

**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 KD Moroka (SC) – DoJ representative  
Adv Varney (SC) – The Calata Group  
Adv D Pillay – The Calata Group  
Ms A Thakor – The Calata Group  
Mr Siphon Tlhaole – The Calata Group  
Adv Irene de Vos for President Cyril Ramaphosa  
Adv Nwabisa Ntshizana (for Ex-NDPP's Officials)  
Adv Bridgette Nthambeleni (for Adv Jiba)

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INQUIRY RESUMES

CHAIRPERSON: Good day, I wish to extend an apology, we had a technical problem that we had to attend to. Sorry for starting late.

ADV SEMENYA: Thank you, Chair. Chair, we have as our next witness, Adv Nel whose evidence we are going to be taking virtually. But so too, I may announce that the cross-examination to follow by Adv Varney will also be with Adv Varney virtually.

CHAIRPERSON: Yes, thank you.

ADV SEMENYA: With your permission we beg leave to call Adv Nel.

10 CHAIRPERSON: Adv Nel, can you hear me? You are muted there, Adv Nel. Can you hear me now?

ADV NEL: I can hear you, I can clearly hear you.

CHAIRPERSON: Yes, we can hear you too. Are you going to take an oath or affirmation. Adv Nel?

ADV NEL: I will take an oath.

CHAIRPERSON: Yes, good day. 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 NEL: So help me God.

20 SYBRAND GERHARDUS NEL: duly sworn states

CHAIRPERSON: Thank you, Mr Nel. You may proceed, Ms Rangata.

MS RANGATA: Good afternoon Chair and the Commissioners, and thank you so much for this opportunity. I will proceed to lead the evidence of Adv Gerhardus Nel. I must commend you that when we

consulted, you asked me what should be your attire and I showed you a picture and you look the part. You are looking good. We can now start, Adv Nel. Chair, the evidence of Adv Nel will be centred around the issues surrounding to the Amnesty Task Team.

Adv Nel was one of the members of the ATT, that is the Amnesty Task Team, shortly called the ATT. He was a member from the NPA who was a committee member in that Task Team. His evidence is limited to his involvement within that Task Team and that is what he is going to be talking to the Commission to.

10 CHAIRPERSON: Thank you.

EXAMINATION BY MS RANGATA: Thank you. Adv Nel, can you please for the record look at page 1975 of your bundle? Chair, I am talking from the Commission's bundle where there is an affidavit of Adv Nel. Are you there, Adv Nel?

ADV NEL: I am there.

MS RANGATA: All right. Do you recognise that document?

ADV NEL: I recognise the document, this is an affidavit signed by me.

MS RANGATA: I did not get that, sorry.

20 ADV NEL: You did not hear that? I say I, it is a document that was prepared by me and attested by me.

MS RANGATA: Sorry, I just had to clarify something for my leader. There, that affidavit, if you can go to page 1975 of that affidavit, do you recognise that signature? Is that your signature?

ADV NEL: That is mine.

MS RANGATA: Thank you very much. Adv Nel, let us get straight to the issues. Can you just quickly talk to your professional background that will deal with your academic as well as your work background?

ADV NEL: Thank you. I matriculated at the Willowmoore High School in 1969. I obtained a B Juris at UPE in 1974. I obtained a BA Juris at UPE at 1980.

MS RANGATA: Sorry to interject ...[intervenues]

ADV NEL: I object a B Legum at Unisa at 1980.

MS RANGATA: Adv Nel, I am not sure if you can hear me.

10 ADV NEL: And then ...[intervenues]

MS RANGATA: Sorry to interject. You can just give us a summary, you do not have to deal with the years.

ADV NEL: Ja.

MS RANGATA: Just an overall view.

ADV NEL: Ja and then I also obtained the LLB and I was admitted as an advocate of the High Court on 30 June 1992. Now I am going to start off with my work at the Department of Justice. I was employed in the Department of Justice since January 1998 to the 17 October 1999. Sorry, it was until 31 December 1997.

20 MS RANGATA: Yes.

ADV NEL: In the Department of Justice I held various managerial positions and the last position was that of Chief Director in the Parliamentary Legislation Division of which Adv Rudman was my head.

I was particularly responsible for the drafting and promotion

of certain legislation, which include legislation relating to correctional supervision, the Magistrates Court Amendment Act, the Indemnity Act, the Further Indemnity Act, the Public Protector Act, the Human Rights Commission Act, the Promotion of National Unity and Reconciliation Act and also the Legal Aid Amendment Act and the Commission of Gender Equality.

I also served as a Magistrate during the sole period of eight months. I left the government at the end of 1997 and whilst I was in the private sector, I was approached by the National Prosecuting  
10 Authority to join them. At the National Prosecuting Authority I was first of all on contract basis there and then from the 1 June 2002 I was appointed as a Deputy Director of Public Prosecutions in the office of the National Director.

My job description include amongst others the following; to investigate proposals regarding the enactment of substantive and amending legislation and subordinate legislation and to promote such proposals with the Department of Justice and Constitutional Development and also Parliament.

I was also responsible to prepare draft legislation and  
20 subordinate legislation and to comment on legislation introduced in Parliament. I was also tasked to provide legal advice to the National Director and the NPA as a whole. I also represented the National Director and the NPA at meetings and discussion as may be determined by the National Director or the supervisor.

MS RANGATA: Thank you, Mr Nel. I ...[intervenes]

ADV NEL: I was also tasked to ...[intervenes]

MS RANGATA: Mr Nel ...[intervenes]

CHAIRPERSON: Mr Nel ...[intervenes]

MS RANGATA: Mr Nel, I struggle to find out if you can hear me because now and then I will interject. Are you able to hear us?

ADV NEL: I can hear you clearly.

MS RANGATA: All right, I just want to find out, in your appointment in the office of the NDPP, you were appointed as the Deputy Director of Public Prosecutions. Am I right?

10 ADV NEL: That is right.

MS RANGATA: And in that role, what did it entail, what was your main responsibility? Just your critical responsibility in that office?

ADV NEL: Ja, more than 60% of my work consisted of providing legal advice to the National Director and the drafting of legal opinions. I also drafted proposed amendments to the National Prosecuting Authority and directives. So that was mainly my task within the office of the National Director.

20 I had nothing to do with prosecutions, except when for instance the National Director received representations relating to a specific crime. He would maybe contact me to provide him with a legal opinion in that regard, so that was mainly my responsibility. I can just say that...

MS RANGATA: Yes, you can proceed. You can proceed.

ADV NEL: I also drafted the Prevention and Combating of Corrupt Activities Act and during the time that I was not within the NPA and in

the private sector, I was also assisting the ISS, the Institute for Security Studies with the drafting of the Firearms Control Bill. So my main expertise is the provision of legal opinions, the drafting of legislation and also to address the Portfolio Committees, the Parliamentary Commissions, Committees at Parliament.

MS RANGATA: Yes, thank you for that ...[intervenes]

ADV NEL: And also ...[intervenes]

MS RANGATA: Thank you Mr Nel, I think that is quite sufficient.

Thank you very much for that background. One will then say that  
10 hence you are recommended to the Task Team within the office of  
the NPA. I would like to take you to paragraph 4 of your affidavit. In  
that paragraph 4, you speak about the matters that are being raised  
that you are addressing in this affidavit, that are raised in the notice in  
terms of Rule 3.3 that you have been provided from the Commission.

ADV NEL: That is correct.

MS RANGATA: And then that, I will take you straight to paragraph 5.

Paragraph 5, I would like you to read it into the record, please.

ADV NEL: I will read paragraph 5. I quote:

20 "As a starting point, I would like to state that I have no  
independent recollection of attending any meetings of  
the Task Team. After I received the Rule 3.3 notice, I  
reviewed my personal notes and folders, and could find  
no agendas, minutes, or correspondence confirming my  
attendance at any of the ATT meetings. However, I  
accept that if the official records indicate my attendance

at such meetings it is probable that I did attend. From my recollection, the ATT was established on the 23 February 2004, with meetings reportedly held on the 26 February and 1 March 2004. Thus, the lifespan of the Task Team was very short, approximately only four days. This makes it very difficult to recollect whether I had any participation in the discussion of such an Amnesty Committee.”

MS RANGATA: Thank you, thank you Adv Nel. You made it very  
10 clear in your statement that you accept the record as it stands, that you were a member of the Task Team. I am going to take you and the Commissioners to page 91 of the Calata bundle. You have that in front of you?

ADV NEL: I just want to get hold of that, yes.

MS RANGATA: Yes, can I just find out from the Commissioners if they have got that bundle? Okay.

ADV NEL: Yes, that is the report of the Amnesty Task Team?

MS RANGATA: Yes, it is titled “Secret Report of the Amnesty Task Team”.

20 ADV NEL: That is correct.

MS RANGATA: You know, would you know if, any particular reason if, why this reported was titled secret?

ADV NEL: Not at all. I was not responsible for the drafting of the report, I was also not engaged in the drafting of the report. The report was generated by the Department of Justice of which

Adv Rudman was the Chairperson. So really I do not know why it is marked, classified as secret.

MS RANGATA: Thank you.

ADV NEL: I can say that this forum, the Task Team Forum was appointed by or the committee was appointed by a forum and normally under normal circumstances, they would classify this document as secret. There is really and I do not know why, at some point also this report must be submitted to Cabinet and the instructions are that all Cabinet memorandums have to be classified  
10 as secret.

MS RANGATA: Okay, thank you, Adv Nel. I am going to take you straight to paragraph 1.1 Paragraph 1.1 on page 92 of that document give us the background of the report, that it is there under background, 1.1:

“A Director-General’s Forum, under the chairpersonship of the Director-General: Justice and Constitutional Development on 23 February 2004, appointed a Task Team to consider and report on the following.”

You can see that?

20 ADV NEL: Ja, correct.

MS RANGATA: You can see that?

ADV NEL: Ja.

MS RANGATA: At that time which is around that period February 2004, who was the Director-General for the Department of Justice?

ADV NEL: I think Adv Vusi Pikoli was at that stage the Director-

General.

MS RANGATA: All right, thank you for that. The Task Team, we see that it is created to consider:

- 10
- “1. Consideration of the nature of the arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation that the NPA and intelligence agencies may come up within assisting persons who divulge information relating to offences committed during the conflicts of the past.
  2. Consideration of a process of amnesty on the basis of full disclosure of the offence committed during the conflicts of the past.
  3. Bearing the abovementioned in mind, whether legislative enactments are required.”

That is what the Task Team has been recommended to consider. You can follow on that.

ADV NEL: Ja and then, and you will see in paragraph 1.2 ...[intervenes]

20 MS RANGATA: Yes.

ADV NEL: The Task Team consists of the following members.

MS RANGATA: Yes.

ADV NEL: It was Adv Rudman, the Chairperson of the Department of Justice, Yvonne Mabule, National Intelligence Agency, Vincent – is it Mogotloane?

MS RANGATA: Mogotloane.

ADV NEL: National Intelligence Agency. Gerhard Nel, National Prosecuting Authority, Dyosi, Lungisa Dyosi, National Prosecuting Authority, Ray Lalla, South African Police Service and Ray Rathebe, Department of Defence.

MS RANGATA: That is Joy Rathebe, thank you. You see yourself ...[intervenes]

ADV NEL: Rathebe.

MS RANGATA: There also being mentioned as a member of this  
10 Task Team. That is in order?

ADV NEL: That is in order, as explained my task ...[intervenes]

MS RANGATA: Yes.

ADV NEL: Was involved in advising the National Director, so I would imagine that under the circumstances the National Director would have requested me. As I say I can really not recall discussions in this Task Team.

MS RANGATA: Yes, we can accept that given the background that you have already outlined for the Commissioners, your expertise, we can accept and understand why you would have been the best  
20 person to represent the NDPP or the NPA in this kind of a structure and then accepting that, I am not going to read, I think this is common cause, the Terms of Refence of the Task Team which are contained on page 93 of the Calata bundle under paragraph 2.1. It goes on until page 95. Those are the Terms of Refence.

ADV NEL: That is correct.

MS RANGATA: And we can still accept that at the time the National Director was still, the National Director, no, no, you did not state that, who would have been the National Director of Public Prosecutions during that time, that is 2004?

ADV NEL: It was Mr Bulelani Ngcuka.

MS RANGATA: Thank you. I am going to take you straight to page 96. Page 96, paragraph 3.2, at paragraph 1 of the Terms of Reference, can you please read into the record 3.2.1?

