

TRUTH AND RECONCILIATION COMMISSION**SECTION 29 HEARING****"IN CAMERA"**

DATE: 04-05-1998

NAME: GEORGE MEIRING

HELD AT: CAPE TOWN

CHAIRPERSON: Ladies and gentlemen, we are about to start. This is an investigation in terms of Section 29, an inquiry and - but before we start, there has been an indication that certain applications are going to be made and I believe it would be proper for us to listen to the applications.

I also would like to ask counsel and or Attorneys to place themselves on record. For our side, I am chairing this proceedings, my name is Ntsebeza, Dumisa Ntsebeza and I am the Commissioner Head of the Investigative Unit.

I do so with Commissioner Glenda Wildschut, she is a Commissioner and she is a member of the Reparations and Rehabilitations Committee.

Two Investigators who will assist us in putting the evidence and conduct the proceedings are going to be - doing more so the questioning, we have Zenzile Khoisan, who is now based in the Western Cape, a member of the Investigative Unit, and (indistinct) also an Investigator, also based in the Western Cape.

MR VAN DER HOVEN: Mr Chairman, my name is Van der Hoven, A.B.T. van der Hoven from the firm Rooth and Wessels in Pretoria. We appear on behalf of General Liebenberg. I have instructed Advocate E.M. Coetzee from the Pretoria Bar, who is sitting next to me, thank you.

MR MEIRING: Mr Chairman, I am General George Meiring, I am presently the Head of the South African National Defence Force, and I have as my Attorney and Advocate first of all the Attorney, Mr Cloete and as the Advocate, Adv Von Lieres from Johannesburg, thank you.

CHAIRPERSON: Just so that I must be sure that both counsel are able to speak, can they place themselves on record.

MR COETZEE: As you please Mr Chairman, my name is Ettiene Coetzee, and as correctly stated by my Attorney, I appear on behalf of Gen Liebenberg.

ADV VON LIERES: The name is Von Lieres. I have been instructed by Attorney Cloete to act on behalf of Gen Meiring, but he seem to be so well versed, I don't know if he really needs me.

MR CLOETE: Thank you Mr Chairman, I confirm what my client has said. I appear on behalf of Gen Meiring, and I am from the firm Armien Cloete Attorneys, and I have instructed Adv Von Lieres, thank you.

CHAIRPERSON: Thank you very much gentlemen. Mr Coetzee, are you going to start?

MR COETZEE: As you please Mr Chairman. Mr Chairman, the first application that I intend launching with the instructions of Gen Liebenberg is an application for your recusal as a Commissioner in the Section 29 hearings.

This application is based on inter alia the following: from the documentation made available to us, it appears that Mr Ntsebeza was the Attorney of record for certain of the people, that died as a result of this operation. It is respectfully submitted that it is inappropriate that he sits as an Investigator or Commissioner in these proceedings.

Clearly the fact that he acted as an Attorney of record for certain of the deceased's families whilst still an Attorney in the Transkei, clearly at the very least makes it very difficult for anybody to accept that there is not at the very least a potential of bias, or that such perception might exist.

In this regard I am going to refer to various case law in which it has been repeatedly stated that justice must be seen to be done, that a mere suspicion of bias is sufficient to warrant a recusal of a Commissioner in an administrative body such as this.

I am going to try and be as brief as possible, but still doing justice to a proper application. The legal principles applicable to

recusal has been set out in various case laws, in Liebenberg v Brakpan Liquor Licensing Board 1994 WLD ...

CHAIRPERSON: If you say it again Mr Coetzee.

MR COETZEE: As you please, the case I am referring to is Liebenberg v Brakpan Liquor Licensing Board, 1994 WLD 52 and I am going to refer to page 54 and 55 of the judgement where Judge Solomon stated the following:

"Every person who undertakes to administer justice, whether he is a legal official or he is only for the occasion engaged in the work of deciding the rights of others, is disqualified if he has a bias which interferes with his impartiality or if there are circumstances affecting him that might reasonably create a suspicion that he is not impartial.

The impartiality of which a court's (indistinct) may often in practise be unrealised without detection, but the ideal cannot be abandoned, without irreparable injury to the standards hitherto applied in the administration of justice."

I would furthermore wish to refer to Mag v Ned Travel (Pty) Ltd, trading as American Express Travel Services 1996 (3) SA (A) (1).

"The Judge must ensure that justice is done. It is equally important that he should also ensure that

justice is seen to be done. After all, that is a fundamental principle of our law and public policy.

He should therefore so conduct a trial that his open mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused."

Judge Jones said the following in the case of Dumba & Others v The Commissioner of Prisons & Others 1992 (1) SA 63.

"It cannot be seen to be a free affair hearing if reasonable people think that the Judge may be biased. The rule against bias is of course one of the corner stones of natural justice. I can see no reason why it should not be applied in the same way as the other corner stone, the audi alteram partem rule which takes effect with all its vigour in all situations, unless it is especially or impliedly excluded (indistinct) by statute.

In other words a proper approach is to apply the wider test of reasonable suspicion to its full extent in every case where bias or self interest is an issue."

Furthermore I would like to refer to BTR Industries v Metal Allied Workers Union 1992 (3) SA (A) 673 and I would like to refer to page 693 and specifically 693 and 694, where the Appellate Division once again stated that the test to be applied in

circumstances such as these, is that the existence of a reasonable suspicion of bias, warrants a recusal.

Applications where somebody is sitting, when rights of people are infringed, principles that apply are those of natural justice and the Du Preez judgment clearly states that the principles of natural justice should apply in pursuance of the Commission.

From the documentation and I can make the documentation available if the Commissioners are not in a position to find the documentation readily, from the documentation that we have received in the Police file, there is various letters of demand, letters relating to the request of forensic testing of certain weapons, etc, sent from N.M. Ntsebeza Inc, which I understand is the firm of Attorneys which the Chairman of this Commission, was associated with in Transkei.

In conclusion I would wish to state the following. The procedure that should apply is a procedure as set out in chapter 7 of the Promotion of National Unity and Reconciliation Act, Act 34 of 1995, which you people are conversant with and more specifically section 36.3(a) thereof which reads as follows:

"If at any stage during the course of proceedings, at any meeting of the Commission, it appears that a Commissioner has or may have a financial or personal interest which may cause a substantial conflict of

interest in the performance of his or her functions as such Commissioner, such a Commissioner shall forthwith and fully disclose the nature of his or her interest and absent himself or herself from the meeting, so as to enable the remaining Commissioners to decide whether the Commissioner should be precluded from participating in the meeting by reason of that interest."

Subsection (b) of Section 36.3 reads as follows such as the disclosure a decision taken by the remaining Commissioners, shall be entered on the record of the proceedings.

If I am correct in stating that the procedure to be followed is a procedure as set out in Section 36.3 of the Act, it remains for the remaining Commissioner to decide then whether Commissioner Ntsebeza should recuse himself or not.

In conclusion I would however like to submit that it is in the best interest of both Mr Ntsebeza as well as my client, that justice must be seen to be done, and that justice will be best served if Mr Ntsebeza recuses himself as a Commissioner in these proceedings, especially due to the fact that as an Attorney he should also clearly have a conflict of interest.

That is the application at this stage, if there are any questions that I can answer or ...

CHAIRPERSON: Thank you Mr Coetzee. Mr Khoisan, do you have anything at this point to add?

ADV VON LIERES: Mr Chairman, if I may be allowed to interrupt. I wonder if I can have a short adjournment, take instructions from my client on this particular application? My client has come prepared to deal with your inquiry, but this having arisen, I think I must quickly consult with him on this issue.

CHAIRPERSON: How much time do you need Mr Von Lieres?

ADV VON LIERES: About a quarter of an hour will be sufficient, thank you Mr Chairman.

CHAIRPERSON: We will adjourn for quarter of an hour, thank you.

COMMISSION ADJOURNS - ON RESUMPTION:

MS WILDSCHUT: We are waiting for Mr Ntsebeza to return into the room. As soon as he does, we will resume, thank you.

CHAIRPERSON: We will resume. We are at the stage where Mr Khoisan - Mr Von Lieres yes.

ADV VON LIERES: Thank you Mr Chairman, I thought this is an in camera hearing, what is this camera doing here?

CHAIRPERSON: Mr Von Lieres, I thought that during the preliminary stage where we are arguing only technical matters, that we should allow the process to be - if we get to the stage, if

we get to that stage, where we should actually proceed, then the house will be cleared.

ADV VON LIERES: Sorry Mr Chairman, I have taken instructions from my client in connection with the application.

I am instructed to inform you that my client has come to this hearing prepared to answer all questions which you wish and have to put to him, that however, his attitude is that the law should prevail and on that basis that he has instructed me to proceed with an application of similar content to Mr Coetzee's.

That is on the basis that we have explained to him that the law provided that he should not feel that he is biased in any way by appearing before anybody.

Mr Chairman, if I may commence, may I make the point firstly that it is quite clear that the legislature in enacting the Promotion of National Unity and Reconciliation Act, appreciated the necessity for the independence of the Commission and provided for example accordingly in Section 36.1 of the Act, where it states that -

“The Commission and members of its staff shall function without political or other bias or interference, and shall unless the Act expressly otherwise provides, be independent and separate from any party, government, administration or any other

functionary or body directly or indirectly representing the interest of any such entity.”

Now, in accordance with this approach the legislature also expressly provided for the disclosure of certain interests by members of, by Commissioners which could cause substantial conflict of interest, and I refer you to section 36.3 of this particular Act.

So, what I want to say is that the intention of the legislature is quite clear, and that is in our submission, to ensure that the Commission discharges its onerous task in an atmosphere as uncontaminated as possible. For that reason also it then expressly declares in Section 5(a) for example, subsection 5(a) of Section 36, that every Commissioner shall inter alia discharge his or her duties without bias and it prescribes a particular procedure.

Now, Mr Chairman, that is the attitude of the legislature with regard to the important task of the Truth and Reconciliation Commission, and its organs.

I think it is common knowledge or trite law at this stage, that the Truth and Reconciliation Commission and its various subsidiary organs and Committees as well as the Investigation Unit, are subject to and are bound to apply the principles of natural justice.

Save insofar as the empowering legislation of course provides for, otherwise. I must say that I did have a look at this, and I couldn't find empowering legislation that indicates an abrogation of the principles of natural justice.

Mr Chairman, my application is not based on Section 36. I don't believe my application under Section 36 is applicable, for reasons which will become clear as I proceed.

One of the principles Mr Chairman, of natural justice which is relevant to the present inquiry, is that persons subpoenaed to appear before you, should be satisfied that they have no reason to suspect that this tribunal or any member thereof, may be biased towards them.

And of course, it is always very difficult Mr Chairman, for anybody to sit in judgement on him or herself in such a matter, and in that connection I would like to refer you to a decision which is recorded in the law reports S v Bam 1972 (4) SA 41(EC) 43H, where the Court held that an accused or his legal representative is confronted with an unenviable task in applications of this nature.

That of course Mr Chairman, is indeed so. But allow me to say that fundamentally an application of this nature, that is an application for the recusal of this, of a Court or in this particular case, yourself Sir, is an application that deals with perceptions.

It is not an application that alleges that you are in fact biased, not at all. It deals with perceptions which is held by a litigant and not with actual bias.

The whole question is whether there is a real likelihood of bias or whether a reasonable man may form the impression that the trial will not be a fair one, or in this case, that recommendations may be made which may adversely impinge on the client.

In S v Bailey 1962, (4) SA 514 EC 517F ..(intervention) ..

CHAIRPERSON: Can you give the citation again Mr Von Lieres.

ADV VON LIERES: Yes, certainly S v Bailey 1962, (4) SA 514 (EC) 517F, this is the authority for the proposition that has just advanced that we deal with perceptions here and not with actual bias.

In the Bam case which I have referred to already, the Court cautions against the showing of unnecessary sensitivity by a Court or in this case, by yourself Sir, in dealing with such an application.

Let me state at the very outset, that I am not instructed to argue the matter on the basis that you are actually biased, but I am instructed to argue the matter on the basis that my client has a reasonable suspicion that he may be, that bias may exist and that he may be prejudiced in this connection.

May I also refer you to another decision which is a famous fraud case, Milne v Erleigh (6) 1951 (1) SA 1 (A) 11. Now Sir, bearing in mind that this is an application that deals with perceptions, I simply need to refer you to the latest authority which my learned friend has already mentioned to you, that is the BTR decision.

BTR Industries SA (Pay) Ltd v Metal and Allied Workers Union 1992 (3) SA, I believe you have the reference already. In this particular case, Mr Justice Hoekstra sets out the test to be applied.

The test is and I quote against the letter I on page 693 -

"For the reasons which follow I conclude that in our law the existence of a reasonable suspicion of bias satisfies the test and that an apprehension of a real likelihood that the decision maker will be biased, is not a prerequisite for disqualifying bias."

In other words Sir, when you adjudicate on this particular application, you must not ask yourself the question am I the Presiding Commissioner biased, but does the client, the person who appears before me, the applicant, does he have a reasonable suspicion that I may be biased.

A suspicion Sir, is not a provable fact. It is a state of mind, it is a condition. Therefore it is not factually provable.

swooped into Umtata and carried out an "operation", at 47 AC Jordan Street, Northcrest.

During the course of that raid, the following persons were shot and killed and the deceased are then listed.

Now, the next sentence.

"The raid on the house in Umtata was authorised on the strength of intelligence provided by the Security Forces, that it was being used as an arms cache for attacks against civilians in other parts of South Africa.

That information,
the apology continues,

"...was inaccurate. At the time of the operation, the killing of the youthful occupants, was unjustified and inexcusable. As President of the new democratic South Africa, I believe that government and indeed the South African nation as whole, need to acknowledge openly and publicly the wrong which was committed on 8 October 1993."

The next paragraph then contains the public apology. The point I am making here Mr Chairman, is that the present government also accepted that the raid in Umtata was authorised.

It matters not Mr Chairman, whether it was based on defective

intelligence, as long as everybody involved in the raid, was bona fide, there can be no question of any criminal results to follow.

I will deal now with the question of a gross violation later, the point, the first summation I would like to make is that both the previous government as well as the new government, are of equal mind and ad idem that the Umtata raid was a government authorised raid.

Now, Mr Chairman, my learned friend and I can make this available to you for ...

CHAIRPERSON: I would like to have that please.

ADV VON LIERES: I handed it up Mr Chairman.

CHAIRPERSON: Thank you.

ADV VON LIERES: I also wish to hand up two letters Mr Chairman, which reflect correspondence between the department of state expenditure and the South African Defence Force from which it is quite clear, that the payment to the parents of the deceased, were regarded as ex gratia without any admission of criminal or civil liability for the deaths incurred.

With your leave, I will ask my Attorney to obtain copies of these two letters, and hand them up to you. These letters are dated Sir, for your records, 14 November 1995, that is from the Defence Force to the Department of State Expenditure, and 3 December 1995, from the Department of State Expenditure to the Defence Force.

If I may illustrate the point. In the Du Preez case, after Mr Justice King made the order, you were reported in the newspaper as saying that you disagreed with Mr Justice King's order. The result of that Sir, was that Mr Justice King perceived that a perception existed that should he make any further orders, he would be seen to be biased, and he recused himself.

You will recall that the Vice Chairman of your Commission, made an affidavit and you filed a supporting affidavit in subsequent proceedings in that particular case.

