

**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 Fana Nalane (SC)
Adv Mfesane Ka-Siboto
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
Adv Motlalepule Rantho (for SAPS)
Mr Lukhele for (NPA Representative)
Adv Nwabisa Ntshizana (for Ex-NDPP's Officials)
Adv Bridgette Nthambeleni (for Adv Jiba)

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INQUIRY RESUMES

CHAIRPERSON: Thank you, Mr Semenya.

ADV SEMENYA: Thank you, Chair. Advocate, we are almost done. Let me invite you to come with me to page 1121. And we deal with ad paragraph 161. You see that.

ADV RUDMAN: Yes, I see.

ADV SEMENYA: And as we can do, as we did earlier, we go to that 121, I mean 161. If you are there, you will see it reads as part of the 33 notice.

10 "The secret Further Report of the ATT was disclosed by McAdam in his affidavit. FA5 as ANNEXURE RCM15 at page 864, perhaps more than any other document. The Further Report reveals the real intent of those behind the political interference. The report is undated, but it would have been generated in 2004 in the weeks or months following the submission of the ATT's first report to the heads of department forum on 4 March 2004."

20 To which your response would say against paragraph 412.

"I have no recollection of the Further Report provided by the ATT. I therefore cannot admit nor deny same. However, I raise the same concern herein as per paragraph 4.8 above, in that the report is undated and unsigned."

And you continue to deal with ad paragraph 162, which reads:

"The report reveals that the heads of department forum discussed the ATT report with members of the task team, 'where after they deliberated the task team's proposal and recommendations *in camera*.' Following these deliberations, the heads of department forum indicated that they have, that they prefer the task team's recommendations relating to the establishment of a departmental task team, parentheses referred as option one. However, they requested the task team to further consider the following aspects. One, in performing its functions, the proposed interdepartmental task team, ITT, must make use of existing structures rather than parallel structures. Two, consider whether there is a way in which private prosecution and civil litigation can be eliminated if the NDPP decides not to prosecute, and investigate the possibility and desirability of legislation if required. The proposed task team should work under the direct supervision of an inter-ministerial committee. It is important that the proposal, proposed task team, the inter-ministerial committee, and the NDPP, in performing their functions and reaching decisions,

should take the national interest into account, advise the forum on whether a person who is aggrieved by a decision of the national director may approach the International Criminal Court of Justice, ICC, advise the forum on a timeline for the completion of the work of the proposed task team. Twelve months was mentioned as a possibility."

You react to that:

10 "That to note the submission made with reference, it is safe to note that submissions made with reference to the contents of the Further Report, I once again reiterate that my task as chairperson was merely to facilitate the discussion set out in the request by the head of department forum. All decisions made and conclusions reached by the members of the ATT, as well as any further recommendations made, will be noted by myself as the chairperson in the

20 report to be submitted."

And then you deal with paragraphs 163 and 172.

COMMISSIONER KGOMO: Mr Semenya, are you still taking the witness with you? He has not responded.

ADV SEMENYA: Sorry.

COMMISSIONER KGOMO: You have not asked him to respond.

ADV SEMENYA: Thank you, Chair, I mean, Commissioner Kgomo.

I have just read to you the response, which appears on page 1121, do you have that?

ADV RUDMAN: I have that.

ADV SEMENYA: Where it deals with paragraph 162.

ADV RUDMAN: Yes.

ADV SEMENYA: And I have read what appears to be your response and your reaction is?

ADV RUDMAN: That is my response, Chairperson.

10 ADV SEMENYA: That is your response. And then you deal with the ones following, which would have been 163 to 172. Again, for completeness, I just have to quickly rattle that out, if you do not mind. 163 would read:

20 "Perhaps most revealing was the forum's instructions to the ATT to explore ways in which private prosecution and civil litigation could be eliminated where the NDPP decides not to prosecute, including the possibility of fresh legislation to achieve this end. This exposes the intent to come up with a means to guarantee maximum impunity for apartheid era perpetrators. The fear that victims and families could turn to the ICC in the event that avenues for accountability in South Africa were completely closed presented a real fear to the forum. Equally chilling, was the

desire of the forum for the ITT to work in codes under the direct supervision of an inter-ministerial committee. If there was any doubt that the prosecution process in relation to the TRC cases was to be under the thumb of political overlords, it was dispelled by this requirement. This is in fact what transpired. As will be discussed below, towards the end of 2006, the ITT was instructed that it must submit a final recommendation to the

10 Committee of Directors-General in respect of each TRC case, which in turn must advise the NDPP in respect of who to prosecute or not. In addition, it emerged that at least by 2007, if not earlier, there was a, 'Cabinet Committee on post-TRC matters', which was a subcommittee of the Justice Crime Prevention and Security Cluster. The proposal was that all players in the process, including the NDPP, should, 'take the national interest into account', when making decisions in

20 relation to the TRC cases was, 'shorthand', for the expectation that all involved, particularly the NPA, would be expected to, 'do the right thing'. Needless to say, no attempt was made to define what the national interest meant in this context, although I am advised that the national interest is

not necessarily the same, 'public interest'. The national interest constitutes the interest of the state usually as defined by its government. Typically, politicians invoke the national interest in seeking support for a particular cause of action. Public interest, on the other hand, typically refers to the collective interest of a community or society in particular, when steps are taken on behalf of disadvantaged, marginalised, and vulnerable people as well, as the pursuit of the objectives that benefit society as a whole, such as the protection of civil liberties. I am advised that while the national and public interest may coincide, in this instance, it does not. The shielding of perpetrators of serious crimes from scrutiny and justice may have served the narrow expedient interest of the state at that time, but it hardly served the public interest of victim communities or society more generally. It goes without saying that the national interest as exposed by the ATT were also diametrically opposed to the interest of justice."

Then deals, and under 167.

"The ATT then met, to work out how to take the heads of department forum's directives forward.