ADV NEL:

10            “That in order to give effect to the ‘arrangements’ contemplated in the President’s statement as reflected in paragraph 1 of the Task Team’s Terms of Reference, it is recommended that a Departmental Task Team be appointed comprising members of the following departments or institutions:

- The Department of Justice and Constitutional Development,
- The Intelligence Agencies,
- The South African National Defence Force,
- 20            - The South African Police Force,
- Correctional Services,
- The National Prosecuting Authority and
- The office of the President.”

MS RANGATA: Thank you. Now that you have put that in context, I want to step a little bit backwards and let us go back to the creation

and the formation of the Amnesty Task Team which you are a member and we can accept that you accept that you are a member and you can read from the records what was discussed and what were the Terms of Reference of that Task Team.

From your own understanding, what do you think was important about this Task Team and exactly what were you supposed to do?

ADV NEL: Well in reading the recommendations of the Task Team and the consideration thereof, they were tasked to formulate  
10 ...[intervenes]

MS RANGATA: Sorry Adv Nel, when you say they, you mean yourself included because you are part of the Task Team?

ADV NEL: Yes, ja, ja. I am referring to the Task Team as a whole.

MS RANGATA: Okay, we. Okay, thank you.

ADV NEL: They were tasked with the main objective or intention to formulate guidelines on directives in the NPA Act where it says they were dealing with directives and that these directives would be recommended to the National Director of Public Prosecutions with a view that he should include that in the policy directives of the NPA.

20 MS RANGATA: What was the takeaway point that necessitated any inclusion or any sort of amendment or any directives with regard to the... We are talking about the TRC cases, what was, what stood out that necessitated the creation of this Task Team to address those kind of matters whilst we have – you have correctly pointed in your statement that we had a very capable Prosecution Policy?

ADV NEL: Well as you see that the Task Team consisted of various members situated in various departments and institutions, and the purpose was according to me, to get the views of the different institutions and bodies so as to recommend and to make recommendations to the National Director in respect of the directives.

MS RANGATA: All right, the answer does not come out quite right but I will just skip it for the moment and go to paragraph 3.2.2 on the same page, 96 of the Calata bundle. It states, "The functions of the proposed Task Team". You will recall that the same Task Team, in  
10 ATT that you were a member, recommended for the formation of another Task Team called the Departmental Task Team. So in ...[intervenes]

ADV NEL: Ja.

MS RANGATA: Paragraph 3.2.2 it gives us the function of that proposed Task Team. Can you tell us? Okay maybe for the record you can read that into the record, (a). 3.2.2(a), can you read it for the record?

ADV NEL: Ja:

20 "Before the institution of any criminal proceedings for an offence committed during the conflicts of the past, to consider the advisability of the institution of such criminal proceedings and make recommendations to the National Director of Public Prosecutions in this regard."

MS RANGATA: Yes, do you want to ...[intervenes]

ADV NEL: Ja.

MS RANGATA: Elaborate on that, what was your understanding of that function? How were they going to get that done?

ADV NEL: Ja, I, it, according to me you know, it is very difficult to comment because in terms of the NPA Act and in terms of the Constitution, the National Director in any case you know, is tasked with a discretion to take all other views into account into his discretion to prosecute or not to prosecute, therefore according to me, this was actually not a preferred concern or recommendation of the Task Team.

10 MS RANGATA: Please just put that into context. You are sitting in the ATT as a member and your part of the recommendations of that committee is to form another Task Team and that Task Team is given a function as you have outlined in 3.2.2.

ADV NEL: Ja.

MS RANGATA: And do you understand your evidence to the Commission that you do not think in hindsight that that recommendation was proper because there are proper provisions that are made with regard to what are the responsibilities of the NDPP or did you regard that recommendation or that function of the ITT to  
20 have been in order or are you saying that now in hindsight it was not good?

ADV NEL: I would say in hindsight it was not good because of the fact that you know, in any case in terms of the Constitution and the National Prosecuting Authority, the National Director is entitled to approach any of these institutions you know, for their advice.

MS RANGATA: All right. Just in passing, I am going to remind you of the Terms of Refence of this Commission, why this Commission is sitting, to investigate any attempts to stop or to delay prosecution or investigation of TRC cases.

ADV NEL: Ja.

MS RANGATA: Having said that what you have just said now, would you attribute that process to have been one of the factors that could have contributed to the delay of the investigation of the TRC cases?

ADV NEL: Ja, that is very difficult to answer. You know, one must  
10 also have regard to the, those directives that were eventually published and according to me there was no such a direct recommendation in the directives in this regard.

MS RANGATA: I do not follow.

ADV NEL: That maybe at that stage...

MS RANGATA: Sorry, you can complete, sorry for cutting you.

ADV NEL: No. Ja, it is very difficult and especially in view of the fact that I was not you know, aware of this specific consideration or recommendation, I was not involved in the drafting thereof, so I cannot really recommend what the purpose of that specific  
20 recommendation was, whether it was to enable these other institutions to make recommendations regarding the prosecution, not prosecution, it is difficult to say. Maybe that was the purpose, I do not know.

MS RANGATA: Thank you, thank you, Adv Nel. We are going to go to paragraph 6 of your statement. We are back to page 1976. You

...[intervenes]

ADV NEL: 1976?

MS RANGATA: Yes. You make reference there to the main responsibility of the Task Team and you make a point that the, that was the drafting of the policy directives for the prosecution of TRC cases. I am going to try and merge this paragraph 6 with paragraph 10 which I would request you to read into the record, particularly dealing with the differentiation that you are bringing out between the policy, Prosecution Policy and the policy directives.

10 ADV NEL: You want me to read paragraph 10 here?

MS RANGATA: 10, 10. 10 is on ...[intervenes]

ADV NEL: Ja.

MS RANGATA: 1977.

ADV NEL: I quote:

20 "I would like to clarify for the benefit of the Commission that there is a distinction between Prosecution Policy (requiring concurrence of the Minister and consultation with Directors of Public Prosecutions) and policy guidelines, also called directives, which are issued at the discretion of the National Director. I therefore confirm that the ATT's work focused on policy directives, and not on amending the Prosecution Policy. For the Commission's convenience, the relevant provisions dealing with the Prosecution Policy and the policy directives in section 179 of the Constitution and

section 21 of the NPA Act, are attached hereto.”

MS RANGATA: Yes and then you attached that relevant section 21 on page 1988 and it is ...[intervenes]

ADV NEL: 19 ...[intervenes]

MS RANGATA: Actually the Prosecution Policy and issuing of policy directives.

ADV NEL: That is right ja, that is right.

MS RANGATA: Yes.

ADV NEL: And ...[intervenes]

10 MS RANGATA: Can you see that? 21(1) ...[intervenes]

ADV NEL: As ...[intervenes]

MS RANGATA: You can read that. Sorry.

ADV NEL: That is now 1987? Do you want me to read page 179 ...[intervenes]

MS RANGATA: 1988, I want you to read on 1988.

ADV NEL: Ja.

MS RANGATA: Yes.

ADV NEL:

20 “The National Director of Public Prosecutions must determine that-

- (a) must determine with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, Prosecution Policy, which must be observed in the

prosecution process;

(b) must issue policy directives” ...[intervenes]

CHAIRPERSON: Sorry Adv Nel ...[intervenes]

ADV NEL:

“...which must...” ...[intervenes]

MS RANGATA: Adv Nel, sorry, the Chair is...

CHAIRPERSON: I think we are not on the same page with what you are reading. Page 1988 is the page you have been referred to.

ADV NEL: 1988. Ja, that...

10 MS RANGATA: That is the ...[intervenes]

ADV NEL: That is referring to section 21 of the NPA Act?

MS RANGATA: Yes, that is where I want you to read, 21(1).

COMMISSIONER GABRIEL: It is entitled, “Prosecution Policy and issuing of policy directives”.

ADV NEL: 1, that is subsection 1:

“The *National Director* shall, in accordance with section 179 (5)(a) and (b) and any other relevant section of the *Constitution*-

20 (a) with the concurrence of the *Minister* and after consulting the *Directors*, determine Prosecution Policy; and

(b) issue policy directives, which must be observed in the Prosecution Policy, and shall exercise such powers and perform such functions in respect of the Prosecution Policy, as

determined in the NPA Act or any other law.”

MS RANGATA: Thank you, Adv Nel. Then you make a point in page 1987 that is... Are you there?

ADV NEL: Ja, I am there.

MS RANGATA: Subsection 5.

ADV NEL: Ja.

MS RANGATA: “The National Director of Public Prosecutions”  
...[intervenes]

ADV NEL: That is now ...[intervenes]

10 MS RANGATA: Yes, you can read that.

ADV NEL:

“(a) must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, Prosecution Policy, which must be observed in the prosecution process; and

(b) must issue policy directives which must be observed in the prosecution process.”

20 In other words, section 21 of the NPA Act gives effect to section 179(5) of the Constitution.

MS RANGATA: And how is that relevant to your evidence and when you deal with that, can you also just elaborate as to what does it mean in terms of what would have necessitated the guidelines as you have already shown the difference between the two?

ADV NEL: Ja, it is important to note that the guidelines or directives were merely directives to assist the National Director in the exercising of his discretion to prosecute or not to prosecute.

MS RANGATA: All right, so if we look back to the period relevant which is in 2004 when the ATT take a decision or a resolution to make those recommendations for the drafting of the guidelines, at the time what was important that necessitated the proposed amendment of the guidelines, for the guidelines, the preparation of the guidelines?

10 ADV NEL: Well as indicated you know, that was a recommendation of the Amnesty Task Team, so all the different institutions came together and they felt that it is necessary that this should be taken into account and I think that maybe they were of the opinion that it is important to in line with the TRC process and the TRC recommendations, that the National Director should also take that into account.

MS RANGATA: I am going to make reference to the Calata bundle at page 107.

ADV NEL: 107?

20 MS RANGATA: 107. It is a transcript of the evidence of the former NDP, Adv Ngcuka and in the last... Are you there?

ADV NEL: I am there.

MS RANGATA: All right, thank you. And the last paragraph there on that page 107 is Adv Varney. He says:

“Right, so if they developed those guidelines or criteria,

was there really any need for the subsequent Amnesty Task Team which was established to propose new criteria which ultimately saw their way into the amended Prosecution Policy? And I know [I am now on 108] these guys, yes after you left but what is your response to that?"

Then he says there:

"No, maybe let us deal with it now."

I am going to read that, sorry it is a bit long. He says:

10 "Because my representatives went to that meeting..."

And we can recall... Okay sorry, we can recall in your evidence that you and Josi, you were the representative from the NDPP's office, Ngcuka's office, and he says:

20 "Because my representatives went to that meeting, attended the meeting, came back and briefed me, and we discussed it and then we decided that it was, for us, there was no point in us continuing to participate in that process. We did not agree that that is what should happen, but also we can explain in that we were just concerned that some of the people in that meeting were concerned about what came to be known as the, those 37 cases of the ANC.

And that whole participation in that process would have compromised us, because we would have had to take decisions whether to prosecute or not to

prosecute them.”

We have heard from the evidence of Adv Ngcuka that he requested his representatives from his office not to continue participating in the ATT. You being a member of that committee or Task Team representing his office, what I should ask you is, did you stop or withdraw from participating in that committee?

ADV NEL: Ja, first of all I can really not recall the meeting with Adv Ngcuka that we had and I cannot recall that we were specifically requested or that I was specifically requested not to attend any  
10 further meetings. But if you look at one of the paragraphs that you referred to, you know that the National Director should first accept proposals from the different institutions, maybe he was not happy with it.

As I said to you, in hindsight I am also of the view that that was not a correct proposal. So my, but if he requested them to leave, then I accept that I left the meeting.

MS RANGATA: But you cannot recall that you left because we ...[intervenes]

ADV NEL: No, I ...[intervenes]

20 MS RANGATA: We know that you would have attended the meeting and once you come back from a meeting you would have given him the report and that reporting as in his evidence, he said he would have said on the 26 February 2004 that do not continue participation in that committee, so you would have stopped communicate, participating at that time.

ADV NEL: No, that is correct.

MS RANGATA: And when do you then come back into the discussions of the ATT if you would have stopped? Because it then continues in your statement, especially we see it in your, in paragraph, I am going to take you there now, I am at paragraph 8, sorry for moving around, I am at paragraph 8 of your statement. It is on page 1976. You say ...[intervenes]

ADV NEL: Correct.

