

RealTime Transcriptions

TRANSCRIPTION OF THE

COMMISSION OF INQUIRY

MARIKANA

BEFORE TRIBUNAL

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

HELD ON

DAY 69 28 MARCH 2013 PAGES 7357 TO 7436

HELD AT

CIVIC CENTRE, RUSTENBURG, NORTH WEST PROVINCE



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

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

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

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

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

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

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

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

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1 people that were killed were killed by such arms, would you
 2 have praised them if you knew that?
 3 CHAIRPERSON: Mr Bizos, wouldn't it have
 4 depended on the circumstances under which those weapons
 5 were used and whether they were really used for purposes of
 6 self or private defence or for some other purpose? So I
 7 think the question in the generalised form without some
 8 kind of qualification isn't helpful.
 9 MR BIZOS SC: If you knew that such
 10 weapons were used did you consider them appropriate weapons
 11 to be used against the crowd?
 12 GENERAL PHIYEGA: It absolutely depends
 13 on the circumstances under which those weapons were used.
 14 MR BIZOS SC: Let me go a bit forward
 15 because during the course of this morning we will give you
 16 the details of where the wounds were and what the nature of
 17 the wounds were. I want you to assume for the purposes of
 18 my next question that the majority of the people that were
 19 killed were shot in the back or on the side and they were
 20 deadly shots. Please assume that I have correctly
 21 summarised what is on the medical reports before the
 22 Commission and in your counsel's possession. Please accept
 23 that as a fact for the purposes of the question. You can't
 24 possibly believe that bullets can turn around can you?
 25 GENERAL PHIYEGA: I don't know, you've

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1 asked me a question, do you want me to answer?
 2 MR BIZOS SC: Please make an assumption
 3 of what I am telling you before I put the question. Are
 4 you prepared for the purposes of the questions I'm about to
 5 ask you to accept that the majority of the people that were
 6 killed were shot in the back by hard ammunition. Are you
 7 prepared to accept that for the purposes of the question
 8 that will follow?
 9 [09:57] GENERAL PHIYEGA: I'm not able to accept
 10 it, I haven't seen it, I haven't been briefed, it is
 11 unfair.
 12 MR BIZOS SC: You're not prepared to
 13 accept the assumption that the people were shot in the back
 14 and they were shot by hard ammunition, why are you not
 15 prepared to accept that hypothesis for the purposes of your
 16 evidence?
 17 GENERAL PHIYEGA: I am just saying that
 18 because I haven't seen it, I haven't been briefed, I don't
 19 know about that report, so it's unfair for me really to say
 20 I accept.
 21 COMMISSIONER HEMRAJ SC: Mr Bizos, are
 22 you relying on this medical legal report for putting that
 23 question?
 24 MR BIZOS SC: Yes.
 25 MS HEMRAJ SC: Because if you look at the

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1 table that's been drawn up there's six or seven out of 34
 2 that were shot from the back.
 3 MR BIZOS SC: How many?
 4 MS HEMRAJ SC: Six or seven that I've
 5 counted out of 34.
 6 CHAIRPERSON: If you look at Annexure C
 7 perhaps if you can refer to it -
 8 MR BIZOS SC: I'll come to those details.
 9 CHAIRPERSON: And then give the exhibit
 10 numbers. FFF20 is it? Yes thank you. Now if you look at
 11 that a medical legal report Marikana Mine Deaths, it has an
 12 annexure, a number of annexures at the end actually. One
 13 of the annexures is annexure, I'm not sure if it's
 14 annexures or annexure but whichever it is, it's Annexure C,
 15 Table of Autopsy Findings Summarised and there are lists of
 16 deceased persons on whom autopsies were performed and in
 17 the column headed (iv), that's a Roman four, there is the,
 18 what's described as Reconciled Main Cause of Death, Main
 19 Injury and one works through that document you'll see that
 20 there are in all, as to be expected, 34 autopsies done.
 21 And if one counts up those that are shots from the rear or
 22 the main injury is from the rear I don't think you get a
 23 majority. Then in Annexure D there's a summary of Selected
 24 Aspects of Autopsy Findings and if you look against the
 25 number eight in that annexure you'll see number shot from

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1 the rear of the body is seven. So according to this
 2 document - I don't want to stop you asking the question but
 3 I want to stop you asking the question on the basis that's
 4 a majority. You can say to the witness according to this
 5 document seven out of 34 which is approximately 20% were
 6 shot from the rear that in itself is a significant number
 7 and you can ask her to comment but you can't put it on the
 8 basis of the majority because that is not in accordance
 9 with your own document.
 10 MR BIZOS SC: Yes. Thank you, Mr
 11 Chairman, for the correction, it is my fault. I have added
 12 the back and the side and I will amend the question that
 13 the majority, the majority were shot in the back or the
 14 side. Sorry that I assumed that in using the word "the
 15 back." I should have said and I do now put that the
 16 majority were shot either in the back or on the side.
 17 CHAIRPERSON: Correct because Annexure D
 18 again, item seven, says number shot from one or both sides
 19 of the body is 21, so that 21 over 34 is -
 20 MR BIZOS SC: 70%.
 21 CHAIRPERSON: No, no 21 over 34 in fact
 22 is three over five which is about 60% but that's a
 23 majority.
 24 MR BIZOS SC: The majority. Let me
 25 repeat the question as corrected by members of the