They consulted legal experts who advised that setting up the department of ATT team did not require legislation. Only a memorandum of understanding would be needed, although all existing structures such as the NPA would have to 'commit themselves, and give their full support and cooperation' to the process. It was apparent that for this work, 'everybody would have to play the game'. As it turned out, they could count on almost everybody in all departments to 'play the game', or at least 'look the other way'. However, two key persons in the NPA, Pikoli and Ackermann, were not willing to bow to political instruction. The charade could not work without them playing along. As will be seen below, the former would be shown the door while the latter was sidelined. According to the Further Report, the question of 'eliminating private prosecutions and civil litigation in case of no prosecution elicited much debate', within the ATT. The ATT spoke to two state law advisors and obtained a legal opinion from Adv JH Brouwer, which was attached to the report. Although it was not attached to the copier next to the McAdams affidavit, there appeared to be agreement that

legislation, 'legislation eliminating private prosecution and civil litigation' will at least affect the ATT's further ignominy on itself when in response to the proposal that the 'national interest should be paramount objective', it responded in several fashion. 'The task team wholeheartedly agrees with the viewpoint of the forum.' The ATT was more than happy to open the door to the imposition of the dominant political views into prosecutorial decision. In relation to the involvement of the ICC, the ATT relied on the advice of Adv Brouwer, concluded that it was not inconceivable that a complainant, who is prohibited from instituting a private prosecution in the national court may approach the International Criminal Court for relief. In relation, lastly there, in relation to the question of setting a timeline for the department's task team to complete its work, the ATT declined to propose a timeline but proposed that, 'the President should rather indicate that it is expected that the task team will finalise its work within a specified period and that such period will be determined taking account the extent to which its objectives are achieved'. Perhaps the ATT realised it should leave this

decision in the hands of the office holder who was really calling the shots. In doing so, the ATT confirmed loudly and clearly that the question of the TRC cases was now firmly in the hands of those in political control."

You give your final response to all of those paragraphs against paragraph 4.14, Advocate, and I will read your response so you will confirm if I have read it correctly and that is what you say.

10 "The submissions made within these paragraphs are noted but I cannot comment on the correctness thereof. I have no recollection of my further involvement in the matter. Subsequent to having provided the reports from ATT, as stated earlier, my limited recollection of events is based on the documentation provided as referred to in the notice in terms of Rule 33, together with annexures referred to in the relevant paragraphs referred to in the said notice. Should further documentation be made available to me, you say,

20 which I can use to refresh my memory, I reserve my right to further respond thereto, if necessary."

I have read that correctly, right?

ADV RUDMAN: That is correct, Chairperson, that is my response.

ADV SEMENYA: That is your response. And the thrust of your reaction to all these allegations that are here is you have no

independent recollection. If I am wrong, please tell me.

ADV RUDMAN: I have no recollection.

ADV SEMENYA: No recollection at all. Those are the questions I have for the witness. I am advised that I did not deal with the allegations that are against pages... that I did not in the assertions made in the Rule 33 notice deal with the pages 168.2 to 168.5. Correction, 168.6. Might I just read those into the record?

CHAIRPERSON: Yes.

ADV SEMENYA: 168.2 say:

10 "They also doubted that the motivation for such legislation would meet the requirements of section 36, the limitations clause of the Constitution, which would be seen as a further amnesty process.

[3] The ATT drew the heads of departments' forum attention to an article in the Rapport of 7 March 2004 where Archbishop Desmond Tutu was quoted as saying that 'those who did not receive amnesty should face prosecution and any new initiative to stop prosecutions', would be seen as negating the amnesty process of the TRC.

20 [4] The ATT advised that the only way to eliminate private prosecutions and civil litigation would be by way of legislation and a

constitutional amendment, which 'would not be desirable'.

10 [5] It is interesting to note that in Nkadimeng one, the Minister of Justice and the NPA argued that the prosecution policy amendments did not promote impunity because families and victims could still bring their own private prosecution, even though they lacked investigative powers and the resources of the state. Judge Legodi, recognising the absurdity of this claim, noted in his judgment in Nkadimeng one that the crimes are not investigated by victims. It is the responsibility of the police and prosecution authority to ensure that these cases are properly investigated and prosecuted.

20 [6] It is not known if the state law advisors and Adv Brouwer were asked to provide an opinion on the constitutionality of the proposed amendments to the prosecution policy, which provided for an effective backdoor amnesty. Archbishop Desmond Tutu filed a supporting affidavit in the legal challenge to the new policy in Nkadimeng one, where he stated the efforts of the state, 'represented a betrayal of all those who participated in good faith in the TRC process'. It

completely undermined the very basis of the South African TRC, an unsigned copy of the affidavit is attached to that as FA25."

You would still provide the same answer, you have no recollection of these details, to which you can give a response, am I right?

ADV RUDMAN: I have nothing to add, Chair.

ADV SEMENYA: Okay, those are the questions we have for the witness, the Chair and Commissioners.

CHAIRPERSON: Thank you.

10 ADV SEMENYA: And might I say, Chair, that I am advised that there are people online who are with us. Shall I give the names?

CHAIRPERSON: Yes.

ADV SEMENYA: It would be Adv Gwala, Adv Rantho, Adv Varney, Adv Ntshizana, Adv Nthambeleni and Bongi Lukhele. Those are the names, Chair.

CHAIRPERSON: Thank you. Ms Moroka, any clarificatory question?

ADV MOROKA: No clarification questions, Chair.

CHAIRPERSON: Thank you. Mr Gwala, any clarificatory question?

No response from Mr Gwala. Ms Rantho?

20 ADV RANTHO: Nothing from me, thank you, Commissioners.

CHAIRPERSON: Ms Ntshizana?

ADV NTSHIZANA: Nothing from the NDPO officials, Chair, thank you.

CHAIRPERSON: Ms Nthambeleni? No response from Ms Nthambeleni. Lukhele?

MR LUKHELE: May it please you, Chair. I am a junior to Adv Gwala, he has not indicated if he has any questions, but I will try to reach to him as well, but so far no questions. May it please you.

CHAIRPERSON: Thank you. Mr Varney?