MS RANGATA:

10 "I confirm that I was involved in drafting a Cabinet Memorandum for the signature of the National Director (then Adv Vusi Pikoli) regarding the submission of the prosecution guidelines to Parliament."

At what stage would you then have then come back to get involved with what would have then been taking place within the ATT?

ADV NEL: I really cannot recall at all or that I went back to any meetings with that ATT or also, I was not involved in any discussion relating to the further report of the Task Team or any other  
20 discussions by the Task Team.

MS RANGATA: Thank you.

ADV NEL: But I must, I must admit that I drafted that Cabinet Memorandum referred to and ...[intervenes]

MS RANGATA: We can get there and recognise it properly. Is that the memorandum that you referred to on page 1979?

ADV NEL: 79?

MS RANGATA: Yes.

ADV NEL: That is the memorandum.

MS RANGATA: All right, also on that memorandum can you maybe identify what is it called?

ADV NEL: It is called the Cabinet Memorandum. A number would be allocated to that Cabinet Memorandum and it was in 2005, and the memorandum was drafted by me in March 2005. And the subject matter ...[intervenes]

10 MS RANGATA: Yes.

ADV NEL: It was:

“Guidelines for the prosecution of cases arising from conflicts of the past and which were committed before 11 May 1996.”

MS RANGATA: Thank you and then what is the ...[intervenes]

COMMISSIONER KGOMO: 11 May 1994?

ADV NEL: Did I say...? Sorry, ja, 11 May 1994.

COMMISSIONER KGOMO: Yes.

20 MS RANGATA: Thank you, Commissioner. And what would you say was the purpose of that memorandum? Can you just give us context how it come about?

ADV NEL: Ja, I can hardly hear you now.

MS RANGATA: Can you give us the context of how you got about to draft the Cabinet Memorandum? What was the purpose of the memorandum, who requested you to prepare that memorandum?

ADV NEL: Ja, I am sure that I was instructed by the National Director, at that stage Adv Vusi Pikoli, to draft the Cabinet Memorandum and I am sure that at first this Cabinet Memorandum was also submitted to the Department of Justice. But it is clear that at a later stage this Cabinet Memorandum was submitted to Cabinet.

MS RANGATA: Yes, what in essence, I want you to in high level to explain to this Commission what were you, what is contained in the memorandum, what is the purpose and what are you addressing and what are you recommending? What are you, what is the key point in  
10 this, in this memorandum? I think it is easy, if you look at the purpose it says:

“The purpose of this memorandum is to obtain Cabinet approval to submit the guidelines for the prosecution of cases arising from conflicts of the past and which were committed before 11 May 1994, as set out in paragraph 6 hereunder, to Parliament in terms of section 21(2) of the National Prosecuting Authority Act 1998, for its consideration.”

ADV NEL: Ja.

20 MS RANGATA: What are you then take [indistinct] the Cabinet in this memorandum?

ADV NEL: Ja, in the first instance I must admit and that was only discussed at a later stage with the Parliamentary Committee that we should not have approached Cabinet to approve the guidelines, but I am of the view that because of the fact that this whole process was

initiated by the President in his speech, that the National Director and also the Director-General considered it prudent to inform then the President what steps the National Director is taking to adhere to the President's guidelines and his speech.

So the word 'approved' is not the correct word, it was merely submitted as pointed out by the Parliamentary Committee for noting and/but of course also to report back to the President and his Cabinet.

MS RANGATA: Sorry, thank you. And what exactly are you asking  
10 for Cabinet to note? Can you just briefly for the record, what were you submitting for the Cabinet to note?

ADV NEL: Well okay, you know there were a lot of, first of instance the, you know we gave the background information, we also you know ...[intervenes]

MS RANGATA: Just to assist you Mr Nel, is this the same submission where you are dealing with the issue of the guidelines that you will request that they be approved or noted for them, for the amendment of the Prosecution Policy?

ADV NEL: Ja, as I say you know, it was and right at the end in the  
20 recommendation, paragraph 11, it is also said:

“That Cabinet approve—

(a) the above Guidelines for the prosecution of cases arising from conflicts of the past.”

MS RANGATA: Yes.

ADV NEL: That is also incorrect, it is, it should be and as I

mentioned that if you look at the Constitution and if you look at the NPA Act, section 179 and 21 of the NPA Act, it is not for Cabinet to approve. I think it was merely admitted to Cabinet to inform, to report back to the Minister and his Cabinets about what the National Director intend doing.

MS RANGATA: Thank you. I must state for the record that the... Maybe let me just do this, if we go to the Calata bundle, page 3 of that bundle, there is an extract of the Cabinet minute.

ADV NEL: You say page 3?

10 MS RANGATA: Page 3, yes.

ADV NEL: Ja, okay.

MS RANGATA: An extract of the Cabinet minute of 22 June 2005.

ADV NEL: Ja, I see that.

MS RANGATA: Yes. It starts with paragraph 9:

“Minister of Justice and Constitutional Development,  
review of the South African Criminal Justice Systems.”

If you go straight to 9.2 it says:

20 “Prosecutorial Policy and directives relating to the  
prosecution of criminal matters arising from the conflict  
of the past and which were committed before 11 May  
1994.”

And then in brackets there it says:

“Cabinet Memorandum 4 of 2005, dated March 2005,  
file number...”

I am reading the fine line there just under that bold 9.2, it

says:

“File number 1/3/PSGN, the Department of Justice and Constitutional Development. Refer to item 3.2.1 of the minutes of the Cabinet dated 16 April 2003.”

And then it says:

10 “The Cabinet approved the Prosecutorial Policy and directives relating to the prosecution of cases arising from conflicts of the past and which were committed before 1994 and that the Prosecutorial Policy and directives be submitted to Parliament for consideration in terms of section 21(2) of the National Prosecuting Authority Act 1998.”

ADV NEL: Ja.

MS RANGATA: Can I just for progress ask that then you would then presented these guidelines to the Parliament, to Parliament on the instruction of the NDPP?

ADV NEL: That is correct.

MS RANGATA: And at the time that was the NDPP?

ADV NEL: Adv Vusi Pikoli.

20 MS RANGATA: All right and what happened on your presentation to Parliament?

ADV NEL: Can I refer you to...? I am dealing with that.

COMMISSIONER GABRIEL: I think it is paragraph 9 ...[intervenes]

ADV NEL: Of my statement.

COMMISSIONER GABRIEL: Of your affidavit.

MS RANGATA: Thank you, Commissioner.

ADV NEL: Ja, I drafted an office note to Adv Pikoli regarding the submission of the prosecution guidelines to the Portfolio Committee.

In these notes I indicated that:

10                   “When I submitted the “Presentation Document” to the Chairperson of the Portfolio Committee on Justice for her consideration before the distribution thereof to members of the committee, she effected changes to make it clear that Cabinet did not “approve” the amended policy but it was merely submitted to Cabinet so as to note the amended policy, thereby emphasising that the NDPP acts independently in determining the Prosecution Policy and the only requirements are, is that you must determine the policy “in concurrence with” the Minister and “after consultation with” the NDPP.”

20                   The committee accordingly accepted the resolution that the amended policy has been noted, the office note, attached that office note. So as indicated, the Chairperson of the Portfolio Committee was correct, it was not submitted to Cabinet for its approval, it was merely submitted to them to be noted.

COMMISSIONER GABRIEL: Mr Nel, can I ask a question? What was submitted to Cabinet? Were they merely guidelines or were they amendments to the Prosecution Policy?

ADV NEL: As far as I can recall, there was no specific amendment. I think that the guidelines, there is a provision in the policy saying that

the National Director is entitled to amend the directives if for instance there is legislation that makes it, necessitates those amendments.

COMMISSIONER GABRIEL: Okay, I am a bit confused because in paragraph 9 of your affidavit, in the opening sentences you say you did a drafting note to Adv Pikoli regarding the submission of the prosecution guidelines to the Portfolio Committee. And then later on in that paragraph you say the Chairperson of the Portfolio Committee said that Cabinet did not have to approve the amended policy. So what were, what was submitted to the Portfolio Committee, were they  
10 guidelines or amendments?

ADV NEL: Guidelines.

COMMISSIONER GABRIEL: Just guidelines?

ADV NEL: Ja, the guidelines were submitted.

COMMISSIONER GABRIEL: So how do you explain ...[intervenes]

ADV NEL: Ja.

COMMISSIONER GABRIEL: Your reference to amended policy?

ADV NEL: Ja you know, it is difficult. Sometimes we refer to Prosecution Policy and directives, so as one what do you call it, mm.

COMMISSIONER GABRIEL: But in the end we know that  
20 amendments were effected to the Prosecution Policy. Do you have any recollection of that?

ADV NEL: Are you referring to specific amendments?

COMMISSIONER GABRIEL: Amendments in or about 2005 on dealing, let me paraphrase with the TRC cases.

ADV NEL: Ja, I cannot recall that there was a specific amendment

relating to dealing with TRC cases.

COMMISSIONER GABRIEL: Okay.

ADV NEL: Those matter was addressed in the prosecution directives.

COMMISSIONER GABRIEL: Okay, thank you.

MS RANGATA: Thank you, thank you, Adv Nel. I am going to take you to paragraph 11 of your, of your statement on your affidavit. You speak about the internal memorandum. Can you just talk to that paragraph?

10 ADV NEL: Paragraph 11?

MS RANGATA: Yes.

ADV NEL: Ja.

COMMISSIONER GABRIEL: Maybe read it into the record.

MS RANGATA: Thank you.

ADV NEL: Ja:

20 "In reviewing my folders and notes, I also came across an internal memorandum addressed to the Amnesty Task Team. I do not know who the author of this memorandum is. However, I assume it was drafted by the Priority Crimes Litigation Unit (PCLU), because in paragraph 2 the memo deals with the general criteria governing a decision to prosecute and these criteria are contained in the Prosecuting Policy and Directives. In paragraph 3 the memorandum deals with the operating guidelines of the PCLU. A copy of this memorandum is

also attached.”

So why I am saying that I assumed that the Prosecution Policy, that this memo was drafted by someone from the PCLU ...[intervenes]

MS RANGATA: Adv Nel ...[intervenes]

ADV NEL: There are two reasons.

MS RANGATA: Sorry, sorry sir, can I interject ...[intervenes]

ADV NEL: First of all ...[intervenes]

MS RANGATA: Sorry sir, can I interject? Let us identify it properly  
10 before you talk to it. It is a document appearing on page 1989 of your bundle, of the Commission’s bundle and it is ...[intervenes]

ADV NEL: 19, 1989?

MS RANGATA: Yes and can you just identify there, internal memorandum, who is it addressed to ...[intervenes]

ADV NEL: Ja.

MS RANGATA: And where it comes from?

ADV NEL: This internal memorandum was addressed to the  
Amnesty Task Team, it was from the office of the National  
Prosecuting Authority and the subject now was “Input” at paragraphs  
20 1 and 2 of the Terms of the Reference of Amnesty Task Team. So as explained, I really do not know who is the author of this, but ...[intervenes]

MS RANGATA: And it is dated 26 February, it is dated 26 February  
2004?

ADV NEL: 2004, ja.

MS RANGATA: Ja. Before you continue ...[intervenes]

ADV NEL: 26 February.

MS RANGATA: Before you continue, the memorandum ends on page 1994 of the bundle at page 6 of the memorandum and it does not have an ending. Is this the end of the memorandum as it appears on the bundle?

ADV NEL: This is the end of the memorandum as found on, in my folder.

MS RANGATA: Thank you, you can continue.

10 ADV NEL: As I was saying that ...[intervenes]

COMMISSIONER GABRIEL: You did not know who wrote this memorandum?

ADV NEL: That is right, but I assume that it was someone in the office of the PCLU. Why I am saying this is that first of all, the date is the 26 February. It was on the 26 February according to all information when the Task Team had its first meeting and according to me, paragraph 2 dealing with the general criteria governing the decision to prosecute, is a very well structured paragraph that you know, explain the general criteria in a very good way.

20 Now then paragraph 3 deals with the operating guidelines of the Priority Crimes Litigation Unit. I do not know about anyone who is conversant with the guidelines of the PCLU except for someone stationed within the PCLU, that is why I make the assumption that this document was drafted by someone within the PCLU.

