

**THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS  
REGARDING EFFORTS OR ATTEMPTS TO STOP THE INVESTIGATION OR  
PROSECUTION OF TRUTH AND RECONCILIATION COMMISSION CASES  
(TRC CASES INQUIRY)**

**HELD AT:**

Sci-Bono Discovery Centre, Corner of Miriam Makeba & Helen Joseph Street  
Newtown, Johannesburg

**BEFORE:**

**COMMISSIONERS:**

The Honourable Ms Justice Sisi Khampepe (Judge Ret.) – Chairperson  
The Honourable Mr Justice Frans Diale Kgomo (Judge President Ret.)  
Adv Andrea Gabriel (SC)

**EVIDENCE LEADERS:**

Adv Ishmael Semanya (SC)  
Adv Vas Soni (SC)  
Adv Fana Nalane (SC)  
Adv Nompumelelo Seme  
Ms Baitseng Rangata

**REPRESENTATIVES**

Adv Varney (SC) – The Calata Group  
Mr J Venter – The Calata Group  
Adv D Pillay – The Calata Group  
Ms A Thakor – The Calata Group  
Mr Siphon Tlhaole – The Calata Group

**12 MARCH 2026**

**DAY 21**

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PROCEEDINGS ON 12 MARCH 2026

CHAIRPERSON: Mr Semenya?

ADV SEMENYA: Good morning Chairperson and Commissioners. Today we have Mr Pikoli to hear his evidence and just for the record as well we are struggling with our equipment to make photocopies that are necessary and may want to be used by Mr Varney. Our machine is broken down, I do not know how we will navigate that difficulty.

CHAIRPERSON: Mr Varney, will you be able to proceed without the  
10 necessary copies being made available?

ADV VARNEY: Madam Chair, I think we should be able to proceed. This is because I understand that before the machine broke down, eight copies were made and provided to the Commissioners and evidence leaders. It is unfortunate, we did circulate updates to bundle 2 to the parties this morning but I understand that they do not have the bundle 2 that was circulated, I believe it was yesterday or the day before and it is that that they currently do not have.

What we will do, we will do our best to refer them to where these documents can be found in other bundles because virtually all  
20 of them are already in the bundles before the commission but we just made an attempt to bring them all together so that we would not have to be running around between so many bundles.

CHAIRPERSON: But you will be referring to bundles, which are already before the commission?

ADV VARNEY: Indeed, Madam Chair.

CHAIRPERSON: Yes.

ADV VARNEY: And I am told that one of my attorneys is busy trying to resolve that and to get our colleagues copies as soon as possible.

CHAIRPERSON: Thank you. We are sorry for the inconvenience, which cannot be avoided. These things do happen.

ADV VARNEY: Madam Chair, with the leave of the commission, Adv Vusi Pikoli is with us and is ready to be sworn in.

CHAIRPERSON: Good morning Adv Pikoli.

ADV PIKOLI: Good morning Chairperson and Commissioners.

10 CHAIRPERSON: How are you?

ADV PIKOLI: I am fine, I am fine, Chairperson.

CHAIRPERSON: Fine. Are you going to take an oath or affirmation?

ADV PIKOLI: I will take an oath.

CHAIRPERSON: Yes. Do you swear that the evidence you will give will be the truth, the whole truth and nothing but the truth, if so, raise your right hand and say so help me God?

ADV PIKOLI: So help me God.

VUSUMUZI PATRICK PIKOLI: duly sworn states

CHAIRPERSON: Thank you. Duly sworn. Mr Varney, your witness.

20 ADV VARNEY: As the commission pleases.

EXAMINATION BY ADV VARNEY: Mr Pikoli, firstly thank you for coming to the commission today and availing of yourself and your time to assist the commission.

COMMISSIONER KGOMO: I am not so sure that the microphones.

ADV VARNEY: Let me let me do another test.

CHAIRPERSON: Yes.

COMMISSIONER KGOMO: Yeah, yeah.

ADV VARNEY: Thank you.

CHAIRPERSON: Much better.

ADV VARNEY: Thank you Commissioner. I have a tendency to lean back and I will try to keep leaning forward.

COMMISSIONER KGOMO: It is going to be a long day.

ADV VARNEY: Indeed. Perhaps even a long few weeks and months. Mr Pikoli, I will start again. Thanks for taking the time to  
10 come to the commission today and I know that you have been doing a lot of preparation for these two days and on behalf of the families, we are indebted to you for all the preparation and time you have put into this work. Before we start, I would like to get you to confirm certain affidavits that you have made and which are before the commission and Commissioners. These affidavits are items 1 and 2 in bundle 2 and actually they have been in bundle 2 for several months already. Let us start with item 1. This is an affidavit of Vusumuzi Patrick Pikoli dated 6 May 2015. It was filed in the matter of *Nkadimeng v National Director of Public Prosecutions and others*, Gauteng Division of the  
20 High Court, case number 36554/2015. It is at pages 1 to 47. Do you confirm that this is your affidavit and that your signature appears at the end of that affidavit?

ADV PIKOLI: I do.

ADV VARNEY: And if I can refer you to your second affidavit. This is an affidavit that was made before this commission. It is dated the 5

November 2025. It appears at pages 48 to 66 of bundle 2 and in that affidavit you confirm the contents of your 2015 affidavit amongst other confirmations. Do you confirm that this is your affidavit and that your signature appears at the foot of that affidavit?

ADV PIKOLI: I do.

ADV VARNEY: Thank you. Now before we get into the substance of the matter, Mr Pikoli, let us just indicate to the commission who you are and your professional experience. Commissioners, Mr Pikoli has set out his professional background in both those affidavits. So in the  
10 first affidavit at paragraph 4, page 12, sorry, paragraphs 4 to 12, pages 3 to 5, he sets out his background. And in the second affidavit, which I think is the one we should focus on, pages 48 to 50 between paragraphs 4 and 4.19 is a more updated version. Mr Pikoli, you may go ahead and give the Commissioners a sense of who you are.

ADV PIKOLI: Can I get some assistance together? Okay. We are talking about bundle 2.

ADV VARNEY: So it is your bundle, bundle 2, exactly.

ADV PIKOLI: Yeah.

ADV VARNEY: So perhaps you want to go to page 48.

20 ADV PIKOLI: Okay. Yes.

ADV VARNEY: And your professional experience is highlighted under paragraph 4. You are free to read into the record all the way to 4.19 or do any highlights that you would wish.

ADV PIKOLI: Thank you, Chairperson and Commissioners. So starting from paragraph 4.4.1, the whole paragraph. I start by

indicating that I am the member of the ANC and I joined the military wing of the ANC in 1980 in Lesotho and I remain a member of the ANC, a loyal member of the ANC, whose loyalty is unquestionable, but is not an unquestioning loyalty to the ANC. I still remain a member of the LWV, Liberation War Veterans of the African National Congress, which is an organisation made up of former combatants of Umkhonto weSizwe.

And then I talk about when I joined government, which was in 1994, appointed as a special advisor to the late Comrade Dullah Omar from 1994 until 1997. Perhaps I should pause there and indicate to the commission that during my stint as a special advisor to Comrade Dullah Omar, he asked me to lead a delegation to Chile in 1994 to study the Truth Commission in Chile.

In that delegation, we had the late Professor Medard Rwelamira. We had Justice Lex Mpati and the other member of the delegation was Ms Tiny Meyer. Mr Omar had wanted us to go to Chile and study how Chile dealt with its past, particularly as it related to the 1974 coup d'état that overthrew the Government of Allende, led by General Pinochet.

Our report, when we came back, inspired discussions which actually then led to the enactment of the Promotion of National Unity and Reconciliation Act. What I remember of that trip to Chile is that there were still victims and survivors of that period who were still out in the streets demonstrating. Now this was in 1994. Perhaps I can come back to this.

And then I further indicate that from 1997 to 1999, I was appointed in the Department of Justice as a Deputy-Director General and I was appointed as the Director General in the Department of Justice in 1999, a position I held until I was appointed to be the National Director of Public Prosecutions on 1 February 2005.

And then in 4.5, I talk about my suspension, which I believed then, as I do now, that it was motivated by the fact that the DSO, the Directorate of Special Operations within the National Prosecuting Authority, which was established in the office of the National Director,  
10 were pursuing charges against the late National Commissioner of Police, Mr Jackie Selebi.

I believe that my suspension then, which was on 23 September 2007, is directly related to that and then there was the Ginwala Commission, which was established following my suspension to determine my fitness to hold office. Perhaps I also need to indicate, before I talk about that commission, that soon after my appointment on 1 February as the National Director, I sat before another commission, which was established on 1 April in 2005, which was chaired by the current Chair of this commission, whose mandate  
20 was to look at the mandate and location of the DSO.

So I am appearing before the Chairperson of this commission for the second time. I hope there will not be a third time. To proceed, 4.8, I got an award from the International Association of Prosecutors in 2008. This was as a result of me being seen as the one who was willing to protect the independence of prosecutors.

2010, 2011, after the Ginwela Commission and me leaving government, I was at SizweNtsalubaGobodo as a Director of Forensic Investigations. And then 2012, 2015, I was a Commissioner on the Khayelitsha Commission, which investigated the breakdown in relations between the police and the community of Khayelitsha.

And then in December 2014, I was appointed as the Western Cape Police Ombudsman. In 2018-2019, I was a Special Advisor to the Minister of State Security Agency. 2019, I was appointed as an Adjunct Professor at the Nelson Mandela School of Public  
10 Governance at the University of Cape Town.

2019-2020, I served as the Chief Legal, Risk and Compliance Officer at the South African Airways and then Special Advisor to the Minister of Public Safety from 2020-2021. 2021-2024 I moved to the same minister to Water Affairs. 2024 the minister of then moved to police. This is Minister Senzo Mchunu. Currently, I am a Special Advisor to the current Minister, Minister Firoz Cachalia.

And then I talk about the Global Initiative against Transnational Organized Crime that I am a member of, and I am also a member of the Africa Board of the Global Initiative against  
20 Transnational Organized Crime. And also, I am a founding member of the International Association of Anti-Corruption Authorities.

And then make reference to having served on the Constitutional Court Trust as a trustee and also a former member of the Magistrate's Commission. And then lastly, the book I co-authored with Mandy Weiner, which is termed *My Second Initiation*. Perhaps

just to give a little bit of insight as to why the book is called *My Second Initiation*. Chairperson, if you allow.

CHAIRPERSON: Yes.

ADV PIKOLI: Thank you. First, I never thought of writing any book and after my tenure in government, after I had left government and then following the Ginwala Commission and whatever transpired at the commission, many people approached me to say, I must write my story and I refused, because I felt that the wounds were still very open and so. But when I did, Mandy Weiner really persuaded me to  
10 write, and said, well, she can be a co-author to give an element of objectivity in the book, because she would verify all the things that I was telling her.

So, this was at a time when I was suspended. So I was at home with family, and my uncles, paternal uncles, and everybody else sitting there, you know, asking, what is happening? I said, well, it feels like I am undergoing a second initiation. As a Xhosa boy, we go through initiation to get into manhood and the pain that goes with that.

So, when I went through what I went through, I felt that my  
20 suspension and the subsequent Ginwala Commission, and me leaving government, was like a second initiation, but the first initiation, my transition from boyhood to manhood, had prepared me for that. And I must indicate that it could well be that there could be a third initiation, which I think my second initiation prepared me for the third initiation. Thank you, Chair.

ADV VARNEY: Thank you, Mr Pikoli. Well, let us hope the third initiation is not taking place today. You piqued my interest when you mentioned that you had been sent on a trip with various esteemed colleagues to Chile in 1994 by the then Minister of Justice, Dullah Omar, in order to look at how the Chileans had managed their own transition, set up their own Truth Commission, which preceded ours and as you mentioned, your report helped to inform the transitional arrangements that South Africa subsequently entered into.

10 And perhaps by coincidence, Mr Lukhanyo Calata, in his affidavit, also makes reference to Chile and their post-Truth Commission experiences. Commissioners, this is in bundle 1 at page 50 from paragraph 18. And Mr Calata, prior to this paragraph, had given an overview of the lacklustre delivery in the TRC cases. And you probably will know better than most that South Africa has not been able to deliver justice in many cases since the winding up of the Truth Commission and indeed, that is really why we are here today.

So, Mr Calata, from paragraph 18, and perhaps I will just read into the record and seek your reaction.

ADV PIKOLI: Is it 118?

20 ADV VARNEY: Yeah, paragraph 118, I beg your pardon, at page 50.

"In comparison, other similarly placed countries where Truth Commission's recommended prosecutions have achieved considerably more, such as the case of Chile. Since 1998, Chile's courts have resolved hundreds of cases of

dictatorship-era killings, disappearances and torture, and sent dozens of perpetrators to jail. As of July 2023, Chile's Supreme Court had handed down verdicts in more than 530 cases for dictator-era crimes against humanity. Another 2 000 cases were still under investigation awaiting resolution before lower courts. Some 230 former regime agents have been imprisoned for their crimes, with dozens more, 57 in 2023 alone, escaping justice only through death, which they use as biological impunity. And between October 2022 and October 2023, 67 Supreme Court criminal verdicts were handed down, including the conviction and sentencing to jail of 59 former security police agents."

And a copy of an article by Cath Collins titled Chile's Pinochet Cases at 25, an ongoing sea change published in JusticeInfo.net 16 October 2023, was annexed to the Calata affidavit at FA20. So, you visited Chile back in 1994, they also had a Truth Commission, they also made recommendations, and as you can see at least from that article, Chile has been able to pursue many hundreds of cases and secure a few hundred convictions as well. What is your reaction to the contrast between the delivery in Chile and the delivery of post-Truth Commission cases in South Africa?

ADV PIKOLI: Perhaps the startling difference would be the fact that

Pinochet, who was the military ruler of Chile, passed a law that granted blanket amnesty to the generals who were involved in the gross violation of human rights in Chile. This was challenged in the courts of Chile, and those amnesties were overturned, overruled, and the government of Chile, given its position, went ahead with the prosecutions following the overturning of those amnesties, which were granted by Pinochet, which has not happened in our situation.

It boils down to the willingness of those in authority to make sure that the law is followed as it should be followed. That would be  
10 the difference between what happened in Chile and what is happening in South Africa.

ADV VARNEY: Thank you. If we could also just deal with some of your earlier roles, and you mentioned that you were Deputy-Director General of Justice between 1997 and 1999, and then you were Director General of the Department of Justice between 1999 and 2005. During those years in those posts, were you dealing with the developments of the Truth and Reconciliation Commission, and what transpired thereafter?

ADV PIKOLI: Well, the Department of Justice was the one  
20 government department that had to facilitate the work of the TRC. So the logistical arrangements and administrative arrangements were then the responsibility of the Department of Justice. And then also the expectation was that following the reports of the Commission itself and the recommendations that would have been made in that report, that again the Department of Justice will play a leading role in

ensuring the implementation of the recommendations.

ADV VARNEY: Thank you. And while you were DG of the Department of Justice, am I right in saying that you were at some point the co-Chair of the Justice Crime Prevention and Security Cluster, otherwise known as the JCPS Cluster. When did you become the co-Chair of that entity?

ADV PIKOLI: When I became the Director General of the Department in 1999, the ministers who convened the cluster at the level of ministers was the Minister of Justice and the Minister of  
10 Safety and Security, before there was a name change to Ministry of Police and then they worked through their DGs.

So automatically when the Minister of Justice was the Chair or co-Chair of the cluster, the DG would also then assume a similar position amongst DGs administratively, as well as in terms of processing whatever work of the cluster that required processing. So at the time, as well then, the National Commissioner of Police, it was in 2000, I think, it was the National Commissioner, the late Jackie Selebi. So we were co-Chairs of the DGs cluster, which was immediately below the cluster of ministers.

20 COMMISSIONER KGOMO: Yes, Mr Pikoli, as far as possible, because some of the ministers may have to come and testify, it would help and it also would inform the public who the minister would have been at the time. If you remember, but you are also free to refresh your mind from the files before you.

ADV PIKOLI: Yes, well, from 1994 to 1995, the ministers of the

Justice Crime Prevention and Security cluster, the Minister of Justice were Dr Dullah Omar and the Minister of Safety and Security at the time was Dr Sydney Mufumadi. Those would have been the co-Chairs at the ministerial level of the cluster. And then there will also be the intelligence agencies, but in the first year, well in the first administration of 1994 to 1999, there was no Minister of Intelligence. Minister Dullah doubled up as a Minister of Justice as well as a Minister of Intelligence.

