll try and resolve them. If we can't then</p> <p>25 we will have narrowed those disputes and we know what is</p>	<p style="text-align: right;">Page 36956</p> <p>1 Nobody is prejudiced by showing the video, the Commission</p> <p>2 is ultimately going to prejudiced dramatically if the video</p> <p>3 is not shown.</p> <p>4 MR SEMENYA SC: Chair, as you correctly</p> <p>5 pointed out, there's no objection in us looking at the</p> <p>6 video. There is commentary in it, even if it is to one</p> <p>7 person that it is objectionable we're entitled to raise</p> <p>8 that objection.</p> <p>9 CHAIRPERSON: Have you identified all the</p> <p>10 parts of the commentaries to which you object? Because if</p> <p>11 you have you can signal that, I'm not quite sure whether</p> <p>12 it's possible for that commentary to be excised from what</p> <p>13 we see before we see it. But the first question is have</p> <p>14 you indicated what precisely the points in the commentary</p> <p>15 are to which you object? That statement of Mr Lubbe that I</p> <p>16 read talks about some points, I think he raised half a</p> <p>17 dozen or so, but this was only some, it didn't purport to</p> <p>18 be a comprehensive and complete list. Now have you got</p> <p>19 such a thing?</p> <p>20 MR SEMENYA SC: Chair, I may produce it</p> <p>21 in due course, but I can indicate even now if I understand</p> <p>22 what the narrative is to that documentary it now even says</p> <p>23 what we say was eight seconds of shooting in scene 1, is</p> <p>24 now 12 seconds. And I don't know whether I'm able to</p> <p>25 accept that narrative like that from some cinematographer</p>

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1 and that's one of the illustrations that we have  
 2 difficulties with.  
 3 CHAIRPERSON: Is it not possible for you  
 4 to commence your cross-examination, I take it you've got a  
 5 lot of other cross-examination material, to have a session  
 6 with the police perhaps during the lunch hour or whatever  
 7 to identify the bits to which they have specific objection?  
 8 I don't think we should much time on it further at this  
 9 stage, rather spend non-sitting time on it outside the  
 10 chamber you people have. You know if an affidavit is put  
 11 up one knock out the whole affidavit simply because one  
 12 paragraph is not appropriate. That paragraph can be struck  
 13 out. But the way we're doing it at the moment, it's  
 14 obviously important we should see the actual videos  
 15 themselves, even possibly without commentary, the trouble  
 16 is I understand the commentary is not just part of  
 17 soundtrack, it's on the screen as well. So is there a  
 18 solution that you can suggest whereby we can deal with the  
 19 problem, but not waste any further time and you can cross-  
 20 examine the witness on other matters in the meanwhile? I  
 21 would imagine there must quite a number of other matter.  
 22 I'm not wishing to minimise the importance of the video, it  
 23 sounds a very important thing, but are there not other  
 24 matters you can deal with in the meanwhile?  
 25 MS LE ROUX: Unfortunately not, Chair.

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1 So the proposal I make is that we will certainly engage,  
 2 through the evidence leaders with the SAPS on the specific  
 3 annotations that they have objections to. The one Mr  
 4 Semenya just mentioned has never been raised with us before  
 5 this. The overwhelming majority of the annotations are  
 6 simply things like Nyala 4 reaches the kraal or this is the  
 7 single pylon, so I'm sure the overwhelming majority of the  
 8 annotations are there to assist the Commission. And Chair,  
 9 I must pause there because at great expense this exercise  
 10 has been undertaken because we've had repeated requests  
 11 from the Commission, Commissioner Hemraj in particular  
 12 suggesting a chronology that compiles all of the  
 13 available footage. Mr De Rover talks about the use of  
 14 independent, auditable, objective evidence. That is what  
 15 this does. For any handful of quibbles that we may have on  
 16 annotations we'll deal with those in due course and not  
 17 take up any more time in the Commission process today. So  
 18 my proposal remains, we note the objection, we'll undertake  
 19 a process that may result in concessions or revisions or  
 20 something that will provided to the Commission once that  
 21 process is completed and subject to those qualification the  
 22 videos can then be used in closing arguments and if the  
 23 Commission finds them helpful refer to in the report. But  
 24 for today's purposes we just note that these are subject to  
 25 a process, but that we are permitted to use them as a way

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1 that we planned to. And then we will certainly engage in  
 2 that process to try to narrow the questions of dispute.  
 3 So to go back to the five examples listed in Mr  
 4 Lubbe's affidavit two of those refer to inconsistencies  
 5 with earlier documents that didn't rely on the same  
 6 universe of information. Those are easily dealt with. One  
 7 refers to a conclusion reached on the video that seems to  
 8 be an absolute explanation to that part of the video, it  
 9 relates to the flight of rubber bullets and rubber balls.  
 10 We're told by Mr Lubbe that in fact that's the plastic wad,  
 11 the jacket on the ammunition. That may well be the  
 12 complete answer to that part of the video, we would then  
 13 obviously accept that explanation and that would be that  
 14 revision. The one refers to – the first example refers to  
 15 the description of the direction in which the strikers are  
 16 moving. That's an easy revision and the final one relates  
 17 to the animation that is being done that shows the Nyalas  
 18 and the movement of the lead group. It notes at one point,  
 19 at 15 seconds into the video that it claims the lead group  
 20 position is wrong but by 50 seconds into the video they  
 21 accept that it's now correct. These are the minor  
 22 revisions that would be required on what we now understand  
 23 to be the areas in dispute. I should also then just place  
 24 on the record that our own review of the videos have  
 25 highlighted two points of errata. We've engaged with our

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1 colleagues from SERIs who've collaborated with us on this,  
 2 perhaps they also need to have an opportunity to address  
 3 you on this. There are two minor errata points we've  
 4 picked up already from that which is in exhibit V2 which is  
 5 a video which shows the movement of the strikers. 22  
 6 seconds into that video it refers to the strikers visible  
 7 walking off the koppie toward Nkaneng, that needs to be  
 8 revised to say towards the west. At three other  
 9 annotations 20:21, 21:45 and 22:11 it speaks about the  
 10 north-western edge of the kraal, that needs to be the  
 11 northern edge of the kraal. This is the extent of the  
 12 revisions that need to be made and therefore in light of  
 13 that and with the undertaking that we'll deal with any  
 14 specific annotations that cause the SAPS some concern if we  
 15 could be permitted to use the videos today as we had  
 16 planned in order to assist the Commission.  
 17 CHAIRPERSON: Thank you. Mr Bizos your  
 18 light's on at the moment.  
 19 MR BIZOS SC: Mr Chairman, we want to  
 20 make a submission in relation to the objection raised by  
 21 SAPS. They themselves went to a lot of trouble to comment  
 22 on the photographs. Could I use in support of the  
 23 conclusion that I'm going to make, have a look at page 194  
 24 of exhibit L?  
 25 CHAIRPERSON: Slide 194?



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1 MR BIZOS SC: It's one of the examples  
 2 where the police chose to comment on the photograph and put  
 3 colours in and things, but may I read the printing? "In  
 4 the following slides three separate, organised attempts  
 5 will be portrayed where protestors approached the police  
 6 line." That's comment, I assume, Mr Chairman, that the  
 7 witness will have been shown exhibit L before he was asked  
 8 to comment in writing as to what the police case is  
 9 exhibited in exhibit L. We didn't object to that, Mr  
 10 Chairman. I don't know what influence this comment had on  
 11 the conclusion that was arrived at by the witness in the  
 12 witness box. But we didn't object, but now for them to say  
 13 that any commentary is prejudicial to them should not be  
 14 upheld. The SAPS can accept that the Commission will be  
 15 able in coming to a conclusion what is evidence and what  
 16 may be the expression of an opinion. But these opinions in  
 17 exhibit L we have now doubt were made available to the  
 18 witness before he made a conclusion exculpating the police.  
 19 [11:40] It would be manifestly unfair to prevent those  
 20 who do not accept the police version if any portion of the  
 21 video was excluded.  
 22 CHAIRPERSON: In regard to exhibit L who  
 23 was responsible for the captions? The comments that you  
 24 refer to were contained in captions, were they not? And  
 25 they were contained also I suppose in things like coloured

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1 arrows and so forth superimposed on the photographs. Who  
 2 was responsible for those things?  
 3 MR BIZOS SC: Well, exhibit L was put up  
 4 by SAPS.  
 5 CHAIRPERSON: No, the reason I ask you  
 6 the question is that my understanding was it was  
 7 Lieutenant-Colonel Scott and Colonel Visser – I think he  
 8 was a colonel, I'm not sure what his rank was. Scott did  
 9 give evidence. Visser didn't. Now I think I'm correct in  
 10 saying that most of the captions were the work of Visser.  
 11 Am I right?  
 12 MR CHASKALSON SC: Certainly a  
 13 substantial number. In the cross-examination of Colonel  
 14 Scott, Chairperson, there were a substantial number of  
 15 issues on which he was questioned in relation to exhibit L  
 16 which he identified as not being his responsibility but  
 17 Colonel Visser's responsible –  
 18 CHAIRPERSON: Yes, so what you're  
 19 effectively saying to me, Mr Bizos, is what's sauce for the  
 20 goose is sauce for the gander. If the police can put up a  
 21 presentation which contained captions which are opinion not  
 22 backed up by a witness who's able to defend them, then the  
 23 same should apply to the Human Rights Commission. Is that  
 24 your submission?  
 25 MR BIZOS SC: Mr Chairman, thank you.

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1 This is, I wish that I had expressed it as well –  
 2 CHAIRPERSON: Flattery will get you  
 3 nowhere, Mr Bizos.  
 4 MR BIZOS SC: But that is precisely, Mr  
 5 Chairman, but we are going to argue that an important  
 6 matter in relation to this witness's evidence will be was  
 7 he told the whole truth –  
 8 CHAIRPERSON: Yes, yes, I understand.  
 9 MR BIZOS SC: - or was he influenced by  
 10 the material in exhibit L and other matters, and –  
 11 CHAIRPERSON: I understand. What you say  
 12 is he didn't –  
 13 MR BIZOS SC: We hope to persuade the  
 14 witness and the Commission that he was not told the whole  
 15 truth before he made that –  
 16 CHAIRPERSON: What you say is though he's  
 17 endeavouring to be an impartial witness, conscious of his  
 18 duty to the Commission to be an impartial witness, your  
 19 contention is that because he's only heard one side and he  
 20 hasn't heard the other side, his evidence is defective for  
 21 that reason and you're trying to remedy that. That's your  
 22 point basically. Do I understand you correctly?  
 23 MR BIZOS SC: Mr Chairman, I don't  
 24 understand why my learned friend Mr Semanya and his team  
 25 are so concerned that if it's pure comment, not supported