MS RANGATA: Something very interesting, I note that you review

your folders and your notes, when you left your employ in 2015, how would you then retain some of the documents from your employment? Is it in the normal course of your employment that you are allowed to take some of the documents or how did you get, how did you retain this kind of documents 10 years beyond your retirement?

ADV NEL: Can I just first of all explain that I made a backup of all the documents dealing with the NPA? In other words I am talking about legal opinions, drafting, *et cetera* and I handed two backups, 10 the one to Mr Willie Hofmeyr and the other one to Adv Bradley Smith within the NPA. The reason why I kept these is that I was about the only one who had you know, copies of all these documents and for them to trace these documents, would be very difficult.

I was also at a later stage on various occasions, I was requested by the NPA to provide contract work for them via the ISS and I did that. For example, I drafted a memorandum, Cabinet Memorandum, an explanatory memorandum and the necessary legislation to provide for the NPA to have its own Accounting Officer. At the moment the legislation reads that the Director-General of 20 Justice is the Accounting Officer.

Since 2000 and 2001, the various ministers were of the view that this should be changed and that the legislation should be, should make provision for the NDPP, for the NPA to have its own Accounting Officer and then there were ...[intervenes]

COMMISSIONER GABRIEL: Mr Nel, can I ask you a question? Can

I ask you a question? Why ...[intervenes]

ADV NEL: Yes?

COMMISSIONER GABRIEL: Why did you keep these documents relating to the TRC cases? What about them did you consider important?

ADV NEL: No, I had, have folders of different matters that I deal with, for instance the TRC cases I dealt with under the heading or the folder "Amnesty". Now when I you know, considered these, I opened another folder where I dealt with my documents relating to this matter  
10 under TRC Committee. So I dealt with the various documents within the NPA, I dealt with the different headings.

And also legal opinions, I have a folder dealing with legal opinions, I have a folder dealing with our senior personnel, so in respect of all these matters I have specific folders. There was no specific reason for me to keep the documents relating to TRC matters, I filed it on the one folder namely "Amnesty".

MS RANGATA: Thank you Mr Nel, I think you have given... I just want to ask you one last question from what you have said. Are there any other documents relating to the work of this Commission that  
20 might not have been relevant for you that you can share with the Commission, within one of your folders?

ADV NEL: Well as I told you, that I went through my folders specifically with a view to ascertain whether in fact I attended these meetings and whether I participated in the meetings, whether I submitted any proposals to the Task Team. I could not find any, so...

MS RANGATA: Okay, we can accept you do not have anything except for what you have submitted, we can accept that?

ADV NEL: That is right.

MS RANGATA: All right.

ADV NEL: No, there are, there are other documents in that regard but not documents relevant to this Commission's mandate.

MS RANGATA: Okay, thank you, Mr Nel. We are going to move to paragraph 12 of your statement. Do you want to read it into the record?

10 ADV NEL: 12 ...[intervenes]

MS RANGATA: Yes.

ADV NEL: I quote:

“I want to state it unequivocally that during the performance of my work at the NPA and during discussions and the attendance of any meetings in the performance of my duties, there were no discussions to stop or interfere with the investigation or prosecution of TRC cases.”

20 And I can also add now that there were also, I was not present in any meetings and discussions where such an attempt was made.

MS RANGATA: You can read 13, that is your conclusion.

ADV NEL: Pardon?

MS RANGATA: You can read 13.

ADV NEL: Ja:

“Conclusion-

- (a) In conclusion I want to state that at no stage did I participate in any attempt to stop or interfere with the investigation or prosecution of TRC cases. Furthermore, at no stage was I present where such attempts or interference were discussed.
- (b) As indicated above, my involvement was limited to providing legal advice, the drafting of cabinet memoranda and the submission of the prosecuting directives to the Parliamentary Committee of Justice and Constitutional Development.”

10

MS RANGATA: Thank you. Now in hindsight with your conclusion as you have read it into the record, would you then still maintain the same conclusion or would you then factor in and saying that in hindsight some of the processes might have contributed to the delay in the prosecution of TRC cases?

I talk about this in particular in the activities or the involvement of the ATT and the recommendations for the creation of a further Task Team which was also going to have to do or interfere or have to recommend, make recommendations to the NDPP.

20

ADV NEL: Well as [indistinct], I was not involved in the further processes relating to the drafting of further reports of that further forum that was recommended, but as indicated to you, I would agree that one of those recommendations or considerations according to

me is not proper.

And I also just want to say that one must also keep in mind that in terms of sections 32 of the NPA Act, it is an offence to interfere with the work of the National Prosecuting Authority and that the Commission maybe should also take that into account.

MS RANGATA: Thank you, Adv Nel. Thank you Commissioners, that is the evidence of Adv Nel.

CHAIRPERSON: Thanks, Ms Rangata.

MS RANGATA: Thank you.

10 CHAIRPERSON: Ms Moroka, any clarificatory questions?

ADV MOROKA: No clarification questions, thank you Chair.

CHAIRPERSON: Thank you. Mr Semenya?

ADV SEMENYA: I am advised online Chairperson, that there are several people who may have to do clarificatory questions and/or cross-examination. That would be Adv Gwala SC, that would be Mr Varney. I am told also Adv Ntshizana, Adv Nthambeleni and Adv Pillay.

CHAIRPERSON: Advocate?

ADV SEMENYA: Pillay.

20 CHAIRPERSON: Phiri?

ADV SEMENYA: Pillay.

CHAIRPERSON: P-A?

ADV SEMENYA: Pillay [spelled]. Pillay.

CHAIRPERSON: P-I? Oh...

COMMISSIONER GABRIEL: Pillay.

CHAIRPERSON: Pillay?

ADV SEMENYA: Yes, yes, Chairperson.

CHAIRPERSON: I think this would be an appropriate time to adjourn for lunch before taking further clarificatory questions. We will reconvene at 14:20.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Mr Semenya, you mentioned that there is Advocate Pillay who is online for clarificatory questions. He or she is  
10 representing which party?

COMMISSIONER KGOMO: Are you able to answer the Judge?

ADV PILLAY: (Indistinct - not on microphone).

CHAIRPERSON: Okay. Oh, okay, for the Calatas.

ADV PILLAY: Yes Chairperson, I just logged on at the beginning of the session to make sure that my leader was actually present.

CHAIRPERSON: Okay.

ADV PILLAY: And then I logged off. Sorry for the confusion.

CHAIRPERSON: So is it Advocate Varney who is going to cross-examine you, Ms Pillay?

20 ADV PILLAY: It is Advocate Varney. Apologies for the confusion, Chair.

CHAIRPERSON: Mr Gwala, are you with us? Advocate Gwala?

FEMALE VOICE: [Indistinct - not on microphone]

CHAIRPERSON: Yes. Advocate Ntshizana?

ADV NTSHIZANA: Thank you, Chair. I have no clarificatory

questions for the witness.

CHAIRPERSON: Thank you. Ms Nthambeleni?

MS NTHAMBELENI: Thank you, Chair. I have no... Thank you, Chair. I have no clarificatory questions for the witness

CHAIRPERSON: Yes. And Mr Gwala, not yet in. Okay. We then move to the evidence or the cross-examination of Advocate Nel. Mr Varney?

ADV VARNEY: Chairperson, I just want to check if I can be seen.

CHAIRPERSON: We can see you, Mr Varney.

10 ADV SEMENYA: Chair, maybe before he does... (intervenes)

ADV VARNEY: Chairperson, can you hear me?

ADV SEMENYA: Before Mr Varney does, he had asked me and I agreed that he be excused for not having a jacket on. He says it is solitary, Maurice, and if he can be permitted.

CHAIRPERSON: Thank you. Thank you for that politeness. Thank you, Mr Varney.

ADV VARNEY: Thank you for the indulgence. There is a heatwave here in Frankfurt and I have no AC and I am melting, so I am indebted to the Chairperson.

20 CHAIRPERSON: Yes.

ADV VARNEY: Can I just check, is there an echo because I am hearing one from my side?

ADV SEMENYA: Yes. I was also hearing an echo.

ADV VARNEY: Mr Nel, can you hear me clearly?

ADV NEL: I can hear you clearly.

ADV VARNEY: I think that echo has now been sorted. Chairperson, with your leave, I will commence my cross-examination.

CHAIRPERSON: Yes, you may proceed, Mr Varney.

CROSS-EXAMINATION BY MR VARNEY: Thank you, Chairperson. Mr Nel, firstly, thank you for making yourself available and for your cooperation with this Commission. You have mentioned in your statement and in your evidence that in terms of your background, if I heard you correctly, you have three law degrees and you have extensive experience when it comes to providing legal opinions and legislative drafting. Is that correct?

ADV NEL: That is correct.

ADV VARNEY: If we can then turn to your paragraph 6. So in paragraph 6, you make the point that the amnesty task team, the ATT, was tasked with giving effect to the president's speech on 15 April 2003 and it emphasised that there would be no general amnesty and that prosecutions should proceed according to normal legal processes. Before I continue, have you been given a copy of our application to cross-examine you?

ADV NEL: That is correct.

20 ADV VARNEY: Okay. So we did not want to take you by surprise so we actually have provided you with most of the questions. We will have a few more arising from your evidence in chief but you had an opportunity, I believe, to look at the central questions we want to raise with you.

So returning to your paragraph 6, I have a question that I

have posed in paragraph 6.2 of our application and it is a simple question. It says, if the president said that the TRC cases should proceed according to normal legal proceedings, why, in your view, was there a need to put in place an extraordinary legal process for these cases? The president effectively said that the normal legal processes should be used.

ADV NEL: Let me just go to if you are referring to the direct this was done on the recommendation of the ATT committee, the task team. So I do not know specifically, I cannot tell you,, you know, why  
10 specifically they refer to that and why they made that specific recommendation.

ADV VARNEY: So if we are talking about the normal processes of the criminal procedure, I think you do point out in your statement on one of the annexes that, for example, prosecutors could have used key and sentence agreements under section 105A. Could have used the state witness procedure for those who wish to cooperate in terms of section 204. And yet a very special procedure was put in place just for the TRC cases. So would you at least agree with me that the process that the ATT proposed and which was ultimately reflected in  
20 the amendments of the prosecution policy, that that provided for an extraordinary legal process for a particular class of cases?

ADV NEL: I would agree to that because it is specifically mentioned in the directives that it deals with the TRC cases.

ADV VARNEY: Let us turn to the next question we pose in paragraph 6.3 of our application, and it is again referring to your paragraph 6

because in your paragraph 6 you said that the process of coming up with a new procedure for the TRC related cases was not supposed to stop investigations or prosecutions, and yet it seems that this is in effect what happened. There is evidence before this commission that in November 2004 the then Minister of Justice directed the then acting NDPP to suspend the TRC cases pending the formulation of the guidelines and even when those guidelines were issued in December 2005 and came into effect during 2006, the TRC cases were still stuck and indeed no prosecutions were enrolled between  
10 2007 and 2016. So, you know, I would like your comments on that in your view, is that just coincidental or is there a link?

ADV NEL: Look I am not aware of the minister's direction to the NPA I have heard that that was done. If that was done, the minister is not entitled to issue such directions.

ADV VARNEY: Yes on that score we agree and that is also the evidence the then acting NDPP, advocate Silas Ramaite. You have mentioned that you were not responsible for the drafting or compiling of the reports and opinions of the amnesty task team. Who was responsible for formulating those reports or at least carrying out the  
20 drafting?

ADV NEL: Well advocate Radman was the chairperson so he would be ultimately responsible for, if not drafting, to approve the report that was submitted to him and being drafted from the inputs that his committee received from the various members. But I was definitely not involved in the drafting of the reports.

ADV VARNEY: Do you think that other members of the ATT or perhaps, perhaps were there officials who were seconded to the ATT who did the initial drafting?

ADV NEL: I am not aware of any of any such secondment.

ADV VARNEY: Right but as a member of the ATT you would nonetheless have participated in the discussions and the deliberations, and made inputs into the task team's recommendations.

ADV NEL: As I mentioned I do not recall that I have made any input to the task team in this regard, and as pointed out by Bulelani  
10 Ngcuka, the NDPP at that stage, his personnel were only involved in the first meeting and thereafter he requested them not to be members of that committee anymore.

ADV VARNEY: Yes we will return to the evidence of Advocate Ngcuka shortly, but at least in relation to that first meeting as I understand your evidence, you say you cannot recall it but you do not deny that you were not there because your name appears on the list of the ATT members.