Now, what Mr Justice King did there Sir, was to prevent any perception of bias on his part, from being propagated and if I may say so, there is great analogy between the position you find yourself in today Sir, and the position Mr Justice King found himself in then.

So, His Lordship didn't wait for a formal application to recuse himself from the Du Preez case, he said well if one of the Commissioners is of the view that I took an obviously wrong decision, then I must recuse myself, because any further decision that I may take, would then be a perpetuation of this perception that I am biased against the Commission, and he withdrew.

I have the record available if you wish to have a look, but I think you are familiar with the facts, so I leave that aspect there.

Now Sir, having dealt with the legal position, I would like to make the point that the very function of the Investigating Unit

set out in Section 28 of the TRC Act, is indeed to investigate matters referred to it by the Commission or the Committee of the Commission, and to report to the Commission on such an investigation.

Consequently, your recommendations contained in the conclusion of your investigation, does in fact have the potential of being able to adversely affect the rights and interests of my client. And in that way a perception of reasonable suspicion of bias, could indeed create the impression in the mind of my client, that he may not have a fair view.

Now Sir, having dealt with the law, the question is what are the facts because although a suspicion doesn't need to be sourced in many facts, it needs to have a certain logical basis.

May I firstly refer you to certain letters which the firm N.M. Ntsebeza Inc. addressed not only to the Minister of Defence and the State President in Pretoria, in circumstances when the Transkei was regarded as an independent country, but also to other letters which were formulated in your, in this office and which was sent to a variety of international figures, such as for example Ms Clare Honiball, (indistinct) for Human Rights, in which this organisation is advised and I refer to this letter dated 24 October 1993, which this organisation is advised -

"We have already caused by Amnesty International, to be sent to the International Commission of Jurists

(ICJ), the Commonwealth Observer Mission to South Africa, the European Community Observer Mission to South Africa and Physicians for Human Rights, Boston, USA. Kindly add your own weight so that the test can be carried out as soon as possible. We are made to believe that these tests must be conducted within a certain time frame, in order that there could be some degree of accuracy."

Now Sir, it is quite clear from this paragraph that I have read, that on behalf of your clients, your legal firm approached Amnesty International to get their assistance to create pressures against the South African government to accede to your demands, that is the production of the firearms.

It is quite clear that you were advised by Amnesty, your firm was advised by Amnesty International that they communicated with the International Commission of Jurists, the Commonwealth Observer Mission to South Africa, the European Community Observer Mission to South Africa and Physicians for Human Rights in trying to generate support for your particular case.

I think Sir, you will appreciate that my client had reasonable grounds to perceive that in this type of internationalisation of the case, a cause to which your firm committed itself, you created a reasonable impression in the mind

of my client, that in fact what you are busy with, is to make a transparent effort to attack the South African Defence Force in public, and to damage the image of the South African government, in other words Sir, to put it bluntly, this was a propaganda operation in which you internationalised the Umtata operation for the benefit of your clients.

My client perceives this to indicate a very strong basis of bias against his interests and against the interests of the South African Defence Force, especially Sir in view of the fact that the South African government had already at that stage, acknowledged that it was responsible for the operation and the deaths caused by the operation.

So, it is with great respect that I must say to you Sir, that it is an irresistible inference from the conduct of your firm that my client has developed the impression that in fact, there is bias that exists as against him, and the South African Defence Force of which he, at that particular stage, was Chief of the Army and later the Chief of the Defence Force.

Then Sir, apart from the fact that you acted for the family, you also, your firm apparently also decided to issue a letter of demand directly to Pretoria although the Transkei was at that stage deemed to be an independent and a sovereign State.

Then next, if you look at the type of wording which was employed by your firm, when in the letter of demand that was sent

to the State President, and I read to you from the second paragraph of your letter of demand, dated the 11th of January 1994 -

"The attack by the South African Defence Force is alleged and reported in the mass media, to have been at your instance, or with your knowledge or concurrence.

It was wrongful, unlawful, unprovoked, deliberate and completely unjustified."

It is also a submission that I must make to you Sir, that the type of language which was used here, contains apart from the normal type of wording in a letter of demand which is wrongful and unlawful, it contains a lot of innuendo's, repetitive and blame fixing words such as unprovoked, deliberate, completely unjustified.

The use of these phrases unnecessarily so, is perceived by my client to reflect the bias that exists. Then Sir, as you know, it is common knowledge that the present government has settled his claims without an admission of liability.

So in the circumstances, my client already officially adopted the position in 1994, that you are involved in a transparent attempt to discredit the South African Defence Force.

You have personal knowledge, having acted for one of the parties, and my client perceives this to be improper for you at this

stage, to preside at this inquiry bearing in mind that my client does have reasonable grounds, reasonable suspicion for believing that you may be biased for the reasons mentioned.

Then Sir, my client believes that your previous personal experience of erroneous Police Intelligence regarding your own house, is something which may also bias you against my client's case. You will recall that in a letter you wrote that the Police had targeted your house as one being an APLA facility, and that you may have formed the impression based on what you said was erroneous Police Information, that in fact the Intelligence on which these people operated, would also for that reason be erroneous, without really bothering to hear what they had to say.

So, for those reasons your personal experience, your internationalisation of this particular incident and the attitude expressed in various letters you wrote to my client, are such that I submit that sufficient basis have been made out to argue that a reasonable suspicion on behalf of my client has been demonstrated, which requires you in the interest of the credibility of the IU to withdraw from this particular inquiry, thank you.

CHAIRPERSON: Thank you Adv Von Lieres. Mr Khoisan?

MR KHOISAN: Thank you Mr Chairman. Mr Chairman, we have heard from the representatives of Gen Meiring and Gen Liebenberg, but nevertheless, just to place on record that the two Generals, Gen Liebenberg and Gen Meiring, have been called here

today in respect of work that we are trying to complete as part of our mandate.

As part of our mandate as put out in Chapter 2, Section 3(a), which is that we have to -

"Establish a complete, as complete a picture as possible of the causes, nature, extent of gross human rights violations which were committed during the period 1 March 1960 to the cut off date, including the antecedent circumstances, factors and context of such violations, as well as the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of violations by conducting investigations and holding hearings, and also that (d) compiling a report providing as comprehensive an account as possible, of the activities and findings of the Commission, contemplated in paragraphs (a), (b), (c) which contains recommendations measures to prevent future violations of human rights."

That is to make sure that the situation which obtained in our country from 1960 to the cut off date, never ever happens again, and that is why we need to get to all the places, people, institutions to understand how this thing was set up.

And also in Chapter 2, Section 4(a)(i) to (v) -

"The functions of the Commission shall be to achieve its objectives and to that end, the Commission shall

(a) facilitate and where necessary initiate and coordinate enquiries into:

(1) gross violations of human rights, including violations which were part of the systematic pattern of abuse;

(2) the nature and causes and extent of such violations of human rights, including antecedents circumstances, factors, contents, motives and perspectives, which led to such violations and,

(3) the identity of all persons, authorities, institutions and organisations that were involved in such violations and,

(4) the question which such violations were the result deliberate planning on the part of the State or former State or any of their organs or any political organisation, liberation movements or any group or individual and,

(5) accountability, political or otherwise for such violations.

Mr Chairman, we have come here today to deal with this matter in respect of one of many matters that is covered before the Truth and Reconciliation Commission. In respect of the

matter which is sanguine to this inquiry, which is the Umtata raid of October 1993, it is one of many matters which is under consideration before this Commission, matters which have come to us from the Eastern Cape.

I submit Mr Chairman, that you were an attorney operating, working from the Eastern Cape and many of the matters that have arisen in the course of our work in this Commission, and in the course of our work in the Investigative Unit which is a sub-Committee, sub-structure of this Commission, you would have knowledge of, or in one way or another, have been associated with it, because of the nature of the conflicts of the past and because of your role in your professional capacity as an attorney, you did not have distance from it.

But nevertheless, in terms of the constitution of the Commission, Section 7(1):

“The Commission shall consist of not fewer than 11 and not more than 17 Commissioners and may be determined by the President in consultation with the Cabinet;

(2)(a) the President shall appoint the Commissioners in consultation with the Cabinet and,

(b) it is very important here - the Commissioners shall be fit and proper persons who are impartial and who do not have a high political profile”

and in this particular aspect, in order to pass the test of being a fit and proper person, it is my understanding and it also a matter of record, that the Commissioners, the persons who were eventually selected and appointed by the President to serve on this body, were persons who were considered fit and proper persons, and as such able to conduct themselves in a way which did not prejudice the interests of either victims of perpetrators, but served to uphold the Act upon which this institution is based.

Also in terms of the matter which is referred to now, by both the counsel for Gen Liebenberg and Gen Meiring, it must be noted and placed on record here, that that matter in fact which you dealt with in your capacity as a professional person, an attorney, was in fact finalised. That was before the establishment of the Truth and Reconciliation Commission.

Also the reference to 36 which has been made reference to by the counsel for Generals Liebenberg and Meiring, 36(1) the Commission - I believe that that particular section for the purpose here, especially 36(3)(a) is irrelevant in that it deals with the general provisions governing meetings of the Commission itself. That does not deal with the hearings such as this one which is a Section 29 in camera enquiry, called by the Investigative Unit.

I would submit finally Mr Chairman, that if there is an indication as there has been, that somehow this particular hearing will influence a finding, I think that that is something that

Generals Meiring and Liebenberg should take note of. The fact is that no findings will be made at this hearing today.

This hearing is inquisitorial in nature, it is part of ongoing work that we are doing, as part of an Investigative Unit to gather evidence, to gather information relevant to our mandate, relevant to cases that are before this Commission.

I would submit Mr Chairman, that in our view the inference that you, the position that you actually represented the victims in this case, is something that happened before this Commission, and in any case, you conducted that in your professional capacity as an Attorney representing people in the Eastern Cape.

And if you were to recuse yourself in this matter, then by extension, you might have to recuse yourself from the entire Commission, because how many matters have been brought to this Commission from the Eastern Cape of which you had knowledge and of which you were a part in one way or another?

So, and in terms of making findings, I think it should be placed on record that the findings part of this Commission, is handled by the Human Rights Violations Committee. You are the Head of the Investigative Unit, which puts information in front of the Human Rights Violations Committee, but does not direct the course of findings in the Human Rights Violations Committee, that is the function of that Committee, and the finding that will be made with regard to the Umtata raid of 1993 will not be

something which will be in your provence, but will be in the provence of the Human Rights Violations Committee, so it is our submission as persons who are part of conducting this inquiry that there would be, it is not necessary for you as the Chairman to recuse yourself either as the Chairman or as the Presiding Commissioner, from these hearings. Thank you Mr Chairman.

CHAIRPERSON: Mr Khoisan, Mr Von Lieres made the submission that seemed to suggest to me that he is aware that no findings would be made, but that there would be recommendations coming from this inquiry which would be very (indistinct) and very persuasive, might be persuasive to those who would be making findings assuming we accept the correctness of your statement, that the Human Rights Violations Committee is going to be the one to make the findings. What is your response to his submission on that, the recommendations coming from this enquiry, to the extent that they will have my input in it and an input that might be perceived to be tainted by those he represents, because of the reasons that they have given. What is your view?

MR KHOISAN: Without dragging out the point Mr Chairman, first of all the members of the Human Rights Violations Committee, are fit and proper persons who have their full senses about them.

They would know as they have done before, that you would have chaired this proceeding, but this proceeding is in fact not a

proceeding that will result in a recommendation. The function of the Investigative Unit is to investigate and when an investigation is finished, to put the facts on the table, it is not the function of the Investigative Unit to make a decision or to direct that decision. That decision is not in our provence.

CHAIRPERSON: Any reply Adv Coetzee and Adv Von Lieres?

MR COETZEE: I thank you Mr Chairman. This last mentioned point of debate, I would like to submit the following: Any investigation and any evidence led, has to be interpreted. It is not evidence led in the air.

Any Investigative Unit decides what is the result of what we have established. There are certain indications at this stage already by yourself, letters sent, that is already influencing the result of this investigation, namely specifically relating to the names of the operators, that evidence has been requested to be led by yourself, you want to know the names of the operators and there is going to be a report back as a result of this investigation to the rest of the Commission, which is going to influence its findings.

To say this is a process in the air, with no result, is simply I submit ridiculous. Surely any investigation must have a result. The evidence is going to be interpreted. Furthermore relating to the issue of whether Section 36.3 applies or not, I indicated that in all likelihood it is a relevant provision.

However, if I am wrong in that regard, obviously then my application is based on the principles of natural justice as indicated during my application.

Mr Chairman, with all due respect, it is simply unheard of, simply unheard of that an attorney who represented the families of the deceased, sits now as an Investigator against the alleged perpetrators.

It is just unheard of. Surely the simple common sense dictates and the principles of natural justice dictate that an Attorney that appeared for the deceased, does not now at a later stage, sit now as a Chairman of an Investigative Unit against the so-called alleged perpetrators of people that might have been involved in this alleged perpetration during investigation, it is unheard of.

With all due respect to my learned friend, he misses the boat. At no stage during any application, by neither me not my learned friend, have we said that you were biased, that you were an improper person, that you are not partial, that is not what was stated at any stage.

What we did say however, is that there is a perception of bias. Furthermore, that simple common sense and the principles of natural justice, say that - I submit that it is unheard of that an Attorney of record, then becomes an Investigator, it is just not the fit and proper thing to do in circumstances of this nature

where there are other Commissioners available that can do this investigation.

I am repeating myself, but this little ...

CHAIRPERSON: You made your point Mr Coetzee, very passionately.

MR COETZEE: As you please Mr Chairman. Mr Chairman, I noticed that there is another, is there now another Commissioner present in these proceedings, or did I count wrong in the beginning?

CHAIRPERSON: No, Mr Maqekiza is one of the Investigators as well.

MR COETZEE: I see. I have no further submissions to make, thank you Mr Chairman.

CHAIRPERSON: Mr Von Lieres?

ADV VON LIERES: Thank you Mr Chairman. Just two quick remarks, Mr Chairman. Firstly my client and I fully acknowledge the awesome task of the Commission and that is not the issue here.

The plain simple issue Mr Chairman, is whether you are satisfied that my client has a reasonable suspicion of bias on the facts presented to you. At the end of the inquiry which the Investigation Unit must make, you will submit certain facts to the Human Rights Commission, where you will say this is what we found proved.

Those facts will inevitably have your input or partially your input, and that means the perception, the reasonable suspicion of bias is then propagated into the Commission of Human Rights, that is the problem.

You have an unenviable task Mr Chairman, you have to take a momentous decision. It is very difficult to sit in judgement on yourself, but let me reiterate there is no allegation that you personally are in fact, biased. It is the circumstances which creates this image in the mind of my client, and I again refer you to the King conduct in the Du Preez case, which I believe can serve as an example of what should take place.

Consequently Sir, we submit that the test has been satisfied and that you should indicate your withdrawal from this inquiry. May I make the point that I am not approaching you under Section 36, I just used Section 36 to indicate how seriously the legislature wishes to ensure an unbiased image of the Truth and Reconciliation Commission and its various organs.

That is the only purpose I used Section 36. My application is also based on the Administrative Law and the Principles of Natural Justice. In the circumstances Sir, I would say that the, whatever name you wish to give to it, the Investigative Unit, has to pass on certain something to the Commission on Human Rights. That certain something must inevitably reflect its findings.

Obviously we accept that today's inquiry is only part of your broader inquiry into the Umtata raid, operation, that is a matter of logics and we do not dispute that. But ultimately Sir, your presence here today, given the background which we have sketched, is one which my client says there is a reasonable suspicion of bias and my client therefore persists in his application. We would ask that you in these circumstances, recuse yourself.