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1 by the video, it will be ignored.  
 2 CHAIRPERSON: It's like Mr Visser's stuff  
 3 in exhibit L.  
 4 MR BIZOS SC: Yes.  
 5 CHAIRPERSON: Yes, alright. What do you  
 6 say about that –  
 7 MR BIZOS SC: So I urge, Mr Chairman,  
 8 that these videos should be shown. They are very important  
 9 for the final decision by the witness, Mr Chairman, by the  
 10 witness as to whether he was fully briefed by truthful  
 11 evidence at a time that he made his two statements  
 12 exculpating the police.  
 13 CHAIRPERSON: Yes, thank you. Yes, I  
 14 think I have that point. Mr Semanya, how do you deal with  
 15 this sauce for the goose, sauce for the gander point?  
 16 MR SEMENYA SC: Can I make three points,  
 17 Chair, very short three points. We are saying the video  
 18 material must be shown so that that should put that expect  
 19 to bed. What Mr Bizos is referring to here as exhibit L,  
 20 we have heard evidence of that. Whether it is accepted  
 21 later or not, it's a different matter. There is no  
 22 intention of calling these witnesses to support that  
 23 narrative which they are making. That's distinctly  
 24 different.  
 25 But may we propose a solution, Chair; let them

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1 show it with all that narrative that it has if you give us  
 2 the assurance, aspects of which, which are not supportable  
 3 because one does not qualify as an expert to make it, we'll  
 4 ignore them. Aspects to which are references to things  
 5 that we also can be able to watch and not agree with we'd  
 6 have an opportunity to discuss or argue their weight.  
 7 CHAIRPERSON: Alright, we'll give you the  
 8 undertaking that you've asked for. It will apply also of  
 9 course to those parts of exhibit L which was the work of Mr  
 10 Visser, which may also not be capable of being supported.  
 11 So on the sauce for the goose, sauce for the gander  
 12 principle it can go in, but subject to that very important  
 13 caveat which you've expressed and the undertaking that  
 14 we've given you. [Microphone off, inaudible] got to move  
 15 from here, you're going to show the video because it will  
 16 shown behind our backs and –  
 17 MS LE ROUX: No, Chair, for two reasons;  
 18 firstly because all the cabling in the room has now been  
 19 replaced to be high definition, so even your screen, if  
 20 you'd like to watch the big screen you can –  
 21 CHAIRPERSON: No, the problem is we sit  
 22 here and looking at our screen we've still got this  
 23 powerful light in our eyes.  
 24 MS LE ROUX: Yes. Chair, if we can –  
 25 CHAIRPERSON: Now maybe you can handle

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1 that sort of thing, but I'm afraid I can't. So –  
 2 MS LE ROUX: But secondly, Chair, I'm not  
 3 – the plan of my cross-examination, the videos, I don't  
 4 start with the videos. They came in a bit later, so –  
 5 CHAIRPERSON: Well, when you start with  
 6 the videos let me know –  
 7 MS LE ROUX: Yes.  
 8 CHAIRPERSON: - so I can prevent myself  
 9 being blinded by the powerful light of your projector.  
 10 MS LE ROUX: Yes. And of course, Chair,  
 11 there's a related issue which is the videos obviously deal  
 12 with scene 1 and so, and you know, there is a lot of  
 13 footage that may be upsetting, so a warning would also be  
 14 required –  
 15 CHAIRPERSON: When we get there I would –  
 16 MS LE ROUX: - for all the videos.  
 17 CHAIRPERSON: When we get there I'll  
 18 delegate to you the task I normally perform of giving a  
 19 warning to those who may be caused emotional stress and  
 20 grieve by looking at the images that's going to be on the  
 21 screen. Will you do that for me when we get there?  
 22 MS LE ROUX: Yes, Chair.  
 23 CHAIRPERSON: Thank you.  
 24 CROSS-EXAMINATION BY MS LE ROUX: Good  
 25 morning, Mr De Rover.

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1 MR DE ROVER: Good morning.  
 2 MS LE ROUX: Mr De Rover, I'd like to  
 3 start with, in your statement FFF11, page 2, paragraph 6,  
 4 you claim public international law of human rights and  
 5 humanitarian law, particularly as it relates to armed  
 6 forces, police and security forces, as one of your areas of  
 7 expertise. You've also testified this morning about the  
 8 academic qualifications you hold relating to international  
 9 law. When during the engagement with you by CALS we have  
 10 asked you a question – Chair, I'm going to try to move  
 11 through the evidence without us having to go to the  
 12 documents. I'll summarise them and give the references,  
 13 but given the time constraints I'll try to do that as soon  
 14 as we can –  
 15 CHAIRPERSON: The witness has been given  
 16 notice of the documents you're going to rely on –  
 17 MS LE ROUX: He has indeed.  
 18 CHAIRPERSON: - and has had an  
 19 opportunity to look at them.  
 20 MS LE ROUX: Yes.  
 21 CHAIRPERSON: So you can summarise them.  
 22 The witness won't be at a disadvantage and if he feels he  
 23 is I'm sure he'll tell us.  
 24 MS LE ROUX: Yes. Mr De Rover, of course  
 25 if I'm referring to a document you're not familiar with,

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1 let me know and we can place it before you. In the May  
 2 2014 interrogatories posed to you by the Human Rights  
 3 Commission you were asked whether you accept that an  
 4 assessment of the lawfulness of police action that results  
 5 in numerous deaths requires an assessment of the planning,  
 6 briefing, deployment and command of the operation as much  
 7 as a consideration of the actions of individual officers.  
 8 We then noted that in this respect the South  
 9 African Human Rights Commission trusts that Mr De Rover is  
 10 familiar with the European Court of Human Rights case of  
 11 McCann versus the United Kingdom and other similar  
 12 authorities. Chair, that is page 2, paragraph 3(a) of the  
 13 interrogatories.  
 14 Your response to those in June of this year  
 15 stated, "Jurisprudence of regional bodies such as the  
 16 European Court of Human Rights may, in some limited  
 17 circumstances, indirectly contribute to the emergence of  
 18 new international legal norms, although they will never on  
 19 their own generate such norms. To cite judgments of the  
 20 court in a way that implies a direct legal relevance to  
 21 South Africa is disingenuous. As CALS must be aware, those  
 22 judgments impose no legal obligations on states that are  
 23 outside the European Human Rights system. The findings of  
 24 the McCann case may well be of academic interest to the  
 25 issues at hand, but have absolutely no legal relevance to

<p style="text-align: right;">Page 36969</p> <p>1 the Commission and its work." You recall that response?</p> <p>2 MR DE ROVER: I do.</p> <p>3 MS LE ROUX: Now what I'd like to do is</p> <p>4 move away from the question of the relevance of the McCann</p> <p>5 judgment to South African law, because obviously we accept</p> <p>6 it's not a binding precedent. I'd like to ask you whether</p> <p>7 you are familiar with the principle in international law of</p> <p>8 prevention or precaution. Are you familiar with that</p> <p>9 principle?</p> <p>10 MR DE ROVER: In what context?</p> <p>11 MS LE ROUX: In the context of the use of</p> <p>12 force.</p> <p>13 MR DE ROVER: Yes.</p> <p>14 MS LE ROUX: And Chair, if go to what's</p> <p>15 been marked BBBB8, because it was referred to by the SAPS</p> <p>16 in their cross-examination of Mr White, page 93 of your</p> <p>17 bundle, that is the UN special rapporteurs report which</p> <p>18 notes that its intention is to discuss the protection of</p> <p>19 the right to life during law enforcement, making a case for</p> <p>20 the need for a concerted effort to bring domestic laws on</p> <p>21 the use of especially lethal force by the police in line</p> <p>22 with international standards.</p> <p>23 CHAIRPERSON: [Microphone off, inaudible]</p> <p>24 MS LE ROUX: That's the cover page, the</p> <p>25 summary of –</p>	<p style="text-align: right;">Page 36971</p> <p>1 to trigger an explosion did not violate the right to life,</p> <p>2 but the lack of control and organisation of the operation</p> <p>3 as a whole did violate that right."</p> <p>4 Now you'll agree with of course that what the UN</p> <p>5 special rapporteur is doing here is setting out principles</p> <p>6 of international application. They're not parochial or</p> <p>7 regional. It's an international principle identified.</p> <p>8 Sorry, a nod of the head can't be captured for the</p> <p>9 transcript.</p> <p>10 CHAIRPERSON: Although the proceedings</p> <p>11 are being televised, or the television cameras are here,</p> <p>12 those will not be preserved for us. When we go over the</p> <p>13 evidence we'll read the transcript and the transcript won't</p> <p>14 have your body language that you nodded your head. So if</p> <p>15 you want to say yes you must say yes and you must do what I</p> <p>16 sometimes fail to do and turn your microphone on to make</p> <p>17 sure that the word "yes" is recorded.</p> <p>18 MR DE ROVER: On that point I'm already</p> <p>19 leaving it on constantly so I don't forget. Yeah, I have</p> <p>20 no objection to you framing the subject as you've just</p> <p>21 done.</p> <p>22 MS LE ROUX: Thank you, and then Mr De</p> <p>23 Rover, in that context as an international principle and</p> <p>24 irrespective of the status of the McCann decision in South</p> <p>25 African Law, would you agree with me that the principle of</p>
<p style="text-align: right;">Page 36970</p> <p>1 CHAIRPERSON: The cover page is 93. What</p> <p>2 page is the actual report you want us to look at?</p> <p>3 MS LE ROUX: Chair, if we can then go to</p> <p>4 page 10 of that report, there it lists the requirements for</p> <p>5 the use of force and, Chair, in particular it's (a), (b)</p> <p>6 and (c) there, sufficient legal basis, legitimate</p> <p>7 objectives and necessity. If I could then ask you, Mr De</p> <p>8 Rover, to direct your attention over the page 11 to</p> <p>9 paragraph 63. This is the precise paragraph that Mr</p> <p>10 Semanya put to Mr White where the special rapporteur sets</p> <p>11 out that "There is the often overlooked requirement of</p> <p>12 prevention or precaution. It's explained that once the</p> <p>13 situation arises where the use of force is considered, it</p> <p>14 is often too late to rescue the situation. Instead, in</p> <p>15 order to save life, all possible measures should be taken</p> <p>16 upstream to avoid a situation where the decision on whether</p> <p>17 to pull the trigger arises or to ensure that all the</p> <p>18 possible steps have been taken to ensure that if that</p> <p>19 happens the damage is contained as much as is possible."</p> <p>20 The following paragraph sets out that "The</p> <p>21 failure to take proper precaution in such a context</p> <p>22 constitutes a violation of the right to life. In the</p> <p>23 McCann case the European Court of Human Rights held that</p> <p>24 the use of lethal force by soldiers who erroneously but in</p> <p>25 good faith believed that a group of terrorists were about</p>	<p style="text-align: right;">Page 36972</p> <p>1 prevention or precaution is an established principle of</p> <p>2 international law applicable to the use of force?</p> <p>3 MR DE ROVER: You know, the, Chair,</p> <p>4 there's a problem with these principles in international</p> <p>5 law exactly with the fact that they are principles and I</p> <p>6 always have to pull the rabbit out of a hat when I teach</p> <p>7 police, and depending on where I am I even have to refer to</p> <p>8 regional instruments and try and tie them into the right to</p> <p>9 life and the obligation for the State to protect that</p> <p>10 right, to, and not just by enacting law but by actually</p> <p>11 being more proactive than that, and maybe in that</p> <p>12 connection because I understand your reference to McCann,</p> <p>13 and if it's with the caveat that you gave I have no problem</p> <p>14 that it exists as a reference, and I would actually like to</p> <p>15 add to that Osman versus the UK because that is a case that</p> <p>16 may then in its findings have a relevance that you actually</p> <p>17 seek in that it addresses this issue of duty of care where</p> <p>18 if you have a particular set of circumstances where it is</p> <p>19 foreseeable that somebody is going to become a victim of</p> <p>20 crime, you as a state responsible have a duty of care. So</p> <p>21 you must then take steps to protect these people.</p> <p>22 If you want me to link that to Marikana, then for</p> <p>23 example you can hold that as the incident develops – and</p> <p>24 I'm talking 10, 11, 12 – and deaths occur and people are</p> <p>25 put at risk and it is actually quite clear that people of a</p>

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1 particular organisation become a target and that it's  
 2 foreseeable that more of them will become a victim, then  
 3 there is a duty on the police to take measures that seek to  
 4 protect. So if you see the increased VISPOL measures that  
 5 SAPS implemented around Marikana, they are an utterance of  
 6 that. I have to stress that the European Court gave quite  
 7 strict criteria for when that duty of care occurs and you'd  
 8 obviously have to measure them to what exists under your  
 9 own national laws in that respect, but it is an addition  
 10 and it's an operationalisation, if you want.