So it was Minister Dullah 1994 to 1999. From 1999, that is  
10 when we had a full Minister of Intelligence, who is the late Minister Joe Nhlanhla, who was a deputy minister in the first administration, a Deputy Minister of Intelligence. The Deputy Minister of Police at the time, if I recall well, was the late Minister Matthews, Deputy Minister Matthews at the time.

And then at Home Affairs, I think the Minister was the late Minister Buthelezi. In Correctional Services ...[intervenes]

COMMISSIONER KGOMO: Yes, no, only the relevant ministers relating to what your counsel have led you on.

ADV PIKOLI: Then in 1999 to 2004, the ministers were Minister  
20 Maduna as the Minister of Justice. And the Minister of Safety and Security was Minister Tshwete, Steve Tshwete, who unfortunately, I think, died midway. And I think the person who took over was the Minister Charles Nqakula.

COMMISSIONER KGOMO: Yes, thank you.

ADV VARNEY: Thank you, Commissioner. So in respect of the

cluster at the DG level, am I right in saying that the following entities, many of them you have identified already, included Department of Justice, SAPS, NIA. You have mentioned corrections ...[intervenes]

ADV PIKOLI: I must indicate here, the Intelligence at the time, there were two departments and NIA was a responsible for domestic intelligence. And then there was SASS, which was responsible for foreign intelligence. So at the time, there were two DGs, the DG of NIA and the DG of SASS, the South African Secret Services.

ADV VARNEY: Yes, indeed. And Department of Defence as well?

10 ADV PIKOLI: Yes, the Department of Defence.

ADV VARNEY: You have mentioned Correctional Services, Home Affairs and then also Foreign Affairs?

ADV PIKOLI: Foreign Affairs, yes and Social Development, yes.

ADV VARNEY: Now, can you explain to the commission, what was the purpose behind this cluster? What was it meant to do? Well, government had taken a decision that the work of government needed to be grouped to ensure that there is proper coordination of the work and to ensure cooperation and collaboration amongst government departments.

20 So the work or the mandate of the departments that I have mentioned formed the criminal justice value chain, which meant that there was a need to work together in a collaborative fashion to ensure that there is proper coordination and that we strive for an integrated criminal justice system, especially given that there was one value chain.

Investigation starting at the level of the police, documents being sent to the NPA for a decision to prosecute or not to prosecute, and then the matters going to court. And then from court, if there is a conviction and you know, a custodial sentence, it will be the responsibility of the Department of Correctional Services.

And then also social development with the hope that the offenders would have been sufficiently rehabilitated as they go through our correctional services that there will be a need to have them reintegrated into society as good members of society.

10 Therefore, also that is why social development was brought in. Obviously, the others speak for themselves, intelligence and defence.

ADV VARNEY: Thank you, Mr Pikoli.

COMMISSIONER GABRIEL: What we know these days as Cooperative Governance, Principles of Cooperative Governance, or was it more?

ADV PIKOLI: No, of course, when this was set up, the Constitution already had it, you know, the question of Cooperative Governance, it was in the Constitution, but now it was ensuring that the work of government is structured in a manner that will facilitate that  
20 cooperation. So it was rather following what actually the Constitution required in terms of Chapter 3 of the Constitution.

ADV VARNEY: Thank you, Commissioner. Before we dive into the substance of your evidence, I noticed that in your 2015 affidavit that is in bundle 2 at page 6 you provided your views on the independence of the National Prosecuting Authority.

ADV PIKOLI: What page?

ADV VARNEY: So it is page 6 of your bundle, paragraphs 16 and 17 under the heading, "The independence of the NPA" and in our consultation, you wanted to make sure that we provided section 179 of the Constitution, which is at item 16 of the index, as well as section 33 of the NPA Act, which is at item 17. So, please, could you indicate to the Commission your views on the independence of the National Prosecuting Authority?

COMMISSIONER KGOMO: Yes, Mr Varney, I looked at paragraphs  
10 16 and 17 in particular, and I think it might be helpful if those could be read into the record.

ADV VARNEY: As the Commissioner pleases.

COMMISSIONER KGOMO: Yes, because they relate to the independence of the NPA.

ADV VARNEY: Yes, I totally agree, Commissioner. Mr Pikoli, will you do us the favour of reading your paragraphs 16 and 17 on page 6 into the record?

ADV PIKOLI: Thank you, Chair. Paragraph 16.

20 "The office of the NDPP was created on 1 August 1998 in terms of section 179(1) of the Constitution. The NDPP is the head of the NPA and manages the directors of public prosecutions, investigating directors, special directors and other members of the prosecuting authority, either appointed or assigned. During my tenure, I was

duty-bound to carry out the responsibilities set out in the NPA Act, as well as the Constitution of the Republic of South Africa."

Perhaps here I may pause, Commissioners, and indicate that before assumption of my responsibilities as the National Director of Public Prosecution, I took an oath of office, swearing allegiance to the Constitution and the law of the Republic, which meant that I had to do things according to the law and directed by the Constitution and nobody else. Paragraph 17.

10            "As National Director of Public Prosecutions, I strongly believed in the independence of the NPA. I maintained that prosecutors were required to conduct themselves independently, objectively and professionally in making decisions whether to prosecute or not. This view is underscored by section 179(4) of the Constitution and section 32 of the National Prosecuting Authority Act, which both impose a duty on

20            prosecutors to act without fear, favour, or prejudice. These provisions provide both a constitutional and statutory guarantee of independence to the NPA."

And also, Commissioners, perhaps here I would like to indicate that during my first days as the National Director, I made it abundantly clear when I spoke to the prosecutors and the management that I was

not necessarily a fan of conviction targets. Yes, we would want to have a high conviction rate in terms of the work that we do, but being a slave to targets might lead to unethical conduct. I pointed out that as prosecutors and as officers of the court, the responsibility is to place all the relevant and material information and evidence before the presiding officers.

And if in the course of our work we come across information or evidence that might be of benefit or even can lead to an acquittal of an accused person and because of the oath of office that we take  
10 before assumption of duty, it is our responsibility to place it before the presiding officers for them to make a determination and not hide, hoping that, you know, or wishing for a conviction when you know deep in your heart that the wrong man or woman is going to be sent to prison. That is what I used to say to the prosecutors.

ADV VARNEY: Thank you, Mr Pikoli.

CHAIRPERSON: Mr Varney, is it not an appropriate time to adjourn for tea?

ADV VARNEY: Yes, indeed, Madam Chair, I was about to raise that, yes.

20 CHAIRPERSON: Yes, we will adjourn and reconvene at quarter past eleven.

ADV VARNEY: As the commission pleases.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Mr Varney?

ADV VARNEY: Thank you, Chairperson. Commissioners, before we commence, my learned friends for Adv Menzi Simelane have pointed out that inadvertently we have put up in some of the copies distributed this morning, the replying affidavit of Adv Simelane in the Ginwala Commission, that is his affidavit dated 25 February 2008, it is, I do not believe it is in your bundles and it is not in my bundle either, but in the extra copies that were made this morning, it was inadvertently placed into copies that were handed to my learned friends for the other parties.

10           We wish to ask those who have that particular affidavit to remove it, because it was not intended to be part of this bundle. What was intended to be part of this bundle, is what I believe you do have in your bundles at page 277, which in fact is the affidavit that Adv Simelane placed before this Commission and that is dated...[intervenes]

CHAIRPERSON: So for the record which affidavit should be taken from one's scripto?

ADV VARNEY: Well to add to the confusion, Chairperson, you do not have it. I do not believe the Commissioners...[intervenes]

20           CHAIRPERSON: We do not have it?

ADV VARNEY: You do not have it, it is in respect of the paperwork that was handed out this morning to the parties, some of them will have it and we would like that affidavit, the replying affidavit...[intervenes]

CHAIRPERSON: To be disregarded?

ADV VARNEY: Be disregarded and removed.

CHAIRPERSON: Yes.

COMMISSIONER GABRIEL: Mr Varney, at page 277 we have the affidavit of Mr Simelane, but it is being titled 'Draft 1'.

COMMISSIONER KGOMO: Ja, that is correct.

ADV VARNEY: Yes.

COMMISSIONER KGOMO: Menzi Simelane.

ADV VARNEY: Ja.

COMMISSIONER KGOMO: That is 277?

10 ADV VARNEY: Yes, 277.

COMMISSIONER KGOMO: Page 277?

ADV VARNEY: It is. Yes, it is titled 'Draft 1' but it is actually a signed affidavit.

CHAIRPERSON: Oh, thank you.

ADV VARNEY: From October of last year that is his affidavit...[intervenes]

CHAIRPERSON: Yes.

ADV VARNEY: Before this Commission and we will likely make reference to it, that...[intervenes]

20 CHAIRPERSON: Yes, so that affidavit is properly before this Commission?

ADV VARNEY: Yes, indeed Chairperson. And I should also add that at the request of my learned friends for Adv Simelane, we will be placing the full transcript of the Ginwala Commission before this Commission. We only, we were only furnished with it quite recently in

the last 48 hours, it is a very large document, it will be maybe 2 000 pages, but since extracts do form part of this bundle, we will put up the entire transcript records from that Commission and we will ask the secretary to deposit it at an appropriate place on the website.

CHAIRPERSON: Yes.

EXAMINATION BY ADV VARNEY(CONTINUED): Thank you, Commissioners. Mr Pikoli, if we could move on, if we can now deal with the speech made by President Thabo Mbeki to the National Houses of Parliament on the occasion of the tabling of the report of  
10 the TRC which took place in April, 15 April 2003, the full speech is attached to bundle 2, it is at page 30.

Now we have actually, this Commission has considered this speech in the evidence of Mr Ngcuka as well as that of Mr Ackermann, so they are recently familiar with it. We are not going to read it into the record, but I would like you to give your views on that speech and what your takeaways were from that?

ADV PIKOLI: Thank you Chairperson and Commissioners. What is quite clear from that address by President Mbeki to parliament in  
20 2003, is that despite all the best endeavours of the TRC, there were still some other issues of concern to government and this relates particularly to those who were denied amnesty and also those who for whatever reason never applied for amnesty, and the law being clear that those who were refused amnesty by the TRC and those who might not have approached the TRC for amnesty but could be criminally implicated in the gross violation of human rights, that they

stood a chance of being prosecuted.

What also came out clearly was that this, the bekknown general or blanket amnesty, this was very clear in the President's address to parliament. But the dilemma being having just emerged from the conflict of the past when you had the defenders of apartheid on one side and members of the liberation movement on the other side which led to serious violence in South Africa, waging of the armed struggle, and the brutal response of the apartheid government at the time, that we still had fragile peace in South Africa, that this  
10 was a matter of serious national concern, that we needed to address this reality and find a way of dealing with it as a country, as a people.

That is why then he said on the matters that relate to the conflict of the past that might not have been resolved or still need to be resolved, then the NPA must do what it is supposed to do. But in this instance he said this must be done within the framework of the law and the Constitution which was guiding the process so to say, that everything needed to be done within the framework of the law.

And he then indicated that the Intelligence Services would work together with the NPA in trying, in attending to those  
20 outstanding matters that required a final resolution. That is my take of that address.

COMMISSIONER GABRIEL: May I ask a question?

ADV PIKOLI: Yes.

COMMISSIONER GABRIEL: What did you understand then about the involvement of the Intelligence Services with having to work with

the NPA? I am asking what your understanding was of that requirement?

ADV PIKOLI: My understanding at the time and also having worked closely with Intelligence Services, it meant that there could be information at their disposal which might not necessarily be at the disposal of the NPA, therefore they could make a contribution in trying to resolve the outstanding matters of the TRC, therefore it was a question of the Intelligence Services placing whatever information that would have been required. Thank you, Commissioner.

10 COMMISSIONER GABRIEL: Thank you.

ADV VARNEY: Thank you, Mr Pikoli. So let us move on and I want to draw your attention to a meeting of the Justice Portfolio Committee that took place on the 10 June 2003 and the minutes of that meeting as prepared by the Parliamentary Monitoring Group is in bundle 2 between pages 70 and 84.

ADV PIKOLI: You said from page 70?

ADV VARNEY: Ja, so your bundle from 70 all the way through to 84, although we are not going to deal with the full minutes. I am going to refer you just to a few sentences. That the Chairperson of that  
20 meeting was Adv Johnny de Lange of the ANC. It does not indicate who was present but it does if you look at the bottom of page 70, Mr Bulelani Ngcuka and DPP briefed the committee. Before we move to the passage, can I ask, do you recall whether you attended this Portfolio Committee meeting?

ADV PIKOLI: No, because I did not always attend meetings that

involved the NPA but where we were to make a joint presentation to parliament, then I would attend.

ADV VARNEY: All right.

ADV PIKOLI: Because at the time I was the Director-General of the Department of Justice.

ADV VARNEY: Yes, so then if I can draw your attention to page 72, in the middle of the page and I will read the passage to you starting at the sentence, 'some cases'. It reads:

10           “Some cases emerging from the Truth and  
Reconciliation Commission are ready to proceed and  
others the NPA awaits ruling from the Supreme Court of  
Appeal and from the reconvened TRC Amnesty  
Committee. The Chair interjected to ask if any  
legislative change was needed to deal with TRC cases  
where immunity from prosecution was to be offered. Mr  
Ngcuka replied that he could see no need for a change  
in legislation.”

20           So the question arises from that middle sentence, the Chair  
interjecting to ask if any legislative change was needed to deal with  
TRC cases where immunity from prosecution was to be offered. And  
given that this was June 2003, do you know what the immunity that  
the Chair was referring to?

ADV PIKOLI: Well firstly, though the President did not envisage any changes in legislation, but he left the task to the NPA to deal with matters within the ordinary legal framework. That was some kind of a

policy statement from the Executive from the President, but given the responsibility of the servants or public servants when trying to put that into effect, could well suggest a need for changes in the law if for instance in the discussions of trying to put into place what the President said, that it would not be possible to deal with what he seeks or wants, therefore it would have fallen on those given that responsibility to say we think in this particular case we might need legislation or an amendment or a new legislation to deal with the task that was given.

- 10 ADV VARNEY: Thank you. So now we are going to try deal with the unfolding story in chronological order, at least to the best of our ability. Now in 2003 as you have mentioned, you were still the Director-General of the Department of Justice, so you were not privy to what was happening within the NPA and the PCLU.

There is evidence from Adv Ackermann who has put up statements and has already testified as well as Adv Macadam and we have certain affidavits from him relating to their endeavours to secure investigating officers for the TRC cases and just in a nutshell in summary, essentially what they say is that within weeks of President  
20 Mbeki's speech, they were make approaches to the DSO and then subsequently SAPS to get investigating officers assigned to these cases.

And you have probably heard the evidence that was led before this Commission when Adv Ackermann testified as well as when Adv Ngcuka testified that the DSO said no and then when the

approach was made to SAPS, the Head of Detective Services said that the NPA should get a written instruction from the President if they wanted SAPS to investigate. Were you aware of these developments while you were DG of Justice?

ADV PIKOLI: No.

ADV VARNEY: And I would just like to put to you a statement that is made in the Calata affidavit that is bundle 1 at page 66. It is at the bottom of that page, paragraph 147. It reads:

10           “The refusal by both the SAPS and the DSO to investigate some of the most serious crimes committed in South Africa, deeply violated the legal and constitutional obligations.”

          Would you agree with that contention?

ADV PIKOLI: Yes, I would agree.

ADV VARNEY: Then let us turn to an incident that took place in May 2004 and this deals with the removal of dockets by SAPS from the Pretoria office of the Director of Public Prosecutions, the DPP. And I can refer to bundle 2, page 27 which is your 2015 affidavit.

ADV PIKOLI: Page?

20   ADV VARNEY: It is page 27 of bundle 2 and at paragraph 72, and I will just read to you the relevant extract:

          “I advised the Minister that all dockets”...[intervenes]

COMMISSIONER KGOMO: Mr Varney.

ADV VARNEY: Ja?

COMMISSIONER KGOMO: Would it not be preferable for the

witness to read that and you could then ask him for a comment?

ADV VARNEY: Yes, yes indeed. I was trying to save his voice but I think it is more appropriate.

COMMISSIONER KGOMO: Yes.

ADV VARNEY: So paragraph, maybe just read the whole paragraph 72.

COMMISSIONER KGOMO: Ja, you can always tell him where to stop.

ADV VARNEY: Indeed.

10 COMMISSIONER KGOMO: Yes.

ADV PIKOLI: Paragraph 72 reads thus:

“The TRC concluded that under apartheid, the Security Forces were a law unto themselves. The vast majority of murders and crimes” ...[intervenes]

ADV VARNEY: Sorry, if I can just interrupt you, are you in bundle 2?