CHAIRPERSON: Mr Khoisan, Mr Coetzee indicated that in circumstances where other Commissioners are available, it seems improper that we should insist of having me in the panel, given the circumstances and given their submissions. We are inclined to accede to the application, who else do you have who you would place and I am asking this question because I need to satisfy myself that he is also not a person who would be similarly tainted and just so that you know, we should exercise our mind in that regard as well, lest we end up doing application upon application. Do you have anybody in mind who might substitute me in the event I were to be inclined to agree and accede the application.

MR KHOISAN: Well, first of all, Mr Chairman, thank you. I don't know where people get their information from, Commissioners are very busy people, people are all over the place.

Many of the Commissioners are tied up at the present moment. Our Deputy-Chairman can't make it. Other Commissioners were approached to be a part of this hearing, obviously they couldn't make it, and we have what we have. We have you and we have Commissioner Wildschut. I mean if and I am putting this at, if it is your position after strong consideration, and I am hoping that you do not accede to this request, then we shall have to find a way to reorganise people's schedules and disrupt the work of the Commission, in order to facilitate this inquiry.

If we have to do it, then we have to do it. But you know, this issue of ...

CHAIRPERSON: Mr Khoisan, you are taking a second bite of the cherry, I just wanted to establish whether if I were inclined to accede, you are able to get a Commissioner to - gentlemen, I think we will need time with Commissioner Wildschut to consider our position.

I have to look at one or two of the authorities that were cited to me, I would hope, I would have liked to look at all of them, but I will not lie and pretend that I will look at all of them.

I will look at those who ...

ADV VON LIERES: Mr Chairman, if it is going to be convenient, may I make available a copy of the BTR decision to you?

CHAIRPERSON: Yes.

ADV VON LIERES: Sorry, that is the latest one, it runs from page 688 which is all you really need, because that is where the history of the thing starts and then on page 693. If that can be of assistance, I will gladly hand that up.

CHAIRPERSON: I think we do have copies of that particular judgement, in fact I think we will have a fair amount of those authorities in the legal section.

ADV VON LIERES: I can assure you it is uncontaminated.

CHAIRPERSON: Let me have that copy.

ADV VON LIERES: Mr Chairman, may I just make one other point, if you don't mind please. I don't want a second bite, I just want to say that the convenience factor is not a criteria in the consideration of the decision whether the case is being made out for reasonable bias.

We are quite comfortable with Commissioner Wildschut, we have nothing, we have no knowledge that she knows anything more than we do, thank you.

CHAIRPERSON: Thank you very much Mr Von Lieres. We will adjourn until possibly after twelve o'clock, until possibly twelve or such further time as we may need to come to a balanced decision. You remain adjourned.

COMMISSION ADJOURNS

ON RESUMPTION:R U L I N G

CHAIRPERSON: This is an application for me to recuse myself as a Chairperson and a participant in these proceedings.

It is an application brought on behalf of General Liebenberg by Adv Jan Coetzee, and on behalf of later on in the proceedings General Meiring, by Adv Von Lieres.

The gravamen of the applicants' case seems to be that their clients would be justified to have a reasonable suspicion of bias as a consequence of perceptions that they might hold by reason of the fact that in the main, I was involved as an attorney in representing the families of the deceased persons.

It is common cause that it is not being disputed, that I was an attorney in 1993 at the time that the events sought to be enquired into here, in Umtata.

It is also common cause that I was involved in a litigation process in which I on instructions, held the view and stated it, that the action of the SADF as it then was, was not only wrongful and unlawful, but that it was deliberate and completely unjustified.

Letters written by my office indeed by myself, in which that view was expressed, in a letter of demand in which substantial amount of money was claimed from the then government, have

indicated by and large the disposition of myself as an attorney of record for the family members.

I need to emphasise that I was acting on instructions. It is also true and common cause that before these proceedings, letters which I wrote at the time, to international agencies and organisations, in which I was seeking their support in putting pressure on the then South African government to make available weapons which were allegedly found at the scene and which were allegedly used in the attack or in the raid. These letters were written by me and they were written with what Adv Von Lieres indicated, propagandistic bias.

It is therefore undisputed that I was intensively involved, very intimately involved with the issues around which the events sought to be investigated in these proceedings, are about.

It is also true that during the course of our investigation of this particular matter, certain letters were written to one of the applicants, Gen Meiring in which the basis of their Intelligence or the veracity of their Intelligence was called into question.

Even though there was a disclaimer in the letter, which sought to say I was not intending to personalise the issue, it is clear from the letter itself that, I stated in no uncertain terms that the Intelligence which was relied upon, to mount the strike at Northcrest, Umtata, was likely to have been as misleading and faulty as the Intelligence which apparently was relied upon by

Major General Koen and others to the extent that they had identified my home in Xala in the Transkei as one of the so-called APLA bases.

It is therefore quite clear that my involvement in this particular case, predates the establishment of the Commission and has also been consistent and apparent during the investigation.

It is clear also that during the time that I was investigating it as an attorney, and I am using the word investigating it, advisedly, that certain documents were sought from the State, certain information was sought from the State. It is clear that I was not an uninterested party.

It is clear also during the course of the investigation of this particular matter in the Commission, that I have not been an uninterested party.

Therefore there is a presumed bias on my part as a Chairperson because of all those factors.

I must say that I find it difficult and I mention this in passing, how any of the Commissioners in broad terms, can be found to be persons in relation to which to whom would be applicants would not have a reasonable suspicion of bias.

I think by its very nature, and by its very composition, by the socio and political milieu in which the Commission was established, virtually all Commissioners are people in relation to whom there would be an perception of bias.

The Archbishop, the Chairperson of this Commission, before and during the life time of the Commission, was a person and continues to be a person, who has stated opinions that have been perceived by many as of a nature that make him to be an unfit and proper person to preside at a Commission such as this.

There have been members of the acuminate who have held a view that he is not unbiased, that he is pro the liberation movement as it was then called and that he is anti those who were against the liberation movement. He has taken public positions on issues as wide ranging as sanctions, he has been in fact the visible expression of conscience during the so-called apartheid era.

He comes with that baggage to the Commission. Take any Commissioner, Dr Boraine comes with a history of involvement in oppositional politics. He has pronounced himself on a number of issues and has stated opinions that clearly make a person in relation to whom some applicants may well have a perception that there is a reasonable suspicion that he may not be able to deal with their issues impartially.

I think it was for this reason that from its very formation, those who would sit as Commissioners in the Commission, had to be taken through a long drawn process of a evaluation and testing to see if they conformed with a presumption in the Act, that people who will sit as Commissioners, will have been people who

have met the test of impartiality, the test of being fit and proper and the test of being not unpolitical, but being not of a high political profile status.

I think the legislature had quite expected that in the manner of things, it would be impossible to find in this country, people who in one way or the other, would not belong to a certain view point in relation to which some sectors of the population, might consider them to be partial if they dealt with their issues. It seems to me therefore, that if one takes a proper look at what the Commission and the constitution of the Commissioners in the Commission, it is virtually impossible to find any one Commissioner in relation to whom a perception might not prevail by some sectors of the society, that their matters when handled by them, would not be dealt with partially.

To come to the case in point, I am held to be a person who for the reasons stated, will not be able to deal with the issues placed before me impartially.

Now, I have taken the opportunity to look at the authorities that I was referred to in argument. The leading authority seems to be BTR Industries SA (Pay) Ltd & Others v Metal and Allied Workers Union & Others 1993 SA 673, it is a judgment of the Appellate Division. I think that authority very well makes the point that the test to be adopted in recusal applications is

whether there exists a reasonable bias, a reasonable suspicion of bias I beg your pardon, on the part of the decision maker.

The authority seems to state it very clearly that an apprehension of a real likelihood that the decision maker will be biased, is not a prerequisite for disqualifying bias.

The authority holds the position correctly in my view, because it takes the view that the very objects which the reasonable suspicion tests are calculated to achieve, would be frustrated if we were to graph onto that test the further requirement that the probability of bias must be foreseen.

Dumba & Others v Commissioner of Prisons & Others 1992 (1) SA 580 (EC) case is also to similar effect. I have also taken a look at another case, Xeki v Commissioner of Correctional Services & Another, a case that was decided jointly with Jansen v Commissioner of Correctional Services & Another 1992 (2) SA 269, also a judgment of the Eastern Cape Provincial Division.

I want to say that I cannot fault the reasoning of these cases, all that I want to stress is that the requirement still is that the suspicion must be reasonable. I must determine for example in this case, whether on the arguments presented, either Gen Liebenberg or Gen Meiring, has reason to believe that I will not be able to handle their matter impartially.

Now, whilst a notion of the reasonable man cannot vary according to individual (indistinct), or the superstitions or the

Intelligence of particular litigants, I still cannot determine the reasonableness of the applicants' suspicion of bias in (indistinct), I have to look at the circumstances of the Generals, the applicants who raised the objection to me and determine whether a person in their circumstances, has reason to believe that I will be partial in dealing with their matters.

In my respectful view, and in view of what I have said in relation to who the Commissioners are and where they come from, I am not able to find that anything that has been said is able to persuade me that their suspicion is either reasonable or well-founded.

As I have said, it will be difficult, short of getting an altogether outside tribunal, to see in what way the applicants would ever be satisfied that any member of the Commission would not be biased.

I cannot therefore see how I can hold that such a suspicion of bias is reasonable. I hold that it is unreasonable on that account, and on the application of the test in the BTR case.

Nor do I think that in any event, that is the test to be applied in this case. I think that the above cases are distinguishable. Again if one has regard to the way in which the Commission is structured, the duties and powers and functions of the Commission has been eluded here.

It seems to me that whereas ordinarily and as has been my approach above, the test for bias is for a Judge to recuse him or herself if there is reason to fear for partiality on his or her part, see also S v Radebe 1973 (1) SA 796 (A).

The test to apply here is the real likelihood of bias test, a test that was adopted in English Law. See also the case of Mönnig & Others v Council or Review & Others 1989 (4) SA 866, a judgment of the Cape Provincial Division.

In that case, decided by Conradie, J a development of the law for recusal was traced and through the authorities, Conradie J cleared up the confusion which had developed as he put it where the Court seem to have run the two tests for bias, into one, one into the other.

It was his view that the real likelihood of bias test, retains its utility where a Court is called upon to consider the impartiality of tribunals in the nature of administrative bodies, which are known and expected by the reasonable lay person, to have an institutional or departmental bias.

In these cases he held the Court will not interfere with the exercises of administrative and even (indistinct) judicial functions, unless it appears that there is or is feared to be a real likelihood that is to say a probability of actual bias on the part of the decision maker or adjudicator.

I hold the view that in all the circumstances of this case, the TRC rightly can be called an institution whose Commissioners can be construed to have an institutional or departmental bias.

I hold that the Commission in this instance is not unlike school governors which are referred to in the Mönning case. The Mönning case relied incidentally on an authority on administrative law, De Smith in his (indistinct) *Opposed Judicial Review of Administrative Action* 4th Edition, page 62.

De Smith states that:

"School governors may have discretionary powers to dismiss teachers. In exercising these powers, they cannot reasonably be required to rid themselves of all personal prejudices and preconceived opinions. They must always genuinely apply themselves to the merits of the individual cases before them and act in good faith. The force of their hostility towards the person concerned may preclude them from discharging these obligations."

Now, nowhere has it been alleged by any of the applicants that I am hostile towards them.

Further, whilst it is true that Commissioner Glenda Wildschut is not judicially trained, I am. In the case I have referred to Mönning, Conradie J, held that reasonable litigants are less likely to regard judicially trained officers as inclined to

succumb to outside pressure or to be influenced by anything, other than the evidence given before them.

Now, that is the attitude I would have held even if this was either a hearing or a trial. It is neither. It is an investigation in which no findings will be made. In the words of the Act, it is an information gathering exercise as an aid to the investigation and the investigative process, even if it were true, that Investigators make recommendations, investigations in the end, are just that. They are not hearings, they are not disciplinary inquiries, they are not trials. They are processes for gathering information in relation to which decision as to credibility and finding will lie with others.

In fact in terms of this particular Act, where a finding which might have adverse inference on those who might be affected adversely by a decision of the Commission, an opportunity still exists for representations to be made and that is one of the safe guards that seems to have been placed by the Act, to make sure that no one comes to prejudice in the course of an investigation and a hearing where an adverse finding has got to be made.

In all the circumstances of this application, I fail to be persuaded on any test whether it is the reasonable suspicion test, or the probable reasonable probability of bias test, that any of the applicants is entitled to hold that he has a reasonable suspicion of

bias. I therefore rule that the application for me to recuse myself, should fail.

I however, take a view of these proceedings. I have always cherished the view that at all material times, the work of the Commission should never be steeped in controversy. In the lifetime of this one Commission, I have had my own fair share of controversy. I will recuse myself not on the basis of any of the legal arguments forwarded in relation to which I have made a ruling, I will recuse myself because I would like Gen Meiring and or Gen Liebenberg and any other whom you may represent, should testify in conditions where they are at ease even if it is my view that their suspicion of bias as articulated in these applications, was not founded.

In spite of the ruling that I have made, I have conferred with others including Commissioner Glenda Wildschut that in any event, I should not be available for these proceedings. I will therefore instruct Mr Khoisan to make arrangements for somebody else to be available if he is able to find somebody else. I will therefore adjourn these proceedings until two o'clock to give Mr Khoisan sufficient opportunity to arrange for somebody to be here.

Mr Coetzee had indicated to me that there was another application that might have been heard relevant to competence of

the Commission, carrying on this investigation in any event in view of its mandate. Since I have already decided that I will no longer be part of this, I think the proper thing would be that that application should be moved at two o'clock before this Commissioner or this Commissioner and any other Commissioner, who might be possibly found between now and two o'clock. We are adjourned.

CHAIRPERSON: As Mr Chairman pleases.

ADV VON LIERES: Thank you Mr Chairman.

COMMISSION ADJOURNS

ON RESUMPTION:

CHAIRPERSON: The proceedings of this hearing or this inquiry are resumed. I welcome again Ms Wildschut, a Commissioner of the TRC. I am Alex Boraine, the Deputy-Chair and acting Chairperson of the Commission and will assume the Chairpersonship of this inquiry.

I would like to welcome again to this session Gen Meiring, I am glad that you are with us. We also have a number of legal representatives, and for the record, even though I am sure you did this earlier, I would be grateful if you would give your names for the record, and who you are representing.

ADV VON LIERES: Thank you Mr Chairman, the name is Von Lieres, initials K.P.C.O., instructed by Armien Cloete and Associates Pretoria, on behalf of Gen Meiring.

CHAIRPERSON: Thank you.

MR COETZEE: Mr Chairman, I am E.M. Coetzee from the Pretoria Bar, being briefed by Rooth and Wessels Pretoria, and I appear on behalf of Gen Liebenberg.

CHAIRPERSON: Right, I understand that Mr Coetzee, you have an application which you wish to present to the Commission?

MR COETZEE: That is correct Mr Chairman. Can I then proceed?

CHAIRPERSON: Yes, proceed.

MR COETZEE: This application primarily relies on three separate issues, the first issue that I would like to raise is whether the present inquiry falls within the mandate of the Act or if it falls outside of the mandate of the Act.