ADV NEL: That is right.

ADV VARNEY: And presumably at least in that first meeting you  
20 would have participated and presumably made inputs or raised concerns or expressed agreement.

ADV NEL: I cannot recall being a part of any of those discussions. I am not saying, if I was present, I am not saying that I did not partake but I really cannot recall. I mean this is 22 years that I know that we are talking about, and as explained this task team was also, it was

only 4 days, there was not really time that we sat down and discussed answers etc. It was, the lifespan was very short.

ADV VARNEY: Alright and I understand your difficulty and certainly unfortunate that we have to ask you to try and recollect from decades ago so I do appreciate the challenges that you have. But I assume you have taken a look at the secret amnesty task team report. That is in the cross examination bundle at page 91. Perhaps you can just go to it.

ADV NEL: 91 Ok. .One is just the, what do you call it?

10 ADV VARNEY: Yes, so the first page is the cover. We do not have time to... (intervenes)

ADV NEL: It is just the cover, ja..

ADV VARNEY: My learner friend for the evidence leaders has already taken you through some of the passages and we are not going to have time to really repeat. I want to try avoid repetition where I can. I am assuming that you have refreshed your memory in relation to this report. So this report as it says, you know, reflects the discussions that the ATT had.

20 I want to draw your attention to certain concerns that the ATT expressed and this is in relation to, I suppose, reaction to various recommendations that it was making. Perhaps you can turn to page, paragraph 3.3.1. I believe that is, I think that is... I beg your pardon It is actually 3.2.4. It is on page 100

ADV NEL: Page 100? Ja, I am on page 100 now.

ADV VARNEY: Okay, so the paragraph 3.2.4 about half way down, it

says the task team realises that the proposed process will have the following shortcoming/concerns, and let us deal with the first one. It says:

Possible negation of the constitutional rights of victims, the public at large, and alleged offenders.

Can you describe what that concern was about dealing with the negation of constitutional rights?

ADV NEL: Ja, I am not aware. I am not aware what the concern was. In any case, I am of the view that we cannot negate the  
10 constitutional rights of victims.

ADV VARNEY: Yes, I think we are all in agreement with you on that, but I assume that this Commission will want to know why the ATT itself raised the concern that its proposals may have the effect of negating constitutional rights.

ADV NEL: Ja, it is difficult for me to answer that, you know. I do not know what the specific concerns were there, and I do not know whether that was a concern raised by a specific member or whether that was a concern in general. It is difficult for me to say. This that you referred to, can you refer me to the paragraph where you deal  
20 with it in the cross-examination document?

ADV VARNEY: Well, yes. In the cross-examination application, it is paragraph 6.6, but we simply paraphrase what is in paragraph 3.2.4(a) of the amnesty task team report. I have already quoted it to you. I do not want to press you on this. If you do not have an answer, I will put certain aspects to you in due course, which I do

think impact constitutional rights.

ADV NEL: You know, I... when I consider this request or this cross-examination paragraph, there I also stated that I do not know about the concerns of the ATT because the ATT cannot negate constitutional rights, and furthermore, private prosecutions are dealt with in there, in section 7 of the NPA Act, and private prosecutions can only be prosecuted if the NEPP provides a knowledge prosecute certificate.

ADV VARNEY: Yes, but the question that arises is why the ATT itself  
10 was concerned that notwithstanding its proposals, even if its proposals were implemented, it would not necessarily stop the institution of private prosecutions.

ADV NEL: Ja.

ADV VARNEY: Perhaps just to give you some context, some of the recommendations that were made by the ATT included the setting down of new criteria upon which not to prosecute the TRC cases. We will go through them shortly, but it included novel criteria such as whether a prosecution would promote national reconciliation, whether the potential accused might have been subject to indoctrination, and  
20 so on. But notwithstanding these avenues not to pursue prosecutions, the ATT is now saying, well, a concern we have is that maybe private prosecutions can proceed nonetheless. So we were interested to know why that was a concern.

ADV NEL: I really do not know why it was a specific concern of them. It is difficult for me to answer, you know. As indicated, we were also

not there all the time when these issues were discussed. So it is very difficult. As indicated, I am not aware, you know, where this came from. So it is very difficult to answer then.

ADV VARNEY: All right. Let us deal with another concern, and this is on the next page at 101, subparagraph (d) at the top of the page.

“Public participation regarding the participation in the further amnesty process by the security services, as the public may regard them as perpetrators in the conflicts of the past.”

10 Why was that concern raised?

ADV NEL: I really do not know, sir.

ADV VARNEY: All right. Let us turn to the next question that we have at our paragraph 6.7 in our application. So we make reference to the debate that the report refers to amongst the members around a further amnesty process and the compiling of a draft indemnity bill, and that is at paragraph 3.3.1 of that report, the same report we were in. So that is at the same page we were on, page 101. I am just going to paraphrase that long paragraph, but it is reported that the task team is of the view that the only way to address the above  
20 concerns adequately would be to provide for a further amnesty process similar to that of the TRC process, and then there were those that elicited much debate. There were those that who rejected that proposal and those who felt that it was necessary to create a further process for perpetrators to get involved in.

The only recollection of the debate around the further

amnesty or indemnity in that first meeting of the task team.

ADV NEL: Ja. Let us see. As indicated, the president specifically ruled out any further amnesty process, and relating to the drafting of a further amnesty process and also then the drafting then of, what did they call it there?

ADV VARNEY: Indemnity bill.

ADV NEL: Indemnity bill, I am not aware of that. I was definitely not involved in the drafting of any bill in this regard, whether it was for a further amnesty process or whether it was for any other reason.

10 ADV VARNEY: Am I right in saying that as part of the, of your legislative drafting responsibility, I believe perhaps while you were still at the Department of Justice, you mentioned that you had drafted the original Indemnity Act and the further Indemnity Act. I think it was promulgated in the early 1990s.

ADV NEL: That is right. But now you are taking me back more than 30 years ago, and really... (intervenes)

ADV VARNEY: Yes, indeed.

ADV NEL: I just cannot remember what the bill's intention was, what the bills whether they were pulled , etc. I can recall that I was present  
20 at the meeting of the Portfolio Committee in that regard, because I was assisting the State Law Advisor that was briefing the Portfolio Committee. That is all that I can recall.

ADV VARNEY: Yes. Now I only raised the earlier indemnity laws because if you had been involved in drafting them, then you might have been seen as an expert on indemnity. Did nobody on the

committee perhaps think of asking you to craft the proposed new indemnity bill?

ADV NEL: No, no one approached me. I also think that the bill was also submitted to Advocate Bruwer. I do not know who submitted the bill to him and what his views were. I really, I am not aware of this bill and the contents thereof.

ADV VARNEY: Right. So in the documentation that we have, that bill was not provided, but when Advocate Chris Macadam put up documents before the court dealing with the Rodriguez matter, he put  
10 up the first two pages of that bill. Oddly enough, it reflected that the bill was put together in the year 2003, which is not 2004. But we only have the cover title and a bit of the preamble, but nothing more. Did you ever have sight of the full indemnity bill that was put up?

ADV NEL: Not at all.

ADV VARNEY: Okay. Just as a matter of interest, the two laws that you were involved in in drafting in the early 90s, both were repealed around the time that the Truth and Reconciliation Commission was set up. All right.

Then let us then turn to the evidence you have given in  
20 relation to the views of Bulelani Ngcuka, or rather his evidence, when he was under cross-examination before this Commission. Luckily, this has been canvassed with you and your evidence-in-chief. Just to summarise, Mr Ngcuka, before this Commission said that, given that there were already guidelines in place, the proposal to develop new guidelines was something that he did not agree to.

Plus, he felt that the fact that there were members of other institutions serving on the task team, for example, from the police and the intelligence services, he felt that the NPA would be compromised because it might end up in a conflict, given that he may have to consider prosecutions in cases like the ANC 37. So, he then ordered his representatives, he did not give us the names, but I am assuming you are one of them and Mr Ratenda was the other. Can I ask, did you... you say you cannot recall that meeting and you cannot recall being told not to go ahead, but as I understand it, you accept that this

10 happened. But now that you know the reasons that advocate Ngcuka has given, do you agree with his approach?

ADV NEL: I agree with him, sir.

ADV VARNEY: And in particular, do you agree with his evidence that serving on a committee like that would compromise the NPA because of the potential conflicts?

ADV NEL: I would agree with that.

ADV VARNEY: Let us turn to some of the documents that you have attached to your statement. As you can see, on page 3 of our application, paragraph 6.9, we just... ja, I will wait for you to get it.

20 ADV NEL: I just want to get to all the documents that I am dealing with.

ADV VARNEY: Yes. Unfortunately, Commissions of this nature often drown in paperwork.

ADV NEL: Okay. You refer me to my statement? Paragraph?

ADV VARNEY: Well, actually I am referring to our paragraph 6.9 in

our application to cross-examine.

ADV NEL: Ja.

ADV VARNEY: So it is a simple question. We just want to know whether you are satisfied that the documents that you have attached are authentic. And we just raise the following concerns that these aren't original documents, they are computer generated, and they are not signed.

ADV NEL: Ja. Look, normally, I submit a draft memorandum to the National Director. And at the same time, I also submit a copy, a Word  
10 copy. So it would be possible for the National Director or his assistant, at that stage, it was Advocate Pillay, it would be possible for them to also bring about changes to that specific document. But that document that I submitted, that is an authentic document. That document was drafted by me, although not signed.

I am not in possession of the signed document. As the evidence, you know, I was pointed out by Ms Rangata. She referred to the minutes of the parliamentary committee. So such a memorandum, cabinet memorandum, did serve before cabinet.

ADV VARNEY: Okay. So you are vouching at least for one  
20 document, and that is the one that you drafted, the cabinet memorandum of March 2005?

ADV NEL: That is right. And also the one that I drafted, the note, the office note addressed to the National Director.

ADV VARNEY: Okay. And that is at page 1986. It is titled Notes for NDPP. But let us turn to the first document, at least they are in date

order. And that is the last one you attached to page 1989 of your bundle. That is the internal memorandum, the one addressed to the amnesty task team. So it is attached to your statement. It is the last document attached to your statement.

ADV NEL: Yes, I have got that one.

ADV VARNEY: So it is from the office of the NPA addressed to the amnesty task team. Subject at paragraphs one and two of Terms of reference of the ATT. And it is dated 26 February 2004.

ADV NEL: Ja.

10 ADV VARNEY: And as you pointed out, that is the same day as the first meeting of the ATT. So, you know, the question arises, was this addressed to the ATT before or after that first meeting of the ATT?

ADV NEL: It seems to me it was drafted for purposes of the ATT on that specific meeting on the 26th of February.

ADV VARNEY: Okay, so I think what you are saying is that it probably was drafted before the meeting, if it was meant to serve at the meeting.

ADV NEL: Ja, ja.

20 ADV VARNEY: Right. How did this document come about? Did somebody request it?

ADV NEL: That I do not know. I found this document in my folder, in my amnesty folder. And I was of the opinion that it is a very good document for purposes of the Commission to point out that there were a general criteria for prosecution policy. And then there were also specific criteria for the PCLU.

ADV VARNEY: Do you know if this internal memo was authorised by anybody, for example, the NDPP himself?

ADV NEL: No, I do not know.

ADV VARNEY: And it is, you know, it says, it is rather vague as to where it is coming from. It says the office of the NPA. What does that mean? Does it mean the head office or some other office?

ADV NEL: I agree with you. If it was a document, for instance, coming from my office, I would address it as the office of the National Director of Public Prosecution. And then it would have been  
10 submitted to the National Director for the National Director to approve that this document be handed to the ATT.

ADV VARNEY: Yes. I would consult with Advocate Ackerman, and to the extent necessary, you know, he might have to make an affidavit to this effect. But he says this is not the kind of memo that would be sent. He says an internal memo is sent, you know, within the organisation from one office within the NPA to another office within the NPA, from one person in the NPA to another person in the NPA. An internal memo is not sent to an outside body like the ATT. Your comment?

20 ADV NEL: Well, I do not think that is always the case. I saw that he is saying that he is not aware that any person, in any case, he did not authorise a document and he did not liaise with the ATT. But I do not think that that excludes that a document was prepared by someone within his office. Because you must remember, his evidence is also that at one stage he was removed.