11 CHAIRPERSON: That was a point I wanted  
 12 to put to you and that is it seems to me that you – I'm not  
 13 being critical – you may be venturing a little bit into a  
 14 field in which you do not belong, if I may say that. We  
 15 are concerned obviously to state as far as we can what we  
 16 think the domestic law of South Africa is in relation to  
 17 these issues. The decisions of international tribunals are  
 18 obviously not binding on us, but they might be used in  
 19 appropriate cases as a source of persuasive material.

20 MR DE ROVER: Ja.

21 CHAIRPERSON: And judges in South Africa  
 22 do that –

23 MR DE ROVER: Ja.

24 CHAIRPERSON: - use comparative material.  
 25 There are also provisions of the Constitution of course

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1 which deal with how you use international legal material,  
 2 as it were, and comparative material of other  
 3 jurisdictions, and there are problems about what is jus  
 4 cogens and what is not, but we won't go there now. But  
 5 just confining ourselves to the domestic situation, South  
 6 African courts would look, if it was appropriate, to  
 7 decisions of a tribunal such as the European Court of Human  
 8 Rights in search of, not binding obviously, but persuasive  
 9 material which would guide us to apply the right principle  
 10 if our law hasn't got clear authority on the point.

11 MR DE ROVER: Ja.

12 CHAIRPERSON: That's the first point. So  
 13 you mustn't tell us that McCann's case isn't legally  
 14 binding in South Africa. We know that, but you also can't  
 15 tell us – and I don't think you are trying to tell us –  
 16 that we can't look there for, look to it for persuasive  
 17 material on how to decide some of the issues that arise  
 18 here.

19 But the second point is we already have domestic  
 20 authority for the proposition that you've just referred to.  
 21 We had a case some years ago where, which eventually went  
 22 up to the Constitutional Court and then came back to the  
 23 Supreme Court of Appeal - I was in that case – where a  
 24 woman brought a claim against the State because she was  
 25 raped by someone who'd been released on bail in

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1 circumstances where it was foreseeable that if this person  
 2 were given bail he was likely to go out and commit further  
 3 crimes. She was the victim of one of those further crimes.  
 4 That's already the law of South Africa. That was laid down  
 5 by the Constitutional Court and so that principle we  
 6 already have as part of our domestic law.

7 But in the search for persuasive authority in  
 8 matters not covered directly by our domestic law we  
 9 certainly look, and that's one of the – if I may put it  
 10 this way – one of the glories of the South African legal  
 11 system is we have tried consistently for many, many years,  
 12 to approach the matter in that way, look for persuasive  
 13 authority elsewhere if we haven't got adequate position, or  
 14 case law on the matter in our own law, and so that I think  
 15 is important for me to tell you that because that is  
 16 effectively what underlies this whole debate about whether  
 17 McCann applies and so on.

18 Again even if the principles are accepted to some  
 19 extent or in entirety, we may disagree on the facts,  
 20 whether there was – you will remember there was dissent in  
 21 the McCann case – we would be able if we consider it  
 22 appropriate to pick the dissent rather than the majority if  
 23 we found the dissent to have more persuasive force. But  
 24 the inquiry is not limited to domestic materials. We  
 25 certainly look at international materials and we are

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1 obviously also encouraged by our Constitution to do our  
 2 best to ensure, without getting into jus cogens problems,  
 3 to make sure that our law is consistent with the  
 4 international position as well.

5 [12:00] MR DE ROVER: Chair, let me then  
 6 apologise if the way I phrased myself led you to believe I  
 7 was disagreeing with you because the opposite is true. I  
 8 was agreeing with that proposition. The next thing, I  
 9 think that acknowledging this part there is actually  
 10 existence of – if you take the basic principles on the use  
 11 of force and firearms they clearly set out those  
 12 requirements and they are most commonly voiced in terms  
 13 that you must attempt non-violent means first and if they  
 14 seem unworkable and your lawful objective is that important  
 15 that you still want to pursue it you must try less extreme  
 16 ends first. So I'm totally acknowledging and in agreement  
 17 with what you say.

18 MS LE ROUX: Thank you, Mr De Rover, then  
 19 turning to precisely that context –

20 CHAIRPERSON: Sorry can I just put one  
 21 other point? You know you spoke about the duty of the law  
 22 to protect innocent people. The law actually goes further  
 23 than that. It says even a criminal, even an assailant is  
 24 entitled to his right to life unless it's, to use the  
 25 expression used by the Bridge players on the Constitutional

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1 Court, I think it's trumped, trumped by something else.  
 2 And that is even if a criminal who is attacking somebody  
 3 else has a right to life which could only be infringed if  
 4 the circumstances are such that there's no other  
 5 alternative. And that's something which is, as you may  
 6 know, it was always the law, but it's become more relevant  
 7 since we have a constitution with an entrenched right to  
 8 life. And of course our entrenched right to life is pari  
 9 materia with the right to life in international instruments  
 10 such as the European convention.  
 11 MR DE ROVER: Chair, I've spent 22 years  
 12 of my life now in the field police and human rights and I  
 13 can only echo that sentiment. There are too many realities  
 14 where it's thought that criminals shouldn't have human  
 15 rights or that to bind police to observing those that is  
 16 un-levelling the playing field because the other side is  
 17 not playing by those rules and I totally disagree with  
 18 that. The norms and the standards and expectations are  
 19 clear and as officials of the state you are bound by them  
 20 and you are supposed to uphold them.  
 21 MS LE ROUX: Mr, De Rover –  
 22 CHAIRPERSON: Sorry, Ms Le Roux, I had a  
 23 conversation with the witness, but I hope it was of  
 24 assistance to us all.  
 25 MS LE ROUX: I'm sure it will be, Chair.

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1 Mr De Rover, in the book that you were the author of the  
 2 first edition To Serve And Protect, you referred to it this  
 3 morning as a very important reference work, I'm assuming  
 4 you approve of the second edition, the update that was made  
 5 to your initial text. You don't disagree with anything  
 6 that was revised in the second edition.  
 7 MR DE ROVER: If you did a text  
 8 comparison there's, I think, close to 90% overlap with the  
 9 first edition. So it's updated to meet current existing  
 10 requirements in terms of case law, applicable treaties, new  
 11 treaties that have come into force. But on the fundamentals  
 12 of the topics as they relate to police task organisation  
 13 and responsibilities, powers and duties I think it's the  
 14 same book.  
 15 MS LE ROUX: Right. Chair, for the  
 16 record this is UUUU3 which is an excerpt from To Serve And  
 17 Protect. In particular it's chapter 7, The Use Of Force  
 18 And Firearms. Now, Mr De Rover, one edition that we have  
 19 been able to identify from your first edition appears at  
 20 page 259 of the typed page in that chapter which has been  
 21 provided to you. It's page 86 of the bundle.  
 22 CHAIRPERSON: This is the book that has  
 23 gone into second edition?  
 24 MS LE ROUX: Yes, Chair, this is the  
 25 second edition.

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1 CHAIRPERSON: This is from the second.  
 2 MS LE ROUX: This is from the second  
 3 edition.  
 4 MR DE ROVER: Can you bear with me for a  
 5 second while I get it on my screen because I have the PDF,  
 6 but I can't find it on my folder.  
 7 MS LE ROUX: Chair, it's also on display  
 8 on the screen next to you.  
 9 CHAIRPERSON: I think he'll find it  
 10 easier to have it on his screen.  
 11 MR DE ROVER: Thank you.  
 12 MS LE ROUX: So on page 259 of that  
 13 document, no page 259 printed page.  
 14 CHAIRPERSON: Page 86 of our bundle, 259  
 15 of the document and the document is now an exhibit, UUUU3.  
 16 MS LE ROUX: Yes and if we could go down  
 17 below that block that's shaded, Integration And Practise,  
 18 there we see the text, this is in the context of  
 19 integrating, inter-training and the like this principle it  
 20 says, the authors write there "Depending on the complexity  
 21 of the situation responsibility does not merely lie with  
 22 the individual law enforcement official at the location.  
 23 The higher command level has overall responsibility for  
 24 taking all precautionary measures in line with the  
 25 provisions of the basic principles for the use of firearms

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1 in order to respect and protect life." In the box below  
 2 that we see again the McCann case cited as that principle.  
 3 So taking the general principle into this context of use of  
 4 force and firearms in policing operations would you agree  
 5 that there is a generally applicable principle in  
 6 international law requiring those in command of a policing  
 7 operation in which higher levels of force are anticipated  
 8 as a possibility to plan and command those operations in  
 9 such a way as to minimise the risk that lethal force will  
 10 be used?  
 11 MR DE ROVER: It goes to the heart of  
 12 accountability and I actually would contend that that does  
 13 not limit itself to organised police operations. In fact  
 14 it's about every police contact with the public. There is  
 15 a possibility to invoke command's responsibility because if  
 16 a single police officer in a single contact with a citizen  
 17 does something that is unbecoming or unlawful and if there  
 18 is reason to believe that a superior officer was aware of  
 19 that and could have done something about it that  
 20 responsibility exists. And of course then by consequence  
 21 your proposition is true and I agree with that.  
 22 CHAIRPERSON: Ms Le Roux, when you reach  
 23 a suitable stage I'd like to take the second adjournment,  
 24 the tea adjournment. But obviously you must tell me when  
 25 it's appropriate because I don't want to break into your

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1 cross-examination unnecessarily.  
 2 MS LE ROUX: Chair, we may as well take  
 3 the adjournment now.  
 4 CHAIRPERSON: 15 minutes.  
 5 [COMMISSION ADJOURNS COMMISSION RESUMES]  
 6 [12:24] can speak to what they did, why they did that and  
 7 what result it produced and for you then to through  
 8 questioning establish whether that was premeditated or  
 9 accidental. If you leave that part out and you only want  
 10 to rely on what you can independently audit you get a skew  
 11 picture, or if you overemphasise the significance of the  
 12 auditable trail you might lose valuable insight.  
 13 Now can I just then in that connection refer to  
 14 the Stockwell investigations in the UK, especially the  
 15 report Stockwell 1. It is included in the three binders  
 16 that I left with the evidence leaders. I know it's a long  
 17 time ago because my statements are now one and a half years  
 18 old, but Stockwell 1 is in there and I put it in there for  
 19 a reason, because it shows you an investigation conducted  
 20 by the Independent Police Complaints Commission in the UK  
 21 into the shooting death of a totally innocent Brazilian  
 22 student on the subway who was mistaken to be a suicide  
 23 bomber, and it seeks to establish how this could happen and  
 24 it's important to stress that everything Mr White has said  
 25 about gold/silver/bronze command, designated senior