ADV VARNEY: Thank you, Chairperson. Chairperson, we applied to cross-examine Mr Rudman. A permission was granted, and with the Chairperson's leave, we can commence?

CHAIRPERSON: Yes.

ADV VARNEY: As the commission pleases.

10 CROSS-EXAMINATION BY ADV VARNEY: Firstly, Mr Rudman, thanks for coming out of retirement to assist this commission, it is appreciated. My learned friend for the evidence leaders, Mr Semenya, was putting various paragraphs from the Rule 3.3 notice. There is just one paragraph that he did not get to. That is paragraph 169. And just for the sake of completeness, I am just going to read that into the record for your response. So that paragraph reads:

20 "In relation to the proposed establishment of an inter-ministerial committee, it is recorded in the Further Report that the task team supports this proposal. The members of the ATT demonstrated their subservience in agreeing with the heads of department forum. However, they were constrained to provide the views of the State Law Advisers, who indicated that a further structure could prove cumbersome, and, 'might

be seen as an attempt by the government to put undue pressure on the National Director of Public Prosecutions in reaching an independent decision."

Your response to that paragraph?

ADV RUDMAN: Yes, it is the same as my response to paragraphs 163 to 172. The submission made within these paragraphs are noted, but I cannot comment on the correctness thereof. I have no recollection of my further involvement in the matter, subsequent to
10 having provided reports from the ATT.

As stated earlier, my limited recollection of events is based on the documentation provided as referred to in the notice in terms of Rule 3.3, together with annexures referred to in the relevant paragraphs referred to in the said notice. Should further documentation be made available to me, which I can use to refresh my memory, I reserve my right to further respond thereto, if necessary.

ADV VARNEY: Thank you, Mr Rudman. Let me just point out that in your paragraph 4.14, you say, 'I have no recollection of my further
20 involvement in the matter, subsequent to having provided the reports from the ATT.' So that paragraph actually dealt with an extract from the Further Reports. You were part of the ATT at the time that that Further Report was together. So we are not asking you to talk about what happened after those reports, but during the deliberations, which led to those reports.

ADV RUDMAN: Yes, I was actually referring to the question of implementation, which was raised in your application to cross-examine me. But as I say, I have no further recollection of the first report, neither of the second report. I do not know when the second report was submitted to my seniors.

ADV VARNEY: All right. We will return to some of those paragraphs shortly. Can you advise the commission how it was that you became involved in the ATT? Who approached you and who appointed you?

ADV RUDMAN: Well, I was approached by the Director-General to
10 chair the ATT.

ADV VARNEY: And was it explained to you what the purpose of the ATT would be? What were its essential tasks?

ADV RUDMAN: Well, I cannot remember exactly what he said to me. I cannot remember at all. The terms of reference of the ATT were set out in the first report and the second report, which I received copies of.

ADV VARNEY: And if we can talk for a moment about the composition of the ATT. Besides yourself, it included individuals from the National Intelligence Agency, the NPA, SAPS and the Department
20 of Defence. Given that you were dealing with questions around prosecutorial discretion in relation to the TRC cases, what was your reaction to the fact that there were also people from departments who do not deal with prosecutions, such as the NIA and the Department of Defence?

ADV RUDMAN: I have no recollection why they were included. I

accept that that was provided to me by my seniors as members of the ATT.

ADV VARNEY: Thank you. But looking back, for the benefit of hindsight, do you see it as perhaps a bit odd to include individuals from those departments?

ADV RUDMAN: No, I cannot recall that I did.

ADV VARNEY: No, I am not asking, you know, what you recall at the time, but just as somebody who spent many years as a legal advisor for the state and involved in drafting laws, do you see it as a bit
10 strange that such departments were involved in such a vast committee?

ADV RUDMAN: Chair, my response is really that I cannot remember whether I was surprised, or I cannot remember. Not even in hindsight.

COMMISSIONER KGOMO: Mr Rudman, are you looking at paragraph 152 to refresh your memory? Those are the list of people that Adv Varney is referring to.

ADV RUDMAN: At paragraph?

COMMISSIONER KGOMO: 152.

20 ADV RUDMAN: 162.

COMMISSIONER KGOMO: 152.

ADV RUDMAN: 152. Paragraph 152.

COMMISSIONER KGOMO: Do you find it? Can someone help?

ADV RUDMAN: Yes, I am at 152.

COMMISSIONER KGOMO: Yes.

ADV RUDMAN: I noted that those were the members. These people that are mentioned here on 152, their names are also reflected in the first report. And as I say, it was not my decision who should be members of the ATT. I followed instructions, and those were the people that sat on the ATT.

COMMISSIONER KGOMO: Thank you, Mr Varney.

ADV VARNEY: Thank you, Commissioner. Yes, to be clear, I am not asking what your recollection or your reaction was at that time, but just looking back, do you not find it odd or strange that such
10 members were included in this task team?

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

ADV VARNEY: Okay. Do you know why the two reports that the ATT worked on were classified as secret?

ADV RUDMAN: Well, just in general, I accepted that the reports would be submitted to Cabinet, and as a general rule, all Cabinet documents are classified as either secret or top secret. But as I indicated in my statement, those reports that were provided to me were not signed by me. It is not dated, so I cannot even verify if those are in fact the reports that was produced by the task team.

20 ADV VARNEY: Because they are not unsigned, you do not know whether these were the final reports, but perhaps because they were unsigned, they might have been the reports that you drafted and submitted to the ATT members for their comment and input.

ADV RUDMAN: I cannot comment on that. As I said, the reports are unsigned. I cannot say that is in fact my report, a draft report, so I

cannot comment on that.

ADV VARNEY: Besides yourself, the other six members of the ATT, as listed in that paragraph 152, did they attend the meetings of the task team?

ADV RUDMAN: I am sorry, will you just repeat the last portion?

ADV VARNEY: Yes, so at paragraph 152 that Commissioner Kgomo referred you to, the seven names listed, including yourself, besides yourself, did the other six members of the team, did they attend the meetings and deliberations of the ATT?