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

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

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

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

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

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

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

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

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

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

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

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

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1 MR BIZOS SC: I beg your pardon.
 2 GENERAL PHIYEGA: The police would not be
 3 expected to do that but maybe IPID.
 4 MR BIZOS SC: Do you know whether that
 5 body has done it or not?
 6 GENERAL PHIYEGA: I don't know because
 7 I'm not part of it.
 8 MR BIZOS SC: In order to decide whether
 9 or not people were injured in self defence or wanton as a
 10 punishment the nature of the injuries of those who had
 11 survived were of some importance including to you to decide
 12 whether or not the so-called self defence story was true.
 13 CHAIRPERSON: Microphone light is on, do
 14 you want to say something?
 15 MR SEMENYA SC: Yes, Chair, as a matter
 16 of law if a death like this results out of police conduct
 17 it is a different legal entity that takes over to do the
 18 pathologies. It cannot be expected of the police to do it
 19 themselves.
 20 MR BIZOS SC: I'll change the question
 21 slightly in order to get on. The nature of the injuries,
 22 those wounded but lived would be useful evidence to decide
 23 whether or not the police shot in self defence or not.
 24 What is your answer?
 25 GENERAL PHIYEGA: I didn't hear an

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1 answer, I heard a statement.
 2 CHAIRPERSON: That was an implied
 3 question, is it correct or do you agree?
 4 GENERAL PHIYEGA: Yes I'm just asking for
 5 that.
 6 CHAIRPERSON: He did make a statement but
 7 by implication he was saying do you agree. So assuming
 8 that that implied question was expressed are you able to
 9 answer it?
 10 GENERAL PHIYEGA: Judge, I'm going to ask
 11 to be asked that question again because I would like to
 12 answer something I understand.
 13 MR BIZOS SC: The nature of the wounds on
 14 the injured would be of importance to decide whether the
 15 police shot in self defence or wanton shooting in order to
 16 punish people. Those injuries were they relevant to decide
 17 whether the police acted in self defence or not?
 18 GENERAL PHIYEGA: I do not know.
 19 MR BIZOS SC: Why don't you know?
 20 MR SEMENYA SC: Chair, that also is a
 21 matter expert field by various scientifically trained
 22 people.
 23 MR BIZOS SC: With respect I disagree. I
 24 will repeat the question slightly more defined so that the
 25 witness is obliged to answer it. May I proceed?

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1 CHAIRPERSON: We'll hear whether the
 2 modification is of the nature you've described.
 3 MR BIZOS SC: Do you know that 84 people
 4 were injured?
 5 GENERAL PHIYEGA: Yes, I do.
 6 MR BIZOS SC: They went to hospitals.
 7 GENERAL PHIYEGA: Correct Counsel.
 8 MR BIZOS SC: Records were kept to the
 9 nature of their injuries.
 10 GENERAL PHIYEGA: Yes.
 11 MR BIZOS SC: Where those injuries were
 12 on what part of the body, what side of the body would be of
 13 importance in deciding for all us including the
 14 Commissioner whether the shots were fired in self defence
 15 or as a matter of aggression against those people. Not a
 16 question of expert opinion, if they were shot at the back
 17 you and I can draw an inference and if they were shot in
 18 front you and I can draw an inference. If they were shot
 19 on the side another possible inference. Please answer the
 20 question.
 21 CHAIRPERSON: Now the time has come to
 22 ask the question. Ask the question in a form which as you
 23 obliges the witness to answer it.
 24 MR BIZOS SC: Yes. Did you take any
 25 steps to ascertain before judging the police what those

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1 injuries were and their nature?
 2 GENERAL PHIYEGA: No because at that time
 3 you would know that it was on the 17th and it was on the
 4 20th and the processes you are talking about were still
 5 rolling out.
 6 MR BIZOS SC: But why would you take the
 7 say-so of the police that they acted in self defence
 8 without examining the evidence that may have contradicted
 9 it?
 10 GENERAL PHIYEGA: There are other
 11 circumstances that informed that decision.
 12 MR BIZOS SC: What circumstances were
 13 those.
 14 GENERAL PHIYEGA: The attack of the
 15 police.
 16 MR BIZOS SC: The police version of what
 17 happened. We close our eyes to all other evidence.
 18 CHAIRPERSON: There was other evidence
 19 that was visible to her in respect of which she could close
 20 her eyes which is an assumption that you're making with the
 21 question but the other factor is of course, I take it you
 22 had a briefing from the police. Had you seen the video
 23 footage that was broadcast or some of it?
 24 GENERAL PHIYEGA: We had seen some of it,
 25 some of it was on the news.

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

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

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

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

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

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

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

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

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

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

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

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

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1 MS PHIYEGA: I have my own reservations
2 because we've clashed in terms of data and statistics with
3 them.
4 MR BIZOS SC: I'm sorry I didn't hear
5 you. Please speak up.
6 MS PHIYEGA: I have my own reservation.
7 MR BIZOS SC: What are your reservations?
8 MS PHIYEGA: We as SAPS have clashed on
9 data and information on how it is clustered.
10 MR BIZOS SC: They make assertions of
11 fact in what I have read to you and also opinions, which
12 facts do you say they've got wrong?
13 MS PHIYEGA: I think there are a number
14 of things that we would have to look into in relation to
15 this one. You asked me about whether I trusted them, I
16 said we have had clashes in terms of data integrity or data
17 commonality. Even our stats when we announce them they
18 would respond differently to the statistics that we have
19 collected. So I first responded to that. Now you are
20 asking me about this, I would need to take this and look at
21 some of the issues that are being raised. For instance you
22 know if I just look at a very simple indicator here, they
23 talk about the growth of the brutality cases. What we are
24 not given here is also against how many arrests that we
25 have made, does it turn out to be a 0.0009 or 10% or

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1 whatever. We need to, in statistical ethics you must give
2 those base lines. So that people can understand the
3 context of what is being done here. This is anecdotal.
4 MR BIZOS SC: Would you regard that any
5 of the facts stated, the number of cases for instance, the
6 number of arrests involved complaints, would you actually
7 not accept their allegations of fact -
8 MS PHIYEGA: I would -
9 MR BIZOS SC: Never mind their opinions.
10 The facts that they put down, do you have reason to
11 disbelieve any of them?
12 MS PHIYEGA: I'd like to note them as
13 their position but I really would like to test the veracity
14 of that against our own data.
15 CHAIRPERSON: May I interrupt you for a
16 moment, just to ask a question which may or may not have
17 dealt, to shorten the proceedings. You recently were
18 before the Portfolio Committee on Police yourself, weren't
19 you?
20 MS PHIYEGA: Yes.
21 CHAIRPERSON: And this presentation by
22 the Institute for Security Studies, which was made on the
23 26th of March, had that been brought to your attention
24 before you came here this morning?
25 MS PHIYEGA: It was post my attendance.