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1 officers, it seemed that all requirements were in place and  
 2 nevertheless a disastrous decision produced.  
 3 Now I'm not so much interested in the  
 4 consequences in the process, because the IPCC acknowledged  
 5 that it wanted an auditable trail. Where that failed,  
 6 where they could not bring up documents that supported  
 7 police statements they lamented that and they came –  
 8 CHAIRPERSON: [Microphone off, inaudible]  
 9 I'm sorry, Mr De Rover. Someone has got some –  
 10 SPEAKER: My apologies, Mr Chair.  
 11 CHAIRPERSON: Is it a cell phone or a  
 12 tape recorder or a computer, it's making a noise. Please  
 13 turn it off, otherwise I'll ask the owner to leave the  
 14 chamber.  
 15 SPEAKER: I have indeed.  
 16 CHAIRPERSON: Carry on, Mr De Rover.  
 17 MR DE ROVER: They lamented the absence  
 18 of records and it led to recommendations to strengthen  
 19 future processes, and I think that the work, some of the  
 20 work Mr White has been involved in with "Keeping the Peace"  
 21 and its evolution in a subsequent document is testimony to  
 22 the efforts that have been made to remedy auditable trail  
 23 deficiencies, but they existed.  
 24 The commission went to police officers to get the  
 25 information they needed to fill the blanks that could not

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1 be explained by officers, or by documents that were  
 2 available to it, and it treated police officers as  
 3 witnesses of truth and that sits well with their public  
 4 role as agents of the State, the oath they swear. So  
 5 unless you can manifestly prove that someone's lying or  
 6 trying to pervert the cause of justice, or they committed a  
 7 criminal act and you need to change their status from  
 8 witness to suspect you treat them as a witness because they  
 9 are obliged and bound by their oath to tell you the truth.  
 10 Now Stockwell in the end culminated in a reality  
 11 where someone ended up being shot dead and it has never  
 12 been clear whether the gold commander actually gave the  
 13 order, shoot to kill. It's a convolution of  
 14 misunderstandings, misinterpretations that led to an  
 15 innocent person's death. What you see as a consequence is  
 16 that it's not just about the operations that you run, it's  
 17 about the way you organise and I contend that whilst I  
 18 agree that you can look at the level of the operation and  
 19 say for future operations we want better safeguards, but  
 20 again I'll talk about unravelling systems, but if you only  
 21 focus yourself on that level I don't think that you are  
 22 going to build structures that stop another Marikana from  
 23 happening.  
 24 That's just my problem, that if you don't bring  
 25 it up to the level of how the police organises as an

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1 organisation, how it trains its personnel, what it teaches  
 2 them, to what standards it holds them, how it is managed  
 3 and who does the managing, if that's not part of the  
 4 equation that problem can't be solved. If you don't go one  
 5 level higher then and say that those that exercise  
 6 authority over the police in government, there needs to be  
 7 a structure to how police receive policy direction that  
 8 goes beyond a phone call to a PC on a mobile, those are not  
 9 I think the types of auditable trails you'd be looking for  
 10 if afterwards you need to render account. So that is a  
 11 long story, but –  
 12 COMMISSIONER HEMRAJ: Mr De Rover, just  
 13 as regards the question posed, on a practical level that  
 14 would be very pertinent to the number of firearms and the  
 15 kind of firearms being used in an operation. Isn't that  
 16 so?  
 17 MR DE ROVER: Look, the basic thing, if  
 18 you can't, if you don't have it on site you can't use it.  
 19 Now sometimes you take the attitude "better sorry with than  
 20 sorry without," but there are certain types of weapons –  
 21 and I consider military assault weapons have no place in  
 22 law enforcement, full stop, and that I say aware of  
 23 particular problems of violence South Africa faces, but to  
 24 me the solution is not in the police arming up, the police  
 25 needs to arm down and smarten up.

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1 COMMISSIONER HEMRAJ: Yes, thank you.  
 2 CHAIRPERSON: While you're raising the  
 3 question of auditable trails, a small point but it makes a  
 4 big difference in this case. For some reason I don't  
 5 understand the police didn't keep a tape recording of all  
 6 the radio exchanges. There are gaps. There are disputes  
 7 about what was said at certain times. Surely that's an  
 8 elementary principle; there should be a tape recording made  
 9 of all traffic on the radio. That must be elementary. Is  
 10 that right?  
 11 MR DE ROVER: Chair, in Stockwell 1 it  
 12 was proven by the IPCC that decision logs were not being  
 13 kept and in cases, for example of the overall commander  
 14 Cressida Dick, she compiled her log many hours after the  
 15 events occurred, and still that did not help to explain to  
 16 the commission what now actually happened and facilitated  
 17 this wrong identification and the disastrous action that  
 18 followed where the ones executing it were absolutely and  
 19 totally convinced that they were dealing with a suicide  
 20 bomber about to detonate a device.  
 21 Now I agree with you, I think the one solid  
 22 recommendation for the future, and that technology exists,  
 23 is that you record what transpires because the done reality  
 24 is that for as long as events concur with what you foresaw  
 25 them to be it is easy to keep records and to keep your

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1 decision log or your occurrence book and to just put down  
 2 everything is happening as your foresaw it. If you take  
 3 the policing operations around the elections, they went  
 4 down without a hitch, and I'm sure that SAPS will be able  
 5 to show you model plans, model occurrence books and  
 6 decision logs and all went as planned because everybody had  
 7 an interest to see that this went down the way it was  
 8 foreseen. But once incidents start to develop in a  
 9 direction that you did not foresee or you consider to have  
 10 a low probability of developing, there is a discrepancy  
 11 between what you expect and what occurs, and if you have  
 12 two people keeping track of what you are saying the  
 13 possibility is that you can't keep up in registering what  
 14 you are doing and the orders you are giving with the speed  
 15 that you are issuing them, and subsequent there is an  
 16 issue.  
 17 Now Stockwell had that same problem. The IPCC  
 18 acknowledged that police officials conferred to try and  
 19 establish the chronology of what had transpired. Rather  
 20 than calling that collusion they said look, it's inevitable  
 21 if you do not have – because they did not have a recording  
 22 in the UK on that incident. The incident room that was  
 23 used did not provide for verbatim recording, video or  
 24 audio. They said it's inevitable that police officials  
 25 would compare records and try and help each other to piece

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1 back together what now actually has happened and how did it  
 2 happen, and you have to then take on advance that they do  
 3 that with the best of intentions, not to pervert the course  
 4 of justice or to give a version that that can't stand the  
 5 light of day, but they do that with good intent and it is  
 6 part of a professional responsibility. So there are - a  
 7 simple base recommendation, videotape everything.  
 8 There are countries where any questioning of a  
 9 suspect in interrogation it's, everything gets videotaped.  
 10 So if there ever is a dispute, a suspect in front of a  
 11 judge claims that undue pressure was exerted, those tapes  
 12 will be commanded and they will be viewed and a decision  
 13 will be reached, and it's easy because you have your  
 14 auditable trail.  
 15 MS LE ROUX: Mr De Rover, let me bring  
 16 you back to Marikana –  
 17 CHAIRPERSON: Sorry, Ms Le Roux, just one  
 18 final point. Apart from anything else it saves millions,  
 19 in a case of a commission like this that sort of precaution  
 20 would save a lot of money, probably millions of rands,  
 21 because the commission could obviously do its work much  
 22 more quickly because a lot of disputes of fact can't arise  
 23 because there's the objective evidence which proves what  
 24 was said over the radio and the video material as to what  
 25 was happening. The videographers as you know for some

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1 reason left the koppie and didn't go just behind the police  
 2 lines, they went to the JOC. They didn't go to scene 2.  
 3 So therefore there's room for an enormous amount of debate  
 4 as to what happened, which takes time to unravel and of  
 5 course costs a lot of money.  
 6 MR DE ROVER: Chair, the, it's irony that  
 7 actually the costs that would, that I would put under the  
 8 heading of preventing this kind of thing are marginal when  
 9 compared to the cost of trying to repair it now, because  
 10 your process is only the first step. It hasn't actually  
 11 led, and it won't, to repair. It will lead to  
 12 recommendations and choices that need to be made.  
 13 There are countries that routinely have their  
 14 officers go out even on patrol wearing individual cameras  
 15 and everything gets recorded. If in Australia you get  
 16 stopped by traffic police that entire encounter is filmed  
 17 from the car, but also from the officer that will approach  
 18 you. So at any point, and you get advised of that fact.  
 19 You get stopped; they tell you it's a traffic stop and the  
 20 first thing after that the officer will advise you that the  
 21 encounter is being videotaped and if need be, that  
 22 videotape will be used against you in a court of law, and  
 23 ja, of course it generates copious amounts of information  
 24 and you don't use them as Big Brother to find fault with  
 25 everything the police does, but the problem, what it does

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1 give you is a solid tool that when things do go wrong at  
 2 least you are able to piece back together the chronology  
 3 and to understand how things occurred, in what frequency,  
 4 and to identify the actors in it without discussion, where  
 5 now a lot of your time has simply gone into establishing  
 6 what is the chronology, what, who were the actors there,  
 7 what were they doing, and you haven't even managed in many  
 8 stages to answer the question how did that happen and why,  
 9 and those are critical questions that the equipment you  
 10 refer to would at least assist in answering, because you'd  
 11 have the rationale behind the decision-making and the  
 12 discussions that lead to it as they happen in real-time.  
 13 MS LE ROUX: Mr De Rover, I need to ask  
 14 for your cooperation and if you could shorten your answers  
 15 that would be very much appreciated.  
 16 MR DE ROVER: Ja, I –  
 17 CHAIRPERSON: [Microphone off, inaudible]  
 18 it's my fault to some extent. I asked him a question about  
 19 something I was interested in, but he's taken the point and  
 20 so have I.  
 21 MS LE ROUX: Mr De Rover, bringing you  
 22 back to the particular operation that we're considering in  
 23 this Commission at Marikana, what has struck me in your two  
 24 statements is that you don't conduct a review of briefing,  
 25 planning, command and control, intelligence, deployment of

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1 resources, etcetera, in any great level of detail and I'm  
 2 interested to know why that is. Were you briefed to  
 3 conduct a comprehensive review of the operation? Because  
 4 what appears to us is that you appear to have been  
 5 instructed to consider the allegations that the police  
 6 deliberately set out to kill the strikers. That seems to  
 7 be the question that you're answering in your statements.  
 8 So first question, were you briefed to conduct a  
 9 comprehensive review of the SAPS operation in all of those  
 10 elements that I've mentioned?  
 11 MR DE ROVER: My answer to you, my terms  
 12 of reference are written down. I don't feel that it's my  
 13 place to give them to you, or to the Commission, but you  
 14 can request them from SAPS and I don't see a reason why you  
 15 would not get those. Specific –  
 16 MS LE ROUX: Thank you, we'll do that.  
 17 Looking at –  
 18 MR DE ROVER: Specifically the, nothing  
 19 has been – how do you say? – instructed, guided, directed.  
 20 I've said at the beginning, and I will reiterate that, my  
 21 existence in an international field since 1992 and having  
 22 visited and worked with police forces in more than 70  
 23 countries, doesn't come from jeopardising my  
 24 professionalism or my integrity. So I'm also not going to  
 25 do that here and I've made that, when I was first