I would like to start off by referring to that the Commission is entitled to conduct an inquiry in terms of Section 4(a) of the Promotion of National Unity and Reconciliation Act, Act 34 of 1995 the inquiry into gross violations of human rights including violations which are part of a systematic pattern of abuse.

Section 1 of the Act, give the definition of a gross violation of human right means, a violation of human rights through (a) the killing, abduction, torture or severe ill-treatment of any person, or (b) any attempt, conspiracy, incitement, instigation, demand or procurement to commit acts referred to in paragraph (a) which emanated from conflicts of the past and which were committed

during the period 1 March 1960 to the cut off date within or outside the Republic, and the commission of which were advised, planned, directed, commanded or ordered by any person acting with a political motive.

I submit that it is trait law that any administrative body or official can only act within the parameters and powers stipulated in the empowering legislation.

If it acts outside thereof, his conduct is obviously ultra vires. It is clear that the Commission is only entitled to investigate gross violations of human rights. It will be submitted that this military operation does not amount to a gross violation of human rights in terms of the definition as set out in Section 1 of the Act.

It goes without saying that the jurisdiction requirements as set out in the Section of the Act, must be satisfied before the Commission has authority to investigate this incident.

It is clear from a definition of gross violations of human rights, that the first requirement thereof is that there must be a killing, abduction, torture or severe ill-treatment of any person.

It is clear that what is intended is unlawful conduct that should be investigated. It is clear that abduction and torture can only be unlawful conduct and that the reference to killing, can only mean the unlawful killing of a human being.

If regard be had to the statements made by the former government, after this incident, it is clear that the conduct was clearly lawful and as a lawful order was given by the government of the day to the military, to execute this operation. It was of a non-political nature.

I would like to refer to certain press releases and statements made after this military operation. A communique by the Defence Headquarters in Pretoria, on the 8th of July 1993, which says as follows: the decision to raid the house was taken because intelligence indicated that it was used as a spring board for criminal acts of terror on unarmed South African Civilians.

This intelligence was obtained from inter alia sources in the custody of the South African Police. Furthermore, there are numerous press releases, but I think one that is also relevant is the press release of H.J. Coetzee, the then Minister of Justice, at the World Trade Centre at the 15th of October 1993, referring to the military operation and it was described as follows: the raid therefore cannot be described as an arbitrary, an impulsive action based on political motives.

I want to specifically mention not based on political motives, in fact considerations were only given to attack other identified APLA facilities in the Transkei. It was felt at the time that the intelligence needed further verification.

Furthermore, that attacks were ...

ADV VON LIERES: Excuse me Mr Chairman, I don't know if this gentleman has a licence to be here, it is an in camera hearing, isn't it?

CHAIRPERSON: Yes, he is a member of our staff. Mr Coetzee, can proceed.

MR COETZEE: Thank you Mr Chairman. Furthermore, there were also during the Goldstone Commission's inquiry, there were also investigations and it was established that certain attacks emanated from the Transkei, from APLA bases.

There are various other press releases and statements, etc, indicating that why this military operation was planned and executed, and it was not based on objects of a political motive but due to a primary interest of protecting innocent civilians.

Furthermore, it is clear that a lawful order was given by the government of the day, and there cannot be any talk of criminal conduct on the part of a military executed operation which had been duly authorised by the government of the day.

In summary, at this stage I would just like to say that it is clear that the orders were given, were not based on political considerations, but on considerations to protect the citizens of South Africa against attack.

It is clear from extracts of the documentation referred to, that APLA was using the Transkei territory as a spring board for

attacks against innocent citizens and civilians which were also corroborated by the findings of the Goldstone Commission.

It is thus clear that the attack was not based on any political consideration or motive. The military orders issues, were of a non political nature and were not based on political motives.

Furthermore the present government, after a thorough investigation of approximately 18 months, also came to the conclusion that this was a lawfully authorised operation, and that the military acted under the orders of the government of the day.

It is clear that the operation was an act of State, duly authorised by the State President, the Cabinet, the Stat Security Council and that the military operation was executed in lawful obedience to these orders.

It is therefore submitted that the requirements set out in paragraph (a) of the definition of gross violations of human rights, is not met, and on that basis alone, the Commission does not have a mandate in terms of this Act, to investigate this specific military operation.

Further aspect which is absent, is that of a political motive, and it clear that the Commission does not have the competency to enquire into this incident, and if it does so, it would amount to a ultra vires act which is not empowered by the legislation.

I would like to now move onto the second issue that I would like to bring to this panel's attention, it is namely that the Promotion of National Unity and Reconciliation Second Amendment Act of 1997, which was assented to by the President on the 26th of November 1997, and more specifically Section 3(2) relating to the transitional arrangements.

As I understand it, it is that this Act was promulgated due to the fact that the TRC - certain of its functions could not be completed within the time period allowed initially, and certain of the functions are being extended over a period of time, as it is, to wind things up.

If I then may refer to subsection 2, notwithstanding subsection 43(1) of the principle act, but subject to subsection 3 and 4, the Committee on Human Rights and Violations and the Committee on Reparation and Rehabilitation as contemplated in Chapters 3 and 5 of the Principle Act, (indistinct) shall complete their work on the 14th of December 1997.

I will carry on to subsection 3, the Committees referred to in subsection 2 shall from the 15th of December 1997 until the 30th of June 1998 have the powers, duties and functions conferred or imposed on or assigned to them by the Principle Act, only in respect of (a) matters other than matters contemplated in paragraph (b), commence by the said Committees not later than

the 14th of December 1997, but not yet finalised on this date. (b) relates to amnesty applications.

I submit that the intention of the legislature is clear. From the 14th of December, from the 15th of December, they don't want the TRC Committees to start commencing new investigations, new hearings. It is basically empowered to wind up part-heard matters and finish their business, but not to investigate and carry on new business.

The subpoenas and the arrangements for this hearings, was long after the 15th of December, and in terms of this Amendment Act, this hearing shouldn't continue.

The further aspect that I would like to touch on, Chairman Ntsebeza had a certain attitude relating and it was discussed prior with him, relating to the identity of the operators.

He was of the view that the names of operators should be disclosed. My client cannot be of assistance in providing these names, but he has a certain view point that I have been asked to place on record. I would like to do that shortly.

The fact that during this investigation, the Commission intends (indistinct) witnesses to disclose the identities and names of the 12 man team that executed the operation. If the Commission still intends to do so, I wish to raise the following points:

At all stages during our negotiations with the Commission, and more specifically the Amnesty Committee, we understood that the Commission's objective was not to apportion a personal blame to individuals, but to investigate and go as far as possible to get a global view point of the conflict of the past.

In this instance the Section 29 notice falls into this category, however, subsequently the emphasis seems to have changed to find out the identity of the actual operators and to apportion blame to them.

We feel that this is uncalled for and not in line with previous undertakings given. Furthermore Gen Liebenberg asked me to place it on record, that it is not in the public interest or in the interest of any government, that the names of the operators be disclosed that are involved in special operations.

The reason being that any operator is involved in a special operation for a government, might not be prepared to take a military operation, if he knows that his name will be disclosed to all and sundry thereafter.

It is submitted that it is in the public interest as well as in the government's interest, that the names of operators in duly authorised military operations, are not disclosed.

If the Committee insists that the names of the operators be made public, this investigation could then appear to be more of a

witch hunt than an investigation to gain an understanding of the conflicts of the past.

Specifically more so in the light of all the investigations to date, including the investigations by the present government, the press statements made by various Ministers of the previous government and for the long term, for the future, that it is not in the interest that the names of the soldiers, as foot soldiers, that were involved in the operation, be disclosed.

Those are the issues that I would like to raise, and have rulings on these two issues. I have no further submissions to make at this stage unless any member of the panel has any questions that I can help with.

CHAIRPERSON: Thank you Mr Coetzee. Would anyone else like to add anything to what has already been said? Mr Von Lieres?

ADV VON LIERES: If I may Mr Chairman, thank you. Mr Chairman, the position of my client is the following: The subpoena which was served on client contains various press statements, which were issued by the previous government. Some of them have been referred to, dated the 8th of October, the 10th of October. There were various meetings on the 10th of October at the World Trade Centre, and so forth.

But the gist of these press statements are that the previous government claimed responsibility for the operation that took

I will make it available, I just don't think it is relevant for the purposes of argument.

"I have ..."

the Minister of Justice carries on,

"...drafted a public apology in coordination with the President and the Deputy-President de Klerk, and a copy thereof is enclosed. I spoke to the President a few days ago and received the go ahead. Mr De Klerk is also happy.

The press statement containing the public apology, should in my view, be issued by the President's office. You may therefore instruct the State Attorney to settle the claim on the basis approved by the Cabinet and liaise with the President's Office on the issuing of the statement.

Hopefully..."

the letter concludes,

"...hopefully this will conclude the unfortunate incident. It is signed by Mr Omar."

Now, Mr Chairman, the apology which was later published or parts thereof, in various newspapers which is also part of the Police docket, includes amongst others the following: In the early hours of 8 October 1993, members of the then SADF

place in Umtata on the night of the 7th/8th of October and said that it had authorised that particular raid and had provided a variety of reasons in various statements why it had authorised the raid.

Now, Mr Chairman, subsequently we received documentation from your Commission, which came or contained part of the Police docket, which was made available to the Commission. We also made some enquiries and we also got some documentation, and in the Police docket, there was documentation emanating for example from the Minister of Justice, written to the Minister of Defence in which the Minister of Justice in a letter dated the 7th of July 1995, now Sir that is important, because that is now the present government so acting, said the following - Minister of Justice writing to the Minister of Defence:

“Dear Colleague, SADF raids in Umtata, 8 October 1994.

At a Cabinet meeting some time ago, I was instructed to negotiate a settlement of the claims against the government and to formulate an appropriate apology.

The claims would eventually with the approval of the Cabinet, settle on the following terms and then the amounts awarded to the parents of the various deceased are set out.”

From that you will see that both these Departments dealt with the matter as an ex gratia payment which does not imply an admission of criminal or civil liability of any sorts.

Now Sir, in investigating gross violations of human rights, as is the Commission's duty to do so, the legislature deemed it fit to provide a definition of gross violations, which you will find in Section 1 of the Act, it is Chapter 1, Section 1 under the heading definitions.

My learned colleague, Mr Coetzee, has already read this definition to you. I do not wish to burden the record unnecessarily by repeating what he has read, but may I make the point Mr Chairman, that a gross violation only comes into being if the killing, abduction, torture or severe ill-treatment of any person, is unlawful, has the quality of being an unlawful killing, an unlawful abduction, or an unlawful severe ill-treatment of any person.

If it was, if there was a lawful command which was not manifestly illegal, the execution of an order, is not unlawful and therefore it doesn't qualify as a gross violation because the element of unlawfulness is missing as a result of the fact that there was State authority to effect this particular act.

Now, let us ignore for the moment Mr Chairman, for the purpose of argument, the fact that youths were killed. Let's just talk about an act objectively, hypothetically. If an act is

authorised by the State, such as for example to spy in a neighbouring territory, and in the process of executing that act, some offence is committed, then that person may possibly be liable under the criminal law of the country in which the offence is committed, for prosecution if he is caught, but he can never be liable for any criminal act in the country from which he originated and which instructed him to execute that particular act.

Now Sir, the Truth and Reconciliation Commission and its organs, which includes the Investigating Unit as is provided for I think in Section 28 of the Act, exercises quasi judicial powers, functions and competencies.

It is trait law, but I think the case of the South African Defence and Aid Fund & Another v The Minister of Police, 1967 SA (1) 263 (a) at various passages in that judgment, makes the point of the competencies when you exercise quasi judicial powers, functions, and I refer you for example to page 269 from the letter A to page 271 against the letter E, and again page 272 against the letter C, to page 273 against the letter A.

And it deals in a composite manner Mr Chairman, with all the relevant authorities, so one doesn't need to read too much.

Once an organ has been identified as exercising quasi judicial powers, functions and competencies, then that organ must act in a certain manner to which I will refer in a second.

May I make the point that it is common cause I think, that the Truth and Reconciliation Commission, does exercise such quasi judicial powers. Firstly there is the power of subpoena, either under Section 29 or under Section 30.

Secondly there is the power that the Commission has to review matters. I refer you for example to Section 5(e), or for that matter to Section 36(4) where other Commissioners may review the question whether one of the co-Commissioners has an interest either financial or personal, and to consider the question whether it is of such a nature, that it may impinge on his functioning.

So Section 36(4) gives you the power of review. The Commission may grant amnesty as we all know, as set out in Section 20(6) and (8) for example. The Commission is empowered to conduct investigations. We all know that Section 28, Section 4 provides for that. And the Commission is entitled to make discretionary findings Sir which may impinge adversely on the rights and interests of other persons and or institutions.

So in as much Mr Chairman, as the Commission or any of its organs which includes the Investigating Unit, thus possesses and exercises these quasi judicial powers and duties, it is bound to apply the rules of natural justice, unless these are expressly excluded by legislation.

In this connection I can refer the Commission to Sacks v Minister of Justice 1934 (A) 11.

Now Sir, we all know and it is trait law and I don't really need to plague you with that, but the basis for the application of natural justice, is that not only must justice be done, but it must actually be seen to be done.

And this manifestly in my submission, includes that the quasi judicial power that the quasi judicial body is not entitled to exceed the limits of the power conferred on it by law.

So if the law then says Chairman, that you are only entitled to investigate a gross violation of human rights if it falls four square within the definition as provided for in Section 1, you don't have the power to investigate something that does not fall four squarely within the definition as given.

Let me immediately say of course, you don't have to have proof beyond reasonable doubt that it does fall in there, if you have a reasonable suspicion that a particular act falls within the definition, and complies with the elements required, then obviously you are entitled to investigate.

That is a matter of common sense if I may say so, and it is not our case that you must have proof beyond reasonable doubt, that is not the case at all. Then you can't investigate anything.

So reasonable suspicion Chairman, is quite sufficient to allow the Commission to exercise its powers, but this reasonable

suspicion must then satisfy each and every of the elements specified in the definition.

If you analyze the elements specified in the definition Chairman, may I suggest that there are four or five elements that have to be satisfied. Firstly, there must clearly be the unlawfulness, it is an element which must be there.

Secondly, it has to take place during the period specified, that is March 1, 1960 to 10 May 1994.

Thirdly it must have been commanded, what does it say here, the commission must have been advised, planned, directed, commanded or ordered by a person acting with a political motive.

That is quite clear, and so then you have the act itself, which constitutes, may constitute either a killing, an abduction, torture or severe ill-treatment or any attempt conspiracy, incitement, etc, of such an act.

Now Sir, for ease of reference, we sit here with killings. The rest of the offences are technically irrelevant, so we've got killings. We've got the time period during which it was committed, to fall four square within the period 1960 to 10 May 1994, we've got that. The other two elements, the question of unlawfulness and secondly, the requirement that the commission of this operation must have been advised, planned, directed, commanded or ordered by any person, acting with a political

motive, we don't have that on the documentation provided to us in the subpoena.

So we fall short of a reasonable suspicion in respect of two of the four elements that need to be present before the investigation can take place. Now, it is our submission Mr Chairman, that through out if regard is had to the press statements issued by the previous government, the bona fides of which have obviously been accepted by the present government as well as the apology by the present government, we come to a position where the objective facts, reasonably show that the purpose of the raid was to combat criminal activities by APLA.