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1 CHAIRPERSON: Sorry?
2 MS PHIYEGA: It was post my attendance,
3 this came since I was there.
4 CHAIRPERSON: I presume, that regard
5 being had to the nature of the allegations made it's
6 something that the police service would wish to revert to
7 the portfolio committee on an answer because there's quite
8 serious allegations made.
9 MS PHIYEGA: Yes.
10 CHAIRPERSON: To the portfolio committee
11 which is a very important body and presumably you owe it to
12 the portfolio committee and you owe it to the police
13 service itself.
14 MS PHIYEGA: Yes.
15 CHAIRPERSON: To answer these allegations
16 insofar as there are inaccuracies and things stated which
17 are perhaps out of context or unfair or exaggerated, would
18 that be correct?
19 MS PHIYEGA: It is correct, Judge, and I
20 was also in a different committee, it wasn't this
21 committee.
22 CHAIRPERSON: Yes, yes I know. Now the
23 reason I asked you this question is, I understand you're
24 bit of a disadvantage in dealing with these allegations
25 here, particularly having seen the document for the first

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1 time today. I presume though that some kind of fairly
2 detailed response will be prepared in due course to give to
3 the committee with, would that be correct?
4 MS PHIYEGA: I'd be happy to do so,
5 Judge.
6 CHAIRPERSON: No I take it, if I may,
7 you'll forgive me for saying it, I think it's something you
8 owe to the committee and indeed to the service, the police
9 service, isn't that right? Obviously you couldn't give the
10 necessary instructions until you knew about the document
11 yourself. But now you do know about it, I take it you'll
12 be giving those instructions that a response be prepared?
13 MS PHIYEGA: Yes, Judge.
14 CHAIRPERSON: Alright. Can you more or
15 less tell us when that's likely to be ready, I know that's
16 a difficult question, and if you can't answer it, I won't
17 be critical. But if you know more or less when it will be
18 ready and if we're still busy with our task if it could be
19 made available to us because I think that would be helpful
20 and it probably be a better response to this document than
21 kind of answers that you'll be able to give sitting, seated
22 as you are, having been faced with this document for the
23 first time today, would that be correct?
24 MS PHIYEGA: Yes, Judge, we will fast
25 track this process and try and let you have our response,