10 ADV RUDMAN: Chairperson, I accept that they did attend, but I cannot say whether they, who attended, whether they attended the first meeting or the second meeting or any other meetings. I cannot recall.

ADV VARNEY: Okay, I also want to read certain paragraphs of your statement for your comments. These paragraphs are earlier in the statement. Let us start with paragraph 33. You write:

20 "It is my understanding that the duties of the chairman of a task team, such as the ATT, include the planning and running of meetings and ensuring that the team stays focused on its goals. I impartially facilitate the discussions as set out in the instructions and or terms of reference provided, and ensure that all appointed members participate to carry out the agreed upon tasks. I ensure that decisions made and conclusions

reached by the members of the task team, as well as any further recommendations made during its meeting, will be noted by myself, and a draft report which is circulated to all members of the task team. Once all further input by members are received, a final report will be drafted, which is once again to be circulated to all members. Should all the members agree to the contents of the report, the report will be finalised and signed by myself as the chairperson, and then submitted to my seniors, who appointed me as the chairperson."

So, given what you say there, can we accept that you were the author of the two reports generated by the ATT?

ADV RUDMAN: Yes, I would have been the author, but as I indicated earlier, I cannot rely on those reports because they were not signed by me. I do not know whether they were drafts or whatever, but as far as I am concerned, those reports, I am not sure who drafted them, and whether it was final reports or not.

20 COMMISSIONER KGOMO: But with hindsight, Mr Rudman, do they look genuine to you?

ADV RUDMAN: I suppose that the formulations appear to be genuine and correct, but I still cannot confirm whether it is the final reports or draft reports. I just cannot do so, because it has not been signed by me and it has not been dated, so I cannot confirm. But the

drafting looks well put, if I can put it that way.

COMMISSIONER KGOMO: Thank you, Mr Varney.

ADV VARNEY: Thank you, Commissioner. And just to follow up on the Commissioner's question, we also know that some of the central recommendations made in these reports were in fact implemented. So, even if these are not the most final reports, it certainly looks like these are the products of the ATT. Would you agree?

ADV RUDMAN: I cannot agree or deny, Chairperson.

ADV VARNEY: Let us move on to paragraph 3.5.

10 "Any report from the ATT, whether draft or finalised, would therefore contain input from all members of the ATT, specifically selected based on their expertise and or interest in the outcome, and does not necessarily reflect my personal views or opinions."

So, I just want to focus on the last piece of that sentence, that the reports do not necessarily reflect your personal views or opinions. Are you suggesting, Mr Rudman, that there are aspects reflected in the reports that are not reflected of your personal views or opinions?

20 Put another way, that you might in fact disagree with certain aspects contained in the reports?

ADV RUDMAN: Chairperson, as I indicated earlier, as chairperson my task was to lead the discussions and I relied on input from the members of the task team. That sentence was added just to indicate that my personal views were not necessarily reflected in the reports

and it was the expression of the views of the members of the task team.

ADV VARNEY: Even though you were the chairperson, you were nonetheless a member of the task team. Are you suggesting that your sole role was merely to reflect the views of others? Did you not make any inputs? Did you not express a view during those deliberations?

ADV RUDMAN: Chairperson, I cannot say whether, how much involvement I had during the discussions. I just cannot remember
10 that. But as a general rule, when I chair a task team or a committee, the point of departure is that I listen to the members and I obtain their inputs and that is my role as I see it as Chairperson.

COMMISSIONER KGOMO: If I describe you then as a facilitator, would I be wrong?

ADV RUDMAN: I am sorry, Chair?

COMMISSIONER KGOMO: I say if I describe your task as a facilitator, would I be wrong?

ADV RUDMAN: I facilitate the process. That is correct.

COMMISSIONER KGOMO: Thank you, Mr Varney.

20 ADV VARNEY: Thank you, Commissioner. Let me ask you the following, Mr Rudman. If you fundamentally disagreed with what was being said or a proposal that was being made, perhaps it offended your sensibilities or you felt that it was bad policy or perhaps it might result in something unconstitutional, surely, you would have intervened and expressed your disagreement?

ADV RUDMAN: Chairperson, if I understand correctly, as I indicated, I cannot recall how much I was involved in the discussions. I only listened to the inputs of the members of the task team and that is what I reflected eventually in the report. And somewhere I noted that there, it was in one of the reports, I noted that there was disagreement about a point.

I think eventually we came to a conclusion and the report was then drafted along those lines. But I cannot recall expressly whether I was or the discussions during the meetings of the task team and my
10 personal involvement in those discussions.

ADV VARNEY: Well, if you are saying that the report does reflect occasions where there was disagreement but you eventually got to a consensus, that assumes that you were involved in that and that ultimately what was produced was something that you supported and agreed with.

ADV RUDMAN: Well, as I indicated, Chairperson, there was, it was mentioned in one of the reports, if I remember correctly, that there was disagreement but I facilitated that process and I accept that the committee came to a final conclusion which I then included in the
20 report. But I cannot recall what the point was that they did not agree on and as I said, I just facilitated the process and I cannot add anything to that.

ADV VARNEY: Well, you have now had an opportunity to refresh your memory that the Rule 3.3 notice was provided some time back. So you have now had sight of the reports to assist your recollection

but simply looking at the two reports, as we stand here today, and I am not talking about going back to 2004, as you sit here today, when you look at those two reports, is there anything in there that you would have had a fundamental disagreement with or a concern? Or looking at them, you would be happy to sign off on that.

ADV RUDMAN: I think that is a very difficult question to answer, Chairperson. I looked at the reports, as I indicated, they appear to be properly drafted and as I sit here, I cannot say whether I agree with some of the recommendations or whether I do not agree. It is very
10 difficult for me. I never thought of whether I agree with it or not, as I sit here.

ADV VARNEY: Well, in both reports, there is talk about a debate around the possible negation of constitutional rights, possibility of eliminating private prosecutions, perceptions around a further amnesty process. These are all very controversial matters. They would be controversial today, they were controversial back then. I put it to you, Mr Rudman, that these are issues that I think you would have a recollection as to whether you agreed with the proposals or not.