The reason for the attack on the house, was not some political motive. There is no substance for that whatsoever, and secondly Sir, the operation having been authorised by the previous government, and that fact being accepted by the present government, brings the actual killing out of the parameters of the unlawful, which also needs to be present before an operation like this, would fall within the definition of a gross violation.

Consequently, on the facts that were made available to us in the subpoena in respect of which my client has to answer questions, the facts fall short of providing the necessary reasonable suspicion in connection with the two elements I have mentioned namely the unlawfulness and that the order must have been tainted by a political motive.

So, when we know if I may put it this way, that according to page 2 of the subpoena which was served on my client, the purpose of this particular meeting is in fact, this inquiry, is in fact to gain an understanding and I quote from the subpoena "of the context in which certain human rights violations were allegedly committed."

So we know that the purpose of this enquiry is to investigate human rights violations. The guide line for that investigation is a definition gross human rights.

Now, it is in a nutshell my submission on behalf of my client, that it is clear that certain of the constituent elements of the definition of gross human rights, are not present in the documentation and consequently, the legal effect of that is that in law a body is not empowered to inquire into such a situation, if the situation or the act complained of, does not fall within the ambit of the particular definition as is the case here.

That in a nutshell is my argument in connection with the question whether or not you have a mandate to enquire into the Umtata operation. I say that the elements which need to be present, are not present, the two that I have mentioned, and that consequently you are not empowered to enquire into this particular operation.

Finally Sir, that being so, if you were to enquire into this operation, you would actually involve yourself in an exercise of

power which the Commission does not possess, qua its legislation. That of course again, may impinge on the credibility of any finding that the Commission may make in respect of something which it investigates, in respect of which it has no real legal power to investigate.

It is my submission that if you analyze the position, you will find that your Commission does not have the power to investigate Umtata in view of the fact that Umtata was a government authorised operation.

If Sir, the argument is hypothetically to be advanced, that but maybe those people who actually pulled the trigger, committed some offence or another, then Sir, that is not the function of this Commission to investigate, that is the function of the Police, because if they had legitimate orders to do something and they didn't act in accordance with those orders, they may in fact have committed some offence.

But that doesn't bring the offence that they have committed, anywhere close to falling within the definition of a gross violation, then if you then persist on continuing on that basis, you are actually doing the Police's work for them. That is not your function, your function as a Commission with respect, is to identify the gross violations and to identify why did they take place and so forth and so forth, but not Police work.

So in all these circumstances, it is our submission that this is really the kernel of the problem. If I could just lastly refer you to one piece of law which I think is being pronounced in pretty straight forward English, I would like to mention the case of The Minister of Interior v Bechler & Others 1948 (3) 409 (A) 440 and I refer to the third paragraph, and may I - this is just to reinforce my argument.

The type of condition Mr Chairman, which requires compliance by administrative or quasi judicial tribunal, is referred to as a jurisdictional fact. A jurisdictional fact which must be present before it can exercise its power, is defined and described in this judgement by Mr, the acting Chief Justice, Justice Tindell as follows:

"It is a fact, the existence of which is contemplated by the legislature as a necessary prerequisite to the exercise of the statutory power.

The power itself is a discretionary one. Even though the jurisdictional facts exists, the authority in whom the power resides, is not bound to exercise it. On the other hand, if the jurisdictional fact does not exist, then the power may not be exercised and any purported exercise of the power, would be invalid."

In concluding I would like to say Mr Chairman, that where there is a non-compliance with a prejurisdictional prerequisites,

as I have identified the question of unlawfulness and the political motive, whether such non-compliance is occasion, maliciously or negligently, a Court is entitled to declare the exercise of such a power in this particular case, the holding of the inquiry ultra vires and null and void.

I again refer you to the Defence and Aid Fund case, at paragraph 34, pages 34 (G) to 35 (C). In the circumstances Chairman, although my client has indicated to me that he is very anxious to testify before you, I had to explain to him that it is important that the law be properly and purely implied and on the basis of my explanation, I was instructed by my client to proceed with this application, although he would much rather testify, he assured me.

But in the circumstances, Mr Chairman, because the law needs to be seen to be properly upheld, and properly applied, I am reluctantly constrained to request you to seize the inquiry into this operation and ask for such a ruling, thank you.

CHAIRPERSON: Thank you Mr Von Lieres. Are there any additional points that need to be made? Are you through Mr Von Lieres?

ADV VON LIERES: I am sorry, my attorney has just asked me to say that it is a letter dated the 8th of January 1986, which I should still hand in, and not the letter dated the 14th of November. I am through, thank you.

CHAIRPERSON: Thank you for that. Mr Coetzee and Mr Von Lieres, you have raised some very important matters with regard to this inquiry.

You will appreciate that we would need time to weigh up these objections, and demands, and to that end, because we take your work seriously, I propose that we will adjourn until half past three, which will give us an opportunity in the Commission, to weigh up the request you both have made. The Commission is adjourned.

COMMISSION ADJOURNED

ON RESUMPTION:R U L I N G

CHAIRPERSON: The Commission resumes its work, half past three. The Commission has given due consideration to the applications which have been placed before it.

On the matter of the objection to the continuing of this inquiry, regarding this being new work, I want to refer to the Second Amendment Act, 1997, 3(2), it has two sections, the first is (a) matters other than matters contemplated in paragraph (b), commenced by the said Committees, not later than the 14th of December 1997, but not yet finalised on that date.

The matter of the Umtata raid has been a matter which has been enjoying the consideration of this Commission, for a considerable amount of time, and certainly before that date and therefore the amending Act gives us the power to continue unfinished business. Therefore we do not accept that application.

On the more substantive matter concerning whether or not the Commission has the power, in terms of its functions to proceed with this inquiry, here again we are not prepared to accept that application and I will give a very brief summary of those reasons, and then we will supply fuller reasons at a later date, in writing if required.

Firstly, the whole question of whether or not this Commission has the right to inquire into matters which are lawful

or unlawful, and the argument was that this was the raid in Umtata in question, was lawful and was authorised by the State at the very highest level.

I refer you to Section 4 of the Promotion of National Unity and Reconciliation Act of 1995, and the functions which include under 4(a), the question whether such violations which of course obviously include killings, were the result of deliberate planning on the part of the State or a former State or any of their organs, or of any political organisation, liberation movement or other group or individual.

It is our view that this matter is still in dispute, and therefore it has to be inquired into in order to try and reach a finding. Indeed, the commission, the raid was authorised, and it has been stated publicly that the operation was intended to discover, if possible, seize, weapons and documents and capture. Nowhere does it say that the raid was authorised in order to kill and in particular to kill children.

This matter is, we believe in dispute and therefore it is a matter that needs to be inquired into and we believe that this inquiry should continue.

As far as to whether there is a political motive or otherwise, obviously any matter which a State enters into, may well have political motives, and of course the agents of the State,

may also or may not also, have a political motive, other than carrying out an order.

The only way to ascertain that of course, is to have an inquiry so as to get the fullest possible information in order to come to a conclusion.

One of the papers that were handed in to us, was the apology to victims of the SADF raid. For the sake of time, I am sure the entire letter or apology was not read out.

But I draw your attention to the third paragraph, which begins with the words "the raid on the house", and I want to read that paragraph.

"The raid on the house in Umtata was authorised on the strength of intelligence provided by the Security Forces." We believe that a further inquiry needs to be made into the source of the intelligence, provided by the Security Forces, other than that given by the SADF, and it goes on to say that it was being used as an arms cache for attacks against civilians in other parts of South Africa. And then the key sentence, "that information was inaccurate at the time of the operation, and the killing of the youthful occupants was unjustified and inexcusable." The raid may well have been authorised, it certainly did not include an order to kill at all costs.

We believe that this matter is still in debate, and needs to

be investigated. For these and other reasons which I will supply to the legal representatives, at a later time, we believe that this inquiry must continue and I would like us to proceed to that now.

MR COETZEE: As you please Mr Chairman. Mr Chairman, Gen Liebenberg is unfortunately not in a position to attend these hearings. I have discussed it with the previous Chairman. However, Gen Liebenberg would like to assist the Committee as far as possible. In this regard an affidavit has been prepared that I can read into the record, setting out in detail his knowledge of the Umtata operation, as well as an answer to the questions that formed part of the Section 29 notice given, as well as various medical certificates, indicating what his state of health is at this stage.

I beg leave to hand up the original affidavit as well as copies of the affidavit for the other Commissioners.

CHAIRPERSON: Thank you.

MR COETZEE: The affidavit is in Afrikaans and I will read it out, I am going to go to the main body of the affidavit, paragraph 1 thereof.

CHAIRPERSON: Just one moment please, if I may, just to make absolutely sure that the translators are ready in case there are those who need it.

Can I have some indication, are you ready to go, thank you Mr Coetzee.

MR COETZEE:

"I am a mature male person and retired Head of the South African Army and I served in the period of 1990 up until 1993.

I am personally aware of the information here and I am capable of making this declaration. I want to put it very clearly that I am completely committed to national unity and reconciliation, and to work with the TRC. Because of circumstances outside of my control, I was not capable to appear before the Committee on the 31st of March 1998.

Because of that, I also attach this as Annexure L1A medical certificate which was given to us by Major C.J.S. Duvenhage, the Head of Department, Internal Medicine at 1st Military Hospital. It is dated the 26th of March 1998 and it explains my position.

I was also not capable to appear on the 4th and the 5th of May 1998 and a medical certificate marked Annexure L1B is attached to this.

I actually consulted with my legal representatives and I gave them instructions to give you this affidavit on behalf of my appearance in front of the Committee, in order to give you a complete version of the events and what the subjects is of the Section 29, and to give it to the Commission.

It also should be mentioned that as far - that I am completely willing, as far as my physical means is concerned, and if any other questions should arise, I will give a written answer to them.

Before I tell you exactly what happened within my ... I understand that the interpreter said I must slow down a bit, so I will.

CHAIRPERSON: Right, please we have noted that, if you will just take it a little slower, thank you.

MR COETZEE:

"Before I describe the events as far as it is within my knowledge, I also would like to put that even though I am not aware of the identities of the operatives in this specific operation, I do not think it is proper for the Committee to insist that we make the names of these people known.

My personal and moral reasons why I have this opinion, is the following: Paragraph 3.1, the operation which is the subject of the Committee's investigation, was evidently an operation which was completely sanctioned not only by the State President, but also by the people of the Security Council.

Because of my position whilst I was Head of the South African Defence Force, I was obligated to carry out. I want to put it very clearly that when we exercised this

instruction, there was no political motive and it was according to South African Defence Force and its statutory obligation, was legal order coming from the State President, and the Security Council, and it was executed without any political motive, hence I want to qualify this, that it was an act of State, the executioners of this specific operation had no choice as to execute a legal order from the State.

3.2, in considering what is set out in this subparagraph 3.1 above, I want to put it very clearly that I feel morally obligated to - I have received an instruction from the State President and the Security Council which I then gave through to the South African Defence Force to handle as such and to honour it, and that they should protect a legal order.

It is a fact that the South African National Defence at the moment, the subject of rationalisation and transformation. Furthermore the South African National Defence Force thus have amongst its members ex-members of APLA, MK and also of course the South African Defence Force.

It is a well known military doctrine that unity is a very important component of any arms force in general and if the names of the executioners of this operation are known, it

would also effect the spirit of a Defence Force, and they can't function without that feeling of unity.

Any transformation and integration processes, which are at this stage part of the South African National Defence Force, would be very badly influenced and it would create unnecessary tensions which the South African National Defence Force cannot afford at this stage.

It also should be known that if the names of the executioners are made known, there will be no doubt whatsoever, that it will have a negative influence on the South African National Defence Force in the future.

If the foot soldiers which work on ground level, realises that they cannot rely on the credibility and loyalty and support of his Commanders, it will feel to him that in any instructions, the fact that he should complete an operation of whatever nature, there won't, there might be a subjective judgment afterwards.

In military doctrines and discipline with which any military force might function, it is absolutely not possible and according to myself, it should not be allowed that the foot soldiers should be placed in such a dilemma. It will be detrimental to the total discipline and the working order of any army and it might be contra-productive.

Further it should be mentioned that as a dilemma we are talking about here, it shouldn't only be limited to a specific Unit which was involved in the operation, but it will have an effect on the total South African National Army.

At this stage I will put it clearly that the objections in the above paragraphs is my personal, moral objections and even so it is also judicial objections which might be represented by my legal representative.

The South African Army has a proud history of which you will find support, loyalty and cooperation. The South African National Army is busy undergoing a transformation process which is not at all times very easy to integrate in the current Forces.

My respectful opinion is that this process rather would be helped, should be helped and supported and in the name of national unity and reconciliation.

In the end, I can with all respect not see why the names of the operatives should be disclosed in order for the Commission to determine whether human rights were violated or not.

We all know that five persons died, and there is no evidence or indication of any evidence that any person, that any people were mistreated, tortured or kidnapped.

The facts of the operation which I give afterwards, is to the best of my knowledge, and I also would like the Committee to know that both the Chairman and the sub-Chairman of the Commission, should in the public, make it known that the Commission was not interested in the individual names of the executioners of these instructions.

To the best of my knowledge, the President of the State of the Republic of South Africa, made a similar statement.

What is of cardinal importance is that their Honourable Judges Wilson and Mall, during a personal meeting in 1997, told me that the Amnesty Committee was not interested in the names of the people who executed these operations.

I am of the feeling that the disclosure of the names of the executioners is not in public interest, and in these circumstances, I would like to say that, and I would be adamant, to withhold the names of the people who executed this operation.

Me, in my representative capacity as Head of the South African Army during this relevant time period, do actually accept responsibility for this specific operation.

Paragraph 4, now following I would like to deal with the facts as I remember them.

I would like to put it that at the end of October 1993, I retired as Chief of the South African Defence Force. Full

documentation is not available to me with respect to the operations that the TRC is seeking, and with the exclusion of certain documentation that was published or disclosed before the previous appearance on March 31, 1998, I have to rely on my memory and the incomplete documentation that is in my possession to this effect.

In this relevant documentation, if the Committee would supply me with such documentation, I would give a more detailed and explanatory statement.

To the best of my knowledge, and if I remember the facts as correct, during the first week of October 1993 I was out of town on official business for a few days, Lieutenant General, as he was then, George L. Meiring, had to the best of my knowledge, acted as the non-official Head of the South African Defence Force.

During the morning of the 7th of October 1993, after my return, the Chief of the Army, Gen Meiring came to speak to me in my office and told me that the Commissioner of Police, Gen Johan van der Merwe, gave information to him, that was discovered and it was discovered that an APLA terrorist was caught by the South African Police and he was being questioned in Bloemfontein.

4.3 - further Gen Meiring told me, paragraph 4.3.1 the information amongst others had an address and a

description of the house in the outskirts of Umtata that APLA used as a base for operations against the citizens of the Republic of South Africa.

4.3.2 - in my absence Gen Meiring received authorization from the Minister of Justice, Mr Kobie Coetzee to execute a low risk reconnaissance mission to confirm the happenings at this house.

4.3.3 - the low risk reconnaissance mission confirmed this APLA terrorist.

4.3.4- after this authorization was received by Gen Meiring from Kobie Coetzee, and also had the authorization of the then State President, Mr F.W. de Klerk, to do more detailed reconnaissance work.

4.3.5 - elements of the South African Defence Force executed a more detailed reconnaissance mission to establish the place and plans of this house in Umtata. It was also confirmed that the house was only occupied by men at this time, one of the members of the reconnaissance group stayed behind in order to carry out further reconnaissance work, and the evening of the attack, it was confirmed that the house was indeed occupied.