<p style="text-align: right;">Page 7401</p> <p>1 the latest by mid April.</p> <p>2 CHAIRPERSON: Obviously, Mr Bizos, if</p> <p>3 that happens and there are points which you consider</p> <p>4 relevant for our commission to which you don't agree you'll</p> <p>5 get an opportunity to deal with them.</p> <p>6 MR BIZOS SC: So I will leave it, I will</p> <p>7 leave it at that except that I want one more question.</p> <p>8 Would these allegations, are these allegations coming to</p> <p>9 you as new or was there a problem long before you saw it</p> <p>10 published in a document such as this?</p> <p>11 MS PHIYEGA: I have read about a lot of</p> <p>12 allegations in the press and yes there are other challenges</p> <p>13 that we are having internally but as I have promised the</p> <p>14 Judge, we will respond to this, we will contextualise, we</p> <p>15 will give you our facts.</p> <p>16 MR BIZOS SC: Yes.</p> <p>17 MS PHIYEGA: In relation to that.</p> <p>18 MR BIZOS SC: You agree, you agree that</p> <p>19 there are allegations of fact which are reasonably rebutted</p> <p>20 if there are incorrect, for instance the billions of money</p> <p>21 that has been claimed for wrongful acts by the police,</p> <p>22 that's quite easily checked?</p> <p>23 MS PHIYEGA: I can tell you before I</p> <p>24 respond to you, that this figure that you see here is a</p> <p>25 result of a litigation report, the first litigation report</p>	<p style="text-align: right;">Page 7403</p> <p>1 MS PHIYEGA: Yes.</p> <p>2 CHAIRPERSON: And then how much was</p> <p>3 actually paid out because you may, you will find clearly a</p> <p>4 disparity between the two. But even so of course the</p> <p>5 amounts paid out may well present quite a startling picture</p> <p>6 and may form the basis for the kind of questions that, Mr</p> <p>7 Bizos, is asking you.</p> <p>8 MS PHIYEGA: Sure.</p> <p>9 [11:46] CHAIRPERSON: The only point I make and I</p> <p>10 think it's a point you've made, is just to look at the</p> <p>11 claims themselves. I am not suggesting Mr Bizos is only</p> <p>12 doing that either, but just look at the claims themselves</p> <p>13 gives rise to a very misleading impression. So if you – if</p> <p>14 I, maybe suggest when you respond, deal with the, over a</p> <p>15 representative period, the amount claimed and the amounts</p> <p>16 actually paid out, because that will give a more accurate</p> <p>17 picture of the nature of the problem. My impression from</p> <p>18 press reports, is it is still quite a serious problem but</p> <p>19 we'll deal with that when we get there.</p> <p>20 MR BIZOS SC: I agree, with respect, in</p> <p>21 relation to the amount, and I know from my personal</p> <p>22 experience that sometimes fantastic sums copied from other</p> <p>23 jurisdictions, millions are made, but let us we deal with a</p> <p>24 more closer issue. The number of people killed by the</p> <p>25 police, is that something that is debatable or do you</p>
<p style="text-align: right;">Page 7402</p> <p>1 that I have requested as the national commissioner and from</p> <p>2 1994 and this is not reflected here, that's why I answer</p> <p>3 comprehensively and give feedback to this commission and if</p> <p>4 I may just touch on the 14 billion again, again it's not</p> <p>5 the money that is going to be paid. We, the formula we are</p> <p>6 using to calculate the 14 billion in my report we'll talk</p> <p>7 about that. When we receive any letter that says I want 30</p> <p>8 million we count that as a letter, before it even becomes a</p> <p>9 summons, before it even goes to court. So this is a highly</p> <p>10 exaggerated number, I'll qualify it uncharacterised and my</p> <p>11 report that I'm going to give to the commission will talk</p> <p>12 to that because I wanted to understand as a national</p> <p>13 commissioner the civil claims. I called for the litigation</p> <p>14 report. I asked our legal department to do that so that I</p> <p>15 can tell you that this number is a number of a report that</p> <p>16 I commissioned and it is misinterpreted.</p> <p>17 CHAIRPERSON: National Commissioner, may</p> <p>18 I make a suggestion which I hope you won't take umbrage at.</p> <p>19 We all know that people can claim anything, it doesn't</p> <p>20 necessarily mean when the case is finally disposed of they</p> <p>21 get anywhere near the amount they've claimed.</p> <p>22 MS PHIYEGA: Yes.</p> <p>23 CHAIRPERSON: So what would be a helpful</p> <p>24 exercise if I may suggest it, is to take a couple of years</p> <p>25 and show how much was claimed.</p>	<p style="text-align: right;">Page 7404</p> <p>1 accept the figures?</p> <p>2 GENERAL PHIYEGA: Yesterday, a number was</p> <p>3 banded that 720 deaths reported by IPID were caused by the</p> <p>4 police but now when we read this, we see that there was</p> <p>5 evidence of criminality in 162. It's those type of</p> <p>6 messages that confuses the environment, and we would like</p> <p>7 to also give you our own feedback that we've got back from</p> <p>8 IPID because we don't count those people, it is the report</p> <p>9 of IPID but we would like to look at those, and I just</p> <p>10 worry about the anecdotal information that keeps on rearing</p> <p>11 its head in the media, and we are bringing it even in the</p> <p>12 Commission, so I'd like to ask for an opportunity to</p> <p>13 respond to each of those bullets.</p> <p>14 CHAIRPERSON: One of the interesting</p> <p>15 points that flows from this document, is the second bullet</p> <p>16 here about the deaths, which Mr Bizos has read. It appears</p> <p>17 from that, that it's not – it's misleading just to look at</p> <p>18 the number of deaths at the hands of the police or in</p> <p>19 police custody and so forth. Some of them may be</p> <p>20 justifiable homicides, in fact, insofar as the facts</p> <p>21 indicate that to be so. But what appears from these</p> <p>22 certificates, if they are correct, is that about one in</p> <p>23 five of the deaths in police custody, or regarding the</p> <p>24 police, because presumably sometimes it would be someone</p> <p>25 who is not yet in custody, who's been shot. One in five of</p>

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

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

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1 documents. They didn't conceal from us that she previously
 2 said these words and had second thoughts and left them out.
 3 So it doesn't look as if there were any second thoughts. I
 4 won't stop you from asking the question, but I just,
 5 perhaps improperly have expressed the view that I don't
 6 think it's going to help us, but if I am wrong, and you can
 7 persuade me that you are right, please carry on.
 8 MR BIZOS SC: Well, I don't want to
 9 belabour the point, Mr Chairman, but the respect of the
 10 police of the "congruent with the bill of rights enshrined
 11 in our constitution, which guarantees rights of peaceful
 12 and unarmed demonstrations and/or protests," are absolutely
 13 vital and in order to make a just decision in relation to
 14 this matter, to be told that it was a mistake by the legal
 15 team, is not a minor matter, it must have been a deliberate
 16 action by someone. We want to know who that someone was,
 17 if not the witness.
 18 [12:06] CHAIRPERSON: Mr Semenya has told us it
 19 wasn't the witness, it was one of his team and I am not
 20 sure that it's within our terms of reference to find out
 21 who it was. I don't think the President is likely to
 22 appoint another Commission to find out, and I don't think
 23 that will be necessary in any event. The fact is this
 24 witness has already said under oath – affirmed under oath
 25 by a signature what was in the first draft. We've been

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1 told by senior counsel for the police that the omission was
 2 something which was done I take it by inadvertence by a
 3 member of his team, and who it was is a matter you can
 4 discuss with him afterwards. Frankly I'm not interested in
 5 who it is. Whoever it is may hang his or her head in shame
 6 but I'm not interested in that person's identify. It
 7 sounds to me like a very large storm in a very small teacup
 8 and I suggest we move on to something else.
 9 MR BIZOS SC: Commissioner, the paragraph
 10 in either form is really something that we all would have
 11 expected from the South African police, even more in its
 12 original form, but that's a small matter as his lordship
 13 ruled. What I want to ask is this that this paragraph
 14 praising the noble function of the police is expected to
 15 perform in terms of is to be welcomed. But what we are
 16 dealing here with is what happened on the, particularly the
 17 16th of August, and we have in the exhibit that we have put
 18 today before you statements by the Institute of Security
 19 Studies that purport to put facts and opinions completely
 20 or substantially different to what you say the police that
 21 you lead stand for. Is it a matter of concern to you that
 22 the allegations made by the Institute are made
 23 contradicting to what you say in your affidavit?
 24 MS PHIYEGA: What helps me to respond to
 25 this is that you're saying allegations, and it is