CHAIRPERSON: I think we are not on the same page.

ADV VARNEY: Are you in bundle 2 at page 27?

ADV PIKOLI: This is bundle 1.

ADV VARNEY: Ja, so that is bundle 1.

20 ADV PIKOLI: Page 27?

ADV VARNEY: Yes.

ADV PIKOLI: Okay, I have got it now, sorry. Paragraph 72:

“I reminded the Minister that my predecessor had satisfied himself that there was no basis for the leadership of the ANC to be investigated and he had

then briefed the then Minister of Justice as well as the President. I also advised the Minister that all the dockets relating to the TRC cases which had been stored at the office of the Director of Public Prosecutions in Pretoria, had been handed over to the SAPS in early and mid-2004. In my capacity as the then Director-General of Justice, I was actually present in the office of the DPP when representatives from the SAPS collected the said dockets.”

10 ADV VARNEY: Now can you give us the context in which this happened? What led to the removal of the dockets relating to the TRC cases from the DPP office removed by SAPS?

ADV PIKOLI: Ja, at the time I was still at the Department of Justice and then by virtue of our discussions at the cluster, the late National Commissioner, Mr Selebi, would be talking about the NPA wanting to prosecute the President together with the ANC members who were denied amnesty by the TRC.

20 So this became a source of tension between the NPA and the police in particular around this issue which then led to suspicions about the motive of the NPA, why would they want to prosecute the President and other members of the ANC whose amnesty was denied by the TRC? I think then at that stage, Mr Ngcuka was equally angry and I think rightfully so because he was of the firm view that the matter had long been addressed, that there was no ongoing investigation on the members of the ANC including the President of

the country.

So this story never went away, it was always there. I think then out of that and/or frustration on the part of Mr Ngcuka, an arrangement was made that the police would come to the office of the DPP, take those dockets away and take them to the SAPS. As I say here, I was there when this thing happened, at the offices of the DPP, Pretoria in my capacity as the Co-Chair of the cluster.

ADV VARNEY: And do you recall whether the SAPS took simply all of the dockets relating to cases from the TRC or was it just the  
10 dockets in relation to the ANC suspects?

ADV PIKOLI: I would not be in a position to, Commissioners, to say that they took everything that was there, you know, the dockets that were there, but it is reasonable to infer that these are the dockets that are a source of tension and controversy which were lying, which were in the office of the DPP in Pretoria, that is probably would have been those dockets but I cannot confirm or verify that.

ADV VARNEY: Thank you. So let us then proceed.

COMMISSIONER KGOMO: Are you leaving, Mr Varney, are you leaving the issue of the dockets?

20 ADV VARNEY: Ja.

COMMISSIONER KGOMO: Because I just want to...

ADV VARNEY: Yes, of course, Commissioner.

COMMISSIONER KGOMO: Adv Pikoli, when I read this paragraph it intrigued me. The dockets according to my understanding, are now out of the hands of the police, they are now with the DPP for a

decision. How can anyone being the police or a politician, then direct that the dockets be taken away from the DPP, to be taken back to the police? What should they do with the dockets because the dockets have been investigated?

ADV PIKOLI: Thank you, Commissioner. I do not think that they were all decision dockets because of the nature of the work of the... Because this was a special category of dockets that dealt with the TRC and the NPA was responsible via the DSO to do investigations, so there would have been dockets there that were not, there would  
10 have been some files, I do not want to say docket but you know, that still required investigation by investigators. I do not think that they were, they could all have been decision dockets necessarily.

COMMISSIONER KGOMO: Yes. Does it mean, should we understand it that it was the prosecutor left dockets or investigations and this was the time of the DSO, the Scorpions?

ADV PIKOLI: That is correct Commissioner, because that was the methodology of the DSO, what we used to refer to as the troika principle, intelligence driven and prosecution led investigations.

COMMISSIONER KGOMO: Ja.

20 ADV PIKOLI: Which meant that all these, the investigators, the analysts, you know, prosecutors, were operating under one central command in one place, unlike you know, in the past before the establishment of the DSO where it was a question of you know, the police going to you know, to the prosecutors and prosecutors would write and give instructions and then it goes back. These people were

working in the same environment.

COMMISSIONER KGOMO: Now what did the police require then to do with those dockets? Now they are basically not prosecution led, only one leg was dealing with the police, what was the understanding? What should the police then do with these dockets?

ADV PIKOLI: Well I would not know as to what was in the mind of my predecessor and because what I can say, that it could have been out of frustration and also to show that he had closed the matter insofar as the ANC matters, that he had nothing to do with that  
10 because there were no investigations, therefore there could not have been a decision to prosecute without you know, investigations which would have yielded perhaps some evidence or sufficient evidence for them to enable them to take a decision.

So I think he was, you know, washing his hands off and say look, you can take this because insofar as the 37 ANC members, he is *functus officio*.

COMMISSIONER KGOMO: Yes and the DPP was not left with any copies of those dockets, they were just handed over lock, stock and barrel, no forensic investigation as to whether some documents may  
20 have been harvested from the dockets, nothing?

ADV PIKOLI: In my recollection Commissioner, when I was there, when the documents were removed, there was no auditing. I do not know whether it had already been done, I had no knowledge of that.

COMMISSIONER KGOMO: Yes, thank you.

ADV VARNEY: Thank you, Commissioner. And just following up on

Commissioner Kgomo's questions, it does seem as if it might have been an irregular move given that we are aware that at that time, the SAPS was saying that they would not investigate in the absence of the President's direction.

So given that removal of the docket, be that ANC docket or whatever documents, I think the political label is irrelevant here, removing them to an entity who is already on record that they would not be investigating TRC cases, does it not give rise to an unfortunate implication that they were being removed to ensure that they would not go any further?

ADV PIKOLI: Commissioners, I think this was evidence of one, frustration on the part of my predecessor because he felt that you know, there is no ongoing investigation on these particular ones which did not remove the need to have investigators to look at other TRC matters and I think he, I do not know, I do not want to think and speak on his behalf, I see it as a frustration and a continuation of mistrust between the police and the NPA [indistinct] the DSO, because there have always been tensions between the DSO and the police.

So to me it is evidence of the continuation of that trust deficit between the DSO and the police. I do not know whether he was saying look, satisfy yourselves, do whatever investigations that you think you should do if all of a sudden we now have investigators, therefore let them investigate this. Because I mean it drags counter to what has been happening to say that they will investigate if the

NPA wants investigators, then they must speak to the President. So it is something that does not connect that.

ADV VARNEY: Is it normal procedure in relation to dockets that were prosecuted that the NPA declines to prosecute, that the docket is then sent back to the police? I believe that to be the normal procedure and that that is in fact what Adv Ramaite mentioned to this Commission.

ADV PIKOLI: It is because the NPA does not need that docket anymore. It has declined to prosecute on the matter, therefore that docket is of no use to the NPA or to the prosecutors, therefore it is not [indistinct].

ADV VARNEY: Yes, so that is the normal procedure although in this case the context is a little different because as I understand it, at that time the dockets were not being held by the police but by the DSO, although we are also aware that by this time the DSO had declined to investigate and in fact there is evidence that Adv Ledwaba would had Andrew Leas, the Chief Investigating Officer, to hand over all the dockets to the DPP in Pretoria which explains why they were sitting there, so I did put that context on the table.

20           The next issue of course is when did the NPA decline to prosecute in those cases and that is not clear, I have asked my team to look into it and if they come up with the answer, then we will put it up. There is also evidence on the table which my team will assist us with, where I believe Adv Bulelani Ngcuka did request the organisations, we had prepared dossiers on the ANC leadership to

hand over those dossiers, but they refuse to do so and according to Adv Bulelani Ngcuka, that contributed to his decision to close those cases. Are you familiar with that?

ADV PIKOLI: I am sorry, as we are talking I was also thinking, just casting my mind back to this question. For me I cannot even say there was a decision not to prosecute because a decision to prosecute is when you know, a docket has been placed in front of you and as a prosecutor you believe that everything is there in terms of admissible evidence, question of witnesses and all that when you  
10 think that a matter is you know, sort of right and then it is sent to the prosecutors.

Now these people are working together and you know, having also looked at the bundle here, it was because there was insufficient evidence but I was not there at the time, but I remember some here, that there was insufficient evidence to even take a decision whether to prosecute or not to prosecute. So for me it looks like it was not even a matter that was ready for a decision to be taken on.

ADV VARNEY: Okay.

20 ADV PIKOLI: But then I am now, I am not answering the part that you raised because when you were talking, my mind was you know, cast back. Can you?

ADV VARNEY: Yes, so my recollection from the evidence of Adv Ngcuka and I believe it is even in his testimony or his statement but my team are busy looking for it, he pointed out that information

had come to the attention that dossiers had been prepared by various organisations and he had requested those dossiers to be given to the NPA, but they were not and that contributed to his decision to... Are you familiar with that?

ADV PIKOLI: Well I did not know that, but I have since come to know now as I was preparing for this.

ADV VARNEY: Okay, I am not having any further issues on this one, I am going to move on. And I want to draw your attention to the decision to create a Directors-General Forum which was chaired by  
10 yourself as then DG of Justice and your first meeting was on the 23 February 2004. What was this DGs Forum and why was it created?

ADV PIKOLI: Okay, you want to refer me to [indistinct]?

ADV VARNEY: Well I do not have to refer you, there is a reference to it in bundle 1 under the heading, 'Amnesty Task Team' at page 67, paragraph 148.

ADV PIKOLI: Okay. I do not know whether I would be taking a long route if I were to talk to the job specification of Directors-General, given the fact that DGs are an implementing of the Executive and my  
20 source for this is section 85 of the Constitution. That verse, the Executive Authority of the Republic in the President, with 85(2) then saying then that Executive Authority is exercised together with members of the cabinet, meaning those Ministers who are appointed by the President and they work together, the President and the Ministers.

And then you would have then the DGs, therefore when, therefore the DGs are responsible for you know, implementing what the Executive Authority wants and Ministers are Executive Authorities of their departments and the DGs then work closely with the Ministers in implementing those executive decisions.

So coming back to the question, then it was then the responsibilities of the DGs to then try to interpret and execute or bring to reality what the President announced in parliament in 2003. And the JCPS DGs then had that responsibility and this was not without  
10 President, because if we were just to cast our minds back to 1999 which actually led to the establishment of the DSO, it was via an address by President Mbeki to parliament in 1999 where he spoke of a need to do or to fight crime differently and therefore he needs to establish a new unit that would be able to deal with the transpose by organised crime and transnational organised crime.

So as DGs then we had then to sit down and say this is what the President had said which amounts to a policy statement by the President, so it had to happen because if you recall, in that statement the President said you know, he has instructed his Ministers to work  
20 on this and the Ministers worked on the question of the establishment of the DSO via their DGs.

So this was in the same light then where you had to then, because then we met as a Forum of DGs to give effect to what President Mbeki said in 1999. So the Forum had now subsequent to the 2003, was more or less along those same lines to give effect to

what the President wanted.

COMMISSIONER GABRIEL: And what is it that the President wanted?

ADV PIKOLI: The President when addressing parliament in 2003, said that there is still some outstanding work. Yes, he accepted the report because it was the final report of the TRC and the President's view was that not all matters relating to the work done by the TRC was concluded. But now that the TRC is no longer there, government had to find ways and means of ensuring that the work that was not  
10 perhaps concluded or outstanding matters still had to be followed up because this was the reality of the situation at the time.

COMMISSIONER GABRIEL: But earlier I understood you to be saying that the President had in that address, left it to the NPA?

ADV PIKOLI: That is correct.

COMMISSIONER GABRIEL: To make decisions about matters. So what more was needed? Was it about the nation building concerns or the, what you spoke to earlier about our fragile democracy?

ADV PIKOLI: Yes.

COMMISSIONER GABRIEL: Is that what was outstanding?

20 ADV PIKOLI: Yes, that is what, without being in the mind or in the head of the President.

COMMISSIONER GABRIEL: Ja.

ADV PIKOLI: Clearly there was a concern.

COMMISSIONER GABRIEL: Okay.

ADV PIKOLI: Because remember also that time, I do not know

whether the matter was already on trial, there was also the question of the Boeremag trial which actually you know, went to court. So that you know, told the whole country that you know, even though the TRC's work was aimed at trying to unify us as the nation and have reconciliation, the crack is still there.

COMMISSIONER GABRIEL: Okay, thank you.

ADV VARNEY: So the first meeting of that DGs Forum on the 23 February 2004, what was the specific purpose of that meeting?

ADV PIKOLI: Can you just to refresh me?

10 ADV VARNEY: Yes sir, so as I understand it, the meeting was called to give effect to President Mbeki's speech that...[intervenes]

ADV PIKOLI: I believe so.

ADV VARNEY: He had given the previous year.

ADV PIKOLI: Ja, I thought that is what I had already alluded to, to say that as the DGs Forum then we were to give effect to what the President said in parliament in 2003. It was a responsibility that fell on the – although of course the President said it falls on the lap of the NPA, but the NPA also should be assisted with this work by the Intelligence Services, a matter which we have already canvassed.

20 And then also since both you know, the Intelligence Services are a department that forms part of the JCPS Cluster, again adopting a broader approach in terms of ensuring incorporation, so that is why it also fell on the lap now of the DGs to take it forward.

ADV VARNEY: And did the DGs Forum decide to create a mechanism to actually carry out and give effect to the speech in itself

and what was that mechanism?

ADV PIKOLI: Yes, firstly the DGs now had to think and say what we do, this is what the President wants or has indicated in parliament, how do we give effect? What mechanisms can be brought in without necessarily duplicating the work of the TRC? Because the TRC itself was established in law via legislation and also taking into account what the proscript of the 1993 [indistinct] Constitution said about these issues.

So we sort of had to think and say how, how do we do this.

10 That is why then we said then as DGs then we need to establish some structures or subcommittees that will report to the Forum of the DGs to work out you know, what no one will say, you know, let the democrats work out you know, the finer details, but then reporting to the Forum of the DGs.

So then the intention was to find ways of giving effect to what the President said and establishing a mechanism through which to achieve the desires of the President.

ADV VARNEY: Sir, I understand Mr Pikoli, that the body that was set up was called the Amnesty Task Team and that there were terms  
20 of reference drawn up and that is in bundle 1. Let us, well I think we might still be in bundle 1 and it is at page 343 of bundle 1 and this document was provided by Ackermann, at least to Adv Chris Macadam where we filed an affidavit in the Rodrigues matter, it is titled, 'Terms of reference of the Amnesty Task Team' and it is, there is a big draft imprint, so it is unclear whether this was the final version

of the terms of reference but for what it is worth, let us just go through these terms of reference. Can you read them into the record, please?

ADV PIKOLI: Okay, this is on page 343:

“The Task Team is to consider and report on the following:

1. What criteria does the National Prosecuting Authority apply in deciding on current and impending prosecution of cases flowing from the conflict of the past?
2. The formulation of guidelines that will inform current impending and future prosecution of cases flowing from the conflict of the past.
3. Bearing the abovementioned guidelines in mind, whether legislative enactments are required?
4. Whether any of the two Bills that have already been formulated, can be proceed with bearing in mind the views of intelligence agencies.”

ADV VARNEY: Thank you. Now just from these terms of reference, do you accept that what was being proposed for this group to do was to effectively carve out a special regime for the handling of the TRC cases? Would you agree?

ADV PIKOLI: Yes, I would agree and I do agree, and also I must state upfront that I fully agreed with what the President said in 2003, having been a participant in those conflicts, in those drivers. I agreed

with the President and I was fully committed and I was driving that process from my position as the Director-General of the Department of Justice, having to give effect to policy positions of government.

That was my responsibility, provided of course one does not see it as an unlawful instruction for instance, even if you are a DG you are not obliged and in fact you should not carry out an unlawful instruction. So with me I said we are dealing with something that is peculiar to us as South Africans, this is part of our history, this is what has happened, blood was shed, people were killed, people were  
10 tortured, people disappeared. And we have to find a way as South Africans to say how do we deal with this?

So for me it was not a question of playing along you know, when we established these structures, I genuinely believed that the position taken by the President was correct. But of course you know, that is why for instance when we set up these committees, they you know, even consulted with the state law advisors to make sure that everything would be done in accordance with the law.