The Army at this time, was ready on the night of the 7th/8th of October 1993, to move in to execute their task.

4.4 - the morning of the 7th of October 1993, before the Security Council met, this particular day, I had a commitment with the State President after my meeting with Gen Meiring, I had to leave to meet with the State President.

4.5 - At this meeting, the State President, in the State President's office, the following persons were present:

4.5.1 - Mr F.W. de Klerk, Chairman,

4.5.2 - Mr R.F. Botha, Minister of Foreign Affairs, Mr Kobie Coetzee, Gen Meiring, and myself. I cannot remember if Mr Hernus Kriel was also present. I am of the opinion that the Commissioner of Police, Gen Johan van der Merwe was also present during this meeting. More information was established in this reconnaissance mission as well as information that came to the fore during the Police's interrogation of the particular APLA terrorist.

This information in the situation, moved the State President to the opinion that Mr Kobie Coetzee gave the decision and the instruction to lead an attack on this basis.

4.8 - I focused the State President's attention to the fact that if the South African Defence Force would attack the bases and destroy the terrorist, Mr Holomisa would use these bodies and go on to a propaganda war and they would

also win it, and the South African Defence Force and the government could be put in shame.

I then also pointed out to the President that the further dilemma if we brought the terrorist to the front for means of an interdict, we could be forced to give the terrorist back to the Transkei, the South African Police Force at that stage, had similar experiences in the past.

Even despite all of this, it was still decided that one prisoner should be brought back to the Republic of South Africa alive and as many of them as possible, as long as it wouldn't endanger our own troops.

After this, everybody that attended this specific meeting attended the scheduled State Security Council meeting, which started immediately after that and it also had Mr Meiring there, which at that stage was not a member of the State Security Council.

The State President explained the situation as far as APLA was concerned, as good as possible to the State Security Council, and to the best of my knowledge and recollection, Gen Johan van der Merwe, also gave certain input, and he also questioned, answered specific questions.

He asked colleagues, are you with us, do we have to go forward to go on with this, and everybody who was present

there, said yes. The effect of this was that the Security Council authorised the operation.

Because of this, the State President told Gen Meiring that he was pulling out of this, he was retreating from the further procedure of the meeting. While Meiring left the room Mr R.F. Botha told Mr Meiring, go and "voeter hulle op".

4.15 - After I read the operational directive myself, I amended it so it could be read that as many as prisoners of war could be taken as possible, and they should be brought to the Republic of South Africa. The taking of prisoners of war is actually, should not be placed as a priority above the safety of our own troops.

The operation was launched in the night, and the next day media declarations were made both by the Transkei as well as by the South African Defence Force.

Gen Meiring under whose command these elements were executed and who was also the Chief Commander with regard to the specific operation, did after he thought about it, tell me that the South African Defence Force's reconnaissance during the evening of the 7th of October 1993, was inside the house and confirmed that the house was occupied by men only.

The amount of terrorists that were present in the house as well as how the house was built, was once again confirmed.

4.18 - Gen Meiring also told me that it was planned to execute a very quiet insurgence operation, it was actually not successful and the front door had to be forced open, and the operatives entered the living room, where they did not expect any terrorists.

One of the people there was busy to pull a gun from underneath the mattress or the blanket. This action was seen by the operatives and consequently they opened fire.

The normal house cleaning procedure was followed, and the bedrooms were stormed where they expected the terrorists to be found. There was no one there though.

The normal procedures were executed during this operation. The specific person who did the reconnaissance to whom we refer in paragraph 18 above, never told me that there were any children in the house.

During the operation several hand weapons and small calibre weapons of communist origin and also APLA hand book was brought back, text book.

As said above, I would like to put it very clearly, that there was no political motive behind this operation. As already mentioned it was a direct instruction from the State President, and the State Security Council, and me in my

capacity as Head of the South African Defence Force, I adhered to my statutory obligation and I also adhered to the South African Army's obligation to do exactly as the State President and the State Security Council, wanted me to do.

With information that was given to me, I was also satisfied that the correct procedure was followed for house cleaning operations and just to make it as complete as possible, I attach an Annexure of the events as it took place and it was given to me by H.J. Coetzee on the 15th of October 1993 during we had at the negotiations we had at the World Trade Centre and I will mark it is Annexure L2.

To the best of my capability I will answer seriatim on the questions as put out to me in terms of Section 29 of Act 34 of 1995. We refer to the first question that was posed, on or about the 8th of October 1993 and at number 47 A.J. Jordan Street, Northcrest Umtata, certain members of the Defence Force allegedly shot and killed and then there is a list of names.

That was the question on the Section 29 notice. Gen Liebenberg answered thereto as follows, in paragraph 6 of this affidavit. The contents of this paragraph is the unfortunate result of this operation. As an Intelligence report, I was satisfied that the address is as put out, was indeed an APLA facility from where actions were launched against people from South Africa.

The second question on the notice of Section 29 was as follows, I as said before, at the end of October, retired from the South African Defence Force. This is how Gen Liebenberg handles this question, I, as said previously retired at the end of October 1993 from the South African Defence Force.

I do not have possession of documents that are there, and I have no document in my possession that the Committee put before me. To the best of my knowledge, this was through the instruction that I gave to the South African Defence Force, it is taken in paragraph 4.15, in my affidavit supra.

Paragraph 8 reads as follows, paragraph 3 thereof, because of my absence as put forward, during my affidavit, the initial planning of the operation was done by Gen Meiring. I underscribed it later.

Paragraph 3.1 of the notice reads as follows: months before the operation of the subject that is part of this investigation, the need was identified to establish the enemy activities in the Eastern Cape, to lead proper intelligence investigations as to the activities of APLA in the Transkei.

The APLA activity was not limited to the Eastern Cape, but took place in Free State as well as in the Western Cape. This was as a result of the need for the government to give instruction to the security community, to gather information that would lead to this particular operation. As mentioned before, a sharpened

hostile activity by members of APLA as in attacks on farms, attacks on innocent citizens and similar operations, would be read in conjunction with the intelligence that was collected.

This moved the government to give instruction as put out above.

I wish to put it clearly that the pro's and cons of this particular investigation, was discussed thoroughly by the government, seen in the light specifically of the sensitive nature.

With regard to paragraph 10 of Gen Liebenberg's affidavit, at paragraph 3.2 Gen Meiring was appointed as Chief. In the practice this meant to me that he had to coordinate activities of the South African Air Force and South African Medical Services, who had part in the coordination of this operation.

In my absence Gen Meiring established if the specific operation could be done or not. With my return, I confirmed the possibility of carrying out this operation.

10.3, the non-military repercussions of this operation is of the nature - Gen Liebenberg handles the following question as follows: Paragraph 3.3, who was the Commander to whom the plan in broad outline was presented for further planning? Gen Liebenberg handles with the question as follows. The plan was initiated by Gen G.L. Meiring. I am not sure of which officers he made use to finalise the plan, but after the completion of this, it was submitted to me and I authorised it.

Paragraph 3.4, how many coordinating conferences if any, were held between the SADF and SAP in order to formulate a plan for the raid? Gen Liebenberg answered as follows: Coordinating the South African Police basically dealt over which information the South African Police obtained, and this gave lead to the execution of the operation. I have no further information or particulars which could be of any help to the Commission with regard to this question.

Paragraph 3.5, who was the Commander to whom the final plan including the support plans, were presented for approval? What information was available to him or her at this stage to persuade him or her to go ahead as planned? The plan including the support plan was finalised by Gen G.L. Meiring, who submitted it to me on the morning of the 7th of October 1993 for my approval.

Also the operation was discussed during the initial meeting and the complete hearing of the State Security Council afterwards, and it was also debated there and I received instructions from the State President, and also the Security Council to execute this operation, and after I made myself known with the facts that the operation could be executed, the formal instruction in the form of an operational directive, was supported.

Paragraph 3.6, what was the outcome of the debriefing after the conclusion of the operation? Gen Liebenberg deals with this

in paragraph 14 of his affidavit. I did not attend the after operative questioning, it was Gen Meiring who was the Head Executioner of the operation, and it was his responsibility and task.

Paragraph 4, results of the ballistic tests conducted on weapons found at the house. I accept the results of the ballistic tests must be in the possession of the Police, consequently I cannot give any comment on this question.

Paragraph 5, documents that were discovered at the house, must be produced for scrutiny by the TRC. As already mentioned in my affidavit supra there were certain other documentation found, but it is not in my possession and consequently I cannot give it to the Committee.

In conclusion in paragraph 17 of his affidavit, Gen Liebenberg states the following. I would like to put it that I commit myself completely to national unity and reconciliation and I hope the Committee treats me as such, and I also show understanding for a very important military doctrines as I have put it out in my affidavit.

The affidavit is then signed by Gen Liebenberg in front of a Commissioner of Oaths. At the beginning of the reading of this affidavit, I indicated that he was not in a position, and it is primarily based on Annexure LIB, and specifically paragraph 5 thereof where the opinion is stated in paragraph, the General is

not capable of appearing in the court and then the various medical reasons for this recommendation and opinion, is stated in detail in this medical report and it is my respectful submission that Gen Liebenberg's non-attendance should be excused.

As far as was humanly possible, we have tried to assist the panel by answering the questions by way of an affidavit, but his non-attendance be excused. The explanation tendered is reasonable and I think it should be accepted.

CHAIRPERSON: Thank you Mr Coetzee. We have received the affidavit together with the medical certificates. On the basis of that, Gen Liebenberg is obviously excused from attending.

We are appreciative that he has actually completed this affidavit, despite his ill health. Before we proceed, I am wondering if Gen Meiring and you may prefer to handle this as we proceed, but is there any comment or anything that you would like to dispute which is contained in the affidavit before us?

ADV VON LIERES: Mr Chairman, we haven't had prior notification of this affidavit, we would like to have a look at it and if we could get an opportunity at nine o'clock tomorrow morning, that would be appreciated.

Sorry, I don't think there is much, I just want to get definite instructions.

CHAIRPERSON: That is in order, thank you. Are you then ready Gen Meiring for, to deliver your own statement if you have

such a statement or affidavit or can we proceed with the questions?

GEN MEIRING: I think I would prefer to continue with my affidavit in one stretch, and maybe it will take too long for your perusal, but as you wish Chairman.

CHAIRPERSON: As you know Gen Meiring, and your legal representatives, I assumed the Chairpersonship of this Committee only this afternoon, and I am not sure whether you have actually handed in an affidavit? No, so we do not have that before us?

ADV VON LIERES: Chairman, Gen Meiring is ready to start with his opening remarks, which he would like to make before we come to the questions, and maybe when he has finished his opening remarks, it maybe a convenient stage to take the adjournment until tomorrow morning, then he can read Gen Liebenberg's affidavit and then respond to the questions, and Gen Liebenberg tomorrow morning at nine o'clock before the questions.

CHAIRPERSON: The only point I want to make here is that it is now almost twenty past four, I am not sure how long the opening remarks are and I am not bothered by that, because we are quite prepared to go on.

But if we are going to try and complete the work, then we really need to move quite speedily, I think it is in the interest of all of us, but I would have no objection and I don't think my

colleagues will have an objection for the opening remarks to be made now, and then for us to adjourn until nine o'clock tomorrow morning, if that is your wish.

ADV VON LIERES: Mr Chairman, if you could indicate a time, would you like to sit till five o'clock or half past five?

CHAIRPERSON: I would like to suggest that we, I just consult my colleagues before I rule for them, if you will give me one second, we are just going to check to see what the situation is where the interpreters are concerned. Normally we try to conclude round about 4.30 in order for them to finish their work.

We are just checking now, perhaps if we can continue till five, it might be useful to save some time tomorrow. We have ascertained that at least one of the translators has to catch a plane, so that we suggest that we go on, we receive Gen Meiring's opening remarks, and if that takes us beyond quarter to five, then unfortunately we will have to adjourn at that point.

ADV VON LIERES: Mr Chairman, they will be in English, it was drafted that way for ease of the Commission, so maybe we don't need the interpreters.

CHAIRPERSON: Officially we try to make absolutely sure that people are given at least the translations, but if we can come to some meeting of minds on this, and I can say that at quarter to five, the translators could leave, and we will just see how far

we've got. Thank you, Gen Meiring, will you the proceed with your opening remarks, thank you.

GEN MEIRING: Thank you.

CHAIRPERSON: Sorry, will we have a copy of that before we leave tonight, or will we just simply take notes?

ADV VON LIERES: Mr Chairman, we will provide you with copies tomorrow morning at nine o'clock, it must just be photostatted still.

CHAIRPERSON: Thank you, please proceed.

GEN MEIRING: Thank you Chairman.

At the outset, I would like to place on record Chairman, that I regret that the circumstances pertaining to the night of the 8th of October 1993, resulted in the loss of any life and in this case in fact the lives of five youths.

It is Sir, a sad commentary amongst society that the world over revolutionary movements prey and rely on women and youths as part of their strategy, (indistinct) and armoury.

It is also Sir, documented that where operations were mounted and youths were killed, such circumstances were always propagandistically exploited by these movements against the legitimate government of the day. In our case, it was no different.

During the Umtata operation of 8 October 1993, I was then the Chief of the Army, of the South African Defence Force

at the time. Shortly thereafter that is on the 1st of November 1993, I became Chief of the South African Defence Force and then later, Chief of the SANDF where I hold the same position presently.

In my capacity as Chief of the Army, I inter alia had access to, attended briefings and was briefed on a regular basis by both the South African Police, the South African Defence Force regarding the security situation pertaining to the Republic of South Africa.

In this same capacity, I only had authority to employ military personnel to act on behalf of the State. Over the period 1991 to 1993, I became aware of the escalating nature of violence being perpetrated by the Azanian Peoples' Liberation Army, APLA, that is the armed wing of the PAN Africanist Congress.

Such violence included murder, sabotage, robbery, assault, arson, the throwing of hand grenades and other criminal and terrorist acts.

The summary of which for the period December 1992 to October 1993, I will dwell on a little bit more fully, although not exhaustively.

As from the end of November 1992, APLA raids on the RSA territory increased considerably. A number of the attacks were particularly gruesome. I will mention a few of them.

A bomb explosion on the Spur restaurant in Queenstown killing one client and injuring 18 people. That Sir was reported in the Weekly Mail of 4 December 1992.

The Trow family was attacked with hand grenades and petrol bombs in two separate attacks on the family home.

It was reported in the Rapport on the 6th of December 1992.

In Ficksburg a widow and her children were attacked at night with two hand grenades in the children's room followed by automatic gunfire and a petrol bomb.

A Policeman, an innocent bystander, also shot in this process. This was reported by the Volksblad on the 12th of December 1992.

By mid-1992 a 15 year old Leonie Pretorius was killed by APLA in an attack on their family home by night. The father subsequently appealed through the media, to the government to protect its citizens by acting against the perpetrators across the Transkei borders.

This was reported by the Citizen on the 21st of December 1992, and in the Rapport on the 27th of December 1992.

Two people were wounded in the Steaks restaurant in Claremont, reported by the Argus on the 28th of December 1992.

Further repeated APLA attacks on the Police in which (indistinct) were used to puncture tyres of pursuers. A young man died in Beaufort West in the Yellowwoods Motel Bar, this was reported by the Rapport on the 21st of March 1993.

A man was killed while passing Boipatong on his way to work in his vehicle. Another three people were killed in the Johannesburg area in the same week, reported in the Transvaler on the 22nd of March 1993.