ADV VARNEY: Yes, he was removed, but that was some years later. That was after the Chikane prosecution, the Chikane plea and sentence agreement, and sometime after the suspension of Advocate Pikoli. So, that was sort of later in 2007.

ADV NEL: Ja.

ADV VARNEY: So, we are a few years earlier. We are now in February of 2004. And as you have pointed out, Advocate Ackerman says that he was not aware of the ATT and its deliberations at that time.

10 [speaking together]

ADV NEL: I cannot take it further by saying I do not know who is the author of this document. It was definitely not a document created on any of my computers, because there would be an invitation. And also, when I opened the document, I had a specific way of drafting documents using certain key, etc, and that was not the case with this document.

ADV VARNEY: Yes, it certainly is a mystery. But given that you think it was the PCLU, unless you are forming another view on the matter, why would the PCLU send such a memo to the ATT at that time?

20 ADV NEL: Well, the ATT was dealing with guidelines. And obviously, the ATT was also dealing with the policy itself. In other words, the ATT, according to me, had to indicate that they are dealing with these matters in a different way. So, maybe that was the reason. I do not know. I do not know the reason, the intention of this document.

MS MOHLAHLANE: Are you disputing Advocate Ackerman's

evidence that at that time he had no relationship with the ATT and was not aware of its deliberations?

ADV NEL: No, that I cannot say.

ADV VARNEY: So, you know, here are you...

[speaking together]

ADV NEL: I am just saying that it is not impossible that someone else in his office drafted such a document.

ADV VARNEY: Well, if that is the case, then it seems as if they did it without his knowledge. And it is unclear whether a junior person in  
10 the office can send official documentation to somebody outside the organisation, without the authority of the PCLU head, or for that matter, the NDPP himself. But if it was going to come from the PCLU, surely it would have said from the office of the PCLU?

ADV NEL: Not necessarily, again. Maybe they did not want to indicate to the ATT that it is coming from their office. I do not know. You know, if you look at paragraph three of that specific document, it deals in detail with the operation of the PCLU in respect of these cases. Now my question is, who would have known this except for someone with NND in the PCLU? And maybe, I do not know whether  
20 there was also a stage when the PCLU dealt with the DSO. I do not know whether there was a person within the DSO, maybe, that assisted in the drafting and that was aware of the guidelines.

ADV VARNEY: The fact of the matter is... (intervenes)

ADV NEL: Well, I do not know.

ADV VARNEY: Yes, okay. I am not going to press you on that. But

we will be disputing the authenticity of this document given all the inconsistencies. And let me bring you one more oddity to your attention. Given the nature of this document and that it addresses the terms of at least two paragraphs of the terms of reference directly, is it not odd that in the report of the amnesty task team, there is no reference to this document at all?

ADV NEL: That is right.

ADV VARNEY: All right.

ADV NEL: And as you pointed out, there is also no reference to the  
10 functioning of the PCLU.

ADV NEL: Yes. All right. Let us move on. Or perhaps let me just raise one paragraph in that document. That is paragraph 2.1(b). So, a warning is sounded here. It says the decision whether or not to prosecute must be taken with care because it may have profound consequences for victims, witnesses, accused and their families. A wrong decision may also undermine the community's confidence in the prosecution system. And we did provide a question, that is at 6.10.5 on our application. And it reads as follows.

20 "Given that concern, would the provision of a special process for apartheid-era perpetrators,"

I will wait for you to find it if you prefer. Okay. So, it is page 3 of our application at 6.10.5.

"Would the provision of a special process for apartheid-era perpetrators in which additional criteria not to prosecute are provided, would that

not have profound consequences for victims and families and undermine their confidence in the prosecution service of the system?”

ADV NEL: Ja, If you look at B of the general criteria, it does not refer to TRC matters. It says the decision whether to prosecute must be taken with care because it may have profound consequences for victims, witnesses, accused and their families. So, it is referring to any other person. Not necessarily TRC matters. You must remember that this paragraph deals with general criteria governing a decision to  
10 prosecute. In other words, not criteria relating to TRC matters.

ADV VARNEY: No, I am acutely aware of that. I am simply raising it to contrast it with the recommendation made by the ATT in relation to criteria not to prosecute TRC cases. So, yes, this falls under general criteria dealing with cases generally. And in cases generally, it says you have to be very careful because decisions have profound consequences and may undermine confidence in the prosecution system.

So, with that context, that background, given that the ATT made recommendations of additional criteria dealing only with the  
20 TRC cases and several of them provided grounds, further grounds not to prosecute the TRC cases, would you agree that that approach has profound consequences for complainants, their families, and that it would have undermined their confidence in the prosecution system?

ADV NEL: Yes. I will say, as it is stated here, that which additional criteria not to prosecute are provided, it is not only criteria not to

prosecute. It is criteria relating to a prosecution or not.

ADV VARNEY: All right. We will return to the criteria shortly. I want to refer you to the further report of the Amnesty task team, and that is at page 103 of the cross-examination bundle.

ADV NEL: Paragraph?

ADV VARNEY: So, it is the very first paragraph. It is titled "Background information." It refers to the fact that on 3 March 2004, the ATT submitted a report to the heads of department forum for consideration. Then, if we turn to paragraph 1.2, it says the heads of departments... (intervenes)

ADV NEL: I am not with you now. Which document are you referring to?

ADV VARNEY: It is called the Amnesty task team further report, and it is at page 103 of the bundle. It looks like that.

ADV NEL: Okay. I have got it.

ADV VARNEY: So, if you can turn to the second page, that is 104. 104. And the background information, it says:

On 3 March 2004, the ATT submitted its report to the heads of department for consideration.

20 And then paragraph 1.2:

The heads of department discussed the report with members of the task team. Thereafter, they deliberated the task team's proposals and recommendations in camera.

So, it seems as if the heads of department actually held a

discussion or a meeting with members of the task team before they went off to deliberate in camera. Do you recall such a meeting? And if so, were you part of it?

ADV NEL: Not at all. I was definitely not present at such a meeting.

ADV VARNEY: Okay. Then, if we can just look at the directions that the heads of department gave the task team, and that is actually in the same paragraph. It is basically listed from (a) to (f). So, they asked the task team to give consideration to the following aspects in relation to option 1, and this is the setting up of a departmental task  
10 team, whether parallel structures in order to assist the task team are not acceptable, whether they should make use of existing structures.

Then again, the question of private prosecutions was raised. They asked the task team to consider whether there is a way in which private prosecutions and also civil litigation can be eliminated if the NDPP decides not to prosecute, then to investigate the possibility and desirability of legislation required.

Let us just pause there. In subparagraph (b):

“Consider whether there is a way in which private  
prosecution, civil litigation can be eliminated if the  
20 NDPP decides not to prosecute.”

The fact that the heads of forum wanted to know from the ATT whether there were ways of eliminating those possibilities, what does that say about their general intentions around the prosecution of TRC cases?

ADV NEL: Ja, obviously, according to me, they are not fully aware of

the National Director, you know, his powers in terms of section 7 of the NPA Act relating to private prosecutions, and then also, I think you would know better than us about civil litigation. There is nothing else that you can do except for approaching the National Director again and indicating that private prosecutions should not be allowed or should be allowed, making recommendations to the National Director in this regard. But there is nothing that you can do.

ADV VARNEY: Yes. No, I agree with you that legally that simply was not possible.

10 ADV NEL: Ja.

ADV VARNEY: And ultimately, the ATT was advised that in the absence of both constitutional and legislative amendments, that possibility could not be eliminated.

ADV NEL: Ja, that is right. But it does suggest a view, at least among some on that heads of department forum, that they were looking for ways to, in fact, eliminate private prosecutions and civil litigation.

ADV NEL: It seems like that.

ADV VARNEY: Yes. And then they proposed that the task team...

20 (intervenes)

ADV NEL: But sorry, sorry to interrupt. It may also be as a result of not knowing the provisions, the relevant legislation.

ADV VARNEY: Well, yes, I think I agree that they were operating from a level of ignorance in terms of constitutional and legislative provisions.

ADV NEL: Ja, that is what I mean.

ADV VARNEY: Yes. Yes, I agree with you. And then they wanted the ATT to look at whether the task team should work under the direct supervision of an inter-ministerial committee.

ADV NEL: Now, which task team are they referring to? Is this now the amnesty task team? Or is it this departmental task team?

ADV VARNEY: This is the departmental task team that they are proposing should be established.

10 ADV NEL: Well, maybe it was, you know, a view that the inter-ministerial committee is on a higher rank than the task team itself. And that that should, you know, give more weight to the recommendations from such an inter-ministerial committee.

ADV VARNEY: Yes, it would certainly give more weight. But having an inter-ministerial committee oversee or directly supervise the work of the departmental task team, would that not give rise to concerns of political overreach when it comes to prosecution decisions?

20 ADV NEL: It is possible. But I do not think that a National Director would give in to, you know, that was what was put to him, you know. I do not know. The National Director has got a not a discretion in terms of the constitution and the NPA Act. And no one can Interfere with administration, notwithstanding their ranks, notwithstanding what task team it is that make the recommendation, the National Director is not bound by any of the recommendations.

ADV VARNEY: Right, well you will know as good as the rest of us that what is said in law is not always respected in practise. But let us

move on. There was also another aspect that the task team was asked to look into and that was whether somebody aggrieved by decision of the NDPP could approach the International Criminal Court to perhaps prosecute cases that were not being taken up locally.

ADV NEL: I am not in a position to provide, you know, an opinion in this regard, but my view is anyone can approach the International Criminal Court.

ADV VARNEY: Yes, I suppose the question really is why was this a particular concern of the ATT?

10 ADV NEL: Yes, you are right. Again, it is the same concern relating to private prosecutions and the other matters that you mean.

ADV VARNEY: Yes, that is correct. All right, let us move on to the response of the ATT to the different requests of the Heads of Department Forum. And I want to be fair to you because as I understand your evidence, you accept that once Mr Ngcuka had received a report or had met with the representatives after the first meeting, he instructed you and Mr Radeva not to be involved anymore. But am I right in saying that in relation to the second report, the further task team, at least the amnesty task team further report  
20 that you were not present at the subsequent meeting?

ADV NEL: No, definitely not.

ADV VARNEY: So, the odd thing that arises is that, you know, if the NDPP had instructed his representatives not to have any further dealings with the ATT, would not you have expected the second report to reflect that the NPA is no longer part of this and they have

been asked to refrain from attending meetings and yet there is nothing in the further report that says that?

ADV NEL: I think that is a fair comment.

ADV VARNEY: Because anyone just reading this will just assume that the original members are also involved here and that this also then has the buy-in of the NPA and yet NDPP Ngcuka tells us that that is not the case. So, the report is somewhat misleading in that regard?

ADV NEL: No, I cannot answer, sorry.

10 ADV VARNEY: All right, but I would like to seek your views, nonetheless, on what this further report has to say. So, then we are aware from this report that the ATT then deliberates further and indeed, I think they approach Advocate Bruwer for at least one opinion or maybe even more than one opinion. It is too much for us to go into any detail, but let us take a look at paragraph 2.1.

So, they basically agree to persist with the setting up of that task team. They agree with the proposal of the state law advisors that it does not require any legislation because it is an administrative process.

20 Then if we turn to paragraph 2.2, the involvement of existing structures. So, there the ATT says, yes, existing structures can be used. But they do say the following: They say that all parties involved and presumably also the NPA would have to commit themselves and give their full support and cooperation to the process and that perhaps an MOU could be contemplated. So, the suggestion

by the ATT that existing structures can be used, but that everybody involved have to give their full support and cooperation. What does that suggest to you?

ADV NEL: Well, again, it is difficult to know because I was not involved in this further report. I see that they are also referring to the parties, maybe drafting a memorandum of understanding in this regard. I do not know whether a memorandum of understanding can do anything about the directive that was proposed. So, I do not know. It is very difficult for me to answer.

10 ADV VARNEY: All right. I will not press you on that. Then if we turn to paragraph 2.3, and that actually gives us the answer to the discussion we had previously.

CHAIRPERSON: Mr Varney, and rightfully so not to press him on that. Because you are soliciting an opinion whose weight is of no significance to us.

ADV VARNEY: Yes. Noted Chairperson, and that is why I did not persist with questions on that aspect.

CHAIRPERSON: Yes.

20 ADV VARNEY: Nonetheless, I still think his view is valuable for the Commission, given his legal expertise and long service in the Department of Justice and NPA, and given that he initially served on the ATT.

Anyway, 2.3, we do not have to deal with Mr Nel because that actually answers that discussion we had previously. Advocate Bruwer does give an opinion saying that eliminating civil litigation and

private prosecution in those matters would require new legislation and an amendment to the Constitution.

I do note at the bottom of 2.3.4, that if legislation, that route was taken, including a constitutional amendment, that they viewed that such a step would not be desirable. I take it you would have agreed with that view?

ADV NEL: That the view that it would further delay the matter?

ADV VARNEY: Well, it would not be desirable to amend the constitution in order to eliminate it.

10 ADV NEL: And that would also be not in line with the president's guidelines or the speech that he made.

ADV VARNEY: Do you know perchance whether the State Law Advisers and Advocate Bruwer or perhaps some other advocate, whether they were asked at any point to provide an opinion on the constitutionality of the proposed amendments to the prosecution policy?

ADV NEL: I do not know.

20 ADV VARNEY: While we run opinions on the amendments to the prosecution policy, do you recall having sight of internal opinions developed by advocates Ackerman and possibly Macadam, in relation to the proposed amendments in which they said those proposals would be unconstitutional?

ADV NEL: I am aware of those opinions. And I think that in his statement, he also said that it was submitted to the National Director and discussed with the National Director. He also said that he

discussed it with me. That is so. But, you know, to go into whether I agree with that or not agree, that is something different.

ADV VARNEY: All right. But I assume that at that time, you did not agree with Advocate Ackerman?

ADV NEL: No, because you must remember, it was not only my views. The National Director received recommendations from a task team, a task team that consisted of various members of the different bodies, etc. So the National Director also had to take into account those recommendations and put that against the recommendations of  
10 Ackerman and Macadam.

ADV VARNEY: Right. Let us move on to paragraph 2.4 of the further report that is dealing with the establishment of an inter-ministerial committee. And again, I am just seeking your view on this. Is it not odd that the ATT supported this proposal, even though it stated, and I quote, that

“This might be seen as an attempt by the government to put undue pressure on the NDPP in reaching an independent decision.”

So that is at the top of page 106 on the next page.

20 ADV NEL: Ja, I hear them, you know, that is a possibility. But as pointed out, you know, the National Director has got a discretion. And he is balancing his discretion, taking into account the general criteria, taking into account the directives. And balancing that, he have to decide whether to go ahead with the ATTs proposals relating to directives or whether to stop them. And I think that maybe the

opinion was held that this came from a body consisting of various, you know, people being experts within their departments, et cetera.

And I think that maybe played a role in his decision.

ADV VARNEY: Do you know, perchance, whether the subsequent Cabinet Committee on Post-TRC Matters, which was a subcommittee of the Justice Crime Prevention and Security Cluster, whether that was inspired by the ATTs suggestion for the creation of an inter-ministerial committee?

10 ADV NEL: I am not aware of that. I do not know. I cannot comment on that.

ADV VARNEY: Okay. Then turning to paragraph 2.5, which is titled, you know, national interest should be the paramount objective. And here, the ATT responded by saying it wholeheartedly agrees with this viewpoint of the forum. Essentially, here, as I understand it, the recommendation was that all involved in this process, including the NPA, should hold the national interest above all else.

20 ADV NEL: Ja. I will not say above all else. But, you know, taking into account the national interest or the public interest, is not something new. That was contained in the first prosecution policy that was submitted and approved, I think it was 11 November 1928.

So it was always there. It is not something new that was included.

ADV VARNEY: Yes. Okay. I will not belabour the point. But we have made the point, and we will argue that there is a big difference between the public interest as set out in the original prosecution policy and the national interest, but because the national interest and

the public interest do not always coincide. And the national interest is typically reflective of the dominant viewpoint in government. But let us... (intervenes)

ADV NEL: Yes, but again, you know, do you think that the recommendation took into account what you are saying now, that there is a difference between national interest and public interest? I do not think so. Well, I think they are also ignorant about that difference.

ADV VARNEY: Yes. Well, we could have an interesting discussion  
10 on it, but time is short. But we would certainly suggest that the contents of the amended policy are inconsistent with the public interest. All right. Let us leave the reports and then turn to the specific recommendations of the amnesty task team. So here we can go back to the original report. It starts at page 91.

ADV NEL: Okay.

ADV VARNEY: Perhaps let us just start with the composition, the proposed composition. And that is at paragraph 3.2. And under 3.2.1, it says it is recommended that a departmental task team comprising a number of institutions, including Department of Justice,  
20 intelligence agencies, South African National Defence Force, SAPS, Directional Services, NPA, and the Office of the president. Why did the ATT, given the task of this task team, which was to advise the NDPP on a case-by-case basis, why did it deem it necessary to include, for example, Department of Defence and the Office of the president? Why should they have members in such a body?

ADV NEL: I do not know. I cannot comment on that.

ADV VARNEY: Would you agree that it is somewhat incongruous or a little irrational to have such parties represented on the departmental task team?

ADV NEL: You know, was it not a specific that they may be called that in a certain cluster? And that is that the South African Defence Force at that stage formed part of that cluster. You know, there are different clusters, a justice cluster, a security cluster, etc. I do not know, really.

- 10 ADV VARNEY: Yes. No, I hear you. I will not press you. I will just make the point that to have a departmental task team dealing with prosecution of specific individual cases, that this is unusual to say the least.

But let us turn to the first function and that has been put to you, that had been read in the record, just to remind ourselves that that is a 3.2.2. Before the institution of any criminal proceedings on defence committed during conflicts of the past to consider the advisability of the institution of such proceedings and make recommendations to the NDPP.

- 20 Am I correct in saying that it is, this provision that with hindsight you now conclude that that is improper?

ADV NEL: Ja, I would say I would not agree with that specific paragraph. Maybe that is one of the reasons why Advocate Bulelani Ngcuka decided that the NPA should not be further be involved in these ATT. I do not know.

ADV VARNEY: Yes, it may well be and I can also tell you that Advocate Pikoli also objected to that and in fact that particular paragraph did not find its way into the amended policy because Pikoli did not agree to it.

ADV NEL: Precisely.

ADV VARNEY: And only subsequently when members of the task team tried to reinsert that proposal that Pikoli again raised his objections and indeed it ultimately caused the collapse of that task team.

10                   And let us turn to, I am not going to take you through the rest of the application process. Let us turn to the criteria which is at paragraph D on the next page. That is at paragraph, at least page 97. And the new criteria are set out under paragraph B, particularly from paragraph Roman numeral II. There are quite a few criteria. We do not have time to go through them. I am just going to highlight some of them.

So, for example:

20                   Humanitarian considerations relating to the accused may justify the non-prosecution of the case.”

These are not numbered but it looks like it is the fourth or fifth bullet point. A few bullet points down:

“The alleged offender's sensitivity to the need for restitution, the degree of remorse shown and his or her attitude towards reconciliation. The degree of

indoctrination to which the alleged offender was subjected.”

So, these are now additional criteria upon which the NPA may decline to prosecute a case it normally would have gone ahead with.

ADV NEL: That is possible.

ADV VARNEY: So, what is your response to the inclusion and these criteria did find their way into the amended policy. So, what is your comment on the fact that just in these cases, only the TRC cases, a  
10 decision not to prosecute could be made on the basis of questions around reconciliation, humanitarian concerns, indoctrination and the like?

ADV NEL: Ja, I would not say that is just in respect of TRC cases. It is so that that is included in the directives but this may also be in respect of the rest of the directives because in terms of the constitution, the National Director may take into account the views of the people that he approached directly or people that make recommendations to him and maybe that is also a factor that should be taken into account, not only in respect of TRC cases but in respect  
20 of maybe other cases. I will not say all other cases but in respect of other cases.

ADV VARNEY: But Mr Nel, that just is not the case. These criteria do not apply to other cases. They only apply to the TRC cases. So, if the NPA declines to prosecute somebody on the basis of indoctrination in a case unrelated to the TRC cases, that would be an

unlawful decision.

ADV NEL: Ja, it is difficult to answer on that. As I say, I am of the view that the National Director can also take that into account in respect of other cases. Maybe this was specifically mentioned relating to TRC cases to emphasise the importance thereof.

ADV VARNEY: Well, if you are able to, we do not have to do it now, but if you are able to point us to such a provision either in the NPA Act or the original prosecution policy where that is possible, then I invite you to do so. I put it to you that... (intervenes)

10 ADV NEL: I am not saying there is such a criteria within the prosecution policy or the policy directives. I am saying that the National Director can also, in terms of the exercising of his discretion in terms of the constitution, take that into account.

ADV VARNEY: Well, I must put it to you, Mr Nel, that you are mistaken in that regard. If that was the case, there would have been no need to insert these exceptional criteria dealing specifically with the TRC cases. But we do not have to debate this right now.

20 So, you are aware, of course, that the bulk of the recommendations did find their way into the amended prosecution policy. I take it you are also aware that in 2008, the High Court struck down the amended policy as unconstitutional and unlawful?

ADV NEL: I am aware of that.

ADV VARNEY: Do you believe that the court reached the correct decision?

ADV NEL: I am not prepared to comment on that. I am not, you

know, at the top of my head to prepare that. I haven't done research in this regard. It requires a deep study of the matters and providing a well thought through legal opinion.

COMMISSIONER GABRIEL: With respect to Mr Varney, I am not sure what you are trying to achieve now.

ADV VARNEY: Yes, Commissioner, I will move on. The recommendations, Mr Nel, to insert new prosecution criteria only in relation to the TRC cases, and criteria to base additional grounds upon not to prosecute, the composition of the departmental task  
10 team, including individuals not normally involved in the prosecution process, the recommendation that before a decision is made that the NDPP must wait for a recommendation from the task team, cumulatively speaking, are these not aimed at creating further avenues for parted area perpetrators to escape justice? Do these not amount to interference with the independence authority and the ability of the NPA to pursue the TRC cases?

ADV NEL: Are you addressing now a question to me or are you addressing a question or the question of the, one of the Commissioners?

20 ADV VARNEY: No, it is to you. I want to know whether, within your view, those recommendations do not amount to an attempt to interfere with the independence and authority of the NPA.

ADV NEL: I do not think so.

ADV VARNEY: Let us turn to your unsigned cabinet memo. That is at page 1979 of your bundle and it reflects the ATT

recommendations. So that is the cabinet memo that you drafted.

ADV NEL: Can you just give me the number of that page again?

ADV VARNEY: Ja, it is attached to your statement at 1797. Sorry, 1979.

ADV NEL: 1979. I have got it.

ADV VARNEY: So the question is why were these guidelines submitted to cabinet for approval when there was no constitutional or legislative requirement to do so?

ADV NEL: Well, that was a mistake. I already indicated that we  
10 should not have referred to approval and as rightly pointed out by the portfolio committee chairperson, it should have been only for noting. And as I am of the view that maybe it was submitted for approval, not in terms of the legislation, but to inform the president. Because of the president's guidelines and his speech, to inform the president this is what the national prosecuting authority is going to do and to approve that. But it should not have referred to approval of the directives.

ADV VARNEY: Yes. And in your evidence in chief, you said that this  
happened because the process was initiated by the president, not the NPA. Can I ask, but for the intervention of the president, would I be  
20 right in saying that the NPA would not have initiated such a process?

ADV NEL: I think you are right because there would not have been the establishment of ATT.

ADV VARNEY: Yes. And you mentioned that it was the chairperson of the portfolio committee, I think it is in paragraph 9 of your statement, who suggested that it be amended and just as you have

indicated, it was submitted to cabinet, not for approval, but just to be noted.

ADV NEL: You are referring to paragraph 9 of my statement?

ADV VARNEY: Yes, yes, indeed.

ADV NEL: That is correct, ja.

ADV VARNEY: But given that we know that the... (intervenes)

COMMISSIONER KGOMO: Mr Varney?

ADV VARNEY: Yes, Mr Commissioner?

COMMISSIONER KGOMO: just to enquire Mr Nel, who was the  
10 chairperson? You seem to suggest that it was a lady, so who was the  
chairperson of the portfolio committee there?

ADV NEL: I think it is Ms Jean Khota. I am not a 100% sure. But  
during that time there were a few chairs, Mr Johnny de Lange was a  
chair, and then Billie Hofmeyer was a chair, and she was also a chair.

COMMISSIONER KGOMO: Yes, thank you. Thank you, Mr Varney.

ADV VARNEY: Thank you, Commissioner. But we know that, in fact,  
the cabinet did not note the proposals, it actually approved the  
prosecution policy and directives. And my learned friend for the  
evidence leaders put to you the decision, the cabinet minute, that is at  
20 page three of the bundle.

So, as a matter of fact, although they did not have to, but in  
fact they did approve that policy. So, the chairperson in making those  
adjustments, did not that amount to some misrepresentation? She  
may have been correct in interpreting the law and what was needed  
and what was not, but it misrepresented what in fact happened,

because it was actually approved by cabinet.

ADV NEL: That may be so. She cannot amend the cabinet memorandum, but she can amend their resolution taken within the parliamentary committee. In other words, that it was submitted to them for noting and not for approval.

ADV VARNEY: Do you also agree that there was no legal requirement to submit the amendments to Parliament for their consideration?

ADV NEL: Can you just repeat the question?

10 ADV VARNEY: Well, the cabinet minute that you put together was for two reasons. One, to get cabinet approval, and then also to get approval to submit to parliament for its consideration. Would you agree that there was no requirement, legal requirement to get parliament's consideration on this policy?

ADV NEL: I agree with you, except for saying that the parliamentary committee was aware of the president's speech. The parliamentary committee was also aware that the president gave certain specific guidelines in his speech, and I am sure that there is nothing wrong with indicating to the parliamentary committee that following on what  
20 the president's speech, that this was submitted for them for noting.

ADV VARNEY: Would I be right in saying that the real reasons probably were because the subject matter, the impact it would have on victims, families, and the wider community. In fact, it was described in your document under communication implications, that this was a very sensitive and controversial matter. Was it not the real

reason why cabinet approval was sought and it was put before parliament?

ADV NEL: No. It is difficult for me to answer on that because I am of the view that that was not the reason. I mean, the chairperson specifically indicated that they are not going to approve, they are noting, and it was mentioned like that. The resolution was drafted in such a term.

ADV VARNEY: Yes. Well, we will be submitting that even though there was no legal requirement to put the amendments before cabinet and parliament, it was done so because of the far-reaching effects of the amendments. But let us move on. Are you still persisting with your view that the prosecution policy was not amended and that only policy directives were issued?

ADV NEL: That is right. Policy directives.

ADV VARNEY: So, well, first I want to put it to you that I think you are mistaken in this regard because the amended policy was far-reaching. It effectively amended the criteria that were in the original prosecution policy by adding criteria in relation to the TRC cases, which could not have been done any other way except by way of amendment. And this is why, in fact, item 8(a) was included in the amendments together with appendix A, because normally policy directives are not included in the policy itself.

ADV NEL: Ja, I cannot answer that.

ADV VARNEY: Okay. And I will just quickly refer you to the report of the justice portfolio committee, and that is at page 111 of the bundle.

Actually, it starts at page 110. So, in this meeting summary at page 111, you know, it refers to section 1791 of the constitution as well as 5(a).

Then you can see from that third paragraph, the amendments proposed by the NDPP were submitted and approved by the minister of justice, who also submitted them to cabinet, which noted the amended prosecution policy.

In the very next paragraph, prosecution policy was amended by insertion of a new paragraph 8A(a) This gave the NDPP power to supplement or amend the prosecution policy. So can you not see that even in that meeting, it was seen as an amendment?

ADV NEL: Can you just refer me to that page again?

ADV VARNEY: So, the report, the meeting summary starts on page 110.

ADV NEL: Ja.

ADV VARNEY: Paragraphs I just quoted are at the top of page 111.

ADV NEL: Okay.

ADV VARNEY: Perhaps just to help you, it is that paragraph starting "The amendments proposed by the NDPP were submitted and approved by the minister of justice, also submitted them to Cabinet to note. All the DPPs also supported the amendments."

ADV NEL: Ja.

ADV VARNEY: So, we are talking about, at least according to this

report, an amendment to the prosecution policy.

ADV NEL: That is correct, they are talking about an amendment.

ADV VARNEY: Yes. So, your assertion that the policy was not amended and only directives issued, is not correct?

ADV NEL: In other words, you are referring to paragraph 8(a) that was inserted.

ADV VARNEY: Paragraph 8(a) together with appendix, with the appendix that was attached to the policy. But I tell you what, Mr Nel, it is a legal question. I do not think it is material. We do not have to  
10 pursue it further.

ADV NEL: No, but I do not want to persist saying, no, that was not an amendment. You know, that amendment, I think there was an amendment at one stage where we also referred to OECD matters. And it was felt that if there is new legislation and if there is criteria that the National Prosecuting Authority had to adhere to in terms of the OECD requirements, then it was necessary to provide the national director with the authority to amend the policy, to determine prosecutorial policy and directives in the respect of specific matters. For instance, matters in respect of new legislation and matters of  
20 national interest.

ADV VARNEY: Mr Nel, I am going to move on unless you wish to add anything further.

ADV NEL: Just to say that I would agree now that that is an amendment that was also, that formed part, although it was actually the directives that constituted the amendment and not an amendment

of the prosecution policy. The amendment of the prosecution policy only relates to that specific first part of 8(a).

ADV VARNEY: Yes, but as pointed out in the paragraph below, prosecution policy was amended by the insertion of a new 8(a). That gave the NDPP power to supplement or amend the policy so as to determine prosecution policy and directives, which in fact happened as per the appendix that was attached. Let us move on. Perhaps on that score we will have to agree to disagree. Can I refer you to your notes for the NDPP, which is at page 1986?

10 ADV NEL: 1986? I am there.

ADV VARNEY: In that bottom paragraph 3, it says

“Some MPs and members of the media wanted to know why we took so long in developing the guidelines. I pointed out that it was a long consultation process where we had to consult with other law enforcement agencies, relevant departments, the minister, the DPPs and unit heads. Furthermore, the minister consulted cabinet.”

20 What is missing from your paragraph is any attempt to consult with victims, families, civil society and the wider community. Why were they not consulted?

ADV NEL: Well, where is the...you know, that memo? 1989. It is one of the other memos and also in the prosecution policy, there is a specific provision providing that victims should be consulted at all

time. And I am talking now when the national director has to make a decision to prosecute or not to prosecute, that the NPA is obliged to consult with the victims.

ADV VARNEY: Yes, but that is not what we are talking about here. I know that that is in the policy.

CHAIRPERSON: Mr Varney?

ADV VARNEY: Yes, Chairperson?

CHAIRPERSON: Sorry, I think your question is why were these things missing in your note, advocate Nel. That is the pointed  
10 question you must ask.

ADV NEL: Sorry, is that a question to me?

CHAIRPERSON: Yes, it is a question to you. The pointed question which has been put to you is, why were the victims left out in your note for the NDPP?

ADV NEL: You know, this note... there is a note. This note did not really address, you know, the whole consultation process. It only referred to that there was a consultation process and especially the ATP process and the other forum process and interdepartmental processes, et cetera. That takes a long time. Having hindsight,  
20 maybe we should have also included, you know, the consultation with regard to victims. But because it was a note, as I explained, that was in any case a policy direct, it is a policy itself within the prosecution policy that at all stages we must consult with the victims.

ADV VARNEY: Yes, but Mr Nel, as the Chairperson has pointed out to you, we are not talking about that. We are talking about the

consultation process in developing the amendments to the prosecution policy itself. It is a central complaint of victims, family and civil society that they were excluded from that process.

ADV NEL: I understand what you are saying.

ADV VARNEY: All right, let us move on. I should say we have included it in our application to cross-examine at paragraph 6.28.2, that although the victims and families were not consulted, there is an allegation from one of the authors who interviewed the attorney representing some of the perpetrators that they were sporadically  
10 consulted on this question. And from the perspective of victims and families, this rubbed salt into the wounds.

ADV NEL: I hear what you are saying. In other words, the perpetrators were consulted, but not the victims.

ADV VARNEY: That is the allegation. That is what was reported by an author who spoke to a late attorney who represented the perpetrators.

Chairperson, I just have a few questions arising from the evidence in chief. I will try to be as short as I can. In your evidence in chief, Mr Nel, you said that you have no involvement in  
20 prosecutions, unless there were representations made to the NDPP on a specific crime, and then you might be approached for a legal opinion on that particular case. Can I ask whether any of those cases happened to be a TRC case, perchance?

ADV NEL: Not at all. No one.

ADV VARNEY: Noted.

ADV NEL: You know, as indicated, the PCLU dealt with those cases and they would have dealt with representations in that regard.

ADV VARNEY: Right. But talking of the NDPP, I assume you are talking about his power under section 22 sub 2(c) to review decisions made by other prosecutors. Is that correct?

ADV NEL: Sorry, you are referring to which section?

ADV VARNEY: Section 22 sub paragraph 2 sub paragraph (c). The NDPP has the power to review a decision made by a DPP or another prosecutor.

10 ADV NEL: That is right.

ADV VARNEY: Yes. Am I also right in saying that the NDPP does not, under the Constitution and the NPA Act, does not make decisions in individual cases? He or she can only review those decisions?

ADV NEL: That is correct. And there are specific guidelines in terms of which. If I am talking about the guidelines, I am referring to legislation, under what circumstances he can review. In other words, where, for instance, prosecution policy is not adhered to, he may interfere.

20 ADV VARNEY: Yes, and of course, those limitations also put the policy in conflict with law and the constitution. You mentioned that you have other documents dealing with the PRC cases, but not documents that are relevant to the mandate of this commission. Would you be willing to permit the commission to inspect those documents so that they can just satisfy themselves that they are not potentially relevant? Who knows what we are able to find, but it may

be of assistance to this Inquiry.

ADV NEL: Well, how am I going to identify those documents? As I said, I interviewed all the documents in my possession. In the meantime, taking into account my involvement in the commission's work, you know, I received several documents. I have got quite a big, what do you call it, a...

ADV VARNEY: Collection.

ADV NEL: Yes, a big selection of documents.

ADV VARNEY: Well, if you have them in electronic form, perhaps the  
10 Commission's staff can do searches to see whether there are other documents potentially relevant to this Inquiry, those dealing with the PRC cases?

ADV NEL: You know, I do not know whether I am entitled to provide that because there is a provision in the NPA Act that no documents may be submitted outside except with the approval of the National Director.

ADV VARNEY: All right, well, I am sure that approval or permission can be granted.

COMMISSIONER KGOMO: But Mr Varney, is that not too broad? Is  
20 it not too broad?

ADV VARNEY: Well, Commissioner, we will not know.

COMMISSIONER KGOMO: But... (intervenes)

ADV VARNEY: Sorry, Commissioner.

COMMISSIONER KGOMO: In the questions that you put, the witness, as experienced as he is, would also have an idea as to what

is required, unless maybe he would not want to disclose certain information or if there is suspicion that he may not wish to disclose certain information.

ADV VARNEY: Yes, Commissioner. Is it because he said that he had other documents relating to the TRC but not relevant to the mandate of the Commission. So just to play safe, I was asking whether he would give permission to the Commission to look at the documentation to see whether there might in fact be cases that are relevant. He has indicated that the NDPP would have to grant  
10 permission for that and my suggestion is that perhaps the Commission should approach the NDPP in that regard, and perhaps I will just leave it at that, Commissioner.

COMMISSIONER KGOMO: Yes, I will leave it to the Chair to rule on it, yes.

CHAIRPERSON: Yes.

ADV VARNEY: Thank you, Commissioner. Chairperson, thank you for your indulgence. No further questions.

CHAIRPERSON: Thank you, Mr Varney. Do we still have Mr Gwala? No. Any re-examination, Ms Rangata?

20 MS RANGATA: Thank you, Chair, there is no re-examination for me.

ADV NEL: Thank you, ma'am.

MS RANGATA: Thank you.

CHAIRPERSON: Advocate Nel, we thank you for having agreed to come and give evidence before this commission. Your evidence has been completed and you are now excused as a witness.

ADV NEL: Thank you very much, Madam Chair. I appreciate the opportunity to address the Commission and to answer the questions.

I appreciate that.

CHAIRPERSON: Thank you. We are adjourned until tomorrow at 10 o'clock.

INQUIRY ADJOURNS UNTIL 2 JULY 2026



## 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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#### **TRANSCRIBER'S NOTE:**

- Names of which the spelling was not known were transcribed phonetically.
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