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1 allegations I would like to engage the ISS on.
 2 MR BIZOS SC: Finally on this point, when
 3 you were asked why there is a certain attitude against the
 4 police, did it occur to you that you may have given some of
 5 the reasons set out by the Institute instead of just
 6 calling it beautiful?
 7 MR SEMENYA SC: The question is unclear
 8 to us. We won't be able to follow the answer.
 9 CHAIRPERSON: I think you should
 10 particularise the question a bit more than you have. It is
 11 a little bit on the vague side and I'm not sure whatever
 12 answer we get is going to help us, so – I'm not stopping
 13 you from asking the question, but I think you can
 14 particularise it a bit more.
 15 MR BIZOS SC: I don't know what my
 16 learned friend's problem is, but I'll try and clarify it.
 17 When you were asked by Al Jazeera why criminals behave the
 18 way they do you might have mentioned some of the things
 19 that are contained in FFF21 in the paragraph that I read
 20 out.
 21 MS PHIYEGA: I have already mentioned a
 22 few minutes ago that I find serious problems with some of
 23 the statements that are being made by ISS and therefore I
 24 would not have mentioned the type of issues that they are
 25 mentioning because I don't agree with some of them.

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1 MR BIZOS SC: I will go to the next
 2 subject, but –
 3 CHAIRPERSON: Remember that the national
 4 commission has said we're going to get their response –
 5 MR BIZOS SC: Yes.
 6 CHAIRPERSON: Which they can give to the
 7 portfolio committee to what the ISS has said, and I've said
 8 to you that if there's anything in that response that you
 9 feel is incorrect which this commission should know about,
 10 you'll be given an opportunity to do so.
 11 MR BIZOS SC: Yes.
 12 CHAIRPERSON: So you're leading the
 13 matter but not necessarily forever.
 14 MR BIZOS SC: Yes, now, the other matter
 15 that you were to go through is the document that really –
 16 the documents that really say what sort of ammunition was
 17 used and you asked for an opportunity to read the document,
 18 particularly D3 and Exhibit FFF22 and you were given an
 19 opportunity to go through. It's 20 and 22, D3. Have you
 20 read them? Have you understood them?
 21 MS PHIYEGA: Is it this report on medico-
 22 legal?
 23 MR BIZOS SC: I'm sorry?
 24 MS PHIYEGA: Is it the report on the
 25 medico-legal?

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1 MR BIZOS SC: Yes, no -
 2 CHAIRPERSON: It's FFF22.
 3 MR BIZOS SC: The clinical record, FFF22,
 4 D3.
 5 MS PHIYEGA: I have FFF20.
 6 MR BIZOS SC: I'm sorry, again, I didn't
 7 hear you.
 8 MS PHIYEGA: I have FFF20.
 9 MR BIZOS SC: You don't have FFF22?
 10 MS PHIYEGA: No, I don't.
 11 MR BIZOS SC: Well, it's short paragraph.
 12 I will read it to you. FFF22, D3, "Shot Directions and
 13 Trajectory", that's the paragraph.
 14 CHAIRPERSON: It's FFF22, page 3, and on
 15 that page the paragraph which begins on that page is headed
 16 "3. Shot Directions and Trajectory". That's the pages, Mr
 17 Bizos, yes?
 18 MR BIZOS SC: Yes. The record's
 19 available. May I read it to you?
 20 MS PHIYEGA: Yes.
 21 MR BIZOS SC: "The records available were
 22 not helpful in determining of direction in most cases. In
 23 just 29 cases where shot direction could be extracted the
 24 victims appear to have been shot from the rear in most
 25 cases, from the front in three cases and from the side in

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1 six cases. 28 cases were unspecified in respect of shot
 2 direction. The analyst believes that access to the actual
 3 notes of the doctors and operation theatre procedure
 4 records would greatly clarify the unspecified. It is
 5 further submitted that the extrapolation from the cases of
 6 non-direction would suggest that when all records are fully
 7 analysed most gunshots were likely to be found to have been
 8 shot in the rear of the victims." As provisional as the
 9 opinion may be, would you accept that the high degree of
 10 probability was that most of the people that were shot and
 11 survived were shot from the, to use the words, from the
 12 rear of the victims?
 13 MR SEMENYA SC: Chair, in all fairness,
 14 Mr Bizos must read the last paragraph appearing under that
 15 heading. It's critical.
 16 MR BIZOS SC: "That's why I say the
 17 information addition is - and define the determination of
 18 suspects such as the trajectory of missiles, of angles of
 19 attacks through the body due to meagreness of detail and
 20 lack of pure forensic observation." I have read that. I
 21 don't know that it changes because I said as provisional as
 22 the it may be -
 23 CHAIRPERSON: I'm sorry, it may also be
 24 helpful perhaps to read paragraph E on page 4 which is a
 25 disclaimer.

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1 MR BIZOS SC: Page?
 2 CHAIRPERSON: E on page 4.
 3 COMMISSIONER HEMRAJ: And the author's
 4 remarks on the last paragraph on page 1 as well which
 5 qualified the finding.
 6 MR BIZOS SC: This is why I say
 7 "provisional", Mr Chairman, but there can be no doubt with
 8 the information available most were from the rear, but -
 9 CHAIRPERSON: What's more accurate to say
 10 is of the 61 patients who, in respect of whom information
 11 was available, it was clear - it seemed clear from 29 of
 12 those that where the shot direction was extracted, that 20
 13 of them had been, appear to have been shot from the rear.
 14 That appeared from the nursing care notes. Whether that is
 15 a sufficiently representative sample for one to draw
 16 conclusions as to overwhelming probability as to everybody,
 17 I'm not sure, but anyway, I suppose I shouldn't comment.
 18 It's for the witness to give us her views. It sounds as if
 19 there's going to be a bit of a debate between the experts
 20 on this and Mr Naidoo is going to come, I beg your pardon,
 21 Dr Naidoo is going to come on the one side and possibly
 22 your side may have someone else from the other, but in the
 23 meanwhile based on this provisional finding, are you
 24 prepared to give us some kind of provisional response?
 25 MS PHIYEGA: No.