APLA attack on a school bus failed whereupon a mother and two children were killed instead on their way to school, the 20th of March 1993. APLA Commander Sabelo Palma declares that they killed school children with the intention of harming whites where it hurts most, reported in the Burger on the 6th of April 1993.

The Highgate Hotel, East London was attacked, killing five civilians and injuring seven. Four Policemen were killed in an ambush in Soweto, five were wounded. The Citizen of 6 May 1993.

PAC boasts in the press that they had killed 64 Policemen in the first four months of 1993. APLA cadres were arrested in Natal before they could attack public bars. It was reported in the Natal Mercury of the 31st of May 1993.

On 3 July 1993, five people were killed and three wounded in an APLA attack on a supermarket in Wesselsbron in the Free State.

25 July 1993, APLA attacks the St James Church in Cape Town, killing 12 people and wounding 54.

During August 1993, an oil depot was attacked in East London using an RPG 7 rocket, a Policeman was also shot.

Reported in the Citizen.

White couple in De Deur was attacked and robbed by APLA cadres, reported by the Beeld of the 6th of September 1993.

Furthermore APLA leaders also made frequent statement reported by the press, promising more aggression.

They accepted the responsibility of the loss as I have listed above. An opinion expressed by an APLA leader reported by the Citizen of 4th May 1993 states the following: We have reached our second stage of guerilla warfare, it has now become a peoples' war and therefore must include people. My call to the youth is that the barrel of the gun is the only language."

Boasting by APLA, the Citizen of the 18th of June 1993, that in less than six months, more than 90 Security Force members had been killed in 120 operations of which 80 were in rural areas.

The same time Sir, a war of words also raged in the press. Johnny Majose of the APLA declared according to Beeld, on the 2nd of December 1992, war to rage in the RSA promising at the same time many more attacks like the one on the golf course.

Mr Hernus Kriel, the Minister of Safety and Security appealed to APLA to control their members or expect to feel the power of the Police action, that was mentioned on the 4th of December 1992.

The PAC youth wing threatened with more APLA attacks should any APLA leaders be arrested. Major General Holomisa, the then Transkei leader threatened to get outside military help, should the RSA Security Force undertake hot pursuits across the border. That was on the 28th of December 1992.

Sir, more than 50 terrorist attacks were undertaken into the RSA by APLA cadres across the Transkei border in the calendar year preceding the 8th of October 1993.

Apart from the incidents mentioned in paragraph 3 above, the following APLA attacks were also reported. From October 1992 to December 1992, four attacks on farm houses, seven attacks on vehicles, one armed robbery, one attack on a restaurant.

From January 1993 to the 8th of October 1993, one attack on a farm house, four armed robberies, one car bomb, and 19 attacks on vehicles.

As I said Sir, what I have read to you is not exhaustive.

The ever escalating numbers of incidents in the Eastern/Western Cape apparently emanated from the Transkei where APLA was based. The position in respect of various chains, agencies involved in the liberation struggle then deteriorated to such an extent that the Secretary General of the United Nations recommended that "the Goldstone Commission undertake a series of investigations into the functioning and operation of certain agencies, inter alia the Azanian Peoples' Liberation Movement".

Following on these recommendation, a Commission of Inquiry regarding the prevention of public violence, known as the Goldstone Commission, conducted an investigation into the activities of APLA.

On the 15th of March 1993, the Commission inter alia reported that-

"Firstly, APLA uses Transkei as a springboard for attacks into the Republic of South Africa. Arms and ammunition were stored in the Transkei for use by APLA leaders. Secondly, APLA's operational activities were aimed at

members of the South African Police, the South African Defence Force and civilians in general.

Thirdly, APLA members have received training in Transkei. Fourthly, arms and explosives have been smuggled into the Republic of South Africa and Transkei for use by APLA members.

Fifthly, APLA's internal high Command for the Republic was based in the Transkei.

When six, the Commission's findings were not refuted in the Transkei's inaction, created circumstances favouring continued APLA operations".

Government's attitude and interpretation was that subsequent to the Goldstone report, situations deteriorated further. Despite ongoing negotiations APLA had time and again refused to abandon its armed struggle.

Evidence indicated that APLA had continued to make use of the Transkei in his actions against South Africa, in a course of which a number of civilians have been brutally murdered.

It is common knowledge that APLA openly accepts the responsibility for a number of these attacks.

The state of affairs caused concern and was discussed by the State Security Council. I will try and read for you as an example a part out of a State Security meeting.

A pertinent fact that was a meeting, number 11 of 1993, meeting of the State Security Council, 19 August 1993. Teenwoordig Voorsitter, E.W. de Klerk, Staatspresident, Ministers R.F. Botha, Minister van Buitelandse sake en Dr D.J. de Villiers, Minister van Openbare Ondernemings, Mr H.J. Coetzee, Min of Justice and Defence, Min Vlok, Min of Correctional Services, S.E. de Beer, Min of Education, Kriel, Min of Law and Order, Meyer for part of the meeting, Min of State Development and Communication and Fourie, Min of Ground Affairs, Ground and Water Affairs.

The relevant passage I would like to read to you was paragraph 1.1.9(b) - the information concerning the training of APLA members in the Transkei and as soon as possible the Min of Justice and also of Law and Order, they should receive information concerning the training of these APLA people."

So far the example quoted out of the minutes of the State Security meeting. Regarding the PAC and its activities, reference can also be made to the Mortimer submissions, paragraph 32 to 34, that is attached to the present TRC subpoena. If I can get it quickly Sir, within a minute, I will read it to you.

After the banning of the PAC in 1960, militant PAC members founded the para-military movement called Poqo, ie pure, we stand alone or back alone.

Poqo's aim was to create a climate of chaos and panic through carefully planned and well executed armed action.

During the period of 1962 to 1963, Poqo was responsible for isolated incidents, but in 1963, the SAP arrested the most prominent Poqo leaders and thus effectively neutralised the organisation.

In 1968 the military wing of the PAC became known as the Azanian People's Liberation Army, APLA. The aim of the Pan Africanist Congress was to overthrow the South African government by revolutionary means to establish an Africanist social democracy.

The prime aim of APLA was the seizure of State political power by means of armed revolution. The PAC/APLA strategy for the takeover of government was based on the classic revolutionary model, that is a national liberation struggle or people's war and (b) a social revolution with the aim of establishing a new socialist order.

So far that from the Mortimer submission.

Government considered the situation worrisome in view of the effect that it had on the public, and required it to be

addressed urgently. The South African Police were monitoring the situation.

Sometime during September 1993, the South African Police approached the South African Defence Force advising it that they had obtained information which identifies a particular house on the outskirts of Umtata as an APLA facility and as a starting point from which attacks were being launched against targets in the Eastern Cape and the Western Cape.

The South African Police also advised that the information had indicated that a large number of weapons including AK47's, machine guns, rifles, Easy machine guns, R1 rifles, rocket launchers, hand grenades and the like, were stored at this particular facility and that these had been there since September 1993, when the actually had actually seen the weaponry.

The Police had provided the address of the (indistinct) as being 47 A.C. Jordan Street, Northcrest, Umtata and requested the South African Defence Force's assistance in verifying this information.

On the 1st of October Chairperson, 1993, after I obtained permission from the then Minister of Defence, Mr Kobie Coetzee, to cause a low risk reconnaissance to be mounted, I issued the following instructions: to verify the address,

to be on standby to do a military attack on the target if such approval was to be forthcoming from the State President.

The purpose of these instructions was to obtain intelligence, to either verify or refute the information provided by the South African Police, that the house at 47 A.C. Jordan Street, Northcrest Umtata, was being used by APLA as a springboard to launch criminal acts of the type that I have just mentioned to you inter alia in the Eastern and Western Cape.

On the 5th of October 1993 reconnaissance confirmed the broad information that the house was situated at an address of 47 A.C. Jordan Street, that the data provided by the Police informants coincided with what was visible and what could be observed.

The contents of the house could not be confirmed. Subsequent authorization for a more detailed reconnaissance was then given by Min Coetzee. At this stage Sir, it is common knowledge that the then South African government has made public all relevant intelligence emanating from the South African Police and South African Defence Force on which the decision to strike in Umtata was based.

I confirmed the facts referred to by Gen Van der Merwe during a press conference on the 8th of October 1993 at the Union Building.

It is attached, but I will also read it through to you Sir. I quote the relevant passage. I was advised that I need not read it, but for I think to make it thorough, I might just read it. I quote "since the findings of the Goldstone Commission ...

ADV VON LIERES: I am sorry Mr Chairman, the subpoena that was served on my client, contains all the press reports and these are extracts from those press reports attached to the subpoena that he is going to read, just for clarity sake. Thank you.

CHAIRPERSON: Thank you. Gen Meiring?

GEN MEIRING: Thank you Sir. I quote:

"Since the findings of the Goldstone Commission, the following incidents occurred in which regarding to information, the disposal of South African Police, APLA members or weapons coming from the Transkei, were involved."

And further on page 4, it again stated:

"During September this year, the South African Police arrested a man in connection with an illegal possession of hand grenades. During questioning it emerged that this suspect was a foreign trained APLA terrorist, who was allegedly involved in the murder of

a number of persons inside the Republic of South Africa in July 1993. This suspect also identified another APLA member who is allegedly involved in a number of murders in the Republic. This suspect was also arrested and both suspects are now being detained in terms of Section 29 of the Internal Security Act. Both the subjects will appear in court in due course. During further questioning of the first suspect he alleged he was personally involved in processing of certain weapons at 47 A.C. Jordan Street, Northcrest Umtata. This is the house raided by the South African Defence Force. These weapons according to the report, including 13 AK47 rifles, 150 hand grenades, 2 light machine guns and other weaponry. This information was given to the South African Defence Force which conducted ongoing reconnaissance of the house at 47 A.C. Jordan Street, Northcrest, Umtata. Information received to the reconnaissance was in turn verified with the suspect and found to be reliable. Questioning of the first suspect was video taped by the South African Police, and will be made available to the Attorney General. Investigations are continuing and are at present at a sensitive stage. Further arrests may follow."

Sir, it is now 16h42, if I continue, I will go beyond 16h45 in a specific phrase of this, perhaps I should stop here, but I am at your disposal Sir.

CHAIRPERSON: Just to save time, are we agreed that the interpreters can be dispensed with? I don't want to be accused later on of not having interpreters available? If it is agreeable, then I must say I would prefer Gen Meiring to continue, because then we would have the whole document before the Commission, and we could start fresh tomorrow morning.

Let me just consult with my colleagues. Unless you have, you know you are tired or whatever, we are prepared to continue until you have completed your opening remarks.

GEN MEIRING: Excuse me Sir, the operational instructions are in Afrikaans, I might read them to you. It might be that you would like to have them verified. This is not very far from now.

CHAIRPERSON: I understand one of the interpreters is willing to stay on.

GEN MEIRING: I am at your disposal.

ADV VON LIERES: Let's carry on.

CHAIRPERSON: Okay, let's go on.

GEN MEIRING: Thank you very much. I have stopped where I closed the quote by Gen Van der Merwe. I then continue with my submission.

At that point in time Sir, I myself referred to the following, You have heard the Commissioner of Police verify that certain specific information became available. As a result of this information, it was decided that a specific low risk reconnaissance were to be taken by the South African Army to verify the information whether it had substance or not.

All the information ladies and gentlemen, was verified, except the presence of weapons which could not be verified because it was inside the house. It was then jointly decided to launch an operation to clear that house, by confiscating documents and weapons and the possibility to take prisoners. The operation was launched by a small team in the early hours of this morning.

A number of these team members entered the house and found five people who reacted offensively. Action was taken against them. Documents and a number of weapons were found and these were taken at the house. The team then withdrew after spending only 15 minutes at the house and not 27 as was at first reported.

There was not a large quantity of weapons found in the house, although there were indications that provision had been made to store large quantities of weapons in the area.

There was no interference with the team at all, and they all returned safely with no losses."

On the 15th of October Sir, at the World Trade Centre Min Coetzee made available the following further facts: "Since 22nd February 1991, APLA has allegedly been involved in 54 terror attacks in South Africa. Clearly APLA is waging an armed struggle against innocent civilians. This must be seen against the background of the following, that APLA has ignored all the resolutions passed at the multi party negotiating forum pertaining to the kerbing of violence, that APLA still refuses to end or even suspend its armed struggle or sign the national peace accord, and continued threads uttered as recently as 23 September by APLA's Chief of Staff, have been made. The following, APLA itself admitted in a publication called Invo, quoting Mr Lieso Marly, Border Regional Chairman of the PAC, that it was recruiting and training youths.

APLA is therefore not only abusing youths for military training, but clearly is using them as human shields to inhibit possible Security Force action. Attention is also drawn to a report in the Pretoria News of the 31st of August 1993, according to which the PAC said it was not satisfied with the level of militancy of its youth.

The provocative challenge was made at the opening of the Mushes High School at Maluti by Mr Gilbert Seneki, a PAC spokesman. He said that if other organisations were afraid to use

slogans such as "kill the boer, kill the farmer", your duty is to adopt these slogans, that said by this particular individual.

Therefore given the fact that APLA abuses juveniles for terrorist purposes, the only way to prevent further incidents of this nature in future, would be for APLA/PAC to abandon their armed struggle.

The operation was based on intelligence initially provided by three suspects in detention. The following intelligence and sequence of events starting on 25 July 1993 resulted in the Umtata operation on the 8th October 1993.

On 25 July, the South African Police arrested two men on a passenger bus at the Kei Bridge border and seized weapons. Questioning of one of these suspects produced the following information: That he received crash training by APLA in weapon handling in Port Elizabeth in order to attack SAP members, that he on several occasions went to the Transkei to fetch weapons and money and that during one of such visits, he received weapons at 47 A.C. Jordan Street, Northcrest, Umtata, hereafter referred to as the house, to take to Port Elizabeth.

During his stay at Northcrest, he on three occasions witnessed weapons being issued to APLA members and that 18 APLA members slept in the house.

An accurate sketch of the house was also drawn up as a result of this information. Information gathered independently

through other information, confirmed that an APLA facility existed at Northcrest.

Further intelligence relating to the house in Northcrest was obtained on the 15th of September 1993, after a foreign trained APLA member was arrested at a roadblock at the Elliot/Cala/Qumbu crossroads in connection with the possession of three M27 grenades.

Questioning of this APLA member revealed that he had returned to South Africa from abroad in September 1992 and went to Umtata, that he was allegedly involved in the robbery of a liquor store in Sterkspruit, Transkei during October, in which R52 000 was taken. This money was taken to Umtata.

In Sterkspruit at the end of November 1992, he received orders to proceed to a neighbouring country, that was Lesotho and to join a group of APLA members surveilling the South African border. He was send back to fetch weapons from Sterkspruit and afterwards return to the same place.

Attacks were later carried out in the Ficksburg area and an APLA member called Kenny related the details to him, that he allegedly took part, that is how I read it Sir, on an APLA attack on a Wesselsbron supermarket in which four persons were killed on 3 July 1993. Five witnesses have since positively connected him with the attack.

That during his stay at Umtata, he stayed at the house where he was involved in loading magazines and processing weaponry which included 30 AK47 rifles, two RPG 7 rockets and three project towers, two light machine guns, 150 hand grenades, eight R1 rifles, four Easy sub-machine guns, two Scorpion machine pistols and land mines.