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1 approached by SAPS in the week before the 28th of February  
 2 I've made that abundantly clear, and my personal  
 3 motivation, I, they are in a lot of difficulty with regards  
 4 to Marikana, I understand that; some of it of their own  
 5 making, and maybe you will find that they should have  
 6 foreseen that that is open for discussion and it is  
 7 constantly being discussed here.  
 8 My attempt has been to not reduce the issue, as  
 9 I've seen yesterday, I understand sometimes you can take  
 10 people to a point of saying if that vehicle hadn't moved  
 11 there then this wouldn't have transpired, but that is at a  
 12 micro level. That's a tactic in an operation. So that  
 13 won't answer your fundamental question. So what I've done,  
 14 and please, my statements are one and a half years old – a  
 15 lot of the statements I was confronted with this morning,  
 16 like for example of Ms Moolman, is dated well after that  
 17 submission. So it's problematic. I had limited access, a  
 18 short period of time and a desire at least to try and give  
 19 a perspective that would also allow to do what the  
 20 Commission wants is to look at relevant international  
 21 standards, relevant international practices.  
 22 MS LE ROUX: Mr De Rover, in your  
 23 statement you refer to the unfettered access that you had  
 24 to any of the evidence and information relating to  
 25 Marikana.

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1 MR DE ROVER: Ja.  
 2 MS LE ROUX: I understand there was a  
 3 time constraint from when you were briefed in February to  
 4 when your statement was filed on the 8th of March, but you  
 5 haven't been – when you have sought information you haven't  
 6 been refused that information by the SAPS, have you?  
 7 MR DE ROVER: No.  
 8 MS LE ROUX: And when you've been  
 9 provided with information by the SAPS you've obviously used  
 10 it when you were doing your statements, correct?  
 11 MR DE ROVER: Correct.  
 12 MS LE ROUX: But there may well be a  
 13 universe of information and facts that you have not been  
 14 briefed with and therefore you can't be blamed for not  
 15 being able to have reference and consideration to that  
 16 evidence when you were reaching your conclusions, correct?  
 17 MR DE ROVER: That's correct.  
 18 MS LE ROUX: To return to my question,  
 19 were you asked in your terms of reference – which we will  
 20 request from the SAPS – were you specifically asked to look  
 21 at intelligence, planning, briefing, command and control,  
 22 and accountability? Were you asked to look at those five  
 23 themes?  
 24 MR DE ROVER: No.  
 25 MS LE ROUX: Was it within the scope of



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1 your brief to look at those five themes?  
 2 MR DE ROVER: I could well have done it  
 3 and there is probably, and I need to clarify that here,  
 4 there's probably a misunderstanding at that time on my part  
 5 of what this Commission was supposed to do. It's only  
 6 become clear later to me that the parties that are here,  
 7 besides assisting the Commission, also have a personal – if  
 8 I, and I allow the wording – a personal case that they  
 9 represent, an argument. So I was aware of the fact that  
 10 there were two other international experts and I'd read  
 11 early statements of both that already went into that. Now  
 12 I could give you more of the same. I thought I'd try and  
 13 focus on something different that would actually then  
 14 assist the Commission, because you have two qualified  
 15 experts that have looked in detail at that and have made  
 16 their findings and presented their argument and there has  
 17 been cross-examination of those. So it wasn't on my part a  
 18 deliberate attempt to not look at it, other than  
 19 misunderstanding your role here. Had I better understood  
 20 that I may have well decided to say something about it  
 21 myself and to measure that, but the benchmarks that were  
 22 used by Mr White and Mr Hendrickx are by and large accepted  
 23 international benchmarks. I likely would have come with  
 24 similar findings.  
 25 MS LE ROUX: So I understand you haven't

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1 done the exercise, but would it be fair then to say that  
 2 subject to what was identified as disputed or disagreed  
 3 between the Human Rights Commission and the SAPS in the  
 4 expert process that took place, and of course we've had  
 5 very little response, if any, from the SAPS in that  
 6 process, and other than to the extent Mr White was cross-  
 7 examined, are you broadly in agreement with his analysis of  
 8 those five themes, planning, briefing, intelligence,  
 9 command and control, and the accountability question?  
 10 [12:44] MR DE ROVER: You know, the – and I think  
 11 it has come out in cross-examination that at a general  
 12 level I don't have an issue with those, because as I said  
 13 his analysis is based on internationally accepted  
 14 standards. The issue is always with can you make it  
 15 relevant in a local context and Stockwell, Stockwell is  
 16 from his parent country and police force, or to all intents  
 17 and purposes. The deficiencies, the apparent deficiencies  
 18 there, so if you put that 100% the general requirements, in  
 19 Stockwell if you analyse it for yourself and take issue  
 20 with my percentage, but they did not manage –  
 21 MS LE ROUX: Mr De Rover, could I ask you  
 22 to concentrate on Marikana? Obviously Stockwell will be  
 23 useful in submissions with –  
 24 CHAIRPERSON: No, no, Ms Le Roux –  
 25 MS LE ROUX: – to the Commission, but if

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1 we could, given the time constraints –  
 2 CHAIRPERSON: No, I understand time  
 3 constraints, but he's entitled to use –  
 4 MS LE ROUX: - keep the focus on  
 5 Marikana.  
 6 CHAIRPERSON: Sorry, I'm sorry I'm  
 7 interrupting you. Forgive me. He's entitled to use  
 8 Stockwell to buttress his argument – not his argument, his  
 9 evidence in relation to Marikana. As long as he's  
 10 conscious of the fact, which I think he is, he's talking  
 11 about Marikana, he's entitled where he's dealing with the  
 12 applications of the world-best practice to Marikana to  
 13 refer to Stockwell, which is a famous incident which has  
 14 been exhaustively written about. So I think he can carry  
 15 on, but you'll bear in mind Ms Le Roux hasn't got unlimited  
 16 time and so she's very worried when –  
 17 MR DE ROVER: Chair, I appreciate. My –  
 18 CHAIRPERSON: - when you and I talk for  
 19 too long on these topics.  
 20 MR DE ROVER: And I apologise, but I do  
 21 think it's important to say that ideally you'd hold a  
 22 police force to 100% achievement on those points that Mr  
 23 White has made. Stockwell shows that it was impossible;  
 24 what it has done is lead to recommendations of improvement,  
 25 but it didn't lead to condemnation because none of the

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1 officers involved have been held accountable for the death  
 2 of Mr De Menezes. There has been no finding of  
 3 illegitimate killing.  
 4 So what I'm saying here is whilst I acknowledge  
 5 the pertinence of Mr White's findings, I take issue with  
 6 the relevance in the local context, and particularly in  
 7 terms of SAPS' ability as an organisation and police force  
 8 to comply, because best practice is something that you can  
 9 afford economically. You can have the cost to bring it  
 10 into your organisation and you can train your people to the  
 11 level to produce that result and then you can sustain it.  
 12 So, and then it can be your best practice.  
 13 So if you impose a standard you have to I think  
 14 also ask these questions, and that I think is critical. I  
 15 think that SAPS' ability in absolute terms, and I'm not  
 16 talking ill will or bad design, or you know, I'm just  
 17 saying that I don't judge SAPS' ability to conform to the  
 18 requirements that those standards put on par with the UK  
 19 police. So their score would never be a perfect 100. Even  
 20 at the onset with the best of intentions and the best of  
 21 will they would not be able to score 100.  
 22 MS LE ROUX: Mr De Rover, I want to just  
 23 clarify something on the record because when I said earlier  
 24 that there had been this opportunity to set out points of  
 25 disagreement and agreement between the experts, the

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1 response that was received from the SAPS appeared to have  
 2 no input from yourself and appeared to have been drafted by  
 3 the SAPS legal team. Is that a correct reading of the  
 4 documentation we received from the SAPS in that process?  
 5 MR DE ROVER: Can you –  
 6 MS LE ROUX: That you never engaged in an  
 7 exercise of identifying points of agreement and  
 8 disagreement between yourself, Mr White and Mr Hendrickx?  
 9 Have you done that exercise for them?  
 10 MR DE ROVER: I did.  
 11 MS LE ROUX: You did that exercise for  
 12 the SAPS. What document was produced that records those  
 13 points of agreement and disagreement? Because we've never  
 14 seen them.  
 15 MR DE ROVER: I don't know better than a  
 16 document was submitted to you last year by the SAPS legal  
 17 team, but that part of the process is not my  
 18 responsibility. I know that I was approached and asked to  
 19 sit, and at the time it was with another counsel of the  
 20 SAPS legal team and I spent several days going through an  
 21 extensive document on points of agreement and disagreement.  
 22 MS LE ROUX: So the document that was  
 23 produced to us in June of 2014, you did have input into  
 24 that document?  
 25 MR DE ROVER: Can you direct me to one

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1 that I can have a quick look?  
 2 MS LE ROUX: It's JJJ178.10 and then  
 3 JJJ178.11 was a request for clarification that we made to  
 4 the SAPS on those points of disagreement, to which no  
 5 response was received. It's page 178 in your bundle,  
 6 Chair.  
 7 MR DE ROVER: Can you again give me the  
 8 date reference, please?  
 9 MS LE ROUX: The date reference was the  
 10 1st of June 2014. Mr De Rover, I won't waste time now.  
 11 We'll give you the documents in the lunch adjournment. You  
 12 can advise me if that's the document that you did have some  
 13 input into.  
 14 Taking you then to the operation at Marikana and  
 15 your brief, and if I can take you in your first statement,  
 16 FFF11, to page 12, paragraph 51 of that statement. There  
 17 you recorded that "A full confrontation with a large armed  
 18 group of around 300 individuals, although considered and  
 19 catered for in contingency plans, was in fact never really  
 20 anticipated until the afternoon of the 16th of August," and  
 21 I'd like to unpack those elements of that. The first is  
 22 what contingency plans are you referring to? Because we  
 23 haven't seen any contingency plans that seem to match this  
 24 description.  
 25 MR DE ROVER: What I've written there,

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1 Chair, refers to the, at that time conversations I had with  
 2 General Annandale and Colonel Scott where they showed me  
 3 the written versions of the plan and talked me through the  
 4 intentions, and contingency then for example refers to the  
 5 support role of the TRT in situations of dispersal, disarm  
 6 and arrest where that may become a necessity.  
 7 MS LE ROUX: And perhaps over the lunch  
 8 break if I could ask you to identify the exhibit, if we  
 9 have it as an exhibit, that is the written plan that you  
 10 were shown by Officers Annandale and Scott, if you could –  
 11 we'll do that in the lunch adjournment though. So other  
 12 than whatever documents they showed you - it was a written  
 13 document, correct? It wasn't just the Google Earth image  
 14 that existed at the time?  
 15 MR DE ROVER: If I recall correctly the,  
 16 because that was in the first week when I was here, they  
 17 used slides from exhibit L.  
 18 MS LE ROUX: Okay, so you never saw a  
 19 written –  
 20 MR DE ROVER: No.  
 21 MS LE ROUX: - document that was a plan?  
 22 MR DE ROVER: Not at that stage.  
 23 MS LE ROUX: Right. Were you told by  
 24 either Officer Annandale or Scott that what you were being  
 25 shown was in the plan on the 16th of August, was in