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1 MR BIZOS SC: We'll leave that there, Mr
 2 Chairman, but may we turn to FFF20 regarding the deceased
 3 miners on page 8? You got it?
 4 MS PHIYEGA: Yes I do.
 5 MR BIZOS SC: 21 or 62% were shot from
 6 the side and further 7 or 21% were shot in the rear. 75%
 7 of the deceased miners were shot either in the side or in
 8 the rear.
 9 MR MAHLANGU: On which page are you
 10 reading? Which page of this document?
 11 MR BIZOS SC: Page 8 point 3.
 12 MS PHIYEGA: Yes.
 13 MR BIZOS SC: Direction of shots.
 14 MR MAHLANGU: Oh, page 8.
 15 MS PHIYEGA: I was looking for the 75%.
 16 You lost me when you went to the 75%.
 17 MR BIZOS SC: Yes, it's a collection of
 18 the - both the side and the rear. Now, I want to bring to
 19 your notice that the defence version is that the deceased
 20 or members of the crowd did not rush to attack the police,
 21 but they turned away on the side when the police shot them.
 22 MR SEMENYA SC: Chair, we object. This
 23 document does not support the position at all.
 24 MR BIZOS SC: I'm not talking about this
 25 document. I am talking about the evidence. The evidence

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1 given by the people who have given evidence that they
 2 turned away from where the police were to the side in order
 3 to bypass the kraal and run away. That is the evidence.
 4 MR SEMENYA SC: That evidence has not
 5 been tendered in this commission.
 6 MR BIZOS SC: Well, my memory must be
 7 failing me, but I am sure that I am correct that the two
 8 witnesses that gave evidence that were part of that group
 9 said what I have summarised. Let me put it another way.
 10 People, if they attacked the police and the police shot in
 11 self-defence must have faced the victims, must have faced
 12 one another.
 13 MR SEMENYA SC: Chairperson, the defence
 14 is one of private defence. Even from the side if I think a
 15 member is in imminent danger and I'm entitled in law to
 16 shoot from the side. I'd do that. And it would be
 17 justified in the example I give. The proposition which my
 18 learned colleague is putting to the witness is unfair and
 19 may be misleading.
 20 MR BIZOS SC: - dispute. Let me try. If
 21 members of the crowd attacked the police and the police
 22 shot them in self-defence would you have expected the
 23 injuries to occur on the back and/or the side?
 24 [12:26] MS PHIYEGA: It can't be just an easy, in
 25 my pedestrian view of the matter, it can't just be an easy

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1 assessment of saying because I was injured on the side or
 2 because when I saw the gun I turned, I don't know, I'm not
 3 able to say yes or no because those that were there maybe
 4 can explain that because when I face a lion and want to
 5 stab the lion and if the lion jumps and I see danger I may
 6 not necessarily go that way, I may turn and the lion may
 7 hurt me at the back and yet I might have wanted to kill the
 8 lion. So it's not an easy answer, I can't give a definite
 9 answer to that. It's a very difficult one to answer.
 10 MR BIZOS SC: On page FFF 20, page 8 and
 11 also paragraph 8 the deceased miners or the deceased miners
 12 8 of them, that is 24% of the victims died from gunshot
 13 wounds to the head or face.
 14 MS PHIYEGA: I see it.
 15 MR BIZOS SC: You see that. Shooting
 16 people at the head is a sure way of killing them. There is
 17 no more delicate part of the body then the head. Do you
 18 agree with that?
 19 MS PHIYEGA: Again it depends, I mean we
 20 saw people crouching were they shot on the head standing up
 21 straight, were they trying to duck the bullets and met
 22 those that were going to the ground, I don't know, I won't
 23 agree because -
 24 MR BIZOS SC: I didn't ask you that. I
 25 asked you if shooting people in the head is a sure way of

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1 killing them?
 2 MS PHIYEGA: I will still say shooting a
 3 person on the head, depend on circumstances in the issue
 4 that we are dealing with.
 5 MR BIZOS SC: Were the orders and your
 6 own letter say that if you have to shoot, shoot the lower
 7 part of the body, would anybody who deliberately shot a
 8 person in the head be in violation of the order?
 9 MS PHIYEGA: In all instances, even in
 10 church I'm not a lawyer, circumstances are taken into
 11 account. When that happens all circumstances will be
 12 considered so that you can establish whether there was
 13 deliberateness, whether something else happened. So those
 14 circumstances are critical and I believe even what we are
 15 discussing now depends on circumstances.
 16 MR BIZOS SC: Can you please tell us what
 17 circumstances would, in terms of the standing orders be
 18 expected to be taken into consideration before shooting a
 19 person in the head? What circumstances?
 20 MS PHIYEGA: I'm addressing myself to
 21 this situation and I'll answer your question addressing
 22 myself to the situation we are discussing. I have said
 23 earlier on I do not know where the head was standing, was
 24 it up, was it on the floor, was it crouching, those are the
 25 circumstances that will have to be taken into account when