20 ADV RUDMAN: Yeah, I cannot take this point further, Chairperson. I understand what Mr Varney is saying, Chairperson, but I never thought of it when I prepared myself for this meeting, whether I agree with all the recommendations personally or whether I do not agree. I think some of them might be controversial, but I cannot take it further.

COMMISSIONER KGOMO: Let me ask the question this way. You

asked the various members for their inputs and there were disagreements and you have to integrate them. How do you deal with that part where there were disagreements, when you integrated the various inputs?

ADV RUDMAN: Sorry, Commissioner, I cannot hear.

COMMISSIONER KGOMO: Okay, let me try. I say, according to you, the drafts were distributed to the various members, there were disagreements, they come back to you, you had to integrate them before you send them to your seniors. How do you deal with that part
10 where there were disagreements?

ADV RUDMAN: Well, Chair, I allow further discussions and I allow people to indicate their points of view and we take the matter forward, we discuss further and I try to facilitate that process until there is an agreement on that particular matter. As Chair, that is the role that I played as a facilitator of the discussions to the best of my ability.

COMMISSIONER KGOMO: Thank you, Mr Varney.

ADV VARNEY: Thank you, Commissioner. Mr Rudman, I want to refer you to an extract from a transcript of the evidence of the former NDPP Adv Bulelani Ngcuka. He testified before this commission on
20 the 26 February 2004. And the transcript begins on paginated page 26 of the cross-examination bundle. And I would like to refer you to an extract on page 48 of that paginated bundle. I will just wait for you to find the page. Perhaps somebody can assist Mr Rudman.

ADV RUDMAN: I am sorry, Chair, Mr Varney, will you just repeat the question?

ADV VARNEY: Yes, I have not posed the question yet. I want to refer you to an extract from transcript of the evidence of former NDPP Ngcuka, who testified before this commission on the 11 March of this year. Perhaps to save time with the leave of the Chairperson, I will just read the extract into the record and then pose the question.

COMMISSIONER KGOMO: And you are reading from page 48, the red number, is it?

ADV VARNEY: Yes, it is red 48. That is correct, Commissioner.

ADV RUDMAN: Is it page 48?

10 COMMISSIONER KGOMO: Yes, page 48.

ADV VARNEY: Indeed it is. Yeah. So the context of the exchange between myself and Adv Ngcuka was the question as to why the ATT was developing new guidelines for the TRC cases and this is the response of Adv Ngcuka. It is about line five on page 48.

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 those 37 cases of the ANC and that whole participation in that process would have

compromised us because we would have to take decisions whether to prosecute or not to prosecute them. And so we felt that it was not necessary for us to participate. In fact, it would not have been wise for us to participate in that process. Hence, my instruction was let us pull out of it, and we did."

So, according to former NDPP Ngcuka, after the first meeting of the ATT, he received a briefing from his representatives and that was
10 presumably Gerhard Nel and Lungisi Beosi and for the reasons described, he instructed them to pull out of the ATT. Do you have a recollection of the NPA pulling out at that time and not attending the next meeting, not being involved in the Further Report?

ADV RUDMAN: Chairperson, I cannot recall whether they withdrew or whether they attended subsequent meetings. I cannot recall that at all.

ADV VARNEY: And what is your comment about Adv Ngcuka's reasons for pulling his team out of the ATT? He said he could not agree with what you were doing, and moreover, simply being at that
20 meeting would place the NPA in a conflicted position.

ADV RUDMAN: Chairperson, I really cannot comment on that because I cannot recall. Perhaps the two members that you referred to, perhaps they can shed light if they can recall, but I really cannot recall them withdrawing, and whether they attended further meetings, and why they withdrew. I cannot recall. We are talk ...[intervenes]

ADV VARNEY: Thanks, Mr Rudman.

ADV RUDMAN: No, no, I was just saying we are talking here about things that happened 23 years ago. I just cannot recall.

ADV VARNEY: Yes, you have answered the question, and my question was a little different. I am not asking whether you can recall whether they withdrew or not. I am simply asking for your view, your response to Adv Ngcuka's reasons for withdrawing, reasons that are on page 48, and which I just read to you. So, looking at those reasons, do you agree with Adv Ngcuka that it was correct to pull the
10 NPA members from the ATT?

ADV RUDMAN: Chairperson, I have read this paragraph. Adv Ngcuka must have had his reasons for that. Whether I agree or not, I cannot indicate to you what my view is.

ADV VARNEY: Well, Adv Ngcuka is clear. He says he does not agree with the need for new guidelines, and secondly, discussing individual cases such as that of the ANC to 37 could compromise or place the NPA in a conflicted position. Does he not have a point?

COMMISSIONER KGOMO: The propriety or impropriety of withdrawal.

20 ADV RUDMAN: I am sorry, Chair? Commissioner?

COMMISSIONER KGOMO: Yes, I said the propriety or the impropriety of withdrawal by the NDPP.

ADV RUDMAN: I cannot comment on this question, Commissioner. It appears to be, it appears that Adv Ngcuka was not happy with decisions taken at the ATT. Whether I agree with that or not, I cannot

comment on that.

ADV SEMENYA: Chair, without unnecessarily impeding Mr Varney and his questioning, I am not sure we are going to go anywhere close to having the witness recall these events. I am just making the observation, Chair.

CHAIRPERSON: Yes. You may proceed, Mr Varney.

ADV VARNEY: The Chairperson pleases. Mr Rudman, if we can turn to the secret Further Report of the Amnesty task team. And that is at red number 16. That is the cover. And then the report starts at
10 page 17. And we are going to jump to paragraph 1.2. I will just wait for you to get there.

ADV RUDMAN: I have got that, yes. Thank you.