I saw somewhere in the document, in the bundle there is reference to an opinion received from the state law advisors, in  
20 particular Adv Bruwer who was guiding the process. The state law advisors exist to make sure that before any Bill is introduced into parliament, it must be consistent with the Constitution. They certify Bills before they get introduced in parliament. So for me the time the initiating Minister comes up with proposals to amend the law or to come up with a new law, the cabinet would discuss that, once the

cabinet approves but before it goes to parliament, it will go to the state law advisors to give an opinion to ensure that whatever is being proposed will meet the constitutional muster.

ADV VARNEY: Thank you, Mr Pikoli. Commissioner?

COMMISSIONER GABRIEL: Would this not perhaps be seen as vectoring the discretion of the NPA?

ADV PIKOLI: Well as...[intervenes]

COMMISSIONER GABRIEL: Because what I propose...[intervenes]

ADV PIKOLI: Yes with, with the benefit of hindsight and somebody  
10 can argue with foresight it will not need hindsight, but we are dealing with a novel situation here and for me it was that everything that had to be done, had to be done within the framework of the law.

But now as things turn out, it is clear that you know, my colleagues that I was working with, you know, did not share my own thinking that you know, the genuine effort that the country was trying to put in place, because even the question which perhaps will come up later about that the DGs Forum would make recommendations to the NPA, it was rejected. That is why it did not find its way even in the guidelines at the amended prosecution policy.

20 One can argue about you know, the prosecution policy and the guidelines which you will find and will have attend, but even at that stage the question of DGs recommending to the NPA, simply cannot be because it would be fettering the discretion of the NDP on the NDPP.

ADV VARNEY: Thank you, Commissioner. Sir, as I understand your

evidence, Mr Pikoli, you accept that the initiative anticipated differential treatment for these crimes such as murder and unlike compared to or what we might call you know, normal murders, but that the context in South Africa at the time justified this and it, and I know that at least in President Mbeki's speech he had spoken of nation building and national reconciliation. Is that what you are referring to?

ADV PIKOLI: That is correct Commissioners and if I may say so, I also want to say even the establishment of the TRC was not  
10 compatible to your customary indigenous law on issues that violated human rights, gross violation of human rights. Issues of torture have to be prosecuted but because of our situation as South Africa and South Africans who were in this situation which requires a customised approach, with your leave Commissioners, I would just want to make a short reference to the fact that these issues were not confronting me for the first time.

I think around 1989 or early 1990 when we were still in exile and being part of the ANC's Department of Legal and Constitutional Affairs, we had discussion with lawyers from South Africa, talking  
20 about what is going to happen or we were imagining a post-apartheid South Africa and these issues were raised in that meeting even before we came back home in 1990.

There were concerns expressed by the law... But then it was exclusive by the white lawyers that we met and primarily Afrikaner lawyers, but of course there were other English lawyers

who were part of that delegation where we would discuss as to what is going to happen in South Africa, are we going to have your union black [indistinct] which was an issue which was of concern, they saying these are issues of concern in South Africa for instance, you see?

So it is not surprising that we came up then with the Truth and Reconciliation Commission, going a step further than what we actually did in terms of the Truth Commission, because in Chile it was just a Truth Commission, in South Africa it became Truth and  
10 Reconciliation, but all this is within the context of forging national unity, to say that let there be peace in South Africa, let us reconcile, let us you know, put back you know, at the back of our minds the question of us having you know, engaged in these brutal engagements and struggles.

So this was found to be what would be correct or right for South Africa, so what I am saying is that even the establishment of the TRC was not necessarily done because crimes of torture and gross violation of rights have to be punished, but because we were to you know, look at our own situation as a country and find ways of  
20 dealing with that, hence the TRC.

So when the President then said this thing, it reasons well with me, I did not have a problem at all.

COMMISSIONER GABRIEL: Just coming back to what was proposed by the committee of the Directors-General, even the name, Amnesty Task Team, I mean the country, we had just come out of a

massive catharsis through the TRC process itself. Years and years were spent, the nation sat spellbound, watching what was happening and out of that process came a comprehensive report, talking about the gross human rights violations in this country.

Having considered I think over 5 000 applications for amnesty, having come to decisions in that and the report was produced and it was handed over to government, now what more was envisaged? I guess that is what I am trying to understand, after that extensive process, what more were the DGs thinking needed to be  
10 done over and above what had already been done?

I know I am asking you a very general question but in my own head I am trying to understand what more was it that needed to be done and what were the DGs aiming for when they set up this body called an Amnesty Task Team? Obviously to get guidance, but guidance on what, amnesty?

ADV PIKOLI: Thank you, Commissioner. Firstly let me concede that it was a misnomer, so shall we call it an Amnesty Task Team, it should not have been called an Amnesty Task Team because it would be like you know, a repeat of what happened at the TRC. I  
20 concede on that one because it would give an impression that you know, people would be granted amnesty and on what basis? What would be the legal authority of bending such?

But what was at the big, what was at the back of our minds was to say yes, the report was handed to the President and the President still feels that there are still outstanding issues. Yes, for

instance I mean the people would never applied but were you know, implicated or those who refused, and therefore there could be information that is still sitting which could still be unlocked, which could perhaps strengthen the process of national unity and reconciliation in the country, because we, I mean I am sure the President did not know the intentions of those who did not go, because we must accept the fact that not everybody accepted the new democratic dispensation, there was resistance.

Even at the time when we were about to cast our first you  
10 know, vote, you know on the 27 April, there were still bombs going, exploding throughout the country. So our situation was fragile and we could not have thought, I do not think we would have been happy with a situation to say now that the TRC has done its work, everything is back to normal when you have gone through tickets and tickets of hundreds of years of oppression and the fight against that oppression.

So to think that by 2003 everything would be normal, it would have been naïve to think so. So that is why we feel that look, let us try to do whatever that can be done to make sure that we do not go  
20 back.

ADV VARNEY: Thank you, Commissioner. In terms of one of the other justifications that President Mbeki in his speech proffered, he made mention of the fact that there were arms caches and ever hoping that if there was an offer of some form of indemnity, that information about the location of these arms caches would be

disclosed. Was that also one of the considerations?

ADV PIKOLI: Thank you, Commissioners. One can go back for instance to there was a police officer, I think it was Phillip Powell who was implicated in you know, ferrying arms from Gauteng to KZN at the time and I am sure that the thing was that it was not only him, there could be you know, so many other arms caches throughout the country that nobody knew of.

And again this emphasises the value of the intelligence [indistinct] who were also being in a position to you know, gather  
10 information that could be of assistance in terms of trying to diffuse the situation. So I would say yes, that could have been part of the consideration, ja.

ADV VARNEY: All right. In that last paragraph of the terms of reference, it says, 'Whether any of the two Bills that have already been formulated, can be proceed with bearing in mind the views of our own Intelligence Agencies'. Do you know which Bills, which were the two Bills they were referring to?

ADV PIKOLI: To be honest I do not have a recollection about the Indemnity Bills, but in our discussions which happened as the DGs  
20 and the committees that were set up, as a way of giving fact to what the President expressed, you would look at the powers of the President in terms of section 84, I think it is powers of pardon, that there could be another way, but pardon comes after the dual process, it becomes an executive action because the person would have been convicted and all that.

We even thought of making use of the Correctional Services Act in terms of paroles you know, that could have you know, been granted. So there were a number of things that we were thinking of, but on the question of the Indemnity Bill or Bills as referred to here, I do not have any [indistinct], the question was to you know, those Bills, what they could have been.

ADV VARNEY: Okay, well it does seem likely that one of the Bills is in fact the Indemnity Bill that you referred to and copies of the front page and the, part of the Preamble, are in bundle 1 at pages 341 to 10 342. This was also attached to the affidavit of Adv Macadam, what he put up in the Rodriques case. So if you take a look at pages 341 to 342 of bundle 1, it is titled, 'Annexure B, Indemnity Bill 2<sup>nd</sup> Draft'. The date is in brackets as B2003 and unfortunately we do not, these are the only two pages that we have.

I think we have requested the evidence leaders to try and find the full Bill. I think it is worth looking at the long title and the Preamble. Can I ask you to read the long title and the part of the Preamble that we have that is on page 342?

ADV PIKOLI: Yes.

20 ADV RANTHO: My apologies, Commissioners.

CHAIRPERSON: Yes, Ms Rantho?

ADV RANTHO: Sincere apologies Commissioners, but we seem to be confused because the witness said he did not know anything about Indemnity Bills, so we are not so sure what evidence because Mr Varney say it would appear as though, so is it his evidence or

whose evidence is that? Because we are really disturbed by that.

ADV VARNEY: Commissioners, or perhaps I should not have asked him to read it, but I want to put the Bill to him for his response.

CHAIRPERSON: Yes, you may proceed.

ADV VARNEY: Yes. So the long title reads:

“To provide for the granting of indemnity by the President to persons.”

He makes full disclosure of all relevant facts relating to Acts associated with the political objective committed in the course of the  
10 conflicts of the past. During the period 1 March 1960 to the cut-off date, for the said purpose to establish a committee on indemnity to consider and investigate applications for indemnity and to make recommendations to the President and to provide for matters connected therewith. And then the first three paragraphs of the Preamble:

“Since the Constitution provided for law to be adopted [so that is the interim Constitution by the way], the Constitution of the Republic of South Africa 1993, provided for law to be adopted by parliament in terms of  
20 its amnesty should be granted in respects of acts, omissions and offences associated with political objectives committed in the course of the conflicts of the past;

And since that law was adopted and a mechanism procedure is established by that law, have run their

course and have been concluded;

And since there remains a need for reconciliation and reconstruction as contemplated in that Constitution.”

So that is all we have, but do you see that at least in terms of the long title and what we have of the Preamble, it is looking at something of a rerun of the amnesty process that took place under the TRC?

ADV PIKOLI: Well the first thing, you know at the time you know, if I look at this Bill on page 341, just below Minister of Justice, B2003, it gives an indication that it could have been in 2003. And in 2003 I was the Director-General of the Department of Justice, and I have no recollection of this here.

In the Department of Justice we do have a division that drafts legislation and at the time it was headed by Adv Deon Rademan and it could not have gone anywhere without me having seen this Bill as the DG of Justice, because a submission would have had to be made to the Minister as well.

But looking at the long title, clearly the President here was given powers that exist nowhere, to provide for the granting of indemnity by the President to persons who make full disclosures, you know, that responsibility was given to the TRC in the form of a Commission that was established. Unless I am wrong and somebody can correct me, in terms of section 84 of the Constitution, the President has no powers to grant indemnity.

He has got powers to pardon people who have been

convicted. So it would have flown in the face of all the work that was done by the TRC. That is all I can say about this.

CHAIRPERSON: So you would say that this would be a portrayal of a rerun of the TRC process? This would constitute a rerun of the TRC process that had already taken place?

ADV PIKOLI: That is correct, Commissioner, Chairperson.

COMMISSIONER GABRIEL: And as DG of Justice you did not know about this Bill?

ADV PIKOLI: No, Commissioner.

10 ADV VARNEY: Though it does seem there is a possibility Mr Pikoli, that that department you refer to that sat under you as DG, the Department of Legislative Drafting I think you mentioned, there is a possibility that they were not passing documents like this on to you?

ADV PIKOLI: Well I have never for a single moment think that there could be things passing without me seeing them and I would not have any reason to believe that there were things that would be hidden from me. I worked closely with all my DDGs that is the Deputy Directors of you know, the Deputy Directors-General, I worked well with them and there is no legislation, there is no draft that was  
20 anywhere, because from that division there is also another division within Justice that is the State Law Advisors headed by the Chief State Law Advisor.

So this happened without me knowing. I am not saying it happened, I am not saying it did not happen, but it was without me having any knowledge of this Bill.

ADV VARNEY: Well there is reference to the Indemnity Bill in the reports of the Amnesty Task Team and we will come back to that a bit later. But just in our endeavours to try and ascertain what the other Bill might have been or other Bills, we do not know as yet, there is reference in the affidavit of Lukhanyo Calata to discussions about other Bills and I want to put those passages to you for your response, so I am referring to bundle 1, page 151 and 152. I will wait for you to find the reference.

ADV PIKOLI: 151, page 151?

10 ADV VARNEY: Page 151, ja.

ADV PIKOLI: Of bundle 1?

ADV VARNEY: Bundle 1, ja. So the research and author, Mr Ole Bubenzer who has testified before this Commission, he at 388, Bubenzer writes:

20 “That Geldenhuys and Krugel advised him that by the end of 2002 the consulting parties had agreed on a detailed proposal for the enactment of a legal mechanism which amounted to a new amnesty. It envisaged an amendment to the Criminal Procedure Act to allow for a kind of special plea based on the TRC’s amnesty criteria followed by an enquiry by the presiding judge.”

Then the next paragraph:

“By late 2002 the proposal and draft legislation had been finalised by the Justice Department and was ready

to be presented to parliament for enactment. However, it first had to be approved by President Mbeki who ultimately rejected it in early 2003, nonetheless has it been set out above the essential ideas and reemerged in the subsequent amendments to the prosecution policy.”

And Commissioners just for your reference, that is referred to in Mr Bubenzer’s book which is at bundle 7 at page 126. And if I can ask you to recall back to those days, were you aware of any of these developments?

ADV PIKOLI: No, Commissioners.

ADV VARNEY: And then let me put the next passage to you which comes from the book of author Michael Schmidt. Commissioners, that is the extract from bundle 8 at page 58, but I refer you to page 152 of bundle 1, paragraphs 391 to 392 and I will just read these paragraphs to you for your comment:

“Prior to Mbeki’s rejection of the amnesty legislation in early 2003, the SADF generals appeared to be on the brink of a breakthrough. Marais [he was a former Major General in the SADF and Head of the so-called Contact Group], he advised Schmidt in the aforesaid interview that after seven years of negotiations, the generals and the Cabinet’s security cluster had agreed on a legal framework for a post-TRC amnesty process. According to Marais the government arranged for “a law writer in

Cape Town” to come up with the new legislation.”

The next paragraph, 392:

“On 17 February 2003, a delegation of SADF generals led by Geldenhuys met with Justice Minister Penuell Maduna and Police Minister Charles Nqakula in Cape Town. The law drafter (a state official in the Department of Justice) was called in to read out the proposed legislation. Marais indicated to Schmidt-

10                   “... and when he finished, we said, ‘But that’s got nothing to do with us’... because they [said] they will grant amnesty to everyone who will make a full statement of his [crimes committed] so General Geldenhuys said, ‘No, we don’t need that. All our people who wanted to make statements and ask for forgiveness already went to the TRC. Our other people ... don’t have to do that, so this means nothing to us .... The whole thing collapsed there .... This whole conversation collapsed...”

20                   And that is from the book *Death Flight* and perhaps just to finalise that account, in 393:

“According to Schmidt, the differences between the sides were now irreconcilable: the generals wanted a post TRC law granting a new blanket amnesty with no disclosure required – but the government appeared only

willing to offer an amnesty based on full disclosure to be decided on a case-by-case basis.”

Do you have any recollection of that?

ADV PIKOLI: No, Commissioners.

ADV VARNEY: All right, then let us then move on to the first report of the Amnesty Task Team and this is in the same bundle, bundle 1. It is at pages 515 and I will just give everybody a moment to get there. Mr Pikoli, have you managed to get to page 515 of bundle 1?

ADV PIKOLI: Yes.

10 ADV VARNEY: Great.

ADV PIKOLI: So this is the report, Amnesty Task Team?

ADV VARNEY: Yes.

ADV PIKOLI: Secret?

ADV VARNEY: Ja, that is right, secret report, Amnesty Task Team and the report itself starts at page 516. The background I think we have dealt with so we do not need to deal with that, but the Task Team comprised individuals from the Department of Justice, two members from National Intelligence Agency, two members from the NPA, one from SAPS and one from the Department of Defence. And

20 I think that composition is consistent with what the DGs Forum have in mind?

ADV PIKOLI: Yes, yes Commissioners.

ADV VARNEY: So it appears from 1.3 that the Task Team was required to deliver a report by 1 March of that year and they met for the first time on 26 February and then again on 1 March. And if we

now turn to 2.1, that really repeats the terms of reference and it is consistent with what the President set out in his speech and you have already advised us of the key elements, so let us then turn to the functions of the Task Team.

So that really begins under paragraph 3 on page 519, 'Discussion', taking into account various legal provisions. And if I can draw your attention to 3.2.1, it says at paragraph 1 at the terms of reference:

10 "In order to give effect to the arrangements contemplated in the President's statement" ...[intervenes]

ADV PIKOLI: Sorry, where are we?

ADV VARNEY: So we are at page 520.

ADV PIKOLI: Ja.