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1 existence on the 16th of August?  
 2 MR DE ROVER: My understanding of what I  
 3 was being told was that that was part of the plan. I  
 4 realise when I look at the level of detail that you attach  
 5 to that maybe I should have been more critical in  
 6 examining, but I understood I was given a briefing as to  
 7 what had occurred and most, on the most part I listened and  
 8 I had the occasional question or clarification, but they  
 9 did a lot of the talking to talk me through the events.  
 10 MS LE ROUX: So other than being shown  
 11 portions of exhibit L and this oral briefing from the two  
 12 commanders, you weren't given any written documentation  
 13 that purported to be a contingency plan?  
 14 MR DE ROVER: Not that I recall now. You  
 15 know this, you're talking one and a half years ago.  
 16 MS LE ROUX: Of course.  
 17 MR DE ROVER: I'm not sure.  
 18 MS LE ROUX: Then in the same paragraph  
 19 of your statement you talk about, you state that "A full  
 20 confrontation with a large armed group of around 300  
 21 individuals was in fact never really anticipated until the  
 22 afternoon of the 16th of August." Now there are five pieces  
 23 of evidence that I'd like to ask whether you were aware of  
 24 when you wrote this statement for submission to the  
 25 Commission. So I'm going to give you the five pieces of

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1 evidence and you can tell me if you were aware of those at  
2 the time that you drafted that.

3 MR DE ROVER: If they are dated after the  
4 8th of March then obviously not.

5 MS LE ROUX: No, these are facts, not  
6 documents.

7 MR DE ROVER: Okay.

8 MS LE ROUX: So the first is did you know  
9 at the time that you drafted the statement that the JOCCOM  
10 meeting at 6AM on the 16th of August began with a briefing  
11 that said that day was D-day? Were you told that the 16th  
12 of August was D-day?

13 MR DE ROVER: Yes.

14 MS LE ROUX: Were you told before you  
15 wrote your statement that shortly after the 6AM JOCCOM and  
16 in response to the discussion of a possible tactical option  
17 Brigadier Van Zyl requested four mortuary trucks to be  
18 placed on standby? Were you told that?

19 MR DE ROVER: I've – no. I've only heard  
20 that discussion came out here in the Commission. I wasn't  
21 aware of that.

22 MS LE ROUX: Okay. Did you know at the  
23 time that you wrote your statement that after the JOCCOM  
24 and before 9 o'clock Majors-General Mpembe and Annandale  
25 warned the Provincial Commissioner that a proposed tactical

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1 option carried a risk of injury and death to strikers?

2 MR SEMENYA SC: Sorry, may I invite my  
3 learned colleague to repeat that? It was a little too fast  
4 for me to comprehend.

5 MS LE ROUX: Did you know at the time  
6 that you wrote your statement that was submitted on the 8th  
7 of March 2013 that after the 6AM JOCCOM, before 9AM on the  
8 16th of August, Majors-General Mpembe and Annandale warned  
9 the Provincial Commissioner that a proposed tactical option  
10 carried a risk of injury and death to the strikers?

11 MR DE ROVER: Chair, I would hold that to  
12 be –

13 MR SEMENYA SC: Chair, again it may –

14 CHAIRPERSON: Yes, I'm sorry, I don't  
15 remember that evidence. I'm not saying it isn't the  
16 evidence, but can you give us the reference to it, please?

17 MS LE ROUX: Chair, I'll get the  
18 references for you over lunch.

19 CHAIRPERSON: I must confess I don't  
20 remember that. I don't that was the basis for Mr Semanya's  
21 objection as well, but if there is a reference – I'm not  
22 saying it doesn't exist, I just don't remember it.

23 MS LE ROUX: Chair, we'll get you the  
24 references, but for now, Mr De Rover, if you could assume  
25 that between the 6AM JOCCOM and before 9 o'clock those two

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1 commanders warned the Provincial Commissioner –

2 CHAIRPERSON: Well, wouldn't it be –

3 MS LE ROUX: - of the risk in the  
4 tactical option?

5 CHAIRPERSON: I'm sorry to interrupt you.  
6 Wouldn't it be sensible for us to get the evidence on that  
7 before he's expected to answer the question?

8 MS LE ROUX: Chair, I think it would be  
9 appropriate if he just assumes that for now.

10 CHAIRPERSON: No, I don't think he should  
11 be asked to assume something that may be wrong.

12 MS LE ROUX: Chair, the entire cross-  
13 examination of Mr White and Mr Hendrickx proceed on the  
14 basis of assume this evidence, assume that evidence. I'm  
15 merely doing goose and gander one more time.

16 CHAIRPERSON: No, no, I know. Lunch is  
17 going to come up in a couple of minutes. It isn't as if  
18 there's much prejudice for that answer to stand over until  
19 we resume, and I think that's better. But can I ask a  
20 question before we take the lunch adjournment? Exhibit L,  
21 slide 78 gives what purports to be the operational plan for  
22 stage 3. It's on a page which has a calendar page for  
23 August, indicating this was on the Tuesday the 14th and the  
24 plan there set out is to disperse the strikers into smaller  
25 groups, encircle and disarm. That is essentially the plan

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1 as it was announced or agreed to at 1:30 on the Thursday.

2 Lieutenant-Colonel Scott conceded in his evidence  
3 that that was not the plan on Tuesday. When he was asked -  
4 and in fact it only became the plan on Thursday at about  
5 half past 1. When he was asked why this was included in  
6 exhibit L he gave the explanation that it wasn't malicious,  
7 it was simply done to make it easier for the Commission to  
8 understand the development of the plan. What I want to  
9 know from you is this; when you were shown exhibit L were  
10 you told that slide 78 which gives what purports to be the  
11 plan already on Tuesday, was in fact not the plan on  
12 Tuesday but that was merely inserted there without malice  
13 to enable the Commission and presumably you to understand  
14 the development of the plan better?

15 MR DE ROVER: Chair, the, I can't recall  
16 seeing this particular slide. I can't recall a particular  
17 reference to when different stages would become  
18 operational. I, but you tell me if you don't want me to; I  
19 am, I have no problem with addressing the question that was  
20 just put to me as a matter, like as a matter of course,  
21 but –

22 CHAIRPERSON: Yes. No, the question that  
23 was just put to you by – you mean by Ms Le Roux?

24 MR DE ROVER: Ja.

25 CHAIRPERSON: Well, my problem is I don't

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1 remember that evidence. I don't say it wasn't given and  
 2 we've had a lot of evidence, we've got well over 35 000  
 3 pages, so I may be forgiven for not remember. But we're  
 4 taking lunch in a minute.  
 5 MR DE ROVER: Ja.  
 6 CHAIRPERSON: So after lunch she'll give  
 7 us the reference. If she's correct you can answer it. So  
 8 Ms Le Roux, convenient for us to take the lunch adjournment  
 9 now?  
 10 MS LE ROUX: No, Chair, I'd like to  
 11 finish the five pieces of evidence, if I could, then that  
 12 point is rounded out.  
 13 CHAIRPERSON: Alright, provided you don't  
 14 put the bit that I can't remember as being correct.  
 15 MS LE ROUX: Chair, I have the reference  
 16 for you. It's day 181, pages 21719 to 21728 and 21661 to  
 17 21662.  
 18 CHAIRPERSON: I think put those pages on  
 19 the screen when we resume after lunch.  
 20 MS LE ROUX: Yes. So –  
 21 CHAIRPERSON: We'll now adjourn for  
 22 lunch.  
 23 [COMMISSION ADJOURNS COMMISSION RESUMES]  
 24 [13:47] CHAIRPERSON: The Commission resumes. Mr  
 25 De Rover, you're still under oath.

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1 CEES DE ROVER: [s.u.o.]  
 2 CHAIRPERSON: During the adjournment we  
 3 looked at the pages to which Ms Le Roux and Hardy referred  
 4 us and at 2, I think it's 21724 to 5 there's a passage to  
 5 the effect that General Annandale and General Mpembe spoke  
 6 to General Mbombo and they told her that if the POP  
 7 couldn't do what they were supposed to do as far as  
 8 dispersal and disarmament was concerned and the TRT had to  
 9 take over, there was a risk of injury or death, but that  
 10 they gave her the assurance that they would use their best  
 11 endeavours to see to it that that didn't happen. I think  
 12 that's – would you agree, Ms Le Roux, that's an accurate  
 13 summary of all the pages that you gave us to look at?  
 14 CROSS-EXAMINATION BY MS LE ROUX (CONTD.):  
 15 Yes, Chair. Mr De Rover, did you have an opportunity to  
 16 review those transcript references over lunch?  
 17 MR DE ROVER: [Microphone off, inaudible]  
 18 MS LE ROUX: So were you aware that at  
 19 the time that you wrote your statement submitted in March  
 20 last year, were you aware that after the 6AM JOCCOM and  
 21 before 9 o'clock Majors-General Mpembe and Annandale had  
 22 warned the Provincial Commissioner that a proposed tactical  
 23 option carried a risk of injury and death to strikers?  
 24 MR SEMENYA SC: Yes, but qualified like  
 25 the Chair has –

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1 MS LE ROUX: Qualified that they would  
 2 make efforts to mitigate that risk.  
 3 MR DE ROVER: Yes, Chair, I was aware of  
 4 that. I'd add that I would actually expect such an  
 5 assessment to be there. Like yesterday Mr White pointed  
 6 out that any decision you make that relates to using force  
 7 you have to contemplate what effects that it will trigger.  
 8 So it, you'd obviously also want to add probability or  
 9 likelihood in your assessment, but I would have been more  
 10 surprised if there had not been some level of advice to the  
 11 PC what possible consequences there would be to going  
 12 tactical, as it has been referred to here.  
 13 MS LE ROUX: Have you seen such a risk  
 14 assessment in the case of the stage 3 tactical plan for  
 15 Marikana for the 16th of August?  
 16 MR DE ROVER: Ja, again I hear you and I  
 17 think you are asking for auditable trail evidence and I  
 18 have not seen a written account of people actively  
 19 assessing that risk, but if I take it that the conversation  
 20 between Generals Annandale, Mpembe and General Mbombo did  
 21 take place, then I would assume that that is the product of  
 22 an assessment, that you don't just go there to make that as  
 23 a statement that you haven't based on a deeper  
 24 consideration before reaching that conclusion.  
 25 MS LE ROUX: But that's the assumption