Corroborating information to the above, was provided by the third subject who revealed that he was known as Kenny and also visited the Northcrest house and that he, that it was then used as a facility by APLA, that he was part of the APLA group which carried out the Ficksburg attack mentioned above, that he for a time had stayed in Lesotho, had carried out reconnaissance along the South African border.

This information was handed by the South African Police to the South African Defence Force and on the 1st of October 1993, the South African Army was instructed to do a low risk reconnaissance at the Northcrest house to confirm the address as well as the information obtained from the South African Police.

On the 2nd of October, the reconnaissance confirmed the address and that all the facts provided by the South African Police, coincided with what was observed. It was also confirmed that the house was occupied.

The location of weapons in the house, could obviously not be confirmed without entering the premises. This reconnaissance

continued up to late afternoon on the 7th of October. At all stages of the reconnaissance, information was cross-checked with the South African Police sources.

As to the operation itself, he declared the relevant intelligence was led before government on the morning of the 7th of October, authority was given by the government for the South African Defence Force to conduct a limited strike on the house. As I stated at the news conference, on the 8th of October 1993," that is the quote by Mr Coetzee.

As a result of the intelligence received as set out above, I instructed the military appreciation of the situation to be conducted, that different options were to be identified. The result of the appreciation had to be presented to me on the 6th of October 1993, after which they could be presented to the Minister of Defence, Min Kobie Coetzee.

At 07h00 on the 6th of October 1993, the available facts and my planning was presented to the Minister of Defence. The Minister instructed that variation of the plan be refined and polished.

Subsequent to the bringing about of the further refinements as directed by the Minister of Defence, the facts together with the various options, were submitted to the State President at 14h00 at the same day.

The State President expressed his preference for a clandestine infiltration operation, coupled with the bringing back of maximum evidence. The State President gave principled approval to continue with the operation, but reserved his position as he first wanted to contact his ministerial colleagues sitting on the State Security Council.

Final authorization would be given on the 7th of October 1993, after he had discussed this matter with them. During the morning of the 7th of October 1993, the State President, took Generals Liebenberg, Van der Merwe and myself with him, to a scheduled meeting of the Cabinet where before the Cabinet meeting commence, members of the Security Council was briefed on the position.

Among these present were Ministers Kriel, Kobie Coetzee, Pik Botha and of course the State President. All of them were individually asked by the President whether they agreed that the operation should take place. They all agreed, Mr Botha also.

I was dismissed before the Cabinet meeting and as I was leaving, Mr Botha wished us success and excuse my words, said to me "fuck them up". The instructions which the Chief of the Defence Force had received from the State President at this meeting, were that an identified target had to be neutralised in a clandestine manner, and maximum evidence be recovered.

Bearing in mind that the safety of own troops were not to be compromised under any circumstances. It was understood by all that it would be endeavoured to execute the operation with the minimum loss of life.

Subsequently the Chief of the Defence Force then ordered me to proceed with the operation. I caused an operation instruction to be issued, which directed the Officer Commanding of 45 Parachute Brigade to execute the State President's decision.

This operational instruction I have marked in my submission as Annexure C and I will continue to read this now Sir.

Sir, this of course is a classified document, it has not yet been declassified and I would just like to submit that to you at this time.

It is classified top secret and I continue to read this. Operation instruction 60 of 1993. Beginning by situation, there is a target in the Transkei that has to be neutralised and evidence has to be received and brought back to the RSA. The Instruction Commander of Parachute Battalion 45 on the evening of 7/8 October 1993, the target in the Transkei should be neutralised.

Execution, general sketch. The operation will take place in clandestine, weapon reconnaissance mission, that will be executed during the later evening. The use of in and ex-filtration by vehicle and on foot in this area the Fort Farm. The authorization

has to be accompanied by a Doctor and has to stand at ready at Cassavack.

The following Forces of 45 Parachute battalion, from seven o'clock or from 17h00 to 18h00 bravo has to be on stand by. 24 operatives from 451 Parachute battalion, 24 operatives from 452 Parachute battalion of Durban, Parachute battalion 453 from Palaborwa as a reserve force, (a) South African Air Force, 2 Orix helicopters as support from Durban, 2 Puma helicopters from Durban, 2 C08 for commanding positions at Durban, 2 C30 Air Force Base of QRF from Palaborwa, one Orix from Queenstown.

South African Medical Services, one medical officer and one medical ordinance from Queenstown, one medical officer and two medical ordinances at Durban.

Guidelines, it has to occur under clandestine circumstances and information should be brought back from the Transkei.

45 Battalion, Parachute battalion should be appointed for the operation, notice of the operation has to be handled exclusively. Commanding communication has to be guided in accordance with the Minister of Defence. The following needs attention, justification for the operation through information background, press conference at Commandment OP at Port Elizabeth, making known the detainee to the public but the identity has to be protected, involve Judge Goldstone and senior ANC operatives at press conference, inform the following persons

to confirm the success of the operation, ANC, Goldstone and the Transkei government.

Minimum loss of local population and Forces without endangering own people. The deployment of supportive Forces would concur only on instruction of a higher level. A sign is given to Meiring, Chief of the Army.

Sir, in issuing the operational instruction, just to elucidate a little bit on that, means in fact that this is not a direct order, this is the framework in which the operational order has to be issued by the Unit concerned, and that was 45 Special Forces Brigade at that time.

This was the initiating, having got the instructions from the Chief of the Defence Force, Chief of the Army issued the operational instruction which gives a guideline from which a detail operational orders were to be constructed.

I need to stress that the order to carry out this military operation was given to a Unit of the South African Defence Force to act in prevention and suppression of terrorism, as was authorised by the Defence Act, 1957.

The operational instruction does not refer to any political motive, nor did I have any such motive when I authorised it in the execution of a lawful command I had received.

The purpose was straight forward, that is to combat the criminal or terrorist activities, perpetrated by APLA inter alia in

the Eastern and Western Cape. The detail of the execution of the operation, has been set out in paragraph 12 to 21 of my report, which I prepared for the Minister regarding the circumstances preceding the operation and the execution thereof.

This is Sir, attached and marked as Annexure D to my report, and I will read it to you.

Again Sir, this is classified secret and it has not yet been declassified. It was dated the 10th of October 1993, and prepared for the Minister.

Again this is in Afrikaans and I will read it, I just want to inquire, the first that I read, was that slowly enough to interpret, to handle?

CHAIRPERSON: Yes, I get the indication that you are doing well, thank you.

GEN MEIRING: Report of the execution and approval of the operation. Paragraph 1, on 1 October 1993, the SA Information Services given by general staff to Division Information, that was the - there are two levels of intelligence. The Intelligence Division naturally of the SADF's level, the Intelligence Staff organisation at the Army level, I am referring to the general staff, that was the Army staff, Intelligence staff organisation and Division Information is that on the level of Chief of the SADF.

On the 1st of October 1993, the SA Army was called to the Directorate of South Africa and was told to control information into Transkei with reference to APLA.

During this work sessions the document that was drawn up by the SAP, the information that was in this document was as follows. During questioning of an APLA member, it came to light that weapons were being warehoused at 47 Jordan Street. Then I proceed and give him the same list that was previously listed mentioned.

The source during the interrogation confirmed that physically himself, the person saw weapons during 1993 at this address. This document from the South African Police requests action against this facility in Umtata.

During this period to the run up of this operation, the address was confirmed through ground reconnaissance and it was confirmed as 47 A.C. Jordan Street, Northcrest.

(Indistinct) gave the following instruction, confirm the address and be ready to attack the address on approval of the State President. On the 5th of October 1993, through physical reconnaissance it was established that the house was indeed at 47 A.C. Jordan Street and that all information as the source gave it, concurred with what was seen at ground level.

It was also confirmed that there were people in the house, it could not be established what the contents of the house was.

The reception of above mentioned gave different options to what to react, this had to be laid before the Minister of Defence and the fact available in the broad execution plans, was at 07h00 put in front of the Minister, several ways in which to go about this operation.

On the 6th, 14h00 it was laid in front of the State President, the State President gave its preference and to establish collection of maximum evidence, but he had to concur with his colleagues to that effect.

On the morning of 7 October 1993, the State President gave instructions that the target had to be neutralised in a clandestine manner and the instruction was that the South African Army, the night of the 7th/8th of October 1993, had to neutralise the target.

The guideline that went with the instruction was that it had to be a clandestine operation and all evidence had to be brought from Transkei to South Africa.

Execution, to ensure that the operation was successful it was to be ensured that the route was open and that the target was indeed APLA members. The attacking force had left their base at 20h00, that means eight o'clock the evening, by road and crossed the border at about twelve o'clock that night. The attack took place on 080245 bravo.

When the attacking force reached the house, the house was dark and the doors leading to the outside, was closed. The door

was kicked open and because of security reasons, they did not switch on the lights of the house, but used flash lights, they were prepared to find as many as 12 people, there were actually only five persons in the lounge and all were killed because they reacted hostilely.

The house was cleaned up and no other members were found in the house. After that, the house was searched and under the bench in the dining room someone slept with an R1 rifle and another was found with a Walter 338, this member was the youngest of the group.

Other weapons, three AK47's were found with the other members in the dining room, in the closet in the hall, other weapons were found, several documentation was also found with the effect to origin of attacking members, manuals to the APLA training were also found, several vehicles were found, a Toyota Hi-Lux in the garage, a room was reinforced to hold much arms, photo's were taken, all the weapons and the documentation were taken and pulled out from there and besides the documentation and weapons that were found, the SAP confirmed that four of the five persons were APLA members, or had APLA connections.

The fifth member was still being investigated. None of the members were under 16 years old.

Mr Chairman, I want to emphasise that these notes were prepared with the operational, at that point in time, that we know

of and we handed them over to the Minister as soon as possible after this operation, for him to conduct the media conference and the talks he had which I have referred to previously at the World Trade Centre.

Sir, this in fact as I could to the best of my knowledge, if you look back, the address block states the 10th of October 1993, so it is very soon after this was constructed by the best of our knowledge at that point in time.

Paragraph 13 of my submission then reads as follows: I have no doubt in my mind that what was reported to me about the attack, as set out in the different paragraphs of this annexure which I have just read to you, that it was correct, the correct version of what had happened.

Aspects to be emphasised are that the photographs were taken of the five victims, that arms and documents were seized and brought back and handed to the South African Police for an investigation.

Subsequently Sir, it was established that one of the firearms, the one R1, was number 296362 which was found in the dining room was issued to the Transkei government by the South African Defence Force at one time. The Transkei Defence Force in fact issued this weapon to an APLA agent.

Sir, this is verified from the Police docket which is available.

It needs to be emphasised that the present government, in disposing of the civil claim and that this matter has already acknowledged that the Umtata was one authorised by the State. The execution thereof by necessary implication, consequently fell within the scope and ambit of my authority as Chief of the South African Army.

Obviously also within the authority and ambit of the function of the Defence Force. I emphasise this Sir, because I want to submit that one could expect that both Min Omar and the President would have been most reluctant to have made such an admission had the facts not convinced them to do so.

Government obviously satisfied itself on this score, after exhaustive studies of these facts. Indications are that it took some 18 months from January 1994 until July 1995 and the apology was issued reported in the press on the 27th of July 1995.

Also significant Sir that the Department of State Expenditure under the present government insisted on ex gratia payment of the civil claims, due to the fact that no legally enforceable claims against the State existed.

Sir, in Annexure E, which has already been handed in, this is stipulated.

This confirms the view that this military operation was conducted lawfully and is therefore not a gross human rights violation.

From the foregoing, it appears clearly that the present government accepts that the operation was a government sanctioned and approved operation as an act of State, therefore it would be ironic and inexplicable if this inquiry were to make a recommendation to the Commission that the operation was not authorised by the State.

The question why a large number of weapons the SADF expected to be present, was not found at the house, does not invalidate the intelligence on which the operation was based.

It may well be as subsequent Police investigations seem to indicate, that there was a security leak which enabled APLA to move stored weapons from the house.

Sir, there is a statement by W.G. Mafelika, dated 7-03-1996 as Annexure F which I would like to bring to your attention.

This comes out of a Police docket and I will try and read this to you. This is Umtata, MR178/10/93, Muleli Gideon Mafelika states under oath in English: I am an adult male, ID number so and so, and residing at number 703 Sticks and Stocks Old Crossroads, Nyanga East, Cape Town, home telephone number, etc.

I am working for the South African National Defence Force as a rifleman at 9SAI, Khayelitsha, Cape Town, telephone number so and so.

I am not a member of any political organisation any more, but I was a member of APLA from 1989 until the middle of 1994.

I know Mr Mpelulu and he is the owner of number 47 A.C. Jordan, Northcrest, Umtata.

APLA gave him the money to buy this house. This house was used by APLA members as a place to stay for safety reasons and from this house, the APLA members decided on operations.

The last time I was staying at the house, was in 1992. I can't recall the date or month. Different firearms were kept at this house and this firearms was used in the APLA operations.

The weapons were kept in suitcases or in the ceiling of the roof. I also know ~~Leclapa Matete~~, who is called Happy, he was the Director of APLA operations that took place in the Transkei and outside the Transkei. From what I know, this man is out on R30 000 bail for a case. I don't know what type of case it is.

Happy called all the APLA members who were involved in operations together, and he said we must be careful because he ~~got information from the Transkei Intelligence Department that~~ the South African Defence Force is going to attack APLA bases in the Transkei.

He did not say from who this information came and he also said that they don't know what APLA place is going to be attacked. The place where Happy told us this was, at 47 A.J. Jordan, Northcrest and were about 90 members altogether.

The day after this, five children were shot dead at number 47 A.C. Jordan, Northcrest. I don't know where this Happy is staying now. The last time we were together was at the funeral of five children that was shot dead, etc, etc.

Sir, this is a Police statement and it forms part of the Police docket and it is so handed in. Sir, in fact I got this from some of the documents that you gave us.

On reading this statement which was obtained from the Police docket, I was shocked to learn Sir that the APLA leaders knew beforehand of this operation. I would respectfully request that the TRC also investigate why APLA allowed these youths to sleep at the house, well knowing at least by Letlapa Mafele, alias Happy Mafelika and 98 others, that the SADF military operation was at hand, moving APLA weaponry, but leaving young people behind in the house, it looks like a propaganda trap set for the SADF but at the expense of the lives of the APLA youths.

~~Sir up to there, is my statement. The next is answers of the~~
questions which you stated to me. If you would like me, I would stop here now, give you time to give through this, and tomorrow I can start answering the questions at your - if you so wish Sir.

CHAIRPERSON: Yes, Gen Meiring, thank you very much. I think that makes good sense. It is now about quarter past five. We will adjourn and resume at nine o'clock here tomorrow morning, thank you very much.

ADV VON LIERES: Mr Chairman, may I just point out that the annexures, the top secret operational instruction as well as the secret chronology of events, is still classified as indicated on the documents.

It hasn't been down graded and unfortunately the minimum intelligence standards which are applicable, need to be maintained in respect of these documents. It means those two documents should be locked up in a safe. If the Commission intends using these documents for any purposes, we have to go through the normal processes of down grading the classification. I would just like to place that on record in case there is any problem.

Secondly these documents are available simply because Gen Meiring had them in his own possession, they are not traceable in any South African Defence Force file. They have apparently been destroyed. I think there is a different report about that, but these come out of his own personal library if I can put it that way.

CHAIRPERSON: ~~Thank you very much, it is so noted and all the~~ necessary precautions will be taken, thank you. The meeting is adjourned, thank you.

COMMISSION ADJOURNS UNTIL 05-05-1998