ADV VARNEY: And in the middle of the page there is 3.2, it is called 'at paragraph 1 of the terms of reference' and I am now looking at 3.2.1. So in 3.2.1:

20 "In order to give effect to the arrangements contemplated in the President's statement, it is recommended that a Departmental Task Team be appointed, comprising members of the following departments or institutions."

And you have made reference to all of them but note that the Office of the President is included there, why was it necessary to include the Office of the President in this Departmental Task Team

that was proposed?

ADV PIKOLI: Well, oh thank you Commissioners, this comes from the President. It made sense for the President to have a sense of whether the DGs are carrying out what you know, he was talking about, having a mechanism that would be able to deal with the outstanding matters of the TRC. I did not have a problem with that and I think it is only fair to have somebody who would be briefing the President.

ADV VARNEY: So one of the reasons why I posed that question  
10 Mr Pikoli, is because of the actual functions that was set out under 3.2.2 at the bottom of that page and let us start with the first one, so:

“The functions of the proposed Task Team should be following:

- (a) Before the institution of any criminal proceeding for an offence committed during the conflict of the past, to consider the advisability of the institution of such criminal proceedings and to make recommendations to the NDPP in this regard.”

So the question really is, you know you have a Task Team  
20 that has members of the Executive outside of the NPA including a member from the Office of the President involved in that kind of function. Would that be appropriate?

ADV PIKOLI: Thank you, Commissioners. As I say, as DGs or let me speak for myself, I was not participating in the discussions of the Task Team, so I do not know the actual role then that was actually

played by the representative from the Office of the President, but obviously the President is an interested party, so I would not know his role. Whether he was there as an observer or whether he effectively participated in the discussions of the Task Team, I would have no knowledge of that.

ADV VARNEY: Yes, to be clear, at this stage this is merely a proposal and we will come back to the role of the Office of the President in the eventual, in the Departmental Task Team that was created once the amendments were proclaimed, but just at the level  
10 of law and principle, should there be a committee comprising, is it advisable at least to have a committee, largely to have Executive members including a member from the President's Office, considering the advisability of instituting prosecutions and making recommendations to the NDPP on a case-by-case basis?

ADV PIKOLI: Thank you, Commissioners. Of course it is not expected nor advisable for the President of the country to be involved on issues of [indistinct] prosecutions.

COMMISSIONER GABRIEL: It says before, if, if, help me  
20 Mr Varney, it says before a decision is taken to prosecute. Is that correct?

ADV VARNEY: Yes indeed, before the institution of any criminal proceedings.

COMMISSIONER GABRIEL: Okay, so what then prevents the NDPP from seeking advice?

ADV PIKOLI: It is not so much seeking advice on the decision of the

NDPP to prosecute or not to prosecute, but what is advisable especially on matters of this nature, is to have all the relevant information placed before the National Director of Prosecutions to enable the taking of a decision to prosecute.

COMMISSIONER KGOMO: Well Mr Pikoli, without being too legalistic but in any event you are a seasoned lawyer, you remember the Glenister cases, Glenister 1, 2 and 3, I think the judgment pinned by Deputy Judge Mogoeng, Moseneke and Judge Cameron where they did not brook the insertion of a clause where three Ministers  
10 would advise the Head of the DPCI which crimes are priority crimes because that would fetter the discretion.

I mean it is really very, very clear they, they pointed out that such a clause was not inserted when before the dissolution of the Scorpions, the DSO, that is why they then pointed out that if those three Ministers were to sift or distil what would pass muster as priority crimes, that would fetter the independence of the Head of that DPCI. Would such a scenario not commend itself to you now if you look at it, are there no parallels with what Commissioner Gabriel is putting to you?

20 ADV PIKOLI: Thanks, Commissioner. Yes, I recall that judgment which was a majority judgment.

COMMISSIONER KGOMO: Yes.

ADV PIKOLI: Pinned by Justice Dikgang Moseneke?

COMMISSIONER KGOMO: And Judge Cameron, both of them, yes.

ADV PIKOLI: And Cameron, yes. I recall that, but it is also fair to

say that it has not been given full effect as we speak.

COMMISSIONER KGOMO: Mm.

ADV PIKOLI: As we speak, it had not been given full effect but if it is given full effect...[intervenes]

COMMISSIONER KGOMO: Pardon?

ADV PIKOLI: But if it is given full effect, then it would have, it will secure the independence and that they were referring to, that the DCPI... But the same could have been said even about the DSO because even then there is Inter-Ministerial Committee even when  
10 the DSO was in existence. But that committee was meant also to ensure that there is proper coordination you know, amongst the relevant departments. So I am fine with that, Commissioner.

COMMISSIONER KGOMO: Yes, mister.

ADV VARNEY: Thank you, Commissioners.

COMMISSIONER GABRIEL: Sorry Mr Varney.

ADV VARNEY: Yes.

COMMISSIONER GABRIEL: Could this not have been seen as an attempt to influence the ultimate decision of the NDPP?

ADV PIKOLI: Ja, I would...[intervenes]

20 COMMISSIONER GABRIEL: Or to pressure the NDPP in a certain way?

ADV PIKOLI: Well here we are talking of this committee made up of various people from all the departments and of course to have somebody from the Office of the President who would carry that weight that is not there in his capacity as just an official, that perhaps

whatever he says would be seen as some or could be seen as what the President wants, which could perhaps have intimidated some members. I do not know.

COMMISSIONER GABRIEL: Okay.

ADV VARNEY: Commissioners, I see it is almost 13:00, would this be an appropriate time for the lunch adjournment?

CHAIRPERSON: Yes, we will adjourn and reconvene at 14:00.

ADV VARNEY: As the Commission pleases.

#### INQUIRY ADJOURNS

#### 10 INQUIRY RESUMES

CHAIRPERSON: Mr Varney.

ADV VARNEY: Thank you, Chairperson. We promised to come back to the Commission in respect of the references that emerged from the evidence of Adv Bulelani Ngcuka relation to the incident in which dockets were removed from the DPP office in Pretoria, and we have managed to find the references in question.

They come from Ackerman's bundle that we used when he gave his evidence, and it deals with an internal memorandum that was addressed by Ackerman to Adv Pikoli dated 16 May 2006. And  
20 the question of the removal of the dockets, and just a small correction, this is now from that particular memorandum, but refer the Commission to paragraphs 15 to 16, and I think it is worth if I just read those into the record quickly. Paragraph 15 of that memo:

"15. Mr Ngcuka further informed me that  
Commissioner Selebi had complained

about the NPA being in possession of SAPS dockets. Apparently the allegation was that these dockets contained the evidence that would be used to prosecute the President and other high profile ANC leaders.

10 I denied the existence of both an attempt to arrest the President and others, as well as the existence of so-called relevant 'police dockets' against them. Mr Ngcuka then made arrangements for you and three police commissioners to be present at Adv Mpshe's office the next day for an inspection of the dockets to be carried out.

1.6 At Adv Mpshe's office, Mr Ngcuka invited SAPS to identify the dockets relating to the President and others, which they were unable to do. Mr Ngcuka then instructed the SAPS commissioners to have all the SAPS dockets removed forthwith, and for 20 the two SAPS members working with Adv Fick to vacate their office at the DPP's premises."

Mr Ngcuka dealt with this in his evidence in yesterday's proceedings. It is in the transcript at page 94 to 95. With the leave of

the Commission, we can commence with our (indistinct)  
...(intervenes)

CHAIRPERSON: Yes, you may proceed.

ADV VARNEY: Mr Pikoli, before lunch we were busy with the first secret report of the Amnesty Task Team, and we had dealt with a few aspects. And I would now like to draw your attention to the next page, that is 521 or bundle 1. Have you managed to find page 521?

ADV PIKOLI: Yes.

ADV VARNEY: Okay, so I am going to draw your attention to the  
10 bottom of the page, sub-paragraph (d), and this deals with the criteria  
as it is set out:

"To consider the following factors when carrying  
out its mandate, what criteria to adopt.

(i) The general criteria governing a decision  
to prosecute, as determined by the NDPP  
in the policy manual, attached as  
annexure A."

And that, of course, is the general prosecution policy. And  
then under Roman numeral (ii) the following specific criteria, and the  
20 first one is:

"Whether the alleged offence is associated with a  
political objective committed in the course of the  
conflicts of the past."

Do you agree that that suggested criterion is effectively a copy of the central criteria that the Amnesty Committee of the TRC used?

ADV PIKOLI: Yes, Commissioner.

ADV VARNEY: And then there are a range of other criteria, there are quite a few of them, so I will just highlight some of them, and they are not numbered, unfortunately, but, for example, the fourth bullet point:

10 "Whether the ill health or other humanitarian considerations relating to the accused may justify the non-prosecution of the case.

Whether the prosecution will lead to the traumatising of victims, and conflicts in areas where reconciliation has already taken place."

I will skip a few, but the ones I skipped are quite close to what is already in the general policy:

20 "The alleged offender's sensitivity to the need for restitution. The degree of remorse shown by the alleged offender and his or her attitude towards reconciliation. The degree of indoctrination to which the alleged offender was subjected. The extent to which the alleged offender carried out instructions or perceived instructions."

On the next page there is some more:

"Renunciation of violence and willingness to abide by the Constitution. Whether the alleged

offender fully disclosed the alleged offences. Any other criteria for deciding whether a political offence was committed, as set out in the TRC Act, and any further criteria which the Task Team might deem necessary."

So just perusing those proposed criteria, and as we will see some of which ended up in the actual amended prosecution policy, would you agree that these are unusual, and that most of them do not appear in the main prosecution policy dealing with other crimes?

10 ADV PIKOLI: Thank you. Yes, Commissioners, I would say that. This seems to have been a "mixed bag", in the sense that some of the things mentioned here would be things that could be pleaded in mitigation of sentence, not necessarily speaking to a decision to prosecute or not. So it is a "mixed bag" of things, but largely modelled along the lines of the TRC Commission, but with a few additions. Thank you, Commissioners.

ADV VARNEY: And would you agree to the notion that these proposed criteria appear to be providing multiple options for a prosecutor to decline to prosecute that a prosecutor would not normally have?

ADV PIKOLI: Come again?

ADV VARNEY: So I have not counted them, but perhaps we are looking at about another 16 or 17 criteria that apply just to the TRC cases. These seem to be proposing that when it comes to these

cases, there are lots of other reasons not to prosecute that are not present in the main prosecution policy.

ADV PIKOLI: Thank you. Commissioners, what seems to be clear is that this was not meant to be in the normal process of prosecution, as provided for in the prosecution policy. These were not meant to replace the existing prosecution policy. This was meant as a supplement or to complement the existing prosecution policy, with the view perhaps of giving those who have been prosecuted an opportunity to sort of, can I say escape from prosecution.

10 I do not want to go back to what I said earlier about this being a novel thing, trying to find, you know, creative ways of how do we give effect to the President's statement. This would have been done along those lines, to say if people after the TRC process are still willing to come up and make a full disclosure, which could help the country on its chosen path of national unity and reconciliation. Then the door should not be closed to those willing to come and disclose, and even put information which might not have been known at the time.

ADV VARNEY: Thank you Mr Pikoli. Can we then turn to  
20 ...(intervenes)

COMMISSIONER GABRIEL: Before you leave this, Mr Varney, excuse me, what I do not see from this list of criteria, and it may be in the original prosecution policy, but many of these additional criteria relate to the alleged offender. Now, what about the interests of the

victims and their families, especially in cases where the TRC had declined amnesty?

And we remember the stories that we heard about the gross human rights violations. What is missing, it seems, to me, unless I have missed it, Adv Pikoli, is there is no mention of the victims and their families and their interests.

ADV PIKOLI: Which, I agree, Commissioner, that could have been one of the weaknesses. But then also in an indirect way, one, two, three, four, the fourth point from the bottom, which makes reference  
10 to the degree of remorse shown by the alleged offender, and his or her attitude towards reconciliation. In a broad sense, it could be said that it also speaks to the victim of those crimes, but it ...(intervenes)

COMMISSIONER GABRIEL: What about justice, what about justice for the victims and their families?

ADV PIKOLI: Yes, that is why I conceded and said that this does not pay sufficient attention to the plight of the survivors and the families of the victims.

COMMISSIONER GABRIEL: Thank you.

ADV VARNEY: Mr Pikoli, let us turn to the next page, that is  
20 paginated page 524, and I want to draw your attention to paragraph 3.2.4, where it says the following:

"The Task Team realises that the proposed process will have the following shortcomings, or concerns: A possible negation of the constitutional rights of victims, the public at large,

and alleged offenders."

So do you accept that even the Task Team itself acknowledged that the constitutional rights of victims, the public at large, and they say alleged offenders, it was not clear to me how their rights could be offended, but that was already on the table at that time? Would that not have been a bit of a red flag or something to be concerned about when this was being developed?

ADV PIKOLI: Yes, Commissioners, but one needs to take into account that already with the establishment of the TRC, the rights of  
10 the victims were to a large extent also curtailed. Because those who were amnestied could not be subjected to any criminal prosecution, or open to being sued civilly, which took away the rights of the victims.

As I said earlier, that on its own was a deviation, but perhaps a justifiable deviation, it was a reparation. But perhaps what is unconscionable would have been a repeat of a similar process that had run its course, and not backed up by any legal authority, whether in the form of the supreme law of the land, the Constitution, or any statutory backup.

ADV VARNEY: Thank you. And then the next one reads:

20 "The possibility of the institution of private prosecutions."

To your recollection, why was the Task Team concerned about that possibility?

ADV PIKOLI: Again it is related to what I have also mentioned above, that in the normal course of events, when there is a *nolle prosequi*,

those aggrieved by that decision that would have been taken by the National Prosecuting Authority, still had this avenue available to them to institute a private prosecution.

ADV VARNEY: And then the last one, the second last one, actually:

10           "The absence of any guarantees that alleged offenders will not be prosecuted, meaning that they will be reluctant to approach the Task Team and make full disclosure. The concerns relating to persons who have disappeared, arms caches that have not yet been discovered, and the Kwa-Zulu Natal problem will not be solved."

Can you elaborate on that concern?

ADV PIKOLI: Thank you, Commissioners. Again, these are sort of related issues because a "carrot, I suppose, had to be dabbled" in front of those who stood to be prosecuted, to give them that possibility to hope that if they make a full disclosure, then there is a possibility of them not being prosecuted. I think that would have been the aim.

20           ADV VARNEY: Right. And then, lastly, let us just deal with the next page, paragraph 3.3, dealing with the second item on the Terms of Reference. So I will just paraphrase that, it is quite a long paragraph, but there was a debate between the Task Team members in relation to a further amnesty process, similar to that of the TRC process. And there were some who were saying that such a process would

undermine and discredit the TRC process and further undermine reconciliation.

But then there were others who were saying that there is a substantial number of individuals who in the past were misled by their leadership, and others who expected their political leadership to provide the overall context against which their cases could be considered, and they may want to make use of a further amnesty process.

Then we see in the next paragraph that the Task Team  
10 decides not to make a recommendation in this regard and to leave  
this decision in the hands of the government. But should government  
decide to proceed, a draft indemnity bill is attached at annexure B.  
So it does seem that the indemnity bill that we were puzzling over a  
little earlier, that this is most likely the same indemnity bill that is  
being referred to here. Would you agree?

ADV PIKOLI: Yes, Commissioner, it would seem so.

ADV VARNEY: And then, Mr Pikoli, to finishes off my last point  
...(intervenes)

ADV PIKOLI: Perhaps if I could just say something on 3.31. Again,  
20 that discussion or different views would have been of no  
consequence if the idea was to put into effect what the President said,  
because the President had already ruled out any general amnesty or  
planned amnesty.

ADV VARNEY: Yes, indeed, that is what he said in his speech. So it  
is a little puzzling that the Task Team seemed to devote quite a bit of

time to addressing that question. And, in fact, they reach a view in the very last paragraph, they say:

10           "Should government, however, decide on a further amnesty process, legislation will be required since the mechanism and procedures of the TRC Act have run their course and can no longer be applied. If it is decided to follow the latter route, an amendment of the Constitution is also proposed in order to enable such legislation  
10           being adopted to pass muster in the Constitutional Court."

So the Task Team is saying, well, if government wants to go down this road, you will even have to amend the Constitution.

ADV PIKOLI: Yes, that was the extent to which there was then this attempt to give effect to the President's statement, to do everything possible, including, as I said earlier on, what justified the TRC Act is what is contained in the interim Constitution. Therefore, there is sufficient legislative justification, but this process, the way some were arguing, especially where there would have been issues of general  
20           amnesty, could not have been possible without amending the existing legislation or even the Constitution to make it possible.