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1 you answer a question such as this.
 2 MR BIZOS SC: Why would anybody be on his
 3 haunches if he was taking part in an operation of attacking
 4 the police? Why would he be on his knees or so low down so
 5 that he had to be shot in the head?
 6 MS PHIYEGA: The few pictures I saw of
 7 the approaching people in some of the instances, they were
 8 not walking straight and tall as I am. Some were walking
 9 like this, some were, so I say those circumstances are
 10 critical.
 11 MR BIZOS SC: How does a person on his
 12 haunches and putting down his head, the way you indicated
 13 threaten the policeman with a very efficient firearm in
 14 front of him?
 15 MR SEMENYA SC: Mr Commissioner, we have
 16 slide exhibit L, slide 206 which shows that the group of
 17 people immediately before the shooting.
 18 MR BIZOS SC: Well if my learned friend,
 19 is referring to 206 nobody seems to be on his knees.
 20 CHAIRPERSON: I don't think she confined
 21 herself on his knees, she demonstrated with her own body,
 22 which something which didn't go on the record of course.
 23 She first of all held herself erect, instead of standing
 24 upright and then she said like this, and then she sort of
 25 leant forward as some of those people do on slide 206, but

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1 I think this is the point that doesn't deserve more than a
 2 couple more questions in my mind, before you move onto the
 3 next one. I don't want to stop you but I just -
 4 MR BIZOS SC: One only, Mr Chair.
 5 CHAIRPERSON: Or you can ask two.
 6 MR BIZOS SC: Would you consider shooting
 7 somebody in the head under any circumstances minimum force
 8 or maximum force?
 9 MS PHIYEGA: In my opinion which
 10 currently informs me I would say if circumstances will
 11 determine whether one defines something as maximum or
 12 minimum. At this point in time I would have said yesterday
 13 when I answered you to say the necessary force to defend
 14 oneself.
 15 MR BIZOS SC: Now if you have a look at
 16 FF22 and FFF20 of the report you will see only six of the
 17 29 cases where people were shot could, the direction could
 18 be ascertained, only 11% of them show to be shot in the
 19 front of their body. F3 page 3, Mr Chair, of FF22 and FF2
 20 page 8.
 21 MR SEMENYA SC: The cover appearing under
 22 paragraph 3 tells us there's a note. "Somebody sustained
 23 several wounds of different tracks thus will show an
 24 overlap of numbers in the list above."
 25 MR BIZOS SC: This may be an overlap but

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1 it only shows 11 out of the 29 and in the other instance
 2 only 6 of the deceased, 6 of the deceased and 6 of the
 3 injured making a total of 12 and 11% were shot in front.
 4 This is the overlap that I think that my learned friend,
 5 speaks about. But would you, if the report is correct that
 6 a very small number of the people were shot in front would
 7 that negate the truth of the allegation by the police that
 8 they acted in self defence?
 9 MS PHIYEGA: I have said front, backside,
 10 those circumstances that I mentioned earlier on still
 11 persist.
 12 MR BIZOS SC: May we now turn to the
 13 deceased miners at, please have a look at FFF20 page 8.
 14 The 34 fatal injuries were all as a result of bullet wounds
 15 to the upper body. That is 100% of the people who died on
 16 the 16th of August were shot in the upper parts of their
 17 body. Does that indicate that the standing orders of
 18 shooting in the lower part of the body negative the defence
 19 of self defence or -
 20 CHAIRPERSON: Mr Bizos, before she
 21 answers the question. I'm not sure that's a fair question
 22 because the standing orders as I understand don't deal with
 23 killings in self defence. There's a general thing at the
 24 end of the standing order saying this doesn't apply to self
 25 defence. Now of course it's a controversial question

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1 before the commission as to how many if any of these deaths
 2 were brought about in circumstances of self defence or
 3 private defence but the police's version is that they all
 4 as I understand it, now if they all were then the standing
 5 order wouldn't have applied. If of course some of them
 6 weren't in self defence then of course the standing order,
 7 would well apply. But we're in the, in a controversial
 8 area at the moment because we don't know at this stage
 9 whether all were in self defence or none were in self
 10 defence or some were and some weren't. But your question
 11 doesn't cater for that complexity.
 12 MR BIZOS SC: Yes. Mr Chairman, we can't
 13 ignore the fact that there isn't a single video that we
 14 have seen in which there is a short space between any
 15 protestor and the policeman and I have that fact as an
 16 incontrovertible fact and we are going to argue that this
 17 idea of comparing it to a bank robber a bit away from the
 18 policeman with a gun knows that he is, must get in first
 19 and he shoots, if the policeman shoots him obviously it
 20 would be self defence. But where we, we must not close our
 21 eyes, well it's a contradiction really of the things that
 22 we have not seen. We have not seen any hand to hand attack
 23 or any one being in personal danger and I'm entitled -
 24 CHAIRPERSON: I'm aware of that. All I'm
 25 -

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1 MR BIZOS SC: I'm entitled with respect
 2 to put the questions on the basis of the evidence that we
 3 have, that this idea of shooting in self defence is a false
 4 allegation.
 5 CHAIRPERSON: That comment of yours
 6 illustrates that my comment is correct. I put to you that
 7 your question didn't allow for the complexity of the
 8 situation. That your question was that there was a breach
 9 of the standing orders and what I'm saying to you was the
 10 standing orders don't provide for shooting in self defence
 11 and insofar as self defence may or may not be applicable,
 12 there's no question -
 13 MR BIZOS SC: Yes.
 14 CHAIRPERSON: - of a breach of the
 15 standing order. But any way, you and I have had a debate
 16 which I think will enable you to refine your question in a
 17 way which will cater for the complexity of the situation.
 18 MR BIZOS SC: Yes.
 19 CHAIRPERSON: And elicit a meaningful
 20 answer from the witness.
 21 MR SEMENYA SC: Mr Chair, perhaps also to
 22 take into account that in terms of Captain Mohlaki the
 23 closest cartridge to body is 5.4 metres.
 24 CHAIRPERSON: I suppose, Mr Bizos, has to
 25 take that in account to his question. Frame your question

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1 the way you wish but endeavour to deal with the
2 complexities so the answer we get is helpful and
3 meaningful.