ADV VARNEY: Okay. So it appears that the heads of department discussed the report with you and your task team members. And they themselves deliberated further *in camera*. And then they came back and asked you and your team to give consideration to various aspects. I will just highlight some of them. These included:

20 “(b) Whether there was a way to eliminate private prosecution. And civil litigation in the event that the NDPP decides not to prosecute and to consider legislation if that was needed, desirable. That the task team should work under the direct supervision of an inter-ministerial committee.

(e) And whether a person aggrieved by a decision of the NDPP might approach the International

Criminal Court.”

Now, I am not asking you to recall the discussion because you already said that you cannot. So I am asking for your view. Such directions from the heads of department forum, does it not disclose a desire or intention on their part to limit or restrict prosecutions of the TRC cases?

COMMISSIONER KGOMO: Mr Varney, let us just see whether the witness is with us. This paragraph 3, would it be at red page 19?

ADV VARNEY: It is red page 17. It is paragraph 1.2. And then it is
10 the sub paragraphs underneath.

COMMISSIONER KGOMO: Okay.

ADV VARNEY: I quoted three of them, sub paragraph b, c and e.

COMMISSIONER KGOMO: Oh, yes, okay.

ADV VARNEY: And just to remind you, Mr Rudman, should I repeat the question?

ADV RUDMAN: No, Chairperson, can I just say, I cannot speculate on why the heads of department decided that our terms of reference should read as indicated in paragraph 1.2, a to f. I was a public servant and I followed the instructions that were given to me. And to
20 the best of my ability, I had discussions take place around these instructions.

ADV VARNEY: Mr Rudman, as somebody who presumably believes in the rule of law, did it not raise your eyebrows? Or let me ask you, reading that now, would it not raise your eyebrows to receive a request to advise the forum on the possibility of eliminating private

prosecutions and civil litigation on the TRC cases?

ADV RUDMAN: If I remember correctly from reading the reports, our view was that we cannot take ...[intervenes]

COMMISSIONER KGOMO: Can you speak into the mic, please.

ADV RUDMAN: away private prosecutions and civil litigation from the members, from any victim.

ADV VARNEY: Thank you, Mr Rudman. The question is, the fact that you were asked to come up with these kinds of solutions or to advise the forum, did it not disclose an intention on their part to look
10 for ways and means of limiting or restricting prosecutions of the TRC cases?

ADV RUDMAN: Chairperson, as I indicated, I cannot indicate to you what the reasons were for these recommendations. I cannot speculate about that. Those were the instructions that were given to the ATT and we considered these proposals. Whether it is in line with the rule of law, we considered these proposals and to the best of our ability, I would presume, we came to conclusions and made recommendations.

ADV VARNEY: Yes, indeed, and in fact you did get a legal opinion,
20 which said that to eliminate private prosecutions and civil litigation would require both a legislative and a constitutional amendment and that this would not be desirable. Presumably, you know why you believe that it would not be desirable.

ADV RUDMAN: No, that is correct. We did obtain that legal opinion and the opinion did indicate what you put to me and I think that was

the view of the task team as well.

ADV VARNEY: Let us move on to a quick discussion on that paragraph c.

"The proposed task team should work under the direct supervision of an inter-ministerial committee."

And the response of your task team is set out on the next page, that is red 18 at paragraph 2.4. And basically, your team supported the establishment of an inter-ministerial committee to supervise the departmental task team and your team did so even though you state in your report that it might be seen as an attempt by the government to put undue pressure on the National Director of Public Prosecutions in reaching an independent decision. Can I ask why your team supported the proposal notwithstanding its awareness that it might be seen as putting undue pressure on the NDPP?

ADV RUDMAN: Chairperson, that was the view of the members of the task team that I reflected in the report. If I remember the documents, the idea was that the inter-ministerial committee should advise and not necessarily direct in regard to prosecutions. That is what I gained from the report. But I want to reiterate once again, it is not necessarily my views. Those were the views of the members of the task team, which I formulated and submitted.

ADV VARNEY: On this particular point, you are raising the possibility that you would not necessarily have agreed with an inter-ministerial committee supervising the inter-departmental task team,

but nonetheless you had to reflect the views of the others.

ADV RUDMAN: That might be so. I cannot comment on that.

ADV VARNEY: We do know that subsequently there was such an inter-ministerial committee set up, and we think it was this body called the Cabinet Committee on post-TRC matters, which was a subcommittee of the Justice Crime Prevention and Security Cluster. Are you aware of the setting up of such a body?

ADV RUDMAN: I am not aware that such a body was established. I was not involved in the further processes of implementation of the
10 recommendations.

ADV VARNEY: Thank you. Noted. Now, my learned friend, Mr Semenya, in reading paragraphs from the Rule 3.3 notice, he read paragraph dealing with differences between the national interest and the public interest. Because the response of your team to the proposal of the DG's forum, that the national interest should be the paramount objective, the response of the ATT was it wholeheartedly agrees with this viewpoint of the forum. Do you agree that the national interest and the public interest are not necessarily the same thing?

20 ADV RUDMAN: I agree with that point of view.

ADV VARNEY: And that the work of the ATT in making recommendations that would restrict the possibility of prosecutions, and having bodies that would oversee or supervise the NPA in relation to the TRC cases, that surely could never be in the public interest.

ADV RUDMAN: Chairperson, I would think that the NDPP will also take into consideration the public interest as well as national interest when it comes to prosecutions, whether to prosecute or not to prosecute. There is a difference between national interest and public interest, I accept that. But I think in any event, the Director of Public Prosecutions should always consider the national interest as well, in the broader sense, whether to prosecute or not to prosecute in a particular case.

ADV VARNEY: Let us turn to ...[intervenes]

10 COMMISSIONER KGOMO: Sorry, sorry, are you saying you accept the definitions as defined in paragraphs 166.2 of national interest and at 166.3 of public interest, you accept those definitions?

ADV RUDMAN: Yes, yeah.

COMMISSIONER KGOMO: Okay, thank you.

ADV VARNEY: Thank you Commissioner. Mr Rudman, if we can turn to the last paragraph of the Further Report of the ATT, so that is in the same document at page, at red 19 of the bundle.