But still, within anything, as I say, you must act still within the constitutional framework and the legal framework. Therefore, if giving effect to what the President wanted would have then led to a need to amend the Constitution, then it would be wise to say this cannot be

achieved without introducing new legislation. This cannot be achieved without amending the Constitution and then leave the process open to those who make the law.

ADV VARNEY: Let us then turn to the next report from the Amnesty Task Team. It is also in bundle one, it is at page 344. Have you found it, Mr Pikoli?

ADV PIKOLI: Yes, I have.

ADV VARNEY: So it is also a secret report, it is styled "Amnesty Task Team Further Report". And let us begin on the next page, under 1  
10 and under "Background Information", it notes that:

"The Task Team...' (intervenes)

COMMISSIONER KGOMO: Sorry, can you just say which page, sorry?

ADV VARNEY: Sorry, Commissioner. We are now on page 345 of bundle 1.

COMMISSIONER KGOMO: Yes, okay, thanks.

ADV VARNEY: It is the first page of the further report of the Amnesty Task Team. So it notes under "Background Information" that:

20 "The Amnesty Task Team submitted its report to  
the Heads of Department Forum consideration on  
3 March 2004."

Am I right in saying that when they refer to heads of Department Forum, they are referring to the Director's General Forum?

ADV PIKOLI: Yes, that will be correct.

ADV VARNEY: And at 1.2:

"It is noted that the heads of Department discussed the report with members of the Task Team. They indicated that they..."

And that was held *in camera*:

10 "And following those deliberations, the heads of Department indicated that they prefer the recommendation in relation to the establishment of a Departmental Task Team, but they wanted the Task Team to give further consideration to various questions..."

Which are then set out from sub-paragraphs (a) to (f). Let us focus on paragraph (b):

"Consider whether there is a way in which private prosecutions and civil litigation can be eliminated if the National Director of Public Prosecutions decides not to prosecute. Investigate the possibility and desirability of legislation, if required."

20 So, why did the DGs Forum pose that question to the Task Team?

ADV PIKOLI: Thank you, Commissioners. Again, the discussions amongst the DGs around this issue, this matter came up as a possibility, and also, it does not necessarily mean that there was unanimity in terms of the discussions. There were differences of

opinion, but every contribution had to be looked at and be considered, and also to look at the legal implications of any decision. That is why also we are talking about, even if we are thinking of, you know, doing away with the private prosecutions, but would it be desirable? So it is a reflection of the nature of the discussions that were taking place.

ADV VARNEY: Yes. So we are going to get to the legal advice that Adv Bruwer offered on that shortly, and indeed his advice was against it. But the concern for, you know, someone reading this report is that the Task Team suggested that there was a desire to explore ways of  
10 clamping down on other avenues of justice through private prosecutions and civil litigation, and that is the concern that arises in relation to the underlying intent there. Do you see that possibility?

ADV PIKOLI: Can you please repeat the question so that I can understand?

ADV VARNEY: Yes, so the fact that your forum said to the Task Team consider whether there is a way of eliminating private prosecutions and civil litigation, and if so, whether legislation is required, it suggests that what is behind that task is a desire to explore ways of closing down other avenues of justice. So, for  
20 example, you might have taken care of, or you might be controlling the process of justice through the offices of the NPA, but it does not mean that you are necessarily stopping private prosecutions or civil litigation. So are there ways of eliminating those possibilities?

ADV PIKOLI: Yes, thanks, Commissioners. You see, as I said, you had a difference of opinion amongst the DGs. For me, this reflects

the need to get further advice or opinion, like, for instance, to say is it really desirable to deny citizens or victims of their enshrined rights in our Bill of Rights to approach the court of laws for any settlement of a dispute.

So this is the nature of what was going on, that is why the matter then had to be referred to the State Law Advisers to give an opinion on whether this is feasible, can it be done, if it is done, what are the implications of doing it. But clearly, I mean, there was a push to say, look, you know, do away with these things, but still try to do it  
10 legally. Which would have not been proper and possible, actually, if we were to operate within the rule of law and also regarding our Constitution as the true norm, the supreme law of the land.

COMMISSIONER GABRIEL: Would you agree with me, it was more? We had just come through the TRC process, we know the Azapo judgment where the families went to court to challenge the TRC Act. And it was clear that they had to relinquish their rights for the greater good in the TRC Act, full disclosure, and then consideration for amnesty. As against that, they gave up their rights for private prosecutions and civil claims.

20 Now, that process has run, and we have a collection of DGs who have instructed this Amnesty Task Team, where the view is now sent back to this Task Team to say some of us are worried that if we go ahead with these plans, the families will still want to prosecute. Now, is it fair for me to conclude that this was a desire at least held by some amongst that team or that Director General's forum? The view

held by them was that they had to shut down the rights of victims and possibly their families. Do you agree with my assessment of this?

ADV PIKOLI: Thanks, Commissioner. You would be right in your assessment, what you are saying, that as I said, there was a division in terms of the approach.

COMMISSIONER GABRIEL: Thank you.

ADV VARNEY: Mr Pikoli, on that point, and since it is your evidence that there was a division, could you tell us who on that committee was in favour of eliminating private prosecutions and civil litigation?

10 ADV PIKOLI: The members of that committee, I mean, they have already been referred to, members of SAPS, (indistinct), Justice, and perhaps it suffices to say that it was the Intelligence Services, it was SAPS, it was DOJ who were proven to be an obstacle, even at the time when the DSO or the PCLU required investigators to assist them in the matter.

There was this obscene obsession to get rid of Anton Ackerman, because every time the matter would come up about working together as a corporation, it would be put as a condition for the corporation and collaboration amongst ourselves, so  
20 this is what we were going through.

That unless and until Anton Ackerman is removed from these cases, we are not going to, sort of, though it was not put in so many words, but just that obsession to remove a person who was appointed by the President as a special director to head the PCLU, the Priority Crimes Litigation Unit.

Now, you had the National Commissioner demanding the removal of such a person, who was clothed with the legal authority to institute prosecutions. This was further amplified, perhaps we are not there yet, but also by another attempt where, you know, a person came to my office to request the removal, other than now the National Commissioner.

COMMISSIONER KGOMO: To the point that, Mr Pikoli, if we are with you and Mr Ackerman, to the point that they even forged, or someone even forged a document purporting to be authored by Mr Ackerman?

10 ADV PIKOLI: Thanks, Commissioner. Perhaps we can address that when we actually come to it.

COMMISSIONER KGOMO: Okay.

ADV PIKOLI: Because also it was another source of pain.

COMMISSIONER KGOMO: Okay, yes.

ADV PIKOLI: Thank you, Commissioner.

ADV VARNEY: So, Mr Pikoli, given the conduct of SAPS that we have, that you have described, and we have also heard from the evidence of Adv Ackerman, would it be safe to assume that SAPS was one of the parties on the DG's forum that was in favour of  
20 eliminating private prosecutions and civil litigation?

ADV PIKOLI: Well, that is a reasonable inference that one can draw. But, ja, I do not want to really get into the nature of the discussions that we had, but in the main SAPS was, you know, ja, it was going to be an obstacle.

ADV VARNEY: Okay, then let us move on to another one of the tasks, and that is that the Amnesty Task Team, the ATT, had to give consideration to the proposed Departmental Task Team working under the direct supervision of an Inter-Ministerial Committee. What was the thinking behind that proposal?

ADV PIKOLI: Well, thanks, Commissioner. You will recall that the DG's as forming part of the executive arm of government are the ones who are required to implement and execute the decisions of the executive. So it would have been their task to, because then they do  
10 not do things just on their own, they have to report to their principals, who are the Ministers, and the cluster itself, I mean, is led by the Ministers.

Therefore, if there are issues or there is guidance required, you know, there will be always that direction between the DG's and the Ministers. But, ultimately, the executive authorities are the Ministers, and, of course, the ultimate authority is actually the State and the President.

ADV VARNEY: Yes. Do you see the concern that the suggestion of placing that Departmental Task Team, which, which has to make  
20 recommendations on prosecutions on a case-by-case basis, that then reporting to a committee of Ministers, political appointees, that, that could be seen as an impinging on the independence of the NPA?

ADV PIKOLI: Yes, certainly, because the difference of the NDPP, it is vastly different from the position of a director-general of a department. The NDPP or the NPA is required to institute on behalf of the State,

and government is not a State. So obviously, there would have been an issue there, because the NPA was...

But perhaps it is something that perhaps you might want to address, which is in the Constitution section 179(5), that says that the cabinet member responsible for the administration of such, you know, shall exercise final responsibility over the NPA. Which I think, basically, was also a source of tensions as to what does this in practice mean.

And at times, you know, when I was the NDPP, I felt that this  
10 was deliberately at times being misinterpreted, because the NPA Act itself explains exactly what is meant by this final responsibility in terms of section 33, you know, in terms of giving reports to the Minister as and when required.

Which we did, to explain some of the decisions that the NPA would have made in any of the cases that the executive authority would have wanted to know, that was done. But nowhere in that section it says that when it comes to taking prosecutorial decisions, a member of the executive has got a role to play. This has been my pain.

20 ADV VARNEY: Yes, and in due course we are going to come to that pain, if I may use your words. Commissioners, section 179, we have actually added it to the bundle, bundle 2 at page 167. Let us then turn to the next task that was given to the ATT, and that was to consider, or let me just read it, paragraph (d):

"It is important that the proposed Task Team, the

Inter-Ministerial Committee and the national director in performing their functions and reaching decisions should take the national interest into account."

So what was the thinking behind the instruction for the Task Team to consider that proposal?

ADV PIKOLI: Instruction?

ADV VARNEY: Well, I suppose not an instruction, but it was a request by the DG's Forum to give further consideration to the following aspects, and that was one of them.

ADV PIKOLI: Ja, I think I have already spoken to this when I said that the DG's report to their Ministers. I suppose that is why also, you know, the national director is put separate from the Inter-Ministerial Committee, so that would be my...

ADV VARNEY: Although here it is saying that the proposed Task Team, the Inter-Ministerial Committee and the national director, presumably, that is the NDPP...

ADV PIKOLI: Yes.

ADV VARNEY: In performing their functions and reaching decisions, and I am assuming, but correct me if I am wrong, that the decision includes prosecutorial decisions, must take the national interest into account.

ADV PIKOLI: Yes, and I suppose the national interest in this matter would have been those broader issues of national unity and

reconciliation, striving for peace and stability in the country, this would have then been a reference to that.

ADV VARNEY: Okay, but it is interesting that the term "national interest" was used as opposed to public interest, because often national interest, it relates to the interest of the State or the government.

ADV PIKOLI: Ja, I suppose that is a debatable issue, you know, that people and lawyers can always engage in.

ADV VARNEY: Yes, indeed, and we will not bore the commissioners  
10 with that debate, as interesting as it is.

COMMISSIONER GABRIEL: Some of us are lawyers.

ADV VARNEY: I suspect all of you. And then the last request to the  
ATT was:

"Advise the forum on whether a person who is  
aggrieved by a decision of the National Director  
may approach the International Criminal Court."

Why was the ATT asked to consider that possibility?

ADV PIKOLI: Ja, I suppose also which might not have necessarily  
been really relevant on this issue, given the establishment of the ICC,  
20 which, if I am not mistaken, was around 2000 or 2002. And the ICC  
would not have had any jurisdiction to such offences committed  
before it was established. But, of course, it does not mean that some  
people were thinking of that possibility, that if domestically there is  
failure to prosecute crimes that have been identified, you know, then  
those matters can be referred to the ICC.

ADV VARNEY: But do you agree that it reflects a certain fear that at least some members of the forum had that even where the NDPP declines, the complainant may go to another body, like the ICC?

ADV PIKOLI: That is correct, Commissioners.

ADV VARNEY: So then let us turn to the next page under the general heading of "Discussion", and let us go to 2.3, because here now we have the results of the legal advice that Adv JH Bruwer provided the Task Team. And so 2.3 deals with:

10                    "The possibility and desirability of eliminating  
                         private prosecutions and civil litigation in cases of  
                         no prosecution."

And he does seem to be clear that this would offend various constitutional rights to equality, rights of access to the courts. He doubts whether it would meet the requirements of section 36, the limitations clause. In the next paragraph he says:

"It would limit the rights of victims or other interested parties."

And so then he concludes at 2.3.4:

20                    "The Task Team is of the view that private  
                         prosecution and civil litigation can only be  
                         eliminated by way of legislation and a  
                         constitutional amendment. The Task team is of  
                         the view that such a step would not be desirable."

So that is the advice that was given to the forum. I assume the forum noted that advice and did not dispute it. And just to finish

up the story in relation to the establishment of an Inter-Ministerial Committee, and this is at the bottom of that page, paragraph 2.4:

"The Task Team supports this proposal, however, it wishes to point out that the State Law Advisor is of the view that the establishment of such a future structure may constitute a cumbersome process and increase the possibility of conflicting views between the various role players and structures."

And the last instance, I think is the important one:

10 "Furthermore, they pointed out that the process might be seen as an attempt by the government to put undue pressure on the NDPP in reaching an independent decision."

So here you have the State Law Advisor saying that, you know, a body like the Inter-Ministerial Committee engaging in a process that involves case-by-case consideration of prosecutorial decisions, that that might be seen as an attempt by the government to put undue pressure on the NDPP. Do you agree with that?

ADV PIKOLI: Yes, I do.

20 ADV VARNEY: So just to follow up ...(intervenes)

COMMISSIONER GABRIEL: Sorry, just correct me if I am wrong, so the Task Team was fully aware of the problems identified by the State Law Advisors that this could potentially impact on the independence of the NDPP?

ADV PIKOLI: That is correct.

COMMISSIONER GABRIEL: But they supported the proposal, nevertheless?

ADV PIKOLI: Pardon me?

COMMISSIONER GABRIEL: But they supported the proposal, nevertheless, the Inter-Ministerial Task Team?

ADV PIKOLI: Yes, Commissioner, yes, in words, this was supported, but indeed, it was something else.

COMMISSIONER GABRIEL: Thank you.

ADV VARNEY: So my follow-up question is the following, if this was  
10 the view, which you appear to accept as correct in relation to the  
Inter-Ministerial Committee, why would the same concern not apply to  
the DG's Forum itself and the proposed Departmental Task Team?

So, in other words, the State Law Advisors are saying, look, if you set up a body to do those kinds of things, but here they were referring to the Inter-Ministerial Committee, that might be seen as an attempt by government to put undue pressure on the NDPP in reaching an independent decision. So ultimately we know that this body was not set up.

ADV PIKOLI: Yes.

20 ADV VARNEY: But the same tasks were carried out by the  
Departmental Task Team, as overseen by the DG's Forum. So the  
question is, well, does not the same concern apply?

ADV PIKOLI: Yes, thank you, Commissioners. I think this is the point that Commissioner Gabriel was raising as well that I agreed to. You know, in terms of saying, yes, fine, we accept this, but that something

has happened, which is in direct contradiction of what people had agreed on.

ADV VARNEY: Yes. And then just to finish up, the Task Team's responses to the other requests that were given on the question of national interest being the paramount objective. The Task Team wholeheartedly agreed with that viewpoint, the viewpoint of the forum, and I think you have explained yourself there, so I will move on. And then in relation to the involvement of the International Criminal Court, paragraph 2.6 Adv Brouwer gave certain advice. Halfway down he

10 says:

"It is not inconceivable that a complainant who is prohibited by legislation contemplated in paragraph 1(a) from instituting a private prosecution in a national court may approach the International Criminal Court for relief."

So Adv Bruwer says, well, you cannot totally close that door, although I agree with your legal advice, actually, that the ICC only had a jurisdiction from 2002, so it was not really an issue. All right, then let us move on from this report, unless commissioners have further

20 ...(intervenes)

COMMISSIONER GABRIEL: Can I ask a last question? Is there any possibility that the DG's Forum misunderstood what President Mbeki said in his speech?

ADV PIKOLI: My sense is that misunderstanding is rather, you know, an understatement.

COMMISSIONER GABRIEL: Explain?

ADV PIKOLI: No, in the sense that whilst, you know, the DG's Forum was to establish this mechanism, but the dominant view was saying now like then the NDPP should not take decisions without us saying, you know, or making recommendations to the national director.

COMMISSIONER GABRIEL: And that was the dominant view?