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1 you're making that there was such a risk assessment, such  
 2 an exercise that identified risks and engaged with  
 3 probabilities.  
 4 MR DE ROVER: Now what –  
 5 MS LE ROUX: You don't know of any other  
 6 - you haven't been told, I understand you don't have a  
 7 paper trail. Have you been told that such a risk  
 8 assessment exercise took place?  
 9 MR DE ROVER: No. What I have been told  
 10 is a reflection of what you now ask me as a question, that  
 11 they considered the potential, the possible consequences of  
 12 going tactical, one of them being that it would cause  
 13 injury or death, but obviously not to the measure that it  
 14 ended up producing but as a possibility that you are, you  
 15 deploy a means and nothing occurs and nobody comes to harm,  
 16 or you deploy a means, a tactical means of dispersal and  
 17 even if we take the suggestion of Mr Hendrickx that you jet  
 18 a person with the water cannon, and I heard him say you're  
 19 being thrown away 10 metres, I would concede, or contend  
 20 that it's distinctly possible that in such a tumble you  
 21 sustain injury, so that you, before you decide to use it  
 22 you countenance that possibility, and that mental exercise  
 23 is a risk assessment in how far you can hold SAPS to a  
 24 requirement that that such processes should then be put on  
 25 paper so that afterwards you can come and say yes, I have

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1 now objective and verifiable proof that that indeed  
 2 occurred. It probably comes back to what we discussed  
 3 earlier, that had you had mechanical recording devices in  
 4 the JOC you might have stumbled upon that segment or not to  
 5 validate or invalidate what you are saying.  
 6 MS LE ROUX: Now Mr De Rover, of course  
 7 our difficulty is that we don't even have witness evidence  
 8 that such a risk assessment took place, so we rely on what  
 9 you were told. With respect to what you were told, when  
 10 did this risk assessment take place and who participated in  
 11 it?  
 12 MR DE ROVER: Again you're asking me now  
 13 about meetings that are a long time ago. I'm from policing  
 14 background, I'm also used to investigations where if after  
 15 a certain time you have new insight you can bring a witness  
 16 back and confront them with new questions or information.  
 17 Here the process has been that you've tried from A through  
 18 Z to deal with people as they became available to you and  
 19 I'm sure that today you would probably conduct your  
 20 examination of General Annandale and Mpmembe differently  
 21 than you did at the time that you conducted them.  
 22 MS LE ROUX: Unquestionably. Mr De  
 23 Rover, did you take note of the conversations in which this  
 24 risk assessment was discussed? Because of course we've had  
 25 an exchange with you already in interrogatories relating to

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1 your notes around the scene 2 reconstruction. We're told  
 2 they're in Australia. We were hoping you might be able to  
 3 get them to us even from Australia if someone could scan  
 4 them and email them to us. Did you take notes of this  
 5 conversation in which this risk assessment process was  
 6 described to you? Because obviously it doesn't appear in  
 7 your statements other than where you say and in response to  
 8 an interrogatory there was a risk assessment.  
 9 MR DE ROVER: Look, I –  
 10 MS LE ROUX: Do you have notes of these  
 11 interviews?  
 12 MR DE ROVER: I'm in a habit when I  
 13 conduct interviews with people to jot things down. I was  
 14 never imagining that at some stage someone like you, or you  
 15 would ask me to have I got these notes. So no, they're not  
 16 here. I'd even have to check whether I kept them at all  
 17 because I do not do this as my only job. I have many, and  
 18 if I seek to preserve or archive also let's say my works of  
 19 deliberation, if you want, or the process of gathering  
 20 information and the notes corresponding, I'd have to rent a  
 21 separate place. Like fortunately nowadays electronically  
 22 it becomes a little bit easier, but hardcopy notes, at  
 23 times once I'd compiled a document on which they are based  
 24 I tend not to keep them. So I'd have to check.  
 25 MS LE ROUX: We'll engage with the SAPS

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1 legal team and ask you to undertake that exercise. But I  
 2 just want to be absolutely clear that the five pieces of  
 3 evidence I'm asking you about and you said, I just want to  
 4 understand that my understanding was correct that these are  
 5 based on when you met with Officers Annandale and Scott and  
 6 they took you through exhibit L. Those were your sole  
 7 sources of when I asked you did you know it was D-day, did  
 8 you know about the four mortuary trucks, and now did you  
 9 know about the warnings to the Provincial Commissioner  
 10 about risk and the undertaking to mitigate it. So am I  
 11 correct that the source of that information when you're  
 12 answering the questions to me as to when it fed into your  
 13 March 2013 statement, it's those sole sources, exhibit L –  
 14 MR DE ROVER: Ja.  
 15 MS LE ROUX: Major-General Annandale,  
 16 Lieutenant-Colonel Scott?  
 17 MR DE ROVER: In the lunch break, because  
 18 I've been given a wealth of information and obviously I  
 19 need to try and separate at which date did I get, so I  
 20 tried to isolate, because I remembered that and I can track  
 21 it to the day that I created a folder for it, which is  
 22 Sunday the 3rd of March 2013 at 12:19PM, and the folder I  
 23 labelled "Marikana Deep D Scott" and I was given by him a  
 24 collection of electronic files related to Marikana and  
 25 there is, ja there is quite a few in there that I, and

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1 again it's one and a half years ago. I would have looked  
 2 at those. So I don't see a problem with that information  
 3 that is there. I guess some of it is now entered as  
 4 evidence, but there is, you know cordon and search, daily  
 5 operational concepts, daily plans, POP compilation, there's  
 6 a file deceased summary, discharge – I don't even know what  
 7 that stands for –  
 8 MS LE ROUX: Mr De Rover, would you be  
 9 comfortable with sharing that folder with the evidence  
 10 leaders and parties in the Commission?  
 11 MR DE ROVER: I – ja, personally like I,  
 12 like I said it's information that I would assume, because I  
 13 think it comes from the hard drive that the evidence  
 14 leaders obtained from Colonel Scott, obviously with many  
 15 more files on there because when they received that drive  
 16 it was obviously many months after the 3rd of March.  
 17 MS LE ROUX: Yes.  
 18 MR DE ROVER: But ja, it would at least  
 19 then allow you a comparison if that is –  
 20 MS LE ROUX: Thank you, and –  
 21 CHAIRPERSON: May I ask you a question  
 22 before Ms Le Roux continues. Did Colonel Scott tell you  
 23 that some of the plans which we have in – they're not in  
 24 exhibit L, I think they're in a separate exhibit – were  
 25 actually reconstructed, as it were, afterwards, that there

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1 weren't actual written plans but that he sat down  
 2 afterwards to reverse engineer them in a sense to  
 3 reconstruct them in written form? Did he tell you that?  
 4 MR DE ROVER: Chair, he did and ja, being  
 5 – I'm a policeman by trade, so I can check properties. I  
 6 can check when documents were produced. You know it's a  
 7 handy feature to have, so in addition to him telling me I  
 8 was obviously also able to ascertain that. So before I  
 9 went into a meeting with him I already knew that and I gave  
 10 him a chance first before asking, and I didn't need to ask  
 11 because he explained the process that underpinned that.  
 12 MS LE ROUX: And this explanation and the  
 13 provision of those documents from Lieutenant-Colonel Scott  
 14 came to you in February and March of last year?  
 15 MR DE ROVER: No, I received them on the  
 16 3rd of March 2013.  
 17 MS LE ROUX: Yes, okay. In that folder  
 18 were there the minutes that record the 16th of August as D-  
 19 day, if you can recall?  
 20 MR DE ROVER: My guess is not because I'd  
 21 remember that.  
 22 MS LE ROUX: Okay.  
 23 CHAIRPERSON: Ms Le Roux, I think you'll  
 24 find that, just to remind you, I think you'll find that  
 25 those minutes are actually notes made by Captain, as she

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1 then was, Moolman at the meeting in manuscript form.  
 2 Subsequently the minutes for the meeting went through a  
 3 number of recensions at Roots and the final version we got,  
 4 which was put up as an exhibit, didn't contain those words  
 5 at all. In fact there were significant differences between  
 6 the final version and the contemporaneous notes made at the  
 7 time, and the contemporaneous notes do not exist in  
 8 electronic form, as far as I know. They were given to the  
 9 evidence leaders at some stage on the original pieces of  
 10 paper. So I doubt very much whether he would have got  
 11 them. They became available quite late.  
 12 MS LE ROUX: Mr De Rover, prior to the  
 13 time that you filed your first statement in March of last  
 14 year, you obviously were aware that Lieutenant-Colonel  
 15 Scott's plan contemplated using rollout of barbed wire as a  
 16 barrier to protect police resources and media, correct?  
 17 MR DE ROVER: I'm aware of that.  
 18 MS LE ROUX: So was the purpose of the  
 19 wire explained to you before you filed your statement in  
 20 March 2013?  
 21 MR DE ROVER: Yes, it was.  
 22 MS LE ROUX: And am I correct that it was  
 23 described to you to be the barrier to protect police  
 24 resources and media?  
 25 MR DE ROVER: Yes, and including a

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1 simultaneous rollout of the wire.  
 2 MS LE ROUX: So Lieutenant-Colonel Scott  
 3 told you that –  
 4 MR DE ROVER: Ja.  
 5 MS LE ROUX: - in his plan he wanted a  
 6 simultaneous rollout of wire?  
 7 MR DE ROVER: Ja.  
 8 MS LE ROUX: We'll get to the deployment  
 9 of the barbed wire later on. With respect to the  
 10 intelligence that was available to the police around the  
 11 16th of August were you told about the intelligence, limited  
 12 as it was, showing that there was likely to be a  
 13 confrontation with the strikers because there may be some  
 14 of them that would refuse or be reluctant to disarm and  
 15 that there may then be conflict if they were engaged by  
 16 police? Were you told that the intelligence showed a  
 17 likelihood of confrontation?  
 18 MR DE ROVER: Yes.  
 19 MS LE ROUX: And that again came from  
 20 Officers Annandale and Scott?  
 21 MR DE ROVER: Ja, but it, I'd also  
 22 contend that just taking into account the events as they  
 23 produced on the 10th, the 11th, the 12th, the 13th, that  
 24 likelihood, if you'd need separate intelligence sources to  
 25 confirm it then you're not analysing the events as they

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1 produce on the ground very well, because I think the  
 2 manifestations of violence that were apparent at Marikana  
 3 even before the police was there show that there was a  
 4 predilection at least amongst some to resort to violent  
 5 activity.  
 6 MS LE ROUX: Chair, the team has taken a  
 7 decision over lunch, given the cost of all the high-  
 8 definition projection equipment that we have available,  
 9 that rather than staggering the viewing of the videos  
 10 through my cross-examination we would like to just play  
 11 them all now before –  
 12 CHAIRPERSON: I didn't understand Mr  
 13 Semanya to object to that.  
 14 MS LE ROUX: Yes.  
 15 CHAIRPERSON: All he said was it could be  
 16 done provided there was an understanding in effect with the  
 17 Commission, which he spelt out –  
 18 MS LE ROUX: Yes, of course.  
 19 CHAIRPERSON: - that, and it would  
 20 effectively be treated as the captions in exhibit L were  
 21 which emanated from, I can't remember his rank, Colonel  
 22 Visser.  
 23 MS LE ROUX: Yes.  
 24 CHAIRPERSON: So on that basis you can  
 25 continue. On that basis –

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1 MS LE ROUX: So Chair, if I could –

2 CHAIRPERSON: So you're now going to show

3 the –

4 MS LE ROUX: - if I could then ask Mr

5 Bennett to come and assist us to activate the HD projector.

6 CHAIRPERSON: Yes, so we'd better move

7 from where we are because otherwise –

8 MS LE ROUX: Yes, Chair.

9 CHAIRPERSON: - we will have this bright

10 light shining in our eyes, particularly my eyes, which

11 wouldn't be a good idea.