4 MR BIZOS SC: Have you seen the videos,
5 the video material in exhibit L?

6 MS PHIYEGA: I have seen some of those.
7 Exhibit L is slide –

8 [12:46] MR BIZOS SC: Have you seen the
9 photographs produced, reproduced in exhibit L?

10 GENERAL PHIYEGA: Again, maybe just to
11 take me to that slide, you said exhibit L is slide what?

12 CHAIRPERSON: Well, it's a general
13 question, he says, have you seen the photographs in exhibit
14 L? I think you've said you've seen them. We can assume
15 that you've seen the pictures, the photographs.

16 GENERAL PHIYEGA: Yes. I've seen a
17 number of them.

18 MR BIZOS SC: Have you seen any
19 photograph of a protester near enough any policeman where
20 the policeman was in danger of being stabbed or shot by the
21 protester? Have you seen any such joint presence, anywhere
22 near one another?

23 GENERAL PHIYEGA: I saw police in danger.

24 MR BIZOS SC: No, that's a judgment. I
25 asked you, whether you saw any photograph of a short

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1 distance between a protester and a policeman? Please
2 answer that question.

3 GENERAL PHIYEGA: The proximity I saw
4 shows police in danger.

5 MR BIZOS SC: I ask that the witness be
6 directed to answer the question, Mr Chairman.

7 CHAIRPERSON: It's an answer by
8 implication. If you say that she hasn't answered the
9 question directly, it's a matter you can argue later. You
10 can ask us to draw an adverse inference, perhaps. But I
11 think she has given the answer. It stands with full right.
12 You may be able to use it in your favour. Mr Semenya may
13 be able to use it in his. I don't know that we can, I can
14 push her further than that.

15 MR BIZOS SC: Well, I am going to put to
16 you that there is no evidence, either photographic or
17 video, to show that any police officer was in imminent
18 danger from any attack from any protester.

19 GENERAL PHIYEGA: In my response, I say I
20 do not agree.

21 CHAIRPERSON: Mr Bizos, I think that this
22 is a matter that can be more fruitfully, if I may say so,
23 dealt with in argument. You may say that the answer you've
24 been given is incorrect, you can demonstrate from videos.
25 Mr Semenya may say that, if you read the - look at the

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1 videos correctly, will come to a different conclusion, but
2 it's an argument I think can better be proceeded with at
3 that stage, rather than with this witness.

4 MR BIZOS SC: Yes.

5 CHAIRPERSON: Because I don't know that
6 her answers, and I say this with great respect, one way to
7 t'other, are really going to help us.

8 MR BIZOS SC: I didn't really expect any
9 different answer but I merely put the question, not as to
10 our learned friends, that if they have such evidence, we
11 haven't yet seen it, Mr Chairman, and we'll proceed from
12 that. Now in IFF22 –

13 CHAIRPERSON: I think you mean FFF22.

14 MR BIZOS SC: FFF.

15 CHAIRPERSON: You said IFF, I don't know
16 an IFF.

17 MR BIZOS SC: I am sorry, yes, the first
18 F was a bit short of a line,

19 CHAIRPERSON: FFF22, page?

20 MR BIZOS SC: Yes. Annexure B, it's a
21 table, and what it shows that six injuries were sustained
22 to the upper body with only 25 injuries been sustained to
23 the lower body.

24 CHAIRPERSON: National Commissioner, I
25 think you'll find this annexure is the last page of the

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1 exhibit. "Analysis of selected aspects of findings of
2 survivors." Is that correct, Mr Bizos?

3 GENERAL PHIYEGA: Sorry, exhibit?

4 CHAIRPERSON: The last page of the
5 exhibit, and it's headed "analysis of selected aspects of
6 findings of survivors."

7 MR BIZOS SC: Yes, it's really a
8 summarised figure that I have given based on those pages.

9 CHAIRPERSON: Now that we've both
10 directed the witness to the page, perhaps you would like to
11 ask her the questions based on it.

12 MR BIZOS SC: That 66 injuries were
13 sustained to the upper body with only 25 injuries being
14 sustained on the lower body, that is in relation to the
15 people who were injured. Do you agree that the vast
16 majority were the victims of excessive force and not, or
17 maximum force and not with minimum force?

18 MR SEMENYA SC: Chairperson, the witness
19 must be directed to a very critical note which appears to
20 those stats, and it reads "the above includes only the 61
21 cases where documentation was available. 2. Categories
22 will overlap because of occasional multiplicity of injuries
23 on the same survivor, thus totalling of figures between
24 columns and rows will bear no meaningful result."

25 MR BIZOS SC: Well, I make that

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

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

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

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1 CHAIRPERSON: It is a convenient stage.
 2 Before we adjourn, I would just like to say that what has
 3 been happening recently, is articles, as I understand it,
 4 been sent to the parties by other parties beforehand, but
 5 they haven't been given to us. So we only see them for the
 6 first time when they are mentioned in examination or cross-
 7 examination, and we've done our best to speed read them
 8 here at the table, but it's not been very easy, and we
 9 would appreciate in future, if parties are going to
 10 exchange or give each other articles and other material,
 11 which will be used in cross-examination, that we could be
 12 given it a day or so beforehand, so we can study it
 13 overnight beforehand. It enables us to follow the evidence
 14 more easily and to in fact, sometimes even contribute to
 15 the discussion. So that's a favour we ask, and I don't
 16 think it's an unreasonable one. I expect the parties will
 17 comply with that. It remains for me to wish all concerned,
 18 a very happy and enjoyable Easter weekend, we will resume
 19 at 10 o'clock on Tuesday morning. The Commission adjourns.
 20 [COMMISSION ADJOURNED]
 21 .
 22 .
 23 .
 24 .
 25 .

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