ADV PIKOLI: Yes, and then this is what I thought was, you know, wrong, legally and constitutionally, because I draw a line between making a recommendation. Though a recommendation is a  
10 recommendation, the one to whom it is made is under no obligation to accept it. One will still exercise his own or her own discretion in the matter. But given the importance of the independence of the prosecutors, you know, one should not even give a whiff to the thinking that the independence of the prosecutors can be sacrificed on the "altar" of political expedience, that is my view.

COMMISSIONER GABRIEL: Thank you.

ADV VARNEY: And just to follow up on the Commissioner's question, I suppose if you had an NDPP in place who had integrity, believed in the Constitution, that was strong, then, you know, resistance to  
20 pressure and interference could be expected. But the converse is that if you had a weak NDPP, or even a corrupt NDPP that guidelines along this nature, that we have seen proposed in these reports, would really open the door to interference in the work of the NPA.

ADV PIKOLI: Thanks, Commissioners. Yes, I believe so, that laws should not be enacted to suit individuals, but should be for the

protection of institutions that those individuals are heading, whether they are there or they are not there. Thank you.

ADV VARNEY: All right, then let us move on, and I am going to deal with a topic that in my notes I have titled the "Chikane Arrest Saga", although we are not dealing with the arrest of Chikane *vis-à-vis* the Chikane case. And this Commission has heard evidence around the attempts to carry out the arrests of three suspects on the 11 November 2004, and this predates your time at the NPA because you only assumed office in February of 2005.

10           But I am sure you have heard the evidence of Anton Ackerman, as well as Adv Silas Ramaite, and I intend just to save time just to summarise what they said. But, Commissioners, I refer in particular to the affidavit of Silas Ramaite at paragraphs 30 to 35, and then also to the affidavit of Anton Ackerman, which is in bundle 3 at page 8, paragraph 17, as well as the transcripts of the evidence of Anton Ackerman on the 5 March at page 9.

          Mr Pikoli, essentially what happened is that the PCLU, which Anton Ackerman was heading up, wished to proceed with the arrest of three suspects in the attempted murder matter in relation to the  
20 poisoning of the Reverend Frank Chikane, and on the day in question, being the 11 November 2004, he was called by the attorney for the suspects, Mr Jan Wagenaar, who asked him to hold back on the arrest.

          And when Mr Ackerman declined to do that, Mr Wagenaar told him that he would be called by a senior official in the Department

of Justice, and Ackerman's evidence was it was somebody by the name of De Lange, but he did not know which De Lange it was. Was there a De Lange in the Department of Justice at that time?

ADV PIKOLI: There was a Deputy Minister Johnny De Lange, and he would have known if it was him.

ADV VARNEY: Yes, I can tell you that when he was told that De Lange would be calling him, his evidence, if I recall correctly, was that he thought it was going to be Johnny De Lange, but when the person came on the line, it was not him.

10 ADV PIKOLI: The other De Lange that I can think of or remember in the Department was a director in the branch that was dealing with the legislation, those who were drafting legislation. If I recall correctly, I am not so sure now of his first name, but there was a De Lange who was a director.

ADV VARNEY: Right. Was it by chance Johan De Lange?

ADV PIKOLI: Johan, possibly.

ADV VARNEY: So there is at least a possibility that it was Mr Johan De Lange, director of Legislation, who might have placed that call, and perhaps the evidence leaders might want to reach out to that De  
20 Lange. I do not know whether he is still alive. Do you know if he is alive?

ADV PIKOLI: I have always kept in touch with the Departments where he used to work, but I have never had that passed on. I am not ruling it out, but I have never had that passed on.

ADV VARNEY: In any event, when that De Lange, whoever it might have been, also asked Adv Ackerman to hold back on the arrest and Ackerman declined, he was then later contacted by the then acting NDPP, Silas Ramaite, who indicated to him that he had to hold back because there was guidelines being formulated.

And it is the evidence of Adv Ramaite that he was called by the then Minister of Justice, Bridget Mabandla, who told him to suspend the TRC cases pending the issuing of these guidelines, so an effective moratorium was then put in place. At that time when you  
10 were DG, did any of this come to your attention?

ADV PIKOLI: Perhaps it is another instance where things could have happened without me knowing. Because again, I would find it strange for an official in the Department who was a director, if it is Johan De Lange, I am not saying it was, I do not know who it was, but if indeed it was him, and it is the same one who was in the Legislation branch, he would have reported to a chief director, who at the time, I do not know who it was, but I remember there was a time when Adv Gerhard Nel was the chief director.

But I think Adv Nel left the Department of Justice to go to the  
20 NPA, so there could have been another chief director, and then there is the DDG who reports directly to the DG. Now for a message to go to a director in the Department of Justice, who I was the DG, would have sort of undermined my own authority in the Department. And for this official, who is a director, to be asked to make contact or talk to somebody at the NPA on such an important matter, ja, it baffles me.

ADV VARNEY: Yes. Mr Pikoli, can we now move to the amendments to the prosecution policy itself? And before we dive into that policy, it was the evidence of Anton Ackermann, who at that time was head of the PCLU, and I suppose we should just place on record that you assumed office as NDPP in February of 2005 ...(intervenes)

ADV PIKOLI: 2005.

ADV VARNEY: I am sure we have the actual dates but maybe you remember.

ADV PIKOLI: I assumed my responsibility on the 1 February 2005.

10 ADV VARNEY: On the 1 February 2005.

ADV PIKOLI: The 1 February 2005.

ADV VARNEY: And am I right in saying that a lot of the work in preparing and finalising the amendments to the prosecution policy would have taken place in 2005?

ADV PIKOLI: Commissioners, I cannot really recall as to when it started, but obviously, when I was there, there was that work, which was led by Adv Gerhard Nel, the one who used to be the Chief Director in Legislation at the Department of Justice, who was now at the NPA responsible for legislation at the NPA in terms of  
20 amendments and policy issues, so he was responsible for that.

And then also I must indicate that I knew of that process when I was at the NPA, and it carried through during my time, and I did not oppose it, and the work continued until the policy was approved. And I also recall that there was resistance. One time I

remember miss, we used to call her "comrade", Comrade Janet Love from the LRC.

ADV VARNEY: Is that the Legal Resources Centre?

ADV PIKOLI: Ja, the Legal Resources Centre, who also raised issues around the amendments to the prosecution policy. It was a nice chat, but at the time I firmly believed that if, you know, if that was to be given, that there might be, if this is seen as the best way going forward, so let it be. Because at the end of the day the amendments to the policy would have to go to Parliament and be approved, yes.

10 ADV VARNEY: Thank you. And just for the record, when you refer to Gerhard Nel, you are not referring to the other Gerhard Nel, who was also in the NPA as a prosecutor. They are two different people.

ADV PIKOLI: Yes, not to Adv Gerrie Nel, who was at the DSO.

ADV VARNEY: Right, okay. He is not here this afternoon, incidentally. All right, so then if we can turn to the statement of Anton Ackerman, which is in bundle 3, page nine, paragraph 19. And I know it is becoming quite difficult to work between so many bundles, but essentially what Ackerman was saying in that statement, and I believe he also said it in his evidence, was that he viewed the  
20 amendments to the prosecution policy as unconstitutional, and he said that two legal opinions had been developed. My team has found it for me, so that is paragraph 19. I will just read it so you do not have to find it:

"At least two legal opinions were prepared by my office regarding the constitutionality of the

proposed amendments to the prosecution policy and submitted to the NDPP. The opinions pointed out that the amendments amounted to a rerun of the TRC's amnesty process and were not without constitutional scrutiny. At a number of meetings I voiced my opposition to the proposed amendments. I recall that I had numerous consultations with Gerhard Nel, the legal advisor to the NDPP, who was playing a leading role in formulating the proposed amendments."

So at that time there did seem to be opposition from within the NPA, at least the PCLU. What was your reaction to that?

ADV PIKOLI: Yes, Commissioners, Adv Ackerman had strong views on so many issues. You know, he was the typical bulldog, if I were to use that, as a prosecutor, and I admired him for that. But I felt that, you know, let us give peace and stability a chance in the country, that if in one way or the other this could contribute to the peace and stability project in the country, let us go ahead.

So that was my view when I was at the NPA during the amendments to the prosecution policy. And, of course, the Constitution required that the NDPP must determine the prosecution policy, but with the concurrence of the Minister of Justice, it is in the Constitution, it is in the NPA Act, and I felt that then let that process go ahead.

ADV VARNEY: Before the amendments were finalised, did the NPA reach out to victims or families to solicit their views?

ADV PIKOLI: Commissioners, to be honest, I have no recollection of the victims having been consulted, unless proven otherwise in terms of my own recollection, I do not recall that process. But I do not rule it out completely, because Adv Nel would know exactly the processes that were followed, but from my side, I do not have a recollection of victims having been consulted. But normally on issues of this nature there tend to be broad consultations before actual promulgation, but  
10 in this case I have no immediate recollection.

COMMISSIONER KGOMO: But looking at your record, as someone who has noted dates, has documented just about everything, it is highly unlikely that that was done. I am trying to enter into your mind to think that that does not seem to have happened.

ADV PIKOLI: I would not be surprised if it did, because I have no recollection of that, Commissioner. So what I am saying is, it is not just possible, but a real probability.

COMMISSIONER KGOMO: Yes.

ADV VARNEY: Thank you, Commissioner. And indeed, we would  
20 like to hear from Adv Gerhard Nel on that question, and others, of the Commission in a position to arrange that. Can I refer you to a statement made in the Lukhanyo Calata affidavit, which is bundle 1 at page 84, paragraph 191.

ADV PIKOLI: Page 84, paragraph 191?

ADV VARNEY: Ja, paragraph 191.

ADV PIKOLI: Starting with "No victim"?

ADV VARNEY: Yes. So then Mr Calata says ...(intervenes)

COMMISSIONER KGOMO: If you can take us along, Mr Varney?

ADV VARNEY: Sorry, Commissioner, so it is bundle 1, that is the bundle with the Calata Affidavit and annexures, it is page 84, paginated 84 and paragraph 191 at the top.

COMMISSIONER KGOMO: Yes, we are there.

ADV VARNEY: Mr Calata says:

10                    "No victim, family or organisation representing  
                         their interests were consulted during the drawing  
                         up of the amendments to the prosecution policy.  
                         However, during an interview with the author  
                         Ole Bubenzerer on 8 May 2006, Wagner, who  
                         acted for several of the perpetrators, said that  
                         representatives of the former security police were  
                         consulted informally on a very occasional basis."

20                    And that is at page 132 of Mr Bubenzer's book, and we will  
                         get the bundle reference just now. So there is an allegation that, at  
                         least from Mr Calata, representing the 25 families, that no victim or  
                         family or community group were consulted. But that, according to  
                         Mr Bubenzerer, who conducted an interview with the late Wagner,  
                         representatives of the former security police were consulted informally  
                         on a very occasional basis. What is your response to that?

ADV PIKOLI: Thank you, Commissioners. I mean, this Wagner was representing the apartheid security police officers. Therefore, he was

representing perpetrators of all these atrocities, so it does not amount to a consultation with the victims, far from it. If this is correct what is said here, then it is perpetrators, according to Mr Ole Bubenzerer, so it does not address the question of the victims.

ADV VARNEY: Oh, yes, yes, no, I agree that it does not address the question of the victims. The allegation is that the victims were not consulted, but according to the reference in the book of Mr Bubenzer, who interviewed Wagner on 8 May 2006, Commissioners, the extracts of that book are on bundle 7, page 132, Bubenzer writes that Wagner  
10 told him that representatives of the former security police, yes, the perpetrators, that they were consulted informally on a very occasional basis.

CHAIRPERSON: But the point of your question, Mr Varney, is that, according to Mr Lukhanyo Calata, that no victims of family or organization representing their interest were consulted.

ADV VARNEY: Indeed, Madam Chair.

CHAIRPERSON: Yes. Your response thereto, advocate, to the allegation by Mr Lukhanyo Calata that they were not consulted as victims?

20 ADV PIKOLI: Yes, thank you, Chairperson. That is the point that I addressed to say, and the point that Commissioner Kgomo also followed on, that I said, as far as I can recall, I do not think there was, you know, because I have no recollection of victims being consulted. And I said the best placed person would be Adv Gerhard Nel, who was in charge of the process of the amendments of the prosecution

policy. Because it is common cause that, you know, when the bills or when there is an amendment of the regulations, and even a matter as important as the TRC matters, that there would have been public consultations.

COMMISSIONER GABRIEL: And just thinking out loud, certainly in respect to the cases where amnesty was refused, these are the victims and families that were asked to give up rights as part of the TRC process. Now, they had gone through that process, having given up their rights in exchange for the truth and in exchange for, in  
10 this case prosecution where amnesty was refused. Now, I would think that there would be a heightened duty, certainly with respect to that group, to consult with them if there was, using your word, even a "whiff of a change in the playing fields". Would you agree with that?

COMMISSIONER KGOMO: If I may add, not only where amnesty was refused, those who did not apply for amnesty and said do your damn best.

ADV PIKOLI: Yes, I agree with both positions of the commissioners.

COMMISSIONER GABRIEL: A heightened duty to consult. Would you agree with that?

20 ADV PIKOLI: I do agree, Commissioner.

ADV VARNEY: Thank you, Commissioners. So, we are aware that the amendments to the prosecution policy were eventually promulgated during December of 2005, and came into operation early in 2006. Prior to that promulgation, do you know if Cabinet played a role in the adoption of the amendments?

ADV PIKOLI: In the normal course of things, the Minister of Justice would have put it on the agenda of Cabinet, given the fact that it is a matter which was raised by the President now to say I am trying to give effect to what the President said. That it was deemed fit and proper to have an amendment of the prosecution policy in order to give effect to what the President said.

So in the normal course of things it would have been discussed in Cabinet and approved, because the Minister being the one member of Cabinet who also, whose concurrence is required on  
10 the question of the prosecution policy of the NPA. That would be my submission, Commissioners.

ADV VARNEY: And I have just been advised that, oh, let me deal with this one, it has served before Cabinet on the 22 June 2005, and the reference is bundle 4 at page 1107.

COMMISSIONER GABRIEL: Sorry, start again, bundle 4?

ADV VARNEY: At page 1107, and that is the bundle of Tembi Simelane that the Calata Group put up. And I can just give you an indication of what that document is. It is an internal memorandum dated the 22 July 2005. It is from the NDPP to the Minister of Justice,  
20 and it is titled:

"Prosecution policy and directives relating to the prosecution of criminal matters arising from conflicts of the past tabling in Parliament."

And the purpose of the memorandum in paragraph 1 is:

"To inform the Minister regarding the consultation

process that took place in respect of the above-mentioned policy and directives, and to request the Minister to table the amended prosecution policy together with the above policy and directives in Parliament."

And under "Background Information":

10 "On the 22 June 2005 Cabinet approved, (a), the prosecutorial policy and directives relating to the prosecution of cases arising from conflicts of the past, which were committed before 11 May 1994, and that the prosecutorial policy and directives be submitted to Parliament for consideration in terms of section 21(2) of the NPA Act."

I think that is the nub of the matter, and it is in bundle 4 at page 1107. And a quick glance of the headings and paragraphs does not reflect any consultation with victims or families or communities, although I would ask my team to look at that more closely. Perhaps we can now move to the amendments to the policy itself ... (intervenes)

20 COMMISSIONER GABRIEL: Mr Varney, just before you get there.

ADV VARNEY: Sure.

COMMISSIONER GABRIEL: So with respect to the amendments to the policy, we know the Minister approved it, Cabinet approved it, and I am assuming that the tabling of the policy before the legislature meant that Parliament had no objection. Am I correct?

ADV PIKOLI: I do not recall any objections coming from Parliament.

COMMISSIONER GABRIEL: From Parliament?

ADV PIKOLI: Yes, that is why they were actually put into effect.

COMMISSIONER GABRIEL: So two arms of government approved this, the amendments?

ADV PIKOLI: Ja, it would have been the executive and the legislature and Parliament.

ADV VARNEY: So the amendments to the prosecution policy can be found in bundle 2 at page 537.

10 ADV PIKOLI: 537?

ADV VARNEY: Ja, 537. It is titled "Appendix A" because it is attached as an appendix to the main prosecution policy. It is titled:

"Prosecuting policy and directives relating to the prosecution of offences emanating from conflicts of the past and which were committed on/or before 11 May 1994."

The introduction gives a lot of the background that we have already been through. So to save time, I am just going to draw your attention to the substance, which really begins at part B, that is at  
20 paginated page 539, that deals with procedural arrangements. And the one arrangement that we should focus on briefly is that contained at paragraph 6. which says:

"The PCLU shall be assisted in the execution of its duties by a senior designated official from the following State Departments or other components

of the NPA:

The National Intelligence Agency, the Detective Division of SAPS, Department of Justice and Directorate of Special Operations."