ADV RUDMAN: 19, yes, I am there.

20 ADV VARNEY: Yes, so here the question is around the timeline for the implementation of the recommendations and in particular for the work of the proposed departmental task team. And on this score, the ATT declined to come up with a particular timeline but proposed that the President should rather indicate that it is expected that the task team will finalise its work within a specified period and that such period will be determined taking into account the extent to which its

objectives are achieved. Would I be right in saying that you prefer to leave this in the hands of the President because this was ultimately an initiative of the President and it was a Presidential project, so he should determine the timelines as to when work should start and when it should finish by?

ADV RUDMAN: That is correct, Chairperson, that was the view of the task team that the President determined the timeline.

ADV VARNEY: If we can just turn to some of the central recommendations of the Amnesty task team, at least the ones that
10 were actually implemented. So, the first big recommendation was to insert new prosecution criteria, the NPA's prosecution policy in respect of the TRC cases, essentially to provide further criteria upon which to base a decision not to prosecute. And perhaps I can ask you to turn to the first ATT report, which starts at red page 2, and if you can go to red page 8. When I mean red page, I mean the red number, so it would be red number 9.

ADV RUDMAN: I am at page 2, *ag* 8.

ADV VARNEY: Yes. Okay, well, let us start at page 8, and you can see several recommendations of what this new task team would be
20 doing. And if you look at subparagraph b:

"To consider the following factors when carrying
out its mandate"

And it makes reference to the normal policy manual, and then it suggests further specific criteria. And several of these, in fact, were added to the amended prosecution policy in 2005. There are too

many to go through, but I will just highlight some of them. These are on the next page, paragraph 9.

"So, the various humanitarian considerations that may justify a non-prosecution of the case.

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

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

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

And then the degree of indoctrination to which the alleged offender was subjected."

On the next page, there are a few more.

"Whether the offender was willing to abide by the constitution"

20 So, that gives you a flavour of the new criteria that were proposed, and virtually all of these were included in the amended prosecution policy. So, I would like your comments on that particular recommendation. And perhaps I should just cut to the chase and put it to you that inserting such criteria, in which further grounds are provided not to prosecute and only in relation to the TRC cases, not other murders, not other kidnappings, just these ones, does that not amount to improper interference with the independence of the NPA to

exercise its discretion in relation to these cases?

ADV RUDMAN: Chairperson, these are the proposals by the members of the task team, and if I look at it now, I would think that these recommendations would come from the representatives of the NPA. But whether that is so or not, I cannot comment. But once again, these were recommendations, if they are correctly reflected, these are recommendations by the members of the task team.

CHAIRPERSON: Mr Varney?

ADV VARNEY: Yes, Chairperson.

10 CHAIRPERSON: I think it is an appropriate time to ask Mr Rudman if he is still fine to proceed with the cross-examination. It was indicated to us that you may wish to have breaks.

ADV RUDMAN: Sorry, I cannot hear you. I am very sorry.

CHAIRPERSON: Yes, would this be an appropriate time to take a short break for you?

ADV RUDMAN: We can have a five-minute break.

CHAIRPERSON: Five-minute break.

ADV RUDMAN: That will be fine, thank you, Chairperson.

CHAIRPERSON: We will take a short adjournment of five minutes.

20 ADV RUDMAN: Thank you.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Are you okay, Mr Rudman?

ADV RUDMAN: Thank you, Chairperson. Thank you very much

CHAIRPERSON: Mr Varney?

ADV VARNEY: Just a few more minutes.

CHAIRPERSON: Thank you.

ADV VARNEY: Chair, can you hear me now?

CHAIRPERSON: Yes, we can hear you.

ADV VARNEY: Apologies. Mr Rudman, just to advise that we are quite close to the end. We are just a few minutes away. Just to wrap up that last topic we were dealing with before the break, when I asked you for your views on the new criteria that had been proposed and which found their way into the amended prosecution policy, further
10 grounds upon which not to prosecute the TRC cases. You mentioned that you were merely reflecting the views of the team. Would I be right in saying that those criteria are not necessarily your views and perhaps you don't even agree with them?

ADV RUDMAN: Yes, I can say so. As chairperson, I accepted the proposals of the members of the task team. But Chairperson, Mr Varney, asked me what my opinion was regarding certain matters, my personal view at this point in time. I just want to point out that I have been retired now for more than seven years and I have not been involved in legal matters at all during that time. So, I have forgotten
20 so many things that was taught to me as a student when I achieved my qualifications. But it is very difficult for me now to express an opinion on whether I agree with certain recommendations or whether I do not agree. It is just very, very difficult. As I said, I am a retired person, having a very quiet life at the moment. Thank you, Chairperson.

CHAIRPERSON: Thank you. I take note, Mr Rudman. Mr Varney?

ADV VARNEY: Thank you Chair, and I take note. Mr Rudman, I should bring to your attention, though, that the Commission will be entitled to reach a conclusion, or at least we will make submissions that it is entitled to reach a conclusion, that unless you advise the Commission that there are specific aspects from the two reports that you disagree with, that you felt duty-bound to reflect the views of your team members, we will have to submit that. Since you have not expressed a view on any particular aspect indicating your
10 disagreement, the Commission must assume that actually you did agree with everything reflected in those two reports and the recommendations made.

ADV SEMENYA: Chair, with respect, that submission will be met by the evidence leader's team at the appropriate time. Calling for this witness to comment is objectionable, in fact.

CHAIRPERSON: Yes, Mr Varney? Is that not a matter for argument?

ADV VARNEY: Well, Chairperson, it is not objectionable. I am giving the witness an opportunity to put on the record any specific disagreements he has with the two reports, and I am bringing it to his
20 attention that in the absence of any disagreements expressed, that we will make the submission that, in fact, Mr Rudman was in agreement with everything written, regardless of the fact whether he was the Chairperson or not.

CHAIRPERSON: It is a matter for argument, Mr Varney.