12 MS LE ROUX: Yes, Chair.

13 CHAIRPERSON: So we'll come and sit next

14 to Mr Van Der Bijl.

15 MS LE ROUX: Similarly if we could then

16 just have a blanket warning that probably for the next hour

17 and 20 minutes we're going to be dealing with footage of

18 the events.

19 CHAIRPERSON: I asked you to give it on

20 my behalf, but do you want me to do it or – you do it.

21 Have a go at it. I've done it so often. You must have

22 heard me saying it hundreds of times.

23 MS LE ROUX: Well, then just to the

24 family members and those watching in the overflow room, the

25 five videos we're going to show – perhaps I should just

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1 briefly explain what's happened. All of the available

2 footage before the Commission has been taken by a video

3 expert using various technical terms, because we now know

4 things like CCTV footage only captures one frame a second,

5 other footage is 24 frames a second, etcetera. All of this

6 footage has now been cross-referenced and synchronised so

7 that it follows eTV time.

8 The five videos we're going to watch, the first

9 deals with the movement of strikers around, from the koppie

10 to the kraal, using different video footage. The second

11 video has the first video playing in the corner of the

12 screen so that you can see what's happening at that point

13 in time in the narrative, and then there's an animation

14 showing the movement of the wire Nyalas and the group.

15 I should note for the record that you'll see

16 there's a red shape that is supposed to be the lead group.

17 As Mr Dagan makes clear in his affidavit, that is a

18 representative shape. The position of the group he is

19 confident of, matched against landmarks, but the shape of

20 the group shouldn't be taken as anything other than

21 representative –

22 CHAIRPERSON: Forgive me, Ms Le Roux,

23 you're now giving a warning to those who're going to see

24 the video. The idea was you should give a warning to those

25 who don't want to see the video, so perhaps I'd better do

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1 it. We're going to see a video which shows amongst other

2 things pictures we've seen before, images of deceased

3 miners who were shot, indicating in some cases their

4 injuries, but the pictures are of such a nature that we

5 think that the relatives and loved ones of those people who

6 are depicted in those images will experience extreme

7 emotional pain and distress when they see them.

8 We had occasions in the past where these pictures

9 were shown and people were very upset and started crying

10 and collapsed. So if you feel, if any of you here feel

11 that seeing those images will cause you to react in that

12 way, cause you emotional distress and pain and great

13 sorrow, I'm going to ask that those pictures not be shown

14 until a minute has elapsed from the time I've finished

15 speaking to give those who wish to leave the chamber the

16 opportunity to do so. The minute will start now.

17 During this minute we will actually adjourn to

18 give the technicians the opportunity to set the thing up,

19 so we will leave the chamber with any other people who are

20 minded to do so in a minute's time. We will come back when

21 we are told that the chamber is ready for us to see the

22 video. I don't see anybody moving, but please remember

23 some of these pictures are quite horrific and particularly

24 if it's people you knew and loved you're going to find it

25 painful. It's bad enough for people like us who didn't

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1 know them to see them; it must be terrible for the

2 relations and loved ones. Alright, I think the minute is

3 now up. We'll now adjourn.

4 [COMMISSION ADJOURNS COMMISSION RESUMES]

5 [14:12] CHAIRPERSON: The Commission resumes.

6 We're now going to see the video, but it's not necessary to

7 remind the witness he's still under oath.

8 MS LE ROUX: Alright, so Chair, for the

9 record we're going to start with annexure V2, which has now

10 been marked as UUUU10.4 and this is –

11 CHAIRPERSON: [Microphone off, inaudible]

12 MS LE ROUX: If we could dim the lights

13 that would probably assist, and Chair, this video deals

14 with the movement of the strikers from the koppie around

15 the kraal.

16 [VIDEO IS SHOWN]

17 Chair, just so that we're oriented, the time

18 clock running at the bottom is eTV time. The source of the

19 footage that is being shown in either of the blocks is

20 recorded in the corner and then where there's a zoom-in or

21 a speeding up of the frame rate or something, that's noted

22 as well.

23 [14:32] [VIDEO IS SHOWN]

24 Chair, if we could then play V2A, which is an

25 animation of the movement of the wire Nyalas and the lead

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1 group, if we could, if Mr Bennett could assist, if we could  
 2 play the first minute of the clip and pause one minute in.  
 3 [VIDEO IS SHOWN]  
 4 Chair, the blue line represents the deployment of  
 5 the barbed wire.  
 6 [VIDEO IS SHOWN]  
 7 Then Mr Bennett, if we can then move to 5 minutes  
 8 38 in the clip. Chair, in the interim period I just need  
 9 to give some milestones. So Nyala 1 commenced its rollout  
 10 at 15:42:30, completes its rollout of the wire at 15:43:30.  
 11 Nyala 2 begins its rollout 15:46:30 and completes its  
 12 rollout 15:47:45. The lead group begins to set off from  
 13 the koppie 15:48:20 and that should be roughly where we  
 14 are, yes, and if we could now play from here until 15:55  
 15 and pause at that point.  
 16 [VIDEO IS SHOWN]  
 17 Chair, the yellow lines indicate fields of view  
 18 of the cameras that are in use in the V2 annexure playing  
 19 in the corner.  
 20 [VIDEO IS SHOWN]  
 21 Chair, perhaps just to round it out, the shape  
 22 that's moving through the field of view is representative  
 23 of the lead group. The single red dot is the single pylon.  
 24 The V-shape red is the other pylon. The blue line at the  
 25 top is the fence.

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1 [VIDEO IS SHOWN]  
 2 Chair, that's Nyala 3 beginning to deploy its  
 3 wire.  
 4 [VIDEO IS SHOWN]  
 5 Chair, the yellow indicates the field of view of  
 6 this photograph taken at this point in time.  
 7 [VIDEO IS SHOWN]  
 8 Chair, that's Nyala 4 stopping near the single  
 9 pylon.  
 10 [VIDEO IS SHOWN]  
 11 Chair, you'll note Nyala 5 has started to set  
 12 off, and then Nyala 4 is on the move again.  
 13 [VIDEO IS SHOWN]  
 14 Chair, that's Nyala 4 reaching the kraal.  
 15 [VIDEO IS SHOWN]  
 16 Chair, if Mr Bennett could now fast forward to  
 17 17:47, then we'll skip the section of V2 that had the four  
 18 sources displaying simultaneously and pick it up from there  
 19 to the end where they're played one after each other. So  
 20 to 17:47.  
 21 [VIDEO IS SHOWN]  
 22 [14:51] Chair, the splitting of the group is explained in  
 23 the affidavit of Mr De Gaan. And, Chair, what he sets out  
 24 there is that the smaller little group is what he counts to  
 25 be 37 people coming around the kraal.

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1 [VIDEO SHOWN]  
 2 Chair, I am conscious that it is 3 o'clock. The  
 3 next video, V3 which deals with water cannon usage, I think  
 4 it is about 12, 13 minutes. I am not sure if you would  
 5 like to take tea  
 6 CHAIRPERSON: [Inaudible, microphone  
 7 off].  
 8 [COMMISSION ADJOURNS COMMISSION RESUMES]  
 9 [15:15] CHAIRPERSON: The Commission resumes.  
 10 [VIDEO SHOWN]  
 11 MS LE ROUX: Chair, as will become  
 12 obvious shortly when something goes in front of the camera  
 13 this is a very dirty north-west water canon camera. At the  
 14 moment it's stationary. Chair, the next clip, V4, looks at  
 15 the use of teargas and the stun grenade. And Chair, again  
 16 because we have had an adjournment before the last warning,  
 17 both this video and the next probably should carry a  
 18 warning if any members of the public or loved ones of those  
 19 in the video would like to leave. Chair, for the CCTV  
 20 footage obviously it only captures one frame a second  
 21 versus 24 frames a second, so that explains the difference  
 22 between those sources of footage.  
 23 [15:35] [VIDEO SHOWN]  
 24 MS LE ROUX: And then finally, Chair, V5  
 25 which deals with shooting at scene 1. It has a number of

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1 parts. If we could pause after part 1 and skip part 2  
 2 because that is the subject Mr Lubbe's contention this  
 3 morning that what's observed in that part is in fact the  
 4 plastic wad of the cartridge. So we don't need to look at  
 5 that part of this annexure, but if we can play part 1 and  
 6 then I'll advise Mr Bennett when to skip forward. If we  
 7 could then skip this part of the video, if we just fast  
 8 forward to part 3. No we've gone past part 2. No, no it's  
 9 back. Sorry I'll get the reference in the – if we go to  
 10 3:20 in the video. There we go and if we can play from  
 11 there to the end. Chair, this does contain detailed  
 12 zooming in and the like on the shooting. So again if  
 13 anyone would like to leave they probably should now.  
 14 Chair, when the number appears it appears above the puff of  
 15 dust that has been observed. Chair, here the numbers  
 16 indicate the number of times we can see someone holding  
 17 their hand in the air in an apparent cease fire call.  
 18 Thank you, Chair, that concludes the video presentations.  
 19 Yes, Chair, if I could.  
 20 [15:54] CHAIRPERSON: The Commission resumes. Ms  
 21 Le Roux, I must confess I was under the impression that we  
 22 were going to stop at 4:00 today and I told one of the  
 23 commissioners that that was so and he made arrangements on  
 24 the strength of it. When you asked me if we could on –  
 25 when you told you wanted to go on till quarter past four I



1 assumed that we could. But perhaps we can try to solve the  
2 problem by being very prompt tomorrow starting on the dot  
3 9:00, quarter of an hour breaks to ensure that you get the  
4 full period tomorrow morning. We've got a couple of  
5 minutes left, but –

6 MS LE ROUX: Chair, is it at all possible  
7 to start before 9:00 or finish a little after 1:00, 1:30 –

8 CHAIRPERSON: Mr Semenya, what would you  
9 say to us starting at quarter to nine tomorrow?

10 MR SEMENYA SC: Even if you started at  
11 7:00 it's fine, but I have intimated –

12 CHAIRPERSON: Don't push the envelope too  
13 far.

14 MR SEMENYA SC: I want to make a  
15 different point that have intimated that Mr De Rover had to  
16 leave by 1:00 and –

17 CHAIRPERSON: By?

18 MR SEMENYA SC: By 1 o'clock, so we can  
19 leave the time before the time that that would not  
20 inconvenience him.

21 CHAIRPERSON: Is half past eight possible  
22 for everybody? All right let's make a vigorous effort,  
23 daadwerklike poging to start at half past eight tomorrow  
24 and we will also try to cut – well confine the breaks to  
25 quarter of an hour, definitely quarter of an hour to give

1 you the maximum time. You heard we have to stop at 1:00.  
2 But you have quite a lot of material to think about  
3 overnight, so it's probably appropriate to stop at this  
4 stage anyway. All right we'll adjourn now until half past  
5 eight tomorrow morning. Please half past eight.

6 [COMMISSION ADJOURNED]

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