Am I correct in saying that ultimately an interdepartmental Task Team was created comprising those members, and I understand maybe some other members as well from other departments?

ADV PIKOLI: It would not have gone to other departments who are not mentioned here, so it is safe to assume that these are the  
10 departments that were required to assist the PCLU, and I am sure the commissioners must have noted the absence of anybody from the Presidency.

ADV VARNEY: Yes, that is right, the Office of the President is not listed there, although a bit later we will refer to some minutes and documents where the Office of the President does crop up, but for the moment, at least, paragraph 6 is clear, it was those four departments and did not include the Office of the President. And then just to draw your attention to a few of the paragraphs, for example, paragraph 7:

20 "The NDPP must approve all decisions to continue an investigation or to prosecution or not to prosecute."

That effectively restates your powers under law. Did that perhaps give you some comfort that you were the one making those decisions?

ADV PIKOLI: Yes, yes it did.

COMMISSIONER GABRIEL: But it was already in the Constitution.

ADV PIKOLI: Yes, I know, but for it to be also included now in trying to deal with a special category of cases, so it did not differ from what the Constitution actually demands. Thank you, Commissioner.

ADV VARNEY: And then of course there were also some other similar provisions that would already have been in place with without these amendments. So, for example:

- 10                   "9.     The NDPP must obtain the views of any  
                      private or public person, institution,  
                      intelligence agencies, commission or  
                      SAPS, and obtain the views of victims, if  
                      possible, before arriving at a decision.
10.    A decision of the NDPP not to prosecute,  
                      and the reasons for that decision must be  
                      made public."

So those particular ones did not seem that controversial. And then they repeat section 179(6) of the Constitution in paragraph 11:

- 20                   "The NDPP must inform the Minister of Justice of  
                      all decisions taken or intended to be taken in  
                      respect of this prosecuting policy related to  
                      conflicts of the past."

But would you agree with me that, and I think you did allude to it a little earlier when discussing the section 179, that informing the Minister about your decisions taken or intended to be taken in respect

of the prosecution policy, is not a requirement that you would have to inform her in advance about prosecutorial decisions on a case-by-case basis?

ADV PIKOLI: No that did not mean that. Actually, it would have been a mission impossible given the number of prosecutions that take place daily in our courts.

ADV VARNEY: Yes indeed. And in paragraph 12:

10 "The NDPP may make public statements on any matter arising from this policy relating to conflicts of the past, where such statements are necessary in the interest of good governance and transparency, but only after informing the Minister of Justice."

Why was that included in the amendments to the policy?

ADV PIKOLI: Ja, thanks, Commissioners. If you were to ask me that question, I mean, it is something that I felt I could live with because it is not going to change whatever decision, or it is going to influence whatever decision that is made when it comes to the question of prosecutions, and also it is about making public statements.

20 I did not see it as a threat to the independence of the prosecutors, so I felt I could live with it because, I mean, any further, you know, without having this policy put in place, then it would have caused further and further delays in terms of the NPA going ahead with the prosecution of these matters, so that is something that I felt I could live with.

ADV VARNEY: So then let us turn to Part C:

"Criteria governing the decision to prosecute or not to prosecute in cases relating to conflicts of the past."

And it kicks off by saying:

10 "Apart from the general criteria set out in paragraph 4 of the prosecuting policy of the NPA, the following criteria are determined for the prosecution of cases arising from conflicts of the past..."

Let us then take a look at paragraph 3(a) and (b). It talks about:

- "(a) The need for full disclosure of all relevant facts; and
- (b) Whether the alleged act, mission or offence is an act associated with a political objective committed in the course of the conflicts of the past."

And then the various factors that have to be considered.

20 That is on the next page, Roman numerals (i) to (iv):

- (i) The motive of the person who committed the act.
- (ii) The object of the act, omission or offence, in particular whether it was primarily directed at a political opponent or State property or personnel or against private property of individuals.

- (iii) Whether the act, omission or offence was committed with the approval or the order of an organisation, institution, liberation movement and others; and
- (iv) The relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of relationship and proportionality of the act to the objective pursued, but it does not include acts committed for personal gain or out of personal malice, ill will or spite."

10

Now, do you agree that those are effectively almost word-for-word the criteria that the erstwhile TRC Act put in place for the Amnesty Committee to apply?

ADV PIKOLI: Yes I do, thank you, Commissioner.

ADV VARNEY: So in that sense, at least in relation to those criteria, this does really amount to something of a rerun of the amnesty process?

20

ADV PIKOLI: Yes I do agree to that. It is like a hybrid, you know, policy document, which does not do away with the normal prosecution policy, but also adds other criteria to be taken into account, which largely come from the work of the TRC, and like repeating word-for-word, so it is like a hybrid document.

ADV VARNEY: And then if we look at some of the other criteria, let us look at D, dealing with the personal circumstances of the alleged

offender. You will notice some overlap with what the Amnesty Task Team had proposed, for example:

"(i) The ill health or other humanitarian considerations might justify the non-prosecution of the case.

(iii) The alleged offender's sensitivity to the need for restitution.

10

(iv) The degree of remorse shown by the alleged offender and his or her attitude towards reconciliation.

(v) Renunciation of violence and willingness to abide by the constitution.

(vi) The degree of indoctrination to which the alleged offender was subjected.

20

F. Facilitate whether the alleged offender may contribute, or rather whether the prosecution or non-prosecution may contribute, facilitate or undermine our national project of nation building through transformation, reconciliation, development and reconstruction.

G. Whether prosecution may lead to further renewed traumatising of victims and conflict in areas where reconciliation has already taken place."

And then there is a caption or phrase or a couple of phrases:

"A consideration of any views obtained for purposes of reaching a decision, and any further criteria which might be deemed necessary by the prosecuting authority."

So you agree that there is quite a lot of overlap or borrowing from the recommendations of the Amnesty Task Team?

ADV PIKOLI: Yes, I do Commissioners.

ADV VARNEY: Just as a matter of interest, so a possible criteria or  
10 ground not to prosecute would be the degree of indoctrination to which the alleged offender was subjected. I suppose in apartheid South Africa there was quite a lot of indoctrination, even through Christian national education, you know, the South African Broadcasting Corporation, and the like. Could alleged offenders not have made those claims that just growing up in apartheid South Africa they were subjected to indoctrination?

ADV PIKOLI: Yes, that is correct, and I have my own anecdotes about it at a personal level, yes, I agree.

ADV VARNEY: Ja ...[intervenes]

20 COMMISSIONER GABRIEL: Again, if I may?

ADV VARNEY: Yes, please do.

COMMISSIONER GABRIEL: Again it seems there is not any direct reference to the interests or the needs or the views of the victims and the survivors or the family, the surviving family.

ADV PIKOLI: Yes, I agree Commissioner.

COMMISSIONER GABRIEL: Would you agree with my *prima facie* thoughts that that seems to be a critical omission?

ADV PIKOLI: Well, you go through this, it is clear that this was done more to benefit perpetrators than to deal with the question of the survivors and the families of the victims of such atrocities, I would boldly make that statement.

COMMISSIONER GABRIEL: Okay.

COMMISSIONER KGOMO: Mister, Adv Pikoli, this would then fall foul of what Chief Justice Sandile calls "participatory democracy",  
10 which means the other side has not participated or was not consulted.  
Do you agree?

ADV PIKOLI: Yes, I do, particularly when also the NPA, we put ourselves out there as the people's lawyers, which meant that we had adopted a victim-centred approach or victim-centric approach. So this would offend, you know, that position that the NPA itself had taken.

COMMISSIONER KGOMO: Yes, thank you.

COMMISSIONER GABRIEL: You were happy with this policy at the time, the policy amendments at the time?

20 ADV PIKOLI: As I said, I felt that I could live with them because my source of solace and comfort, being the B part, which did not tamper with the discretion of the National Director of Public Prosecutions, that was my source of solace and comfort. Thank you, Commissioner.

ADV VARNEY: Thank you, Commissioners. That last criteria that is sitting on page 542, is Roman numeral (I):

"Any of the criteria which might be deemed necessary by the prosecution..." (intervenes)

ADV PIKOLI: Number (j).

ADV VARNEY: I beg your pardon, it is actually (j), at the top of page 542:

"Any further criteria which might be deemed necessary by the prosecuting authority for reaching a decision."

Potentially, did not that open the door to almost any ground  
10 or excuse not to prosecute somebody being invoked, because it simply is not specified?

ADV PIKOLI: Thank you, Commissioners. That is a normal casual phrase, you know, to say do anything that is incidental, you know, it is a casual phrase, but it still would not have taken away the discretion. Yes, obviously it would have opened such a window of opportunity, I would agree.

ADV VARNEY: Just for the record, Commissioners, my attorneys have been able to find the dates at which the prosecution policy was presented in Parliament. And according to the PMG minutes, which  
20 we can provide, we will put them up, Gerhard Nel of the NPA presented the policy to Parliament in the National Assembly on the 17 January 2006, as well as before the National Council of Provinces on the 22 March, 2006. But by then the amendments had already come into effect on the 1 December 2005.

Now, Mr Pikoli, we have already spoken about the struggles that the PCLU was having in obtaining investigators. And we did hear from Adv Bulelani Ngcuka last, in fact, yesterday, that he did sign two declarations to have six cases investigated. And my team will remind me of those dates. but this, of course, happened before you assumed office.

And we have looked into those six cases. and with the exception of the Chikane case, the other cases, unfortunately, for various reasons, were not able to be taken forward. But there were  
10 other matters with the PCLU that had been previously investigated, and coincidentally, there were around six of them as well. There was some overlap, for example, the Chikane and PEBCO 3 matters.

But according to the evidence of Adv Ackerman, because they were investigated, those cases were taken forward. And he gave examples of the prosecution of Eugene Terre'Blanche on terrorism charges in 2003, the prosecution of one Ronny Blani, an alleged ANC member who had been involved in mob violence.

That prosecution proceeded in 2004, and then the PEBCO 3 case was also initiated in 2004. And then the case that you would be  
20 very familiar with, the Chikane matter, which ultimately came to light in 2007, and we will get to that in more detail. And there were two other matters that were resolved, I think before you assumed office.

Were you aware of the fact that when you became NDPP in February of 2005 that there was this issue around securing

investigation officers, but that the PCLU was nonetheless proceeding with cases that they had already investigated?

ADV PIKOLI: No, I was not aware of that.

ADV VARNEY: But at some point, and we will get to it in the documentation, you would have become, you became aware that there were challenges in getting investigations done by both SAPS and the DSO?

ADV PIKOLI: Yes, that is correct.

ADV VARNEY: Yes, we will get to that in due course. Let us turn to  
10 the NPA Annual Report of 2005/2006. And that is, I believe, I have got a few references for it. I believe it is in bundle 2 at page 108 to 109.

CHAIRPERSON: Come again, Mr Varney, with the page reference?

ADV VARNEY: It is page 108 of Mr Pikoli's bundle, that is bundle 2. So this is the annual report of the NPA for the year 2005/2006. And if we turn to the next page, that is paginated page number 109, there is a paragraph that starts with:

"Following government's response to the final  
report of the TRC."

20 And since this is actually your words, could I ask you to read this into the record? So we are on page 109, it is that second column. and halfway down the page: "Following government's response", just to the end of the page, please?

ADV PIKOLI: Thank you, Commissioners.

"Following government's response to the final

report of the TRC, and because it is important for the prosecuting authority to deal with these matters on a uniform basis in terms of specifically defined criteria, the National Director, with the concurrence of the Minister for Justice and Constitutional Development, and after consultation with the various directors of Public Prosecutions, issued prostitution policy and policy directives in terms of section 179(5)(a) and (b) of the Constitution regarding the handling of such cases arising from conflicts of the past.

10 These prostitution policy and policy directives, which must be observed in the prosecution process, were tabled in Parliament towards the end of 2005, and came into operation on 1 December 2005. During January and February 2006 the NPA briefed the Portfolio Committee on Justice and Constitutional Development and the Committee on Security and

20 Constitutional Affairs of the National Council of Provinces regarding the contents of these directives. I am sad to report, as at the time of writing this report, that not much has been achieved in this regard, despite all the attempts that have been made in taking this matter

forward."

ADV VARNEY: So I want to focus on that last sentence where you say that you are sad to report, but before we do that, can you just remind us, the annual report deals with 2005/2006. It runs from what month in 2005 to what month in 2006?

ADV PIKOLI: Well, this annual report covers the period 2005 to the end of 2006. Now, I assumed my responsibilities in February 2005, so the last chunk of it, where I was already appointed, would have related to February and March.

10 ADV VARNEY: Okay, so we are not talking about ...(intervenes)

ADV PIKOLI: But then it would cover 2006 until the end of that financial year.

ADV VARNEY: And the end of the financial year is at the end of February or the end of March?

ADV PIKOLI: Actually, this one, 2005, the whole year, I would have been the National Director of Public Prosecutions.

ADV VARNEY: Yes, so it would cover the whole of 2005, but it would only have covered two or three months in 2006?

ADV PIKOLI: No, no, I am saying it would have started in April,  
20 because I think the annual year for government, the year ends in March ...(intervenes)

ADV VARNEY: March, okay.

ADV PIKOLI: It starts in April ...(intervenes)

ADV VARNEY: Okay, so we are talking...

ADV PIKOLI: So it would have been April 2005 to March 2006.

ADV VARNEY: Okay, thank you, thanks for that clarification. So perhaps you can then explain ...(intervenes)

ADV PIKOLI: If I am making a mistake, it would be just by one month, because also I have never been sure whether it ends in February or March ...(intervenes)

COMMISSIONER KGOMO: Do not worry, you are not wrong.

ADV PIKOLI: In that case, I am not wrong. That can always be ascertained.

ADV VARNEY: I think we are all in the same boat when it comes to  
10 our tax obligations, Mr Pikoli. Okay, so perhaps you can explain to the Commission why then for that period of time you say that:

"You are sad to report that at the time of writing not much has been achieved in this regard, despite all the attempts to take this matter forward."

ADV PIKOLI: Again, it was this to-ing and froing in terms of the assistance being given to the PCLU, and also what I refer to as an obsession to remove Adv Anton Ackerman. So it was, you know, a period where there were all these tensions which were a hindrance or  
20 an impediment, you know, to prosecutions, even regarding matters that we already decided on.

Which in this case would have been a matter that did not require any investigation, like the Chikane matter. And I think you will find somewhere in the bundle with assistance where actually I had already taken a decision in February 2006 to proceed with the

prosecution in the Chikane matter. But there was always this impediment where the National Commissioner of Police then would be saying that Reverend Chikane has not been consulted about this prosecution.

I even, you know, had discussions personally with Reverend Chikane on this matter, and I think in one occasion I was accompanied by Anton Ackerman himself and the Adv Mthunzi Mhaga meeting with Reverend Chikane to talk about this matter, or the attempted murder case. And I could not understand why the National  
10 Commissioner kept on using this thing when personally I have had my own discussions. If I am not mistaken, it could have been twice with Reverend Chikane.

But the National Commissioner would always go back and say, no, Reverend Chikane has not been consulted on this matter. And then February that year, I am not sure of the date, whether it was February or January, I had taken that decision that we were going ahead with the prosecution.

COMMISSIONER GABRIEL: So prior thereto, what you call "toing and froing", did you regard that as an effort to, or an attempt to stop  
20 you from prosecuting?

ADV PIKOLI: Yes, I did regard that as an attempt.

COMMISSIONER GABRIEL: You did.

ADV VARNEY: And then, Commissioners, what is reference to Mr Pikoli's affidavit at 32 on page 10, in paragraphs 27 to 28 he makes reference to the fact that in February 2006 he gave the instruction to

proceed with the prosecution of the suspects in the attempted murder of Frank Chikane. Commissioners, I see that it is 4 PM, or it has just gone 4 PM. Unless there are any other queries from the commissioners, would this be an appropriate time to adjourn?

CHAIRPERSON: We will adjourn until tomorrow. Yes, Mr Varney, we may adjourn until tomorrow at 10 o'clock

ADV VARNEY: As the Commission pleases.

**INQUIRY ADJOURNS TO 13 MARCH 2026**

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## CERTIFICATE OF VERACITY

We, the undersigned, hereby certify that **as far as it is audible**, the foregoing is a true and correct transcript of the digitally recorded proceedings in the matter of:

### JUDICIAL COMMISSION OF INQUIRY INTO TRC

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