ADV VARNEY: I will move on, Chairperson. So if we can turn to

other recommendations that your team made, and let us turn to the first secret ATT report at red number seven. And there you will see that you recommend a departmental task team comprising the following departments or institutions: Department of Justice, Intelligence agencies, South African National Defence Force, South African Police Services, Correctional Services, the NPA, and then the Office of the President.

Why did the task team feel it necessary that other executive departments be represented on this task team? For example, the
10 Intelligence agencies and the Office of the President?

ADV RUDMAN: I don't know why they decided, the task team decided this, who the representatives should be, except to say that I noted what the members indicated, and I accept that they agreed with, or they came to a conclusion that these should be the members, and I noted that.

ADV VARNEY: Would I be correct in saying that the proposal to have the Office of the President represented on the task team is because of the same reason you gave in relation to the timeline, that this was a presidential project, and it would be a way of keeping the president
20 informed?

ADV RUDMAN: Yes, I think that is correct.

ADV VARNEY: Then if we can move to the next paragraph, setting up the functions, and the first key function is the following, 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 NDPP in this regard. Can I ask you, with the benefit of hindsight, whether you think that was an appropriate recommendation to make in the circumstances?

ADV RUDMAN: Once again, it is very difficult for me to answer that question, except to say that it is indicated that the team would make recommendations to the NDPP, and it is then for the NDPP to decide. It is not a directive to the NDPP, but it is a recommendation for him to consider, him or her.

10 ADV VARNEY: Yes, so just for your information, this particular recommendation did not find its way into the amended prosecution policy because there was an objection to the recommendation because it would have introduced a so-called two-stage process. Essentially, it would have bound the hands of the NDPP. He would have to wait for a recommendation before he or she could act in any of those cases.

Do you see why that would be objectionable and would bind the hands of the NDPP?

20 ADV RUDMAN: Chairperson, as I indicated earlier, I was not involved in the implementation of the recommendations. And whether the prosecuting authority guidelines were changed, I was not involved in that. But I did read in some of the documents that, if I remember correctly, it was taken to court and the court struck it down, if I remember correctly.

ADV VARNEY: Yes, you do remember correctly. The court did strike

it down as unlawful and unconstitutional, and it described the process as absurd. In addition to binding the hands, do you see that such a recommendation would also introduce an element of oversight and control by members of the executive into individual decision-making by the NPA on cases?

ADV RUDMAN: I am sorry, what is the question, Chairperson?

ADV VARNEY: Well, the reason why I ask this is because subsequently, and perhaps you are not aware, there was an attempt to reintroduce this proposal into the procedures of the task team, namely that before a decision could be made in the TRC cases, the task team must make a recommendation to the NDPP on the advisability before the institution of any prosecution. So what I am putting to you is that this would have introduced an element of oversight and control by members of the executive, who would not normally be involved in the work of the NPA when it comes to decision-making on a case-by-case basis.

ADV RUDMAN: I cannot comment on that.

ADV VARNEY: Do you disagree with that contention?

ADV RUDMAN: Do I disagree with, I am sorry?

ADV VARNEY: The contention that it allows members of the executive insight and a measure of oversight over the decision-making process.

ADV RUDMAN: I cannot tell you now at this stage, as I sit here, whether I agree or disagree. It was a recommendation of the members of the task team and I formulated the recommendation.

ADV VARNEY: Let me put the following to you for your comment.

The recommendations of the ATT, some of which were implemented, which included amending the prosecution policy, establishing a departmental task team, suggesting the use of presidential pardons, that these were aimed at creating avenues for apartheid-era perpetrators to escape justice and that they amounted to interference with the independence authority and the ability of the NPA to pursue the TRC cases. Do you agree with that statement?

10 ADV RUDMAN: Chairperson, once again, it is very difficult for me to agree or disagree. As I indicated on numerous occasions now, these were recommendations made by the task team. If this report is the report of the task team, I indicated that earlier, I do not know. But they made recommendations and I formulated the recommendations and submitted my report to my seniors. Whether I agree or disagree, it is very difficult in hindsight, to sit here now and to say I agree or disagree. But it is, to some extent, I must say that it will not happen today, perhaps. But I cannot take this further.

20 ADV VARNEY: My final question to you, Mr Rudman, is the following. It is what we are going to be submitting to this Commission, and you may respond if you wish. Although we accept that it is very difficult to recall facts and figures from two decades ago, nonetheless, we will be putting it to the Commission that, in your testimony today, that you have been evasive and you have avoided us, answering simple, straightforward questions.

ADV RUDMAN: Chairperson, when I started giving evidence, I swore

to tell the truth, the whole truth, and nothing but the truth. I am not trying to be evasive. As I indicated, these things happened 23, 24 years ago. I cannot, for the life of me, remember what happened, firstly. Secondly, I cannot now give an opinion on whether this is in line with the rule of law or whether it is not. I just cannot do that. So, as I indicated, I am trying to tell the truth and the whole truth and nothing but the truth. I cannot change that.

ADV VARNEY: No further questions, Chairperson?

10 CHAIRPERSON: Thank you, Mr Varney. Mr Semenya, any re-examination?

ADV SEMENYA: [indistinct - not on microphone.]

CHAIRPERSON: Thank you. Advocate Rudman, we express our gratitude for having availed yourself to come and give evidence before this Commission. We thank you for your presence, and we thank you for having withstood the cross-examination, given your health problems. You are now excused as a witness.

20 ADV RUDMAN: Thank you, Chairperson, and may I just thank the Commission also for listening to me, and also the Evidence Leader for taking me through my statement. We had discussions this morning. Thank you very much, Advocate. And then also to Advocate Varney. Really, I understand, and I have the deepest sympathy with the family of the victims, and I can understand their frustration after so many years that nothing has happened. I can understand that.

But once again, thank you, Chairperson, to you and your

Commissioners. I really appreciate what you did, and looking after me as well for the short break.

CHAIRPERSON: Thank you. You are excused as a witness.

ADV RUDMAN: Thank you very much.

NO FURTHER QUESTIONS